No. 25-5150

In the Supreme Court of the United States

DAVID ROBINSON JR.,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I. The NFA violates the Second Amendment.

A. *Miller* supports Robinson's position.

The government relies heavily on the Court's 1939 decision in *Miller*,[1] Opp. at 5–6, but that case cannot bear the weight the government thrusts upon it. And, in fact, *Miller* supports Robinson's position.

As the Court later explained, "*Miller* stands only for the proposition that the Second Amendment right . . . extends only to certain types of weapons": "those 'in common use at the time.'" *District of Columbia v. Heller*, 554 U.S. 570, 623, 627 (2008) (quoting *Miller*, 307 U.S., at 179). Indeed, *Miller*'s discussion of that proposition itself "positively suggests[ ] that the Second Amendment confers an individual right to keep and bear" those common arms. *Id.*, at 622. Short-barreled rifles (SBRs) are in common use today. *See* Pet. at 15–16. Thus, they are constitutionally protected under both *Heller* and *Miller*.

Although *Miller* concluded that short-barreled shotguns were not in common use in 1939, 307 U.S., at 178, that conclusion says nothing about the commonality (past or present) or constitutional protection of SBRs. The government says that Robinson has failed to "meaningfully distinguish" between them, but the functional differences between shotguns and rifles are obvious and well-known, evident from the NFA's own statutory definitions, *compare* 26 U.S.C.

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[1] *United States v. Miller*, 307 U.S. 174 (1939).

§5845(c), *with id.* §5845(d), and were explained in detail below, *see* App. Doc. 47 at 4–5. The differences were also well-known to Congress when it passed the NFA, as its legislative history repeatedly described short-barreled shotguns as especially dangerous and prone to criminal misuse, but raised no concerns about SBRs. *See* Stephen P. Halbrook, *The Power to Tax, the Second Amendment, and the Search for Which "'Gangster' Weapons" to Tax*, 25 Wyo. L. Rev. 149, 166–71 (2025). And they are distinct in another respect that matters: SBRs are over five times as common as short-barreled shotguns even today. Second Amend. Found. Amicus at 17.

Finally, even if *Miller* had spoken to the commonality of SBRs in 1939, that would say nothing about their commonality today. *See N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 47 (2022). The government claims that there is a lack of "evidence establishing any material change in the use of short-barreled rifles or short-barreled shotguns since this Court decided *Miller* or since it reaffirmed that decision in *Heller*." Opp. at 6. But SBRs have exploded in popularity in recent decades. *See* App. Doc. 32 at 26 ("In 2011, there were about 75,000 registered short-barrel rifles across the country. Ten years later, that number exploded to about 532,000." (citing Oliver Krawczyk, *Dangerous and Unusual: How an Expanding National Firearms Act Will Spell Its Own Demise*, 127 Dick. L. Rev. 273, 295 (2022))). And those numbers have continued to balloon since then. According to the government's latest statistics, as of May 2024, there were 870,286 registered SBRs across the country. Bureau of Alcohol, Tobacco, Firearms & Explosives, *Annual Firearms Manufacturing and Export Report 2024*, at 12 (2024), https://www.atf.gov/resource-center/docs/report/2024firearmscommercereportpdf/download.

More to the point, to the extent that *Miller* remains viable post-*Bruen*, it supports Robinson's position. In *Miller*, the Court held that it could not consider short-barreled shotguns to be protected "arms" without "evidence tending to show that possession or use of a [short-barreled shotgun] at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia." 307 U.S., at 178. Citing the Tennessee Supreme Court's decision in *Aymette v. State*, the Court explained that it was "not within judicial notice that [a short-barrel shotgun] is any part of the ordinary military equipment or that its use could contribute to the common defense." *Ibid.* (citing *Aymette v. State*, 21 Tenn. 154, 158 (1840)). *Aymette*, in turn, held that the right to bear arms protects those arms "as are usually employed in civilized warfare, and that constitute the ordinary military equipment." 21 Tenn., at 158.

