No.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner David Robinson Jr. was convicted under 26 U.S.C. §§5861(d), 5871, and 5841—sections of the National Firearms Act that impose criminal penalties of up to 10 years' imprisonment for possessing a short-barreled rifle not registered by the transferor of the rifle. As the transferee, Robinson was not responsible for paying the $200 fee required to register the rifle. The constitutional foundation justifying the federal criminalization of his conduct is Congress's power to tax under Article I, section 8, clause 1 of the Constitution.

The important federal questions presented are:

1. Whether federal criminal punishment of the possession of an unregistered short-barreled rifle violates the Second Amendment.

2. Whether federal criminal punishment of the possession of an unregistered short-barreled rifle exceeds Congress's power to tax under Article I, section 8, clause 1 of the Constitution and violates the Tenth Amendment.

RELATED PROCEEDINGS

United States District Court (M.D. Fla.)
United States v. *Robinson*, No. 5:22-cr-00072
(Feb. 9, 2023)

United States Court of Appeals (11th Cir.)
United States v. Robinson, No. 23-12551
(Mar. 20, 2025)

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PETITION FOR WRIT OF CERTIORARI

Petitioner David Robinson Jr. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a–16a) is not reported, but is available at 2025 WL 870981 and reproduced at Appendix A.

The order of the district court (App., *infra*, 17a–29a) is not reported, but is available at 2023 WL 12066735 and reproduced at Appendix B.

JURISDICTION

The United States District Court for the Middle District of Florida had jurisdiction over this criminal case under 18 U.S.C. §3231. Under 28 U.S.C. §1291, the United States Court of Appeals for the Eleventh Circuit had jurisdiction to review the final decision of the district court.

The Eleventh Circuit issued its decision on March 20, 2025. On June 2, 2025, Justice Thomas extended the time within which to file a petition for a writ of certiorari to July 18, 2025. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. art. I, § 8, cl. 1

U.S. Const. amend. II

U.S. Const. amend. X

26 U.S.C. §5811

26 U.S.C. §5841

26 U.S.C. §§5845(a)(3), (c)

26 U.S.C. §5861(d)

26 U.S.C. §5871

These provisions are reproduced at Appendix C.

STATEMENT OF THE CASE

I. Regulatory background

Short-barreled rifles (SBRs) were regulated and categorized as a distinct class of arms for the first time in the twentieth century.

The National Firearms Act of 1934 (NFA) included any "rifle having a barrel of less than eighteen inches in length" among the "firearms" it subjected to registration and taxation requirements. National Firearms Act of 1934, ch. 757, §1(a), 48 Stat. 1236, 1236. While the NFA was intended to address Prohibition-era violence committed by organized crime gangsters, *see, e.g.*, National Firearms Act: Hearings on H.R. 9066 Before the H. Comm. on Ways & Means (NFA Hearings), 73d Cong., 2d Sess. 117, 136 (1934), there is no evidence that Congress believed SBRs were favored by criminals or exceptionally dangerous weapons, *see generally id.* Unlike other arms included in the NFA,

neither the Attorney General (whose office "formulate[d]" the NFA, *id.*, at 5) nor Congress provided any explanation for including SBRs. *See, e.g.*, *id.*, at 6, 111. Based on the legislative history, the most plausible explanation is that since handguns were in the initial NFA bill, SBRs were later added to prevent citizens from getting around the handgun restriction by carrying shortened rifles instead, but the vestige remained in the bill after handguns were removed. *See* Joseph G.S. Greenlee, *The Tradition of Short-Barreled Rifle Use and Regulation in America*, 25 Wyo. L. Rev. 111, 130–36 (2025); Stephen P. Halbrook, *The Power to Tax, the Second Amendment, and the Search for Which "'Gangster' Weapons" to Tax*, 25 Wyo. L. Rev. 149, 168–71 (2025). "The curious result was that the NFA did not regulate large and small rifled arms, such as long-barreled rifles and pistols, but it did restrict medium sized rifled arms, like [SBRs]." Halbrook, *supra*, at 171.

The maximum barrel length was shortened to 16 inches for rifles with a caliber of .22 or smaller in 1936, An Act to Exempt Certain Small Firearms from the Provisions of the National Firearms Act, ch. 169, 49 Stat. 1192 (1936), and then for all rifles in 1968, National Firearms Act Amendments of 1968, Pub. L. 90-618, sec. 201, §5845(a)(3), 82 Stat. 1227, 1230 (1968) (codified at 26 U.S.C. §5845(a)(3)).

It is unlawful under 26 U.S.C. §5861(d) for any person "to receive or possess a firearm"—including a SBR—"which is not registered to him in the National Firearms Registration and Transfer Record." A transfer of any such firearm is taxed at $200. 26 U.S.C. §5811(a). Violating §5861(d) is punishable by up to 10 years' imprisonment under §5871, and although that statute originally set the maximum fine at $10,000, an amendment in 18 U.S.C. §3571(b) provides for a fine

of up to $250,000. The unregistered firearm is also forfeited. 26 U.S.C. §5872(a).

II. Procedural history

A. Robinson is arrested and indicted for possessing a SBR.

These facts are taken from the parties' stipulation of facts from the bench trial. Doc. 62-1.[1]

In the early morning hours of September 9, 2022, two Citrus County, Florida sheriff's deputies responded to a complaint about a suspicious vehicle parked in front of a house. The deputies saw Robinson, who seemed to be asleep, in the driver's seat with the butt stock of a rifle next to him. They woke him up and ordered him to place his hands on the wheel. Instead, he started the car and drove about 350 feet down the street before stopping once they activated their emergency lights.

A search of Robinson's vehicle uncovered a loaded rifle later measured by ATF to have a barrel with a length of 12.5 inches. After the deputies gave him *Miranda* warnings, he explained that he did not know that he had to register the rifle. A search of the National Firearms Registration and Transfer Record revealed that the rifle was not registered to him. He admitted that he knew that the barrel was less than 16 inches long.

The government charged Robinson with possessing an unregistered SBR, in violation of 26 U.S.C. §§5841, 5861(d), and 5871. Doc. 1.

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[1] Docket entries in the district court are cited as "Doc. ___." Docket entries in the circuit court are cited as "Cir. Doc. ___."

B. Robinson moves to dismiss the indictment and the district court denies his motion.

Robinson moved to dismiss the indictment for many reasons, including two relevant here: (1) the NFA violates his Second Amendment rights; and (2) the NFA is unconstitutional because punishing the possession of an unregistered firearm exceeds Congress's taxation power and violates the Tenth Amendment. Doc. 32 at 2.

The government responded in opposition, arguing: (1) the Second Amendment does not protect SBRs because they are "dangerous and unusual weapons" that are "not grounded in this country's historical tradition"; and (2) Robinson's Tenth Amendment challenge was foreclosed by binding precedent. Doc. 40 at 4, 6, 8–9.

