No. 25-1076

IN THE
Supreme Court of the United States

GEORGE PETERSON,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

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

Brief *Amicus Curiae* of Gun Owners of America, Gun Owners Foundation, Gun Owners of California, Tennessee Firearms Association, Tennessee Firearms Foundation, Virginia Citizens Defense League, Virginia Citizens Defense Foundation, Coalition of New Jersey Firearm Owners, Heller Foundation, America's Future, and Conservative Legal Defense and Educ. Fund in Support of Petitioner

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April 8, 2026

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICI CURIAE* 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 7

ARGUMENT

I. THE LOWER COURTS HAVE LATCHED ONTO *BRUEN*'S "SHALL-ISSUE" DICTA TO AVOID HISTORICAL ANALYSIS, WARRANTING CORRECTION HERE 9

A. *Bruen*'s Footnote Nine Has Been Badly Misunderstood 9

B. By Its Plain Terms, the NFA Is Not a "Shall-Issue Licensing Regime," and There Is a Circuit Split on This Question 13

C. The NFA Does Not Operate as a "Shall-Issue Licensing Regime" in Practice 15

II. THIS COURT SHOULD CLARIFY THAT *BRUEN* CREATED NO "PRESUMPTION OF CONSTITUTIONALITY," AND ALL "FIREARM REGULATIONS" ARE SUBJECT TO HISTORICAL SCRUTINY 17

III. THIS CASE IS EASILY RESOLVED APPLYING THIS COURT'S "COMMON USE" PRECEDENTS, AND A SUMMARY REVERSAL WOULD KEEP THE LOWER COURTS IN CHECK 19

CONCLUSION 23

TABLE OF AUTHORITIES

Page

CONSTITUTION

Article I. 2, 16
Article III, Section 2. 10
Amendment II 2-7, 9, 11, 12, 16, 18-21

FEDERAL STATUTES

National Firearms Act of 1934, 26 U.S.C.
§ 5801, *et seq* 2, 4, 6-8, 12-17, 21, 22
26 U.S.C. § 5811(a)(2) 2
26 U.S.C. § 5812(a). 14
26 U.S.C. § 5821(a)(2) 2
26 U.S.C. § 5822. . . . . 13, 14
26 U.S.C. § 5845. 2
26 U.S.C. § 5861. 2
One Big Beautiful Bill Act of 2025 . . . . 2, 16

STATE STATUTES

Ala. Code § 13A-11-75(c) 16
Nev. Rev. Stat. § 202.366(3) 16
18 Pa.C.S. § 6106(a) 11
18 Pa.C.S. § 6109(g) 14

CASES

Beckwith v. Frey, 2026 U.S. App. LEXIS 9723
(1st Cir. Apr. 3, 2026) 18
Caetano v. Massachusetts, 577 U.S. 411
(2016) 22, 23
Coal. for TJ v. Fairfax Cnty. Sch. Bd.,
146 S. Ct. 541 (2024) 12
Corbett v. Hochul, 2025 U.S. App. LEXIS 30495
(2d Cir. Nov. 21, 2025) 18

District of Columbia v. Heller, 554 U.S. 570 (2008) 2, 7, 8, 18-21, 23
Florida v. Jardines, 569 U.S. 1 (2013) 22
Lomont v. O'Neill, 285 F.3d 9 (D.C. Cir. 2002) . . . 14
McRorey v. Garland, 99 F.4th 831 (5th Cir. 2024) 12
Md. Shall Issue, Inc. v. Moore, 116 F.4th 211 (4th Cir. 2024) 11, 12, 18
N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1 (2022) 3, 6-21, 23
Snope v. Brown, 145 S. Ct. 1534 (2025) 22
United States v. Rahimi, 602 U.S. 680 (2024) 8, 19-21
United States v. Robinson, 2025 U.S. App. LEXIS 6544 (11th Cir. Mar. 20, 2025) 15
Yukutake v. Lopez, 130 F.4th 1077 (9th Cir. 2025) 12

<u>MISCELLANEOUS</u>

@GunFoundation, *X* (Mar. 17, 2025) 4
"Current Processing Times," *BATFE* (Mar. 19, 2026) 15
Firearms Commerce in the United States: Statistical Update 2024, *BATFE* (2024) 22
Aidan Johnston, "88 Day NICS Denials and the Biden Pistol Ban," *GOA* (Feb. 1, 2023) 16
Frank Miniter, "More than a Quarter Million Suppressor eForms Have Been Processed by the ATF This Month," *NRA* (Jan. 21, 2026) . . 22
"NSSF Successfully Leads Effort to Dramatically Reduce ATF NFA Form Wait Times, New Data Shows," *NSSF* (Apr. 9, 2024). 15
"Protecting Second Amendment Rights," *The White House* (Feb. 7, 2025) 4