That holding puts the government in a bind. If the government disclaimed *Miller*, then the government would have had to forgo its argument, Opp. at 5–6, that this Court is bound to affirm based on *Miller*'s conclusions about short-barrel shotguns. But in embracing *Miller*, the government runs headlong into the fact that, under *Miller*, the Second Amendment protects arms that are "part of the ordinary military equipment." 307 U.S., at 178. And the government has never disputed Robinson's assertion, raised below, that the standard-issue rifle for the United States Army and Marines is an M4 carbine with a 14.5-inch barrel—a SBR. App. Doc. 32 at 20 (citing James A. D'Cruz, *Half-Cocked: The Regulatory Framework of Short-Barrel Firearms*, 40 Harv. J. L. & Pub. Pol'y 493, 504 (2017)). How a SBR can be the standard-issue rifle for our Nation's military, yet not be "part of the ordinary military equipment," *Miller*, 307 U.S., at 178,

is left to the reader's imagination.

B. The government's historical analysis is not persuasive.

The Eleventh Circuit, relying solely on *Miller*, did not conduct the historical analysis required by *Bruen*. The government's attempt to recreate the missing analysis falls flat.

It points to severe, outlier restrictions relating to Bowie knives and similar weapons that a minority of States enacted in the mid-to-late nineteenth century. Opp. at 6. But those scattered laws do not establish an enduring tradition of regulation for at least four reasons. They began to crop up over four decades after the Second Amendment's ratification—too late to shed meaningful light on its historically understood scope; they were never adopted by a majority of States; they almost exclusively arose in the slaveholding (or ex-Confederate) South—an unlikely place to look for a mainstream constitutional tradition; and they departed from the mainstream of regulating activity such as the concealed carry of such arms or their sale to minors. *See* David B. Kopel & Joseph G.S. Greenlee, *The History of Bans on Types of Arms Before 1900*, 50 J. Legis. 223, 298–328 (2024).

The government's attempt to conjure a tradition of "regulat[ing] the size of firearms," Opp. at 6, fares no better. Its only evidence for this supposed tradition consists of post-Civil War laws in two States—Arkansas and Tennessee—banning the sale of "pocket pistols." *Ibid.* (citing Kopel & Greenlee, *supra*, at 288–89, 324). It is unclear why these laws should be read as "regulat[ing] the size of firearms." *Ibid.* And more to the point, if two outlier pistol bans did not justify the ban on handguns in *Heller*, they cannot justify the

NFA's restrictions on rifles.

The NFA is also not remotely analogous to these nineteenth-century laws in terms of "how and why the regulations burden a law-abiding citizen's right to armed self-defense." *Bruen*, 597 U.S., at 29. The challenged restrictions require registration of all SBRs and subject them to a special tax, enforceable by a felony conviction, up to 10 years' imprisonment, and a $250,000 fine. This is not a "comparable burden" to that imposed by the historical laws invoked by the government. *Ibid.* Even the scattered nineteenth-century state taxes on Bowie knives or similar weapons—perhaps the most similar regulations of the bunch—are not analogous. Those laws did not require registration—the principal regulatory burden inflicted by the NFA today; they applied to arms that were likely dangerous and unusual at the time, not in common use like SBRs; and they imposed penalties far less oppressive than the NFA's.

Nor are the NFA and these nineteenth-century laws "comparably justified." *Ibid.* The inclusion of SBRs in the NFA has no rational justification. No one has plausibly claimed, in 1934 or today, that SBRs are particularly dangerous, suited to misuse, or disproportionately used by criminals. To the contrary, statistical surveys reveal that SBRs are rarely used by criminals. Joseph G.S. Greenlee, *The Tradition of Short-Barreled Rifle Use & Regulation in America*, 25 Wyo. L. Rev. 111, 141 (2025). And the NFA's legislative history reveals that SBRs were swept in not because of any considerations like these, but merely to make sure that an earlier draft's inclusion of pistols and "other firearms capable of being concealed" would not reach 18-inch-long deer rifles. *See id.*, at 130–32; *see also* Halbrook, *supra*, at 168–71. Given that the NFA's application to pistols was subsequently

removed, including SBRs in the law as passed was apparently just a drafting oversight.