Without holding a hearing, the district court denied Robinson's motion. Doc. 53. The district court held that, under *United States v. Miller*, 307 U.S. 174 (1939), the Second Amendment does not guarantee the right to keep and bear SBRs. Doc. 53 at 8. The district court also held that the NFA was a permissible exercise of Congress's taxing power. *Id.*, at 9.

C. The district court holds a stipulated-facts bench trial, convicts Robinson, and sentences him to probation.

After the district court denied Robinson's motion to dismiss, he waived his right to a jury trial and proceeded to a stipulated-facts bench trial, at which the district court found him guilty. Docs. 60, 61, 62, 64.

The PSR calculated that Robinson had a total

offense level of 15 and, with no criminal record, a criminal history category of I, resulting in a Guidelines range of 18 to 24 months incarceration. PSR ¶¶ 25, 28–29, 61. At sentencing, neither party objected to the PSR. Doc. 99 at 4. In mitigation, Robinson pointed out that although the facts as described in the PSR appeared troubling they were entirely innocent (his possession of the unregistered SBR aside). *See id.*, at 6–8.

The district court, after expressing that it was "not sure society would benefit from putting this young man in jail for any period of time" and that it "[did not] think a prison term would satisfy any legitimate societal goal," imposed a sentence of 18 months' probation with 6 of those months on home detention. *Id.*, at 13–15. A written judgment followed. Doc. 81.

D. Robinson appeals his conviction to the Eleventh Circuit.

Robinson timely appealed his conviction to the Eleventh Circuit. Doc. 86.

As to the Second Amendment, Robinson argued that his possession of a SBR was presumptively protected by the Second Amendment because he is part of "the people," and because SBRs are bearable arms in common use and typically possessed by law-abiding citizens for lawful purposes. Cir. Doc. 32 at 15–18. And because his possession of the SBR was presumptively protected, the government had to prove a historical tradition of requiring pre-possession registration of SBRs, which it could not do. *Id.*, at 21–22.

As to the taxing power and the Tenth Amendment, Robinson argued that the NFA's $200 fee exceeded Congress's authority to tax because it functioned as a

penalty, rather than a tax.[2] *Id.*, at 29–31.

The government responded that, as to the Tenth Amendment, Robinson's argument was foreclosed by binding Eleventh Circuit precedent. Cir. Doc. 40 at 5–6.

As to the Second Amendment, the government argued that *Miller* foreclosed Robinson's argument. *Id.*, at 7–10. The government also argued that the Second Amendment does not cover the possession of SBRs, *id.*, at 12–19, and that the NFA is consistent with the Nation's historical tradition of firearm regulation, *id.*, at 19–22.

In reply, Robinson argued that *Miller* supported his argument because *Miller* protects weapons that are "the ordinary military equipment" and the standard-issue rifle for the Army and Marines is a SBR. Cir. Doc. 47 at 1–3. He also reiterated his argument that the Second Amendment protects the possession of SBRs because they are in common use, and they are not dangerous and unusual. *Id.*, at 7–10. He also explained that there is no historical tradition of requiring people to register and pay taxes on firearms before possessing them, and that the why and how of the government's examples of colonial- and post-colonial-era laws regulating the trafficking of arms and ammunition differed substantially from the NFA's onerous requirements. *Id.*, at 12–22.

E. The Eleventh Circuit affirms.

As to the Second Amendment issue, the Eleventh

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[2] He also acknowledged that this claim was foreclosed by binding Eleventh Circuit precedent, but preserved the argument for further review. *See id.*, at 29 n.7.

Circuit concluded that the Court's decisions in *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022) and *United States v. Rahimi*, 602 U.S. 680 (2024) did not overrule *Miller*, so its holding that the Second Amendment does not bar the NFA's restrictions on short-barrel shotguns remains binding. *See* App. 11a. Having found that *Miller*'s holding about short-barreled shotguns remains binding, the Eleventh Circuit then considered "whether the NFA's similar regulation of short-barreled rifles is similarly permissible under the Second Amendment." *Id.*, at 12a. The Eleventh Circuit concluded that Robinson did "not establish[ ] how the distinctions between short-barreled rifles and short-barreled shotguns present a relevant and material difference that would make one regulation constitutional and the other not." *Id.*, at 13a.

Then, as to the Tenth Amendment issue, the Eleventh Circuit recognized, as Robinson conceded, that his argument was foreclosed by circuit precedent. *Id.*, at 15a.

REASONS FOR GRANTING THE PETITION

Robinson, who had no prior record, has been convicted of a felony for possessing a firearm in common use for lawful purposes.

I. The Court's review is needed to determine whether the NFA's registration requirement violates the Second Amendment.

This Court has held and repeatedly reaffirmed that the Second Amendment's plain text covers all bearable arms. *District of Columbia v. Heller*, 554 U.S. 570, 582

(2008); *Caetano v. Massachusetts*, 577 U.S. 411, 411 (2016); *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 28 (2022); *United States v. Rahimi*, 602 U.S. 680, 691 (2024). The Eleventh Circuit erred by misreading *United States v. Miller*, 307 U.S. 174 (1939) as foreclosing any challenge to 26 U.S.C. §5861(d).

A. *Miller* did not hold that short-barreled shotguns were not protected arms and says nothing about whether SBRs are in common use today.

The Eleventh Circuit below relied exclusively on *Miller*, but the court's reliance was misplaced.[3]

First, *Miller* did not hold that short-barreled shotguns were not protected arms. Rather, because the defendants "made no appearance in the case, neither filing a brief nor appearing at oral argument," *Heller*, 554 U.S., at 623, the *Miller* Court was not presented "any evidence tending to show" that short-barreled shotguns were protected and declined to take judicial notice that they were, *Miller*, 307 U.S., at 178. Consequently, the *Miller* Court explained, "we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument." *Ibid.* Declining to hold, "[i]n the absence of any evidence," *ibid.*, that short-barreled shotguns were protected differs from

[3] *Miller* was a seemingly collusive case in which "the Court heard from no one but the Government." *Heller*, 554 U.S., at 623; *see also* Brian L. Frye, *The Peculiar Story of* United States v. Miller, 3 NYU J.L. & Liberty 48, 50, 65 (2008) ("*Miller* was a Second Amendment test case arranged by the government and designed to support the constitutionality of federal gun control.").

determining that the Second Amendment does not guarantee a right to possess them.

Second, because the *Miller* Court declined to conclude that short-barreled shotguns were protected arms, *Miller* stands only for the proposition that the NFA's restrictions are valid as applied to arms that are unprotected by the Second Amendment. But this says nothing about arms that are protected—such as SBRs today. Moreover, *Miller*'s holding and focus on whether short-barreled shotguns were protected suggests that the NFA's restrictions would be unconstitutional as applied to protected arms. *See Miller*, 307 U.S., at 178 (focusing analysis on whether "the Second Amendment guarantees the right to keep and bear such an instrument"). If the NFA's restrictions were constitutional whether or not short-barreled shotguns were protected, it would have been senseless for the Court to spend so much of its opinion determining whether they were. *Cf. Heller*, 554 U.S., at 622 ("Had the Court believed that the Second Amendment protects only those serving in the militia, it would have been odd to examine the character of the weapon rather than simply note that the two crooks were not militiamen.").