INTEREST OF THE *AMICI CURIAE*[1]

Amici Gun Owners of America, Gun Owners Foundation, Gun Owners of California, Tennessee Firearms Association, Tennessee Firearms Foundation, Virginia Citizens Defense League, Virginia Citizens Defense Foundation, Coalition of New Jersey Firearm Owners, Heller Foundation, America's Future, and Conservative Legal Defense and Education Fund are nonprofit organizations, exempt from federal income tax under sections 501(c)(3) or 501(c)(4) of the Internal Revenue Code. These entities, *inter alia*, participate in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law. These *amici* filed an *amicus* brief in this case below, *see* Brief *Amici Curiae* of Gun Owners of America, Inc., et al. in Support of Defendant-Appellant's Petition for Rehearing En Banc (Mar. 13, 2025). Some of these *amici* also filed an *amicus* brief in a challenge to California's ban of suppressors, in the U.S. Court of Appeals for the Ninth Circuit, in *Sanchez v. Bonta*, No. 24-5566, *see* Brief *Amicus Curiae* of Gun Owners of California, Inc., et al. in Support of Plaintiff-Appellant and Reversal (Apr. 4, 2025).

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[1] It is hereby certified that counsel of record for all parties received timely notice of the intention to file this brief; that no counsel for a party authored this brief in whole or in part; and that no person other than this *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

STATEMENT OF THE CASE

In 2022, during an investigation into an apparently mismanaged firearms business, law enforcement raided Petitioner George Peterson's home — a location where "the need for defense of self, family, and property is most acute." *District of Columbia v. Heller*, 554 U.S. 570, 628 (2008). Petition Appendix ("Pet.App.") at 2a-3a. There, authorities discovered a homemade firearm silencer stored in Peterson's bedroom closet safe. Pet.App.3a-4a. The silencer "was in working condition, but it neither had a serial number nor was registered in the National Firearms Registration and Transfer Record," as federal law requires. Pet.App.4a. Indeed, at the time of the raid, the National Firearms Act of 1934 ("NFA") required Peterson to have paid a $200 excise tax and registered the silencer with the Government prior to taking lawful possession.[2] *See* 26 U.S.C. §§ 5861, 5845. Because Peterson had not done so, he was indicted for a felony violation of the Internal Revenue Code, which he moved to dismiss on Second Amendment grounds. Pet.App.4a.

In 2023, the district court denied Peterson's motion to dismiss his indictment. Despite seemingly recognizing that the NFA is a "prohibitive weapon

[2] The One Big Beautiful Bill Act in 2025 set the excise tax on the making and transfer of silencers at $0, but the NFA's vestigial registration requirements remain. *See* 26 U.S.C. §§ 5821(a)(2), 5811(a)(2); *see also Silencer Shop Found. v. BATFE*, No. 6:25-cv-00056-H (N.D. Tex.) (challenging the continued registration of untaxed firearms under Article I and the Second Amendment).

restriction statute[]" (Pet.App.28a), the district court ultimately concluded that the Second Amendment has nothing to say about silencers at the threshold. Thus, characterizing silencers "not [as] arms, but rather an accessory," the district court declared that "silencers are not bearable arms within the scope of the Second Amendment...." Pet.App.29a. Peterson's motion therefore "fail[ed] the first step of the [*N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022)] analysis," and the district court declined to hold the Government to its burden of justifying firearm regulations historically. Pet.App.30a. Thereafter, Peterson entered a conditional guilty plea, reserving his right to appeal. Pet.App.4a.

In February 2025, a panel of the Fifth Circuit affirmed. Largely reiterating the district court's reasoning, the panel opined that, "while possession of firearms themselves is covered by the plain text of the Second Amendment, possession of firearm accessories is not." *United States v. Peterson*, 127 F.4th 941, 946 (5th Cir. 2025). Thus, the panel drew the line for Second Amendment protection at that which is strictly "*necessary* to the use of a firearm...." *Id.* at 947 (emphasis added). And, because silencers ostensibly are not "necessary" for a firearm to operate,[3] the panel concluded that silencers "do not trigger Second Amendment protection" and fall outside "the plain text...." *Id.* at 944, 947.

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[3] *But see* Brief *Amici Curiae* of Gun Owners of America, Inc. et al., *supra*, at 7 n.3 (identifying "integrally suppressed firearms … whose suppressors are *permanently affixed* to their barrels and therefore are undoubtedly '*necessary* to a firearm's operation'").