C. Robinson can bring a facial challenge to the NFA.

That leaves the government's contention that Robinson has challenged §5861(d) on its face, and that this section may constitutionally be applied "to individuals who [use SBRs for] unlawful purposes," thus purportedly defeating the facial challenge. Opp. at 5 (emphasis omitted). That line of argument misunderstands facial challenges and would take that type of constitutional litigation off the table in the Second Amendment context. Because the Second Amendment does not protect the right of all people to keep and bear all arms, government defendants can always hypothesize at least one set of circumstances—involving dangerous criminals or unusual weapons—where any given firearm restriction could constitutionally be applied.

Indeed, the government's argument would have defeated facial challenges in every Second Amendment case this Court has ever decided. *Heller* itself was a facial case, *see City of Los Angeles v. Patel*, 576 U.S. 409, 415 (2015), yet there the Court facially invalidated D.C.'s handgun ban, *see Heller*, 554 U.S., at 635. That would not have been possible were the government's conception of facial challenges correct.

When this Court has rejected facial challenges it has instead been because the challenged statute could be validly applied to a set of circumstances that could be identified and isolated based on the language of the statute. Thus, in *United States v. Rahimi*, the facial nature of the petitioner's challenge to §922(g)(8) let the Court uphold the constitutionality of §922(g)(8)(i)'s

restriction on people found to pose "a credible threat to the physical safety" of others without addressing the constitutionality of §922(g)(8)(ii)'s separable restriction on those not necessarily subject to such a finding. 602 U.S. 680, 693 (2024). There is nothing like that here. Nothing in the text of §5861(d), or any other relevant provision of the NFA, singles out those who use firearms for "unlawful purposes," Opp. at 5, or distinguishes the NFA's application to such individuals from anyone else. Congress may enact a statute specifically imposing the same limits as §5861(d) on such individuals, and such a statute may pass constitutional muster. The NFA is not such a law. If a facial challenge is unavailable here, facial challenges no longer exist.

II. The NFA exceeds Congress's taxing power.

A. *Sonzinsky* does not control the outcome here.

As to whether the NFA exceeds Congress's taxing power, the government essentially puts all its eggs in the *Sonzinsky*[2] basket, but its analysis cracks under the pressure.

There, the Court faced the question of whether §2 of the NFA, which imposed a $200 annual license tax on firearms dealers, was a constitutional exercise of Congress's taxing power.[3] *Sonzinsky*, 300 U.S., at 511. The Court explicitly concluded that it was

[2] *Sonzinsky v. United States*, 300 U.S. 506 (1937).

[3] The annual tax on dealers is now $500. 26 U.S.C. §5801(a)(2).

"unnecessary to inquire whether the different tax levied by section 3 [the transfer fee at issue in this case] and the regulations pertaining to it are valid," noting that "[f]ull effect may be given to the license tax standing alone, even though all other provisions are invalid." *Id.*, at 512. So that is what the Court did—it concluded that the dealer tax was constitutional, while declining to rule on whether the transfer fee and its accompanying regulations were constitutional. *See id.*, at 514 ("As [§2] is not attended by an offensive regulation, and since it operates as a tax, it is within the national taxing power.").

But what would happen to a so-called tax that was, in fact, "attended by an offensive regulation"? *Ibid.* That is the question presented by this case—a question left unanswered by *Sonzinsky*.

As Robinson explained in his petition, Pet. at 19–20, the NFA's requirements for SBRs are quite burdensome:

- File an ATF application form;
- Pay the $200 fee;
- Submit photo identification, fingerprints, and other personal information;
- Notify local authorities;
- Explain why it is reasonably necessary to acquire the firearm;
- Wait many months for approval;
- After approval, be listed in a national database with the firearm's serial number;
- Not cross state lines without ATF permission;[4]

[4] The Director of ATF "may authorize" interstate transport of a SBR "if he finds that such transportation is reasonably necessary and is consistent with public safety and applicable State and local law," whatever all that means. 27 C.F.R. §478.28(a).

- Notify ATF of any address change; and
- While in possession of the firearm, maintain registration documentation and give it to an ATF officer upon request.

Krawczyk, *supra*, at 289–90; 27 C.F.R. §478.98(a).