Third, even if *Miller* is read as holding that short-barreled shotguns were unprotected arms in 1939, it cannot foreclose a challenge to restrictions on such arms nearly 90 years later because, as *Heller* explained, "*Miller* said . . . that the sorts of weapons protected were those 'in common use *at the time*.'" *Heller*, 554 U.S., at 627 (quoting *Miller*, 307 U.S., at 179) (emphasis added). And *Bruen* clarifies that over time, unprotected arms can become common—and thus protected—arms:

> Whatever the likelihood that handguns

> were considered "dangerous and unusual" during the colonial period, they are indisputably in "common use" for self-defense today. . . . Thus, even if these colonial laws prohibited the carrying of handguns because they were considered "dangerous and unusual weapons" in the 1690s, they provide no justification for laws restricting the public carry of weapons that are unquestionably in common use today.

597 U.S., at 47. The 1939 *Miller* case says nothing about whether SBRs are in common use today.

Fourth, even though *Miller* did not involve SBRs, the court below determined that *Miller* precludes Robinson's challenge because he did "not establish[ ] how the distinctions between [SBRs] and short-barreled shotguns present a relevant and material difference that would make one regulation constitutional and the other not." App. 13a. But that does not justify holding that *Miller* precludes a challenge to the NFA's restrictions on SBRs.

Dangerousness alone does not remove an arm from Second Amendment protection. "If *Heller* tells us anything, it is that firearms cannot be categorically prohibited just because they are dangerous." *Caetano*, 577 U.S. at 418 (Alito, J., concurring). Rather, this Court has clarified that a weapon loses Second Amendment protection only if it is both dangerous and unusual, and SBRs are not "unusual." In any event, SBRs are not "dangerous," either, because they do not differ in function or lethality from other common rifles or handguns. SBRs offer greater stability and accuracy than handguns, making them safer to operate. And they offer greater maneuverability and

portability than standard rifles, which are desirable traits for lawful defense. *See Heller*, 554 U.S., at 629.

Also, "[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). "To limit self-defense to only those methods acceptable to the government is to effect an enormous transfer of authority from the citizens of this country to the government—a result directly contrary to our constitution and to our political tradition." *Friedman v. City of Highland Park*, 784 F.3d 406, 413 (7th Cir. 2015) (Manion, J., dissenting); *see also Caetano*, 577 U.S., at 422 (Alito, J., concurring) (disapproving "the safety of all Americans [being] left to the mercy of state authorities who may be more concerned about disarming the people than about keeping them safe."). Rather, *Heller* affirmed that the People have the right to choose their preferred arms: "*Whatever the reason*, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid." 554 U.S., at 629 (emphasis added).

Bruen repeatedly stated that the "only" way the government can justify a modern regulation is with historical tradition. 597 U.S., at 17, 24, 34. But leaning on *Miller*, the Eleventh Circuit declined to discuss history. This Court's precedents require more.

B. The NFA's registration and taxation requirements for SBRs violate the Second Amendment.

To justify a regulation of conduct that "the Second Amendment's plain text covers," "the government must demonstrate that the regulation is consistent

with this Nation's historical tradition of firearm regulation." *Bruen*, 597 U.S., at 17. Because the plain text covers the possession of SBRs and no historical tradition supports registration and taxation requirements for arms in common use—such as SBRs—§5861(d) violates the Second Amendment.

1. The Second Amendment's plain text covers all bearable arms.

This Court conducted the plain text analysis of the Second Amendment in *Heller*, 554 U.S., at 576–600. Interpreting "Arms," *Heller* held that "the Second Amendment extends, prima facie, to all instruments that constitute bearable arms[.]" *Id.*, at 582. The Court has thrice reaffirmed *Heller*'s holding. *Caetano*, 577 U.S., at 411 (quoting *Heller*, 554 U.S., at 582, and describing *Heller*'s definition of "Arms" as a holding); *Bruen*, 597 U.S., at 28 (quoting *Heller*, 554 U.S., at 582); *Rahimi*, 602 U.S., at 691 (quoting *Heller*, 554 U.S., at 582).

Heller's "general definition" of "Arms," *Bruen*, 597 U.S. at 28, "includes any 'weapon of offence' or 'thing that a man wears for his defence, or takes into his hands,' that is 'carried . . . for the purpose of offensive or defensive action,'" *Caetano*, 577 U.S., at 416 n.3 (Alito, J., concurring) (quoting *Heller*, 554 U.S., at 581, 584) (brackets and citations omitted). It also "covers modern instruments that facilitate armed self-defense." *Bruen*, 597 U.S., at 28; *cf. Caetano*, 577 U.S., at 416 n.3 (Alito, J., concurring).

Thus, "[u]nder the plain text of the Second Amendment, [Robinson's] only burden is to show that [SBRs] are bearable 'Arms'—i.e., 'weapons of offence.' By any measure, they are." *Snope*, 145 S. Ct., at 1537

(Thomas, J., dissenting from denial of certiorari) (cleaned up).

Here, the Eleventh Circuit declined to make an explicit step-one finding that SBRs are protected by the Second Amendment. Instead, by relying exclusively on *Miller*, it implicitly concluded that SBRs receive no Second Amendment protection. That conclusion was wrong for two reasons.

First, *Heller* and *Bruen* establish that the consideration of whether a firearm is "in common use," and the corresponding consideration of whether a firearm is "dangerous and unusual," must be considered in the historical analysis—where the government bears the burden—rather than in the plain text analysis. *See Snope*, 145 S. Ct., at 1534 (Kavanaugh, J., statement respecting denial of certiorari) (referring to the "*historically based* 'common use' test" (emphasis added)).

Heller referred to "the *historical tradition*" of regulating "dangerous and unusual weapons." 554 U.S., at 627 (emphasis added). And *Bruen* explained that the *Heller* Court was "[d]rawing from this *historical tradition*" of restricting "dangerous and unusual weapons" in holding that the Second Amendment protects arms "'in common use at the time,' as opposed to those that 'are highly unusual in society at large.'" 597 U.S., at 47 (quoting *Heller*, 554 U.S., at 627) (emphasis added).