The procedural history that followed is nothing short of odd. After the panel's affirmance, Peterson petitioned for rehearing en banc, highlighting conflicts between the panel's opinion and this Court's precedents.[4] The Government initially opposed, claiming that a silencer "is not an 'arm' within the meaning of the Second Amendment."[5] But then, following public outcry[6] over the Government's position and its conflict with the Administration's Second Amendment policies,[7] the Government supplemented its opposition in May 2025. Reporting that it had "re-evaluated its position in this case," the Government now concluded that "the Second Amendment protects firearm accessories and components such as suppressors."[8] Thus, the Government explained, "a ban on the possession of suppressors or other similar accessories would be unconstitutional." *Id*. Even so, the Government maintained its defense of the NFA, on the theory that the NFA's taxation and registration

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[4] *See* Defendant-Appellant's Petition for Rehearing En Banc, *United States v. Peterson*, No. 24-30043 (5th Cir. Mar. 6, 2025), Doc. 95-1.

[5] United States's Response to Peterson's Petition for Rehearing En Banc at 12, *United States v. Peterson*, No. 24-30043 (5th Cir. Mar. 17, 2025), Doc. 107.

[6] *See, e.g.*, @GunFoundation, *X* (Mar. 17, 2025).

[7] *See* "Protecting Second Amendment Rights," *The White House* (Feb. 7, 2025).

[8] Government's Supplemental Response to Defendant-Appellant's Petition for Rehearing En Banc at 1, *United States v. Peterson*, No. 24-30043 (5th Cir. May 23, 2025), Doc. 129-2.

presented only a "modest burden" on Second Amendment rights, given silencers' purported "adaptab[ility] to criminal misuse." *Id.* at 2. In response to the Government's change in position, the panel withdrew its February 2025 opinion and denied Peterson's petition as moot. *See United States v. Peterson*, 2025 U.S. App. LEXIS 15181 (5th Cir. June 17, 2025).[9]

In August 2025, the panel issued a new opinion, once again affirming the district court's denial of dismissal, but this time with different reasoning. First, the panel refuted the Government's claim that silencers are the implements of criminals. As the panel reasoned, silencers merely "reduce the noise" of gunshots — but do not eliminate it — making "hearing loss … less likely to occur." *United States v. Peterson*, 150 F.4th 644, 648 (5th Cir. 2025). Thus, silencers help hunters "avoid spooking game," allow everyday gun owners to "reduce noise pollution," and "giv[e] … an advantage" in "self-defense scenarios" by "reduc[ing] 'noise, recoil, and muzzle rise'...." *Id.* Moreover, the panel explained that "criminals infrequently use" silencers, noting the "lack of correlation" between their use "and criminal activity...." *Id.* at 649.

Even so, the panel only "assume[d] without deciding that suppressors constitute 'arms' under the Second Amendment...." *Id.* at 652. And, rather than

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[9] *See also* Memorandum, *United States v. Peterson*, No. 24-30043 (5th Cir. June 25, 2025), Doc. 147.

holding the Government to its burden under *Bruen*, the panel simply concluded that "the NFA … is presumptively constitutional because it is a shall-issue licensing regime" under *Bruen*'s footnote nine. *Id.*; *cf. Bruen* at 38 n.9 (discussing public carry licensing regimes). Reading *Bruen*'s dicta to have established a "presumption of constitutionality" for the "NFA's application procedures," the panel left open "the possibility that another litigant may successfully challenge the NFA's requirements." *Peterson*, 150 F.4th at 654. But because Peterson had not shown that the NFA imposes "'exorbitant fees' or 'lengthy wait times,'" the panel declined to hold the NFA unconstitutional as applied. *Id.* at 653.

In September 2025, Peterson filed his second petition for rehearing en banc, again highlighting conflicts between the panel's opinion and this Court's precedents.[10] The Government opposed, once again claiming "the NFA imposes only a modest burden" on Second Amendment rights while dismissing silencers as "nonessential firearm accessories that are uniquely adaptable to criminal misuse."[11]

In December 2025, the panel denied Peterson's second petition for rehearing and issued a substitute

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[10] *See* Defendant-Appellant's Petition for Rehearing En Banc, *United States v. Peterson*, No. 24-30043 (5th Cir. Sept. 10, 2025), Doc. 156-1.

[11] Government's Opposition to Petition for Rehearing En Banc at 4, 8, *United States v. Peterson*, No. 24-30043 (5th Cir. Oct. 14, 2025), Doc. 186.

opinion that largely reiterated its August opinion, with minor alterations not relevant here. Pet.App.25a-26a; Pet.App.1a. The panel again acknowledged the many benefits of silencers and their rarity in crime. Pet.App.5a-7a. Again, the panel "assume[d] without deciding that suppressors constitute 'arms' under the Second Amendment," before upholding the NFA as a "presumptively constitutional" "shall-issue regime." Pet.App.14a. And again, the panel found no evidence of "'exorbitant fees' or 'lengthy wait times'" in Peterson's case. Pet.App.16a.