So what does *Sonzinsky* say about such an obtrusive regulatory regime? Not much. In fact, the Court noted that the dealer tax in that case "contains no regulation other than the mere registration provisions." *Sonzinsky*, 300 U.S., at 513. The same can hardly be said for the onerous regime that follows SBRs. The Court need not overrule *Sonzinsky* to conclude that the NFA's transfer fee and its accompanying regulations exceed Congress's power to tax.

B. The government ignores the functional approach used to identify a tax.

Moving on from *Sonzinsky*, the government restates some generic holdings from taxing power cases, *see* Opp. at 9, but does not explain how those holdings impact the "functional approach" used to identify a tax, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 565 (2012) (*NFIB*). As Robinson explained in his petition, Pet. at 29–30, the proper analysis focuses on the "practical characteristics of the so-called tax," *NFIB*, 567 U.S., at 565.

Here, the practical characteristics of the NFA's $200 fee, particularly when considered alongside its obtrusive regulations, show that it is properly considered a penalty, not a tax. In his petition, Robinson relied on six practical characteristics of the $200 fee in arguing that it is a penalty:

- The amount of the fee has not changed for inflation since the statute was enacted.
- Responsibility for enforcing it lies with the Justice Department and ATF, not the Treasury Department and IRS.
- It is enforced through criminal prosecution.
- Its criminal penalty is far more severe than the penalty for violating tax statutes.
- Its criminal penalty is disproportionally severe when considering the amount of the missed payment.
- Congress intended to effectively ban SBRs, not raise revenue, when it enacted the NFA.

See Pet. at 31–35. The government addresses only two of those, implicitly conceding the rest.

First, the government quarrels with Robinson's argument that the fact that the amount of the fee has not changed since enactment shows that Congress did not enact the NFA for revenue-raising purposes. *See* Opp. at 10. The government argues that "[t]he relevant question under this Court's precedents, however, is whether the tax 'produces at least some revenue.'" *Ibid.* (quoting *NFIB*, 567 U.S., at 564). True, producing some revenue for the government is "the essential feature of any tax." *NFIB*, 567 U.S., at 564. The government claims that "[a] tax that produces at least some revenue remains valid, even if 'the revenue obtained is negligible.'" Opp. at 10 (quoting *Minor v. United States*, 396 U.S. 87, 98 n.13 (1969)). But that conclusion does not follow.

Of course, if a regulatory regime produces no revenue, then no one could argue with a straight face that it is a valid exercise of Congress's taxing power.[5] But

[5] *Cf. Jensen v. Bureau of Alcohol, Tobacco, Firearms &*

the converse is not necessarily true—just because the regime produces some revenue does not automatically make it a valid tax. *See Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 44 (1922) (striking down the Child Labor Tax Law even though it raised revenue). Producing some revenue is necessary, but not sufficient.

Second, the government addresses Robinson's point that the NFA is enforced by the Justice Department and ATF, not the Treasury Department and IRS. Opp. at 10–11. The government questions "why the transfer of an agency from one department to another transforms a tax it collects into something other than a tax." Opp. at 11. That's easy—it matters because the Court has repeatedly said that it matters. A century ago, the Court struck down the Child Labor Tax Law in part because it was subject to enforcement by the Labor Department, "whose normal function is the advancement and protection of the welfare of the workers." *Drexel Furniture*, 259 U.S., at 37. More recently, the Court upheld the Affordable Care Act under Congress's taxing power in part because it is enforced by the IRS. *NFIB*, 567 U.S., at 563–64. The NFA falls on the *Drexel Furniture* side of the ledger.

CONCLUSION

Robinson asks the Court to grant his petition for a writ of certiorari and review.

Explosives, No. 2:25-cv-00223, Doc. 1 (N.D. Tex. Oct. 9, 2025) (newly filed lawsuit challenging the constitutionality of the NFA in light of the One Big Beautiful Bill Act's elimination of the transfer fee for suppressors, SBRs, short-barreled shotguns, and NFA-defined "any other weapons"); *Brown v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, No. 4:25-cv-01162, Doc. 1 (E.D. Mo. Aug. 1, 2025) (same).

Respectfully submitted.

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