Moreover, the *Heller* Court considered that "historical tradition" in its own historical analysis. After completing the plain text analysis of the Second Amendment, 554 U.S., at 576–600, the Court began focusing on historical tradition, including "how the Second Amendment was interpreted from immediately after its ratification through the end of the 19th century," *id.*, at 605. Only after reviewing "Postratification Commentary," *id.*, at 605–10, "Pre-Civil War Case Law," *id.*, at 610–14, "Post-Civil War

Legislation," *id.*, at 614–16, "Post-Civil War Commentators," *id.*, at 616–19, and Supreme Court precedents, *id.*, at 619–26, did this Court identify the "historical tradition" of regulating "dangerous and unusual weapons" and protecting arms "in common use at the time," *id.*, at 627. And the Court identified the tradition of regulating "dangerous and unusual weapons" in the same paragraph as other "longstanding" regulations, *id.*, at 626–27, while promising to "expound upon the *historical justifications* for" those regulations at another time, *id.*, at 635 (emphasis added).

Had the Eleventh Circuit followed this Court's precedents and considered "common use" in the historical analysis, the government would have borne the burden of proving that SBRs are not common—a burden it could not satisfy.

Second, SBRs are commonly used by ordinary, law-abiding citizens for lawful purposes. According to the government's own statistics, there were 532,725 registered short-barreled rifles in the United States in 2021—despite the onerous regulations imposed by the NFA. *Firearms Commerce in the United States: Annual Statistical Update 2021*, Bureau Alcohol, Tobacco, Firearms & Explosives 16, https://perma.cc/6C28-5LX4. In *Caetano*, Justice Alito determined that "stun guns are widely owned and accepted as a legitimate means of self-defense across the country" because "hundreds of thousands of Tasers and stun guns have been sold to private citizens, who it appears may lawfully possess them in 45 States." 577 U.S., at 420 (Alito, J., concurring) (cleaned up and citation omitted). Applying this standard to SBRs, they are common. Americans own over a half-million SBRs, and like the stun guns in *Caetano*, civilians may

lawfully possess them in 45 states.[4] *Cf. Snope*, 145 S. Ct., at 1534 (Kavanaugh, J., statement respecting denial of certiorari) ("Given that millions of Americans own AR-15s and that a significant majority of the States allow possession of those rifles, petitioners have a strong argument that AR-15s are in 'common use' by law-abiding citizens and therefore are protected by the Second Amendment under *Heller*.").

Also, since the NFA requires SBR owners to undergo extensive background checks, the half-million registered SBRs are unquestionably "typically possessed by law-abiding citizens for lawful purposes." *Heller*, 554 U.S., at 625; *cf. Friedman*, 784 F.3d, at 416 (Manion, J., dissenting) ("The fact that a statistically significant number of Americans use [the regulated arms] demonstrates *ipso facto* that they are used for lawful purposes."). Rifles of all kinds are rarely used in crime and used to commit only about 3 percent of homicides committed with firearms per year. *See, e.g.*, FBI Crim. Just. Info. Servs. Div., Expanded Homicide Data Table 8: Murder Victims by Weapon, 2015–2019, https://perma.cc/422T-W3G9. Even if every homicide committed with a rifle were committed with a SBR, over 99.9% of SBRs would still not be used for that purpose. *See id.*; *see also Heller v. District of Columbia*, 670 F.3d 1244, 1269–70 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) ("[S]emi-automatic *handguns* are used in connection with violent crimes far more than semi-automatic *rifles* are.").

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[4] As far as Robinson can determine, only California, Hawaii, New Jersey, New York, Rhode Island, and the District of Columbia prohibit the possession of SBRs. Cal. Penal Code §§16590(s), 33215; Haw. Rev. Stat. Ann. §134-8(a); N.J. Stat. Ann. §§2C:39-1(o), -3(b); N.Y. Penal Law §265.00(3); R.I. Gen. Laws §§11-47-2(15), -8(b); D.C. Code §72502.02(a)(3).

2. No historical tradition supports registering or taxing protected arms.

After not finding that SBRs are "Arms" protected by the Second Amendment's text, the Eleventh Circuit did not consider whether there is a historical tradition of registering or taxing protected arms.

To carry its burden in the historical analysis, the government must prove that "the new law is 'relevantly similar' to laws that our tradition is understood to permit, 'apply[ing] faithfully the balance struck by the founding generation to modern circumstances.'" *Rahimi*, 602 U.S., at 692 (quoting *Bruen*, 597 U.S., at 29). "Why and how the regulation burdens the right are central to this inquiry." *Ibid.* (citing *Bruen*, 597 U.S., at 29).

The NFA burdens the right to keep and bear arms by imposing taxation and registration requirements on specified arms, and by prohibiting interstate travel with such arms without advance permission. It was enacted to prevent ownership of the regulated arms. *See, e.g.*, NFA Hearings, *supra*, at 50 (Representative Samuel Hill calling the regulation a "prohibitive tax").

No one argued when the NFA was enacted that SBRs were exceptionally dangerous weapons or preferred by criminals. Rather, since Congress at first intended to include handguns in the NFA, SBRs were apparently included to prevent citizens from getting around the handgun restriction by carrying shortened rifles instead. *See* Greenlee, *supra*, at 130–36; Halbrook, *supra*, at 168–71.

Because Robinson's conduct of possessing a SBR is protected by the Second Amendment, the central question here is whether there is a historical tradition of requiring people to register and pay taxes on certain

firearms before possessing them. *See Bruen*, 597 U.S., at 24 ("When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation."). As this Court explained, "the appropriate analysis involves considering whether the challenged regulation is consistent with the principles that underpin our regulatory tradition." *Rahimi*, 602 U.S., at 692 (citing *Bruen*, 597 U.S., at 26–31). "[C]entral to this inquiry" are "[w]hy and how the regulation burdens the right." *Ibid.*

So what are the why and how of the historical regulations offered by the government? In the Eleventh Circuit, the government cited a handful of colonial-era laws regulating the trafficking of arms and ammunition:

- A 1652 New York law outlawing illegal trading of guns, gun powder, and lead by private individuals;
- A 1631 Virginia law requiring the recording of all new arrivals to the colony, and of arms and munitions;
- An early-17th century Connecticut law banning residents from selling firearms outside the colony;
- A Virginia law stating that colonists could sell firearms and ammunition to loyal subjects inhabiting the colony;
- "[O]ther colonial governments controlled the conditions of trade in firearms";
- Six colonies' laws outlawing selling or providing firearms or ammunition to Native Americans; and
- An unspecified number of states during the

> 1800s "imposed various taxes on personally held firearms."

Cir. Doc. 40 at 20 (citations omitted). The government acknowledged that the NFA is "not identical to those historical regulations." *Id.* at 21. That was quite an understatement.

a. The why is different.

The purpose of those colonial laws was to make sure that the population was sufficiently armed, not to disarm it. *See Teixeira v. County of Alameda*, 873 F.3d 670, 685 (9th Cir. 2017) (en banc). Colonial governments restricted the sale of firearms because they wanted to make sure that their populations remained sufficiently armed to "protect[ ] vulnerable colonial settlements, especially from Indian tribes resisting colonial conquest, and from foreign forces." *Id.*, at 684 (citations omitted). "Governmental involvement in the provision, storage, and sale of arms and gunpowder is consistent with the purpose of maintaining an armed militia capable of defending the colonies." *Id.*, at 685. The NFA, in contrast, was passed to keep certain firearms out of the public's hands. *See* Oliver Krawczyk, *Dangerous and Unusual: How an Expanding National Firearms Act Will Spell Its Own Demise*, 127 Dick. L. Rev. 273, 276–80 (2022). Talk about a different "why."

b. The how is different.