Following the panel's December 2025 opinion, Peterson timely petitioned this Court for a writ of certiorari.

SUMMARY OF ARGUMENT

The longer this Court waits to issue critical guidance on Second Amendment "hardware" questions, the farther the lower courts will stray from *Bruen*. The opinion below is a case study in this phenomenon, and the Petition presents an ideal opportunity for this Court to begin reasserting some much-needed control. Indeed, even a summary reversal would work wonders correcting the lower courts' gross misinterpretations of *Heller* and *Bruen*.

This Court should grant certiorari for three reasons in addition to those discussed in the Petition. First, the lower courts have badly misconstrued this Court's dicta on "shall-issue" licensing regimes. Rather than treating *Bruen*'s footnote nine as the explanatory aside that it is, the lower courts have

seized upon it to carve all manner of firearm regulations out of *Heller* and *Bruen*'s textual and historical test, declaring all manner of gun control to be "presumptively constitutional."

Second, the panel's approach violates *Bruen*'s methodological holding. This Court never established a "presumption of constitutionality" for licensing laws. To the contrary, *Bruen* declared — and *United States v. Rahimi*, 602 U.S. 680 (2024), reiterated — that *all* "firearm regulations" are subject to historical analysis. That includes the National Firearms Act, and if a judge's preferred gun control law is ahistorical, and therefore unconstitutional, then so be it.

Third, this case is easily resolved applying this Court's "common use" precedents. Even if the Government's onerous restrictions on silencers could be historically justified (and they cannot), silencers' ubiquitous modern popularity obviates any need for historical analysis. The American people overwhelmingly have spoken by purchasing millions of these implements for self-defense, hunting, and sport, and so the National Firearms Act is simply "invalid."

ARGUMENT

I. THE LOWER COURTS HAVE LATCHED ONTO *BRUEN*'S "SHALL-ISSUE" DICTA TO AVOID HISTORICAL ANALYSIS, WARRANTING CORRECTION HERE.

A. *Bruen*'s Footnote Nine Has Been Badly Misunderstood.

The Second Amendment guarantees "the right of the people to keep and bear Arms." In *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022), this Court facially invalidated a New York public carry licensing law that vested authorities with the discretion to deny otherwise-eligible applicants their Second Amendment rights. *See id.* at 13-15. As this Court explained, such a "may-issue" regime was not only atextual, but also ahistorical, as no "historical limitation[] … operated to prevent law-abiding citizens with ordinary self-defense needs from carrying arms in public...." *Id.* at 60.

In *Bruen*, this Court was contrasting New York's "may-issue" regime with the seeming "shall-issue" regimes of states whose laws were not at issue. *See Bruen* at 38 n.9. While other states' "shall-issue" regimes "appear[ed] to contain only 'narrow, objective, and definite standards' guiding licensing officials," New York's "may-issue" regime "requir[ed] the 'appraisal of facts, the exercise of judgment, and the formation of an opinion'...." *Id.* New York's "open-

ended" and "unchanneled discretion"[12] had historical — and therefore constitutional — significance.

But the significance of *Bruen*'s footnote nine ended there. As this Court qualified, other states' licensing regimes only "*appear[ed]* to operate" as shall issue statutes, and only "*appear[ed]* to contain" certain features. *Bruen* at 13 n.1, 38 n.9 (emphasis added); *see also id.* at 13 n.1 ("Delaware appears to have no licensing requirement for open carry."). This emphasis on "appearances" made perfect sense. Opining on the constitutionality of hundreds of laws across dozens of unchallenged regimes not only was *unnecessary* to deciding *Bruen*, but it also would have been *untenable* under the Constitution's bar against rendering advisory opinions. *See* U.S. Const. Art. III, § 2 (limiting the "judicial Power" to "Cases" and "Controversies"). Thus, when this Court declined "to suggest the unconstitutionality of the 43 States' 'shall-issue' licensing regimes" in footnote nine, it merely acknowledged that what was not at issue was *not at issue*.[13] *Bruen* at 38 n.9.

This reading comports with a closer examination of the "shall-issue" regimes *Bruen* discussed. Most of the states at issue have either permitless (or "constitutional") carry regimes, while others require

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[12] *Bruen* at 79 (Kavanaugh, J. & Roberts, C.J., concurring).