The "how" is also substantially different. The NFA's requirements are onerous:

- File an ATF application form;
- Pay the $200 tax;
- 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;
- 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.

Id. at 289–90; 27 C.F.R. §478.98(a). Virtually none of those requirements have a Founding-era counterpart. Only one law cited by the government—the 1631 Virginia law—involved registration of individuals and their firearms. Yet even this solitary example did not require pre-possession registration or impose a tax, and thus the "how" for even that one law is not "relevantly similar" to the NFA. *Rahimi*, 602 U.S., at 692.

The government's only reference to laws requiring payment of a fee or tax was where the government claimed that "throughout the 1800s, the states imposed various taxes on personally held firearms." Cir. Doc. 40 at 20 (citing Robert J. Spitzer, *Gun Law History in the United States and Second Amendment Rights*, 80 Law & Contemp. Probs. 55, 76–77 (2017)). There are a host of problems with that claim.

First, in the cited law review article, the author cites three states that imposed taxes on personally held firearms—North Carolina in 1856 and 1858, Georgia in 1866, and Mississippi in 1867. But the author, and by extension the government, left out important context.

Take the Mississippi law. It provided:

> a tax of not less than five dollars or more than fifteen dollars shall be levied and assessed annually by the board of Police *of Washington county* upon every gun and pistol which may be in the possession of any person *in said county*, which *tax shall be payable at any time on demand*, by the Sheriff, and if not so paid, it shall be the duty of the Sheriff to *forthwith distrain and seize such gun or pistol*, and sell the same for cash at the door of the Court House . . . .

Act of Feb. 7, 1867, ch. CCXLIX, §1, 1867 Miss. Laws 327, 327, available at https://perma.cc/6KWZ-TJX2 (emphasis added). One may ask: Why would Mississippi impose a firearms tax that was only applicable in a single county? Why was the tax payable at any time on demand? And why was the penalty for failure to pay the tax immediate forfeiture of the firearm? To answer those questions, first consider the enactment date: February 7, 1867—less than two years after Robert E. Lee's April 9, 1865 surrender at Appomattox Court House. Next, consider Washington County's demographics: "On the eve of the Civil War, Washington County's population was 15,679, with 14,467 of those residents enslaved."[5] *Washington County*, Mississippi Encyclopedia, https://perma.cc/AAU5-MS62.

It takes little imagination to see why the Mississippi legislature, in the immediate aftermath of the Civil War, was interested in imposing a then-

[5] Its demographics were substantially the same after the war: "With African Americans comprising 86.2 percent of the population, Washington County continued to have the state's largest African American majority." *Ibid.*

substantial tax, payable on demand upon penalty of forfeiture, on firearms possessed by people only in the most heavily African American county in the state. *See also Watson v. Stone*, 4 So. 2d 700, 703 (Fla. 1941) (Buford, J., concurring) (discussing a similar Florida firearm registration statute that "was never intended to be applied to the white population and in practice has never been so applied").

The Georgia statute, while not so transparently racist, was also limited. That statute, also enacted less than two years after the Civil War, only applied in three counties and only applied to a firearm "over the number of three" on any plantation in those counties. Act of Dec. 7, 1866, no. 41, §1, 1866 Ga. Laws 27, 27–28, available at https://perma.cc/6XXQ-93G8.

As for North Carolina's 1856 and 1858 statutes, neither taxed rifles (though the 1858 statute taxed "rifle canes"), and both exempted arms used for mustering—arms suitable for militia use. *See* Act of Feb. 16, 1859, ch. 25, sched. A, §27(15), 1858 N.C. Sess. Laws 28, 35–36, available at https://perma.cc/82W9-EN8H; Act of Feb. 2, 1857, ch. 34, §23(4), 1856 N.C. Sess. Laws 28, 34, available at https://perma.cc/ARF8-2VFP.

And those are not the only problems with the government's reliance on those statutes. For another thing, they are too late. The relevant historical timeframe is limited to the Founding because "'[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them.'" *Bruen*, 597 U.S., at 34 (quoting *Heller*, 554 U.S., at 634–35). Post-Founding history serves a merely confirmatory role of a Founding-era tradition that already has been established. *See id.*, at 37 (treating 19th-century evidence "as mere confirmation of what the Court thought had already been

established"); *see also Rahimi*, 602 U.S., at 737–38 (Barrett, J., concurring) ("[F]or an originalist, the history that matters most is the history surrounding the ratification of the text; that backdrop illuminates the meaning of the enacted law. History (or tradition) that long postdates ratification does not serve that function.").

Yet another problem with the government's reliance on those three states' statutes is that they are outliers. Aside from these bare Civil War-era examples covering one state and another four counties, the government offered nothing for the Eleventh Circuit to rely on to support a conclusion that the NFA's registration tax aligns with our Nation's history and tradition, or the principles underlying the Second Amendment. This Court should not "'stake [its] interpretation of the Second Amendment upon a single law" (or three) "in effect in a single State" (plus a few stray counties) "that contradicts the overwhelming weight of other evidence regarding the right to keep and bear arms for defense' in public." *Bruen*, 597 U.S., at 65–66 (quoting *Heller*, 554 U.S. at 632) (cleaned up).

True, current regulations need not be "identical to ones that could be found in 1791," but they must be "relevantly similar." *Rahimi*, 602 U.S., at 692. The "how" of the NFA's regulations are not even in the same ballpark.

II. The Court's review is needed to determine whether the NFA exceeds Congress's taxing power.

This case also presents an important question about federalism and the extent of Congress's enumerated power to tax. The Eleventh Circuit held that binding circuit precedent prevented relief, but the

cases that underlie that precedent predated this Court's articulation of the functional approach to identifying a tax in *National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 565 (2012) (*NFIB*). This Court should examine the constitutional foundation for 26 U.S.C. §§5861(d) and 5871 under *NFIB*.

Also, resolution of this issue has serious consequences for Robinson, who is now a felon, as well as all other defendants convicted and sentenced under §§5861(d) and 5871 for receipt or possession of an unregistered SBR or other firearm covered by the NFA. Robinson was a downstream possessor of the SBR with no responsibility or ability to pay the required $200 or register it.