[13] *See also* Brief *Amicus Curiae* of Gun Owners of America et al. at 18, *Wolford v. Lopez*, No. 24-1046 (Nov. 24, 2025) (urging this Court to "avoid burying methodological landmines for lower courts to explode," like *Bruen*'s footnote nine).

"shall-issue" licensure only for *concealed* carry, and impose no licensing requirement on *open* carry. *See, e.g.*, *Bruen*, 597 U.S. at 13 n.1 (collecting "'[t]wenty-five states'" with permitless or constitutional carry laws at the time, which "allow certain individuals to carry handguns in public within the State without *any* permit whatsoever"); *cf.* 18 Pa.C.S. § 6106(a) (Pennsylvania requiring licensure to carry concealed, while leaving open carry undisturbed). In other words, most of the "shall-issue" regimes *Bruen* discussed are entirely *optional* in the first place and impose no preconditions on Second Amendment rights, while the rest regulate only the *manner* of carry and do not require licensure for public carry as a general matter. Thus, it certainly would be difficult "to suggest the unconstitutionality" (*Bruen*, 597 U.S. at 38 n.9) of regimes that do not even *mandate* licensure in the first place, and which offer licenses only as an option — primarily for reciprocity purposes with other states.

Yet contrary to these obvious limitations on the scope of *Bruen*'s footnote nine, some lower courts have latched onto this Court's dicta, wielding it as a weapon against Second Amendment rights. Rather than treating this footnote as dicta, these courts argue that *Bruen* definitively *held* that *all* "shall-issue" regimes are constitutional — not just for public carry, but also to *acquire* firearms in the first place. For instance, purporting to follow *Bruen*'s footnote nine, the Fourth Circuit has "h[e]ld that non-discretionary 'shall-issue' licensing laws are presumptively constitutional and generally do not 'infringe' the Second Amendment right to keep and bear arms...." *Md. Shall Issue, Inc. v. Moore*, 116 F.4th 211, 222 (4th Cir. 2024). Likewise,

the Ninth Circuit has claimed that *Bruen* "*concluded* … the constitutional validity of … shall-issue licensing regimes…." *Yukutake v. Lopez*, 130 F.4th 1077, 1094 (9th Cir. 2025) (quotations omitted, emphasis added), *vacated, reh'g en banc granted*, 144 F.4th 1119 (9th Cir. 2025). And in *McRorey v. Garland*, 99 F.4th 831 (5th Cir. 2024), another panel of the Fifth Circuit used *Bruen*'s footnote nine to exempt from historical analysis age-related *waiting periods* on firearm acquisition. Under these courts' logic, so long as one can label a firearm regulation "shall-issue" — no matter how ahistorical, onerous, or unrelated to public carry it is — it becomes *untouchable* unless it "effectively denies the Second Amendment right…." *Md. Shall Issue* at 223.

The panel opinion below is just the latest outbreak of this "virus that may spread if not promptly eliminated." *Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, 146 S. Ct. 541, 545 (2024) (Alito & Thomas, JJ., dissenting from denial of certiorari). Recasting the NFA as a "shall-issue" "licensing scheme" rather than a tax law, the panel claimed that "*Bruen*'s presumption of constitutionality … applies to the NFA's application procedures." Pet.App.14a, 18a. Thus, the panel absolved the Government of its historical burden, requiring instead that *Peterson* prove that the NFA denied his Second Amendment rights. *See* Pet.App.16a. Seemingly at the Government's behest,[14] the panel converted *Bruen* into

[14] *See* Government's Opposition to Petition for Rehearing En Banc, *supra*, at 4 (claiming "the NFA imposes only a modest burden").

a "judge-empowering 'interest-balancing inquiry'" (*Bruen*, 597 U.S. at 22), widely blessing preconditions on the threshold acts of *acquisition* and *possession* — not just public carry.

This expansive application of *Bruen*'s footnote nine is impossible to square with *Bruen*'s methodological holding, which requires the Government to justify all firearm regulations via "consisten[cy] with this Nation's historical tradition of firearm regulation." *Bruen* at 17. *Bruen*'s "shall-issue" footnote has become an all-too-easy "out" for result-oriented judges to avoid historical analysis, and this Court should grant the Petition to reiterate that *Bruen*'s basic methodological "hold[ing]" requires a historical analysis in every case. *Id.*

B. By Its Plain Terms, the NFA Is Not a "Shall-Issue Licensing Regime," and There Is a Circuit Split on This Question.

Central to the panel's reliance on *Bruen*'s footnote nine was its conclusion that the NFA is a "shall-issue" licensing regime. But in support, the panel rested on the slenderest of reeds — a "conce[ssion] at oral argument," and a superficial analysis of the statutory text. Pet.App.14a. In reality, the NFA is nothing like the sort of public carry licensing schemes this Court discussed in *Bruen*, and the panel's dispositive analytical error should be corrected here.