A. The Federal Government has the enumerated power to tax, while the States retain the police power.

"In our federal system, the National Government possesses only limited powers; the States and the people retain the remainder." *Bond v. United States*, 572 U.S. 844, 854 (2014); *see also United States v. Butler*, 297 U.S. 1, 63 (1936) ("Each state has all governmental powers save such as the people, by their Constitution, have conferred upon the United States, denied to the states, or reserved to themselves."). By creating a Federal Government of enumerated powers, the Constitution limits the authority of the Federal Government to exercising only the powers granted to it by the Constitution. *Bond*, 572 U.S., at 854 (quoting *McCulloch v. Maryland*, 17 U.S. 316, 405 (1819)); *see also United States v. Lopez*, 514 U.S. 549, 552 (1995) ("The Constitution creates a Federal Government of enumerated powers."). The Tenth Amendment also reflects this concept of federalism

and provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.

Under this federalist system, "[t]he States have broad authority to enact legislation for the public good—what [the Court] ha[s] often called a 'police power.'" *Bond*, 572 U.S., at 854 (quoting *Lopez*, 514 U.S., at 567). Punishment of local criminal activity is perhaps the clearest example of traditional state authority. *Id.*, at 858 (citing *United States v. Morrison*, 529 U.S. 598, 618 (2000)); *see also NFIB*, 567 U.S., at 535–36 (noting that punishment of street crime is an example of a general power of governing possessed by the States but not by the Federal Government, often called the "police power"); *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993) ("States possess primary authority for defining and enforcing the criminal law."). In contrast, Congress lacks a police power and "cannot punish felonies generally." *Cohens v. Virginia*, 19 U.S. 264, 428 (1821); *see also Bond*, 572 U.S., at 854 (explaining that it has been clear for nearly two centuries that Congress lacks a police power and cannot punish felonies generally). Accordingly, every criminal offense Congress enacts must have "some relation to the execution of a power of Congress, or to some matter within the jurisdiction of the United States." *Ibid.* (quoting *United States v. Fox*, 95 U.S. 670, 672 (1878)).

Congress may not pass laws to accomplish objectives not entrusted to the Federal Government under a pretext of executing its enumerated powers. *McCulloch*, 17 U.S., at 423. As Chief Justice Marshall explained:

> Should congress, in the execution of its powers, adopt measures which are

> prohibited by the constitution; or should congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say, that such an act was not the law of the land.

Ibid. Thus, "[e]very law enacted by Congress must be based on one or more of its powers enumerated in the Constitution." *Morrison*, 529 U.S., at 607; *see also Marbury v. Madison*, 5 U.S. 137, 176 (1803) ("The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written."). And the Court must strike down any act of Congress that transgresses those limits. *NFIB*, 567 U.S., at 538.

B. The $200 exaction imposed on transfer of a SBR functions not as a tax, but as a pretext to coerce conduct reserved to the police power of the States.

Congress's enumerated powers include the power to lay and collect taxes. U.S. Const. art. I, § 8, cl. 1. Invoking its taxing authority, Congress in 1934 enacted the NFA—"a regulatory measure in the interest of the public safety." *United States v. Freed*, 401 U.S. 601, 609 (1971); *see also Staples v. United States*, 511 U.S. 600, 627 (1994) (Stevens, J., dissenting) (stating that the NFA "is primarily a regulatory measure"). As to the NFA, Justice Stevens explained:

> Congress fashioned a legislative scheme to regulate the commerce and possession of certain types of dangerous devices, including specific kinds of weapons, to protect the health and welfare of the citizenry. To enforce this scheme, Congress created criminal penalties for certain acts and omissions.

Staples, 511 U.S., at 630 (Stevens, J., dissenting). This regulatory scheme with criminal penalties evolved, and in 1958, Congress added a criminal offense to the NFA prohibiting the receipt or possession of an unregistered firearm. 26 U.S.C. §5861(d).[6]

Congress does not necessarily exceed its constitutional authority when it levies taxes to try to influence conduct. *See NFIB*, 567 U.S., at 567 ("[T]axes that seek to influence conduct are nothing new."); *see also Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 40–43 (1922) (*Drexel Furniture*) (discussing cases); *cf. Dep't of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767, 779 (1994) ("We have cautioned against invalidating a tax simply because its enforcement might be oppressive or because the legislature's motive was somehow suspect."). Taxes imposed "on proper subjects with the primary motive of obtaining revenue from them and with the incidental motive of discouraging them by

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[6] Before the addition of the provision now found at §5861(d), this Court upheld the constitutionality of a different tax provision of the NFA in *United States v. Sonzinsky*, 300 U.S. 506, 511, 514 (1937) (holding that an annual excise tax on firearms dealers in §2 of the NFA was constitutional). While *Sonzinsky* addressed the annual dealer tax in §2, the $200 transfer fee, which serves as the precursor to 26 U.S.C. §§5811 and 5821, was found within §3. *Id.*, at 511.

making their continuance onerous . . . do not lose their character as taxes because of the incidental motive." *Drexel Furniture*, 259 U.S., at 38.

Yet "Congress's ability to use its taxing power to influence conduct is not without limits." *NFIB*, 567 U.S., at 572; *see, e.g.*, *Butler*, 297 U.S., at 61 (concluding that the Agricultural Adjustment Act of 1933 regulated agricultural production and that the tax was a mere incident of this regulation); *Drexel Furniture*, 259 U.S., at 39–40 (invalidating the "so-called tax" as a "penalty to coerce people of a state to act as Congress wishes them to act in respect of a matter completely the business of the state government under the federal Constitution"). Congress may not use its enumerated powers as a pretext to exercising power reserved to the States. *See Drexel Furniture*, 259 U.S., at 40 (quoting *McCulloch*, 17 U.S., at 423). In particular, Congress may not usurp the police powers of the States under the guise of a taxing act. *See United States v. Constantine*, 296 U.S. 287, 296 (1935).

Courts must read the Constitution's grant of the power to tax and other powers "carefully to avoid creating a general federal authority akin to the police power." *NFIB*, 567 U.S., at 536. Over a century ago, this Court warned of the potential dangers of letting laws stand that pretextually used the taxing authority to legislate on matters of public interest reserved to the States.

> Grant the validity of this law, and all that Congress would need to do, hereafter, in seeking to take over to its control any one of the great number of subjects of public interest, jurisdiction of which the states have never parted with, and which are reserved to them by the Tenth

> Amendment, would be to enact a detailed measure of complete regulation of the subject and enforce it by a socalled tax upon departures from it. To give such magic to the word 'tax' would be to break down all constitutional limitation of the powers of Congress and completely wipe out the sovereignty of the states.

Drexel Furniture, 259 U.S., at 38.

"Congress's authority under the taxing power is limited to requiring an individual to pay money into the Federal Treasury, no more." *NFIB*, 567 U.S., at 574. So the taxing power does not give Congress the same degree of control over individual behavior as the current understanding of Congress's power to regulate commerce. *Id.*, at 573. Critically, "the provisions of the so-called taxing act must be naturally and reasonably adapted to the collection of the tax and not solely to the achievement of some other purpose plainly within state power." *Drexel Furniture*, 259 U.S., at 43.