Consider the plain text of the statute. Citing 26 U.S.C. § 5822, the panel claimed that "[t]he NFA provides that the [Bureau of Alcohol, Tobacco,

Firearms and Explosives] will deny a firearm-making application if the 'making or possession of the firearm would place the person making the firearm in violation of law.'" Pet.App.14a. The related statutory provision for transferring NFA firearms is similarly worded. *See* 26 U.S.C. § 5812(a) ("Applications shall be denied if the transfer, receipt, or possession of the firearm would place the transferee in violation of law."). But these provisions contain no corollary directive that applications "*shall be approved*" if an applicant meets the statutory criteria. Rather, they simply direct what must happen if an applicant is *ineligible*, remaining silent as to all other circumstances. The NFA therefore stands in stark contrast to the "shall-issue" licensing regimes *Bruen* discussed, which contain affirmative language directing authorities to issue licenses — not just deny them. *See, e.g.*, 18 Pa.C.S. § 6109(g) ("Upon the receipt of an application for a license to carry a firearm, the sheriff shall, within 45 days, issue or refuse to issue a license....").

Thus, as the D.C. Circuit once explained, "[b]oth sections" of the NFA — Sections 5812 and 5822 — "provide that applications 'shall be denied[,]' … but neither restricts the Secretary's *broad power to grant or deny applications in any other respect*." *Lomont v. O'Neill*, 285 F.3d 9, 17 (D.C. Cir. 2002) (emphasis added). Of course, such a "broad power to grant or deny" is irreconcilable with the "'narrow, objective, and definite standards' guiding licensing officials" in quintessentially "shall-issue" licensing regimes. *Bruen*, 597 U.S. at 38 n.9. The Fifth Circuit now splits with the D.C. Circuit and joins the Eleventh Circuit on this question, blue-penciling a command into a statute

where there is none. *See United States v. Robinson*, 2025 U.S. App. LEXIS 6544, at *14 (11th Cir. Mar. 20, 2025) (disagreeing "that the NFA is akin to the licensing scheme found unconstitutional in *Bruen*").

This Court should grant the Petition and clarify that the NFA's onerous firearm registration scheme cannot be justified under *Bruen*'s footnote nine. Indeed, under the panel's limitless reading, the compelled registration of *all firearms* — on pain of felony criminal penalties — would be simply immune from historical scrutiny. It seems unlikely that this Court intended such a result from an explanatory footnote about public carry.

C. The NFA Does Not Operate as a "Shall-Issue Licensing Regime" in Practice.

In addition to lacking any textual requirement that authorities issue approvals, the NFA also fails to operate as a "shall-issue" regime in practice, further undermining the opinion below. Two points bear emphasis. First, despite recent improvements in processing times,[15] NFA application determinations historically have taken months to *more than a year* to issue,[16] and applicants with merely "delayed" (but not "denied") background checks have faced automated disapproval despite their satisfaction of the statutory

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[15] *See* "Current Processing Times," *BATFE* (Mar. 19, 2026).

[16] *See* "NSSF Successfully Leads Effort to Dramatically Reduce ATF NFA Form Wait Times, New Data Shows," *NSSF* (Apr. 9, 2024).

criteria.[17] Unpredictable delays entirely within the Government's control — *i.e.*, subject to its open-ended discretion — are no hallmarks of a "shall-issue" regime.[18]

The same goes for unpredictable application determinations. Recently, some of these *amici* reported to a district court a recent denial of an individual's NFA applications. That individual — a member of Plaintiff Gun Owners of America ("GOA") in the *Silencer Shop Found. v. BATFE* litigation[19] — sought to register a silencer and another firearm with ATF under the NFA. However, ATF denied both applications "due to the GOA member's response to 'Box 4(i)'" of ATF's NFA registration form.[20] This portion of the application requires that applicants

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[17] *See* Aidan Johnston, "88 Day NICS Denials and the Biden Pistol Ban," *GOA* (Feb. 1, 2023).

[18] In contrast, the regimes discussed in *Bruen* feature strict deadlines for license issuance. *See, e.g.*, Ala. Code § 13A-11-75(c) ("Within 30 days from receipt of a completed application, a sheriff shall approve or deny the application."); Nev. Rev. Stat. § 202.366(3) ("Within 120 days after a complete application for a permit is submitted, the sheriff to whom the application is submitted shall grant or deny the application.").

[19] This case challenges the continued registration of untaxed firearms under Article I and the Second Amendment, following passage of the One Big Beautiful Bill Act in 2025. *See Silencer Shop Found. v. BATFE*, No. 6:25-cv-00056-H (N.D. Tex.).

[20] Plaintiffs' Notice of Supplemental Authority at 2, *Silencer Shop Found. v. BATFE*, No. 6:25-cv-00056-H (N.D. Tex. Feb. 9, 2026), ECF No. 98-1.

"'specify why [they] intend to make firearm.'" *Id.* And in response, the GOA member "stated that they desired to 'EXERCISE MY GOD GIVEN RIGHT.' … [I]n both cases, ATF disapproved the [application], asserting that the applicant had provided an 'INSUFFICIENT REASON … STATE REASON, NOT ACTUAL.'" *Id.*

Of course, nowhere in the NFA or its implementing regulations is there any guidance as to what a "[]sufficient" or "actual" reason for seeking ATF approval might be. To the contrary, ATF's NFA examiners exercised precisely the sort of "'appraisal of facts, the exercise of judgment, and the formation of an opinion'" that "typify" a "may-issue" regime. *Bruen* at 38 n.9. This is the very essence of open-ended discretion, the thing that this Court says "shall-issue" licensing regimes may not have.

At bottom, the panel sought to justify an inherently discretionary and temporally unconstrained statutory scheme as a "shall-issue" regime. But this Court endorsed no such freewheeling workaround to *Bruen*'s methodological holding, and so it should grant the Petition to set the record straight.

II. THIS COURT SHOULD CLARIFY THAT *BRUEN* CREATED NO "PRESUMPTION OF CONSTITUTIONALITY," AND ALL "FIREARM REGULATIONS" ARE SUBJECT TO HISTORICAL SCRUTINY.

In upholding the NFA's strict regulation of silencers without any historical analysis, the panel

below repeatedly invoked *Bruen*'s supposed "presumption of constitutionality for shall-issue licensing regimes...." Pet.App.18a. But these statements are irreconcilable with *Bruen*'s methodological requirement. Indeed, the Fifth Circuit's contrary approach flips *Bruen* on its head, treating constitutional rights as presumptively *violable* unless and until an individual proves otherwise. This Court should grant the Petition and repudiate the increasingly common approach employed below.[21] To allow such fiction to persist would render the Second Amendment "no constitutional guarantee at all." *Heller*, 554 U.S. at 634.

Rather, the opposite is true: "when the Second Amendment's plain text covers an individual's conduct, the Constitution *presumptively protects* that conduct." *Bruen*, 597 U.S. at 17 (emphasis added). In other words, a regulation of that conduct is *presumptively unconstitutional*, and the only "burden" lies with the Government to prove otherwise. *See id.* at 34 ("Only if [the Government] carr[ies] that burden can [it] show that … the Second Amendment … does not protect petitioners' proposed course of conduct."). Thus, *Bruen* left open only one way for a firearm regulation to be constitutional — "consisten[cy] with this Nation's historical tradition." *Id.* at 17; *see also id.* ("[o]nly if"); *id.* at 24 ("[o]nly then").

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[21] *See, e.g.*, *Beckwith v. Frey*, 2026 U.S. App. LEXIS 9723, at *10 (1st Cir. Apr. 3, 2026); *Corbett v. Hochul*, 2025 U.S. App. LEXIS 30495, at *5-6 (2d Cir. Nov. 21, 2025); *Md. Shall Issue* at 222.

Lest there be any doubt, this Court's subsequent pronouncement on the Second Amendment only reiterated and reinforced *Bruen*'s no-exceptions holding. As this Court explained, "*when a firearm regulation is challenged* under the Second Amendment, *the Government must show* that the restriction 'is consistent with the Nation's historical tradition of firearm regulation.'" *Rahimi* at 689 (emphases added). But at no point did the panel engage with this Court's "if, then" methodology for all "firearm regulations." Instead, the panel charted its own path, developing a *new* standard, deferential to the Government, whereby firearm regulations are declared only *presumptively* constitutional, but not *conclusively* so via historical analysis. This Court's intervention is necessary to course-correct and ensure *Bruen* is followed as written.

III. THIS CASE IS EASILY RESOLVED APPLYING THIS COURT'S "COMMON USE" PRECEDENTS, AND A SUMMARY REVERSAL WOULD KEEP THE LOWER COURTS IN CHECK.

In *Heller*, this Court instructed that the term "Arms" means "'[w]eapons of offence, or armour of defence,'" and "'any thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another,'" and includes "all firearms," as originally understood. *Id.* at 581. And, because the Constitution must protect enumerated rights in modern contexts, this Court explained that "the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding."