1. A functional approach is used to identify a tax.

To identify a tax, this Court has applied a "functional approach" and focused on the "practical characteristics of the so-called tax." *NFIB*, 567 U.S., at 565. This functional approach disregards the label given to the tax in favor of viewing the "substance and application" of the exaction. *Id.*, at 565 (quoting *Constantine*, 296 U.S., at 294). Also, this Court has observed that "[a] tax, in the general understanding of the term, and as used in the Constitution, signifies an exaction for the support of the government." *Butler*, 297 U.S., at 61. "[T]axes . . . are usually motivated by

revenue-raising, rather than punitive, purposes." *Kurth Ranch*, 511 U.S., at 779–80.

In *NFIB*, this Court noted that the exaction imposed by the Patient Protection and Affordable Care Act "look[ed] like a tax in many respects." 567 U.S., at 563, 565. Taxpayers paid the sum into the Treasury Department when they filed their income tax returns, and the amount was determined by familiar factors such as taxable income, number of dependents, and joint filing status. *Id.*, at 563–64. The requirement to pay was found in the Internal Revenue Code and enforced by the IRS. *Ibid.* The payment was expected to raise about $4 billion per year, satisfying the essential feature of a tax—producing revenue for the government. *Ibid.* (citing *United States v. Kahriger*, 345 U.S. 22, 28 n.4 (1953)). The exaction in *NFIB* was not excessive, did not require scienter, and was collected "solely by the IRS through the normal means of taxation—except that the [IRS] [was] *not* allowed to use those means most suggestive of a punitive sanction, such as criminal prosecution." *Id.*, at 566 (emphasis in original). In addition, under the "functional" analysis, the statutory context of the exaction and its practical operation matter in determining whether the exaction is a tax. *Id.*, at 565; *see id.*, at 563–70.

2. The $200 transfer fee does not function as a tax.

The NFA imposes a $200 "tax" for each firearm transferred. *See* 26 U.S.C. §5811(a). The transferor of the firearm pays the tax and registers the firearm. *See* 26 U.S.C. §§5811(b), 5841.

Applying the same functional approach and practical analysis here reveals that the $200 transfer fee underlying the NFA does not look like a tax. Instead,

it serves as a pretext for criminalizing the receipt or possession of a SBR, which should be a matter for the States rather than the Federal Government. As this Court has noted repeatedly, "[t]here comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty with the characteristics of regulation and punishment."[7] *NFIB*, 567 U.S., at 573 (internal quotations omitted) (citing *Kurth Ranch*, 511 U.S., at 779, and *Drexel Furniture*, 259 U.S., at 38).

Several practical features of the $200 payment and its enforcement strongly suggest that it does not function as a tax. First, the amount of the $200 payment has not changed for inflation since 1934. Congress's decision not to adjust the amount for inflation strongly suggests that Congress does not seek with the $200 payment to produce revenue for the government—the essential feature of a tax. *See NFIB*, 567 U.S., at 563–64.

In addition, since 2003, responsibility for enforcing the NFA no longer lies with the Treasury Department and its IRS, but with the Justice Department and its ATF.[8] The decision to transfer ATF from the Treasury

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[7] In *Drexel Furniture*, this Court asked:

> Does this law impose a tax with only that incidental restraint and regulation which a tax must inevitably involve? Or does it regulate by the use of the so-called tax as a penalty?

259 U.S., at 36.

[8] *See* ATF History Timeline, Bureau of Alcohol, Tobacco, Firearms and Explosives, https://perma.cc/9HCF-6ED8; *see also* 6 U.S.C. §531 (transferring the ATF to the Treasury Department).

Department to the Justice Department reflects the domination of the statute's criminal enforcement provision over its revenue collection.[9] Also, enforcement by the Justice Department suggests that the $200 payment does not function as a tax. *See Drexel Furniture*, 259 U.S., at 36–37 (finding that the so-called tax was a penalty in part because it was enforced by the Labor Department, an agency responsible for punishing violations of labor laws); *see also NFIB*, 567 U.S., at 563–64 (finding that the payment was a tax in part because it was enforced by the IRS, an agency responsible for collecting revenue).

In addition, unlike the tax in *NFIB*, ATF and the Justice Department enforce the NFA's required payments using "those means most suggestive of a punitive sanction, such as criminal prosecution." *NFIB*, 567 U.S., at 563–64. The criminal penalties drive the NFA, not the collection of revenue. The penalty provisions are not "naturally and reasonably adapted to the collection of the tax," but to "the achievement of some other purpose plainly within state power." *Drexel Furniture*, 259 U.S., at 43.

And the NFA's criminal penalty is far more severe than other criminal penalties for failing to pay taxes. Failure to obtain a $200 tax stamp on a SBR carries a maximum penalty of $250,000 and ten years imprisonment. 18 U.S.C. §3571(b); 26 U.S.C. §5871. But the maximum penalty for violating the Internal Revenue

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[9] "The Homeland Security Act split the missions and functions of ATF into two agencies: [ATF] transferred to the U.S. Department of Justice, and the Alcohol and Tobacco Tax and Trade Bureau remained with the U.S. Department of the Treasury." *See* ATF History Timeline, Bureau of Alcohol, Tobacco, Firearms and Explosives, https://perma.cc/9HCF-6ED8; *see also* 26 U.S.C. §7801(a)(2).

Code is only five years imprisonment (26 U.S.C. §7201), with other violations carrying three-year (26 U.S.C. §7206) or one-year (26 U.S.C. §7203) terms. And the penalties provided by §5871, including up to ten years' imprisonment, are disproportionately severe compared to the $200 transfer fee that the government never received. A useful contrast is the national median loss amounts and average sentences for various white-collar offenses, as recently reported by the United States Sentencing Commission for FY 2023:

Offense	**Median Loss Amount**	**Average Prison Sentence**
Counterfeiting[10]	$8,640	17 months
Bribery[11]	$35,115	23 months
Credit cards[12]	$116,545	27 months
Government benefits[13]	$170,613	19 months
Theft & property destruction[14]	$200,000	23 months

[10] https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Counterfeiting_FY23.pdf.

[11] https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Bribery_FY23.pdf.

[12] https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Credit_Card_Fraud_FY23.pdf.

[13] https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Government_Benefits_Fraud_FY23.pdf.

[14] https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Theft_Property_Destruction_Fraud_

Copyright and Trademarks (FY 2021)[15]	$229,302	10 months
Taxes[16]	$358,827	16 months
Mortgages (FY 2021)[17]	$371,818	14 months
Money laundering[18]	$566,530	71 months
Healthcare[19]	$1,416,231	27 months
Securities and investments[20]	$3,350,000	45 months

By comparison, the downstream recipient of a firearm who is held criminally responsible for the failure of the transferor to pay the $200 transfer fee is scored under U.S.S.G. §2K2.1, which leads to an average prison sentence of 68 months—by far the lowest monetary harm to the government with nearly the highest

FY23.pdf.

[15] https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Copyright_FY21.pdf.

[16] https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Tax_Fraud_FY23.pdf.

[17] https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Mortgage_Fraud_FY21.pdf.

[18] https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Money_Laundering_FY23.pdf.

[19] https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Health_Care_Fraud_FY23.pdf.

[20] https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Securities_Fraud_FY23.pdf.

penalty.[21]

Also, the downstream recipient, such as Robinson, of the firearm has no duty (or even the ability) to pay the $200 fee and register the firearm; that burden falls on the transferor. 26 U.S.C. §§5811(b), 5841(b); *see also Freed*, 401 U.S., at 603–04 ("[O]nly possessors who lawfully make, manufacture[ ], or import firearms can and must register them; the transferee does not and cannot register."). The offense also "requires no specific intent or knowledge that the [firearm was] unregistered." *Id.*, at 607. So §5861(d) harshly punishes a downstream firearm recipient without a requirement that the government prove any specific intent about the $200 transfer fee.

Under the "functional" analysis, the statutory context of the exaction is also relevant. Congress intended to ban certain firearms, not raise revenue, when it enacted the NFA. *See* NFA Hearings, *supra*, at 8; H.R. Rep. No. 1780, 73d Cong., 2d Sess. 2 (1934); S. Rep. No. 1444, 73d Cong., 2d Sess. 1 (1934). In addition, the NFA is not naturally and reasonably adapted to the collection of the fee. Rather, it is designed to achieve a purpose related to the States' police power. The practical operation of §5861(d) and the statutory context suggest that the $200 registration requirement functions as a penalty, not a tax.

CONCLUSION

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

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[21] https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Felon_In_Possession_FY23.pdf.

Respectfully submitted.

A. FITZGERALD HALL
Acting Federal Defender
MATTHEW D. CAVENDER
Research and Writing Attorney

July 16, 2025

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 23-12551

UNITED STATES OF AMERICA

v.

DAVID ROBINSON JR., Appellant

Filed: March 20, 2025

On Appeal from the United States District Court
for the Middle District of Florida
(D.C. No. 5:22-cr-00072)
District Judge: Honorable Gregory A. Presnell

OPINION OF THE COURT

Before: JORDAN, BRASHER, AND ABUDU, *Circuit Judges*.

PER CURIAM.

David Robinson, Jr., appeals his conviction for possession of an unregistered short-barreled rifle, 26 U.S.C. §§ 5861(d). On appeal, he argues that his statute of conviction violates the Second Amendment in light of *New York State Rifle & Pistol Association v. Bruen*, 597 U.S. 1 (2022), and that the National Firearms Act ("NFA"), 26 U.S.C. § 5801, et seq., is an unconstitutional tax on the exercise of a constitutional right and exceeds Congress's power under the Tenth Amendment. Finding no error—and bound by the precedent of the Supreme Court—we affirm.

I. FACTUAL BACKGROUND & PROCEDURAL HISTORY

In October 2022, a federal grand jury returned an indictment charging Robinson with knowing possession of an unregistered rifle with a barrel less than 16 inches in length ("short-barreled rifle"), in violation of 26 U.S.C. §§ 5841, 5861(d), and 5871.

Robinson moved to dismiss the indictment, arguing that the NFA was unconstitutional because it: (i) violates the Second Amendment under *Bruen*; (ii) exceeds Congress's taxing authority in violation of the Tenth Amendment; and (iii) is an unconstitutional fee or tax on the Second Amendment right to keep and bear arms. After full briefing, the district court denied the motion to dismiss. For reasons we address further below, the district court concluded that the Second Amendment does not guarantee the right to keep and bear an unregistered short-barreled shotgun, and it found no meaningful distinction between short-barreled shotguns and short-barreled rifles. The court also rejected Robinson's Tenth Amendment challenge as foreclosed by precedent and concluded that

Robinson's unconstitutional fee or tax argument was misplaced.

Robinson consented to a bench trial and stipulated to the following facts. On September 9, 2022, law enforcement responded to a complaint of a suspicious vehicle parked in front of a house in Citrus County, Florida. When officers arrived, they observed Robinson, who appeared to be asleep, in the driver's seat and the butt stock of a rifle next to him. Officers used a flashlight to view the inside of the car, waking up Robinson. Officers ordered Robinson to place his hands on the car's steering wheel, but rather than complying, Robinson drove away. Still, once officers activated their emergency lights, Robinson stopped his car and was detained. Officers recovered a loaded short-barreled rifle and a separate upper assembly for a rifle with a sixteen-inch barrel from the rifle. After officers gave him Miranda warnings, Robinson explained that he had bought the rifle in Tampa, Florida, and that he did not know that he had to register the rifle. A search of the National Firearms Registration and Transfer Record ("NFRTR") revealed that the rifle was not registered to Robinson. The barrel was measured by law enforcement to be approximately 12.5 inches long, and Robinson admitted that he knew that the barrel was less than 16 inches long.

After the bench trial, the district court found Robinson guilty. It later imposed a sentence of 18 months' probation, with six months served on home confinement.[1] Robinson appealed.

II. STANDARDS OF REVIEW

We review the constitutionality of a statute de

[1] On appeal, Robinson does not challenge his sentence.

novo. *United States v. Pugh*, 90 F.4th 1318, 1324 (11th Cir.) (citing *United States v. Knight*, 490 F.3d 1268, 1270 (11th Cir. 2007)), *cert. denied*, 145 S. Ct. 236 (2024) (mem.). Two relevant constraints are placed on our review here, however.

First, we "must follow Supreme Court precedent that has 'direct application' in a case, even if it appears that the reasoning of the Supreme Court precedent has been rejected in other cases." *Motorcity Ltd. ex rel. Motorcity, Inc. v. Se. Bank N.A.*, 120 F.3d 1140, 1143 (11th Cir. 1997) (*en banc*) (quoting *Rodriguez de Quijas v. Shear-son/Am. Express, Inc.*, 490 U.S. 477, 484 (1989)). "Only the Supreme Court has 'the prerogative of overruling its own decisions.'" *Id.* (quoting *Rodriguez De Quijas*, 490 U.S. at 484); *see also State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997); *Shalala v. Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000) ("[The Supreme Court] does not normally overturn, or . . . dramatically limit, earlier authority *sub silentio*.").

Second, under our prior panel precedent rule, we are bound to follow our own prior binding precedent until it is overruled by the Supreme Court or this Court sitting *en banc*. *United States v. White*, 837 F.3d 1225, 1228 (11th Cir. 2016); *United States v. Lee*, 886 F.3d 1161, 1163 n.3 (11th Cir. 2018). "To constitute an 'overruling' for the purposes of this prior panel precedent rule, the Supreme Court decision 'must be clearly on point.'" *United States v. Kaley*, 579 F.3d 1246, 1255 (11th Cir. 2009) (quoting *Garrett v. Univ. of Ala. at Birmingham Bd. of Trs.*, 344 F.3d 1288, 1292 (11th Cir. 2003)). "Even if the reasoning of an intervening high court decision is