Id. at 582. Thus, so long as an instrument is "bearable" — meaning one can "'wear, bear, or carry [it] … upon the person or in the clothing or in a pocket, for the purpose … of being armed and ready for offensive or defensive action'" — then it is presumptively protected under the Second Amendment. *Id.* at 584 (internal quotations omitted). This Court later reiterated that understanding in *Bruen*, explaining that the "general definition" of "Arms" presumptively "covers modern instruments that *facilitate* armed self-defense," and that "we use history to determine which modern 'arms' are protected by the Second Amendment…." *Bruen* at 28 (emphasis added).

Silencers clearly are "Arms" under these precedents. First, silencers are "'any thing that a man … takes into his hands, or useth in wrath to cast at or strike another.'" *Heller* at 581. Indeed, when one shoots a firearm equipped with a silencer, they necessarily "use[]" it to "strike" an attacker. Second, silencers are "bearable arms," being instruments capable of being worn on the person or carried in the hand and used for "'offensive or defensive action….'" *Id.* at 582, 584. And third, silencers obviously "facilitate armed self-defense." *Bruen* at 28. As the panel itself acknowledged, a silencer "*might prove useful* to one casting or striking at another" (*Peterson*, 127 F.4th at 946 (emphasis added)), and silencers "may … reduce 'noise, recoil, and muzzle rise' in self-defense scenarios, giving the shooter an advantage." Pet.App.6a. Thus, the Second Amendment presumptively protects silencers and suppressed firearms, and "the Government must show that the

restriction 'is consistent with the Nation's historical tradition of firearm regulation.'" *Rahimi* at 689.

But even if a relevant historical tradition existed (none does), no amount of historical regulation could justify the NFA's restrictions on silencers today, because silencers are "in common use." Indeed, this Court previously observed that "handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid." *Heller* at 629. In fact, the handgun's "overwhelming[]" popularity and entry into "common use" meant that the District of Columbia's ban would have "fail[ed] constitutional muster" "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights...." *Id.* at 628-29. Thus, it did not matter in *Heller* whether historical analogues might have supported the District's ban — although "[f]ew laws in the history of our Nation" could have done even that. *Id.* at 629. Rather, it was "enough to note" a weapon's modern popularity to conclude not only that the Second Amendment had something to say about its regulation, but ultimately that onerous restrictions on such a weapon were simply "invalid." *Id.* at 629.

Reinforcing this principle in *Bruen*, this Court explained that "the traditions of the American people … demand[] our unqualified deference." *Bruen* at 26. Thus, even if historical "laws prohibited the carrying of handguns" in the past, this Court cautioned that "they provide no justification for laws restricting the public carry of weapons that are unquestionably in common use today." *Id.* at 47. Taken together, these

precedents stand for a simple proposition: courts are to defer to individual rights, and the *people's preferences prevail.* Indeed, "[o]ur Constitution allows the American people — not the government — to decide which weapons are useful for self-defense." *Snope v. Brown*, 145 S. Ct. 1534, 1537 (2025) (Thomas, J., dissenting from denial of certiorari). And with over *3.5 million* silencers lawfully registered nationwide as of May 2024,[22] the American people overwhelmingly have spoken — silencers are "in common use," and the NFA's felony restrictions on their acquisition and possession are simply "invalid." *Cf. Caetano v. Massachusetts*, 577 U.S. 411, 420 (2016) (Alito & Thomas, JJ., concurring in the judgment) (finding stun guns are "in common use" with evidence of only "'approximately 200,000'" examples nationwide).[23]

But if this "baseline" approach is supposed to keep "easy cases easy,"[24] the panel below never got the memo. At no point did the panel acknowledge the

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[22] Firearms Commerce in the United States: Statistical Update 2024 at 12, *BATFE* (2024).

[23] The total number of silencers only continues to balloon. In 2025 alone, Americans transferred a "total of 732,863" additional silencers — nearly four times as many as the *total number* of stun guns identified in *Caetano*. Frank Miniter, "More than a Quarter Million Suppressor eForms Have Been Processed by the ATF this Month," *NRA* (Jan. 21, 2026).

[24] *See, e.g.*, *Florida v. Jardines*, 569 U.S. 1, 11 (2013) (obviating analysis of "reasonable expectations of privacy" under the Fourth Amendment when the "property-rights baseline" can resolve a case).

massive number of silencers already in circulation, nor did the panel ever reference the term "common use" in any of its three opinions. But "common use" easily resolves this case in Peterson's favor, and it obviates the need for historical analysis. At minimum, this Court should grant the Petition to summarily reverse the decision below à la *Caetano*, as *Heller* and *Bruen* directly control.

CONCLUSION

For the foregoing reasons, the Petition should be granted.

Respectfully submitted,

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April 8, 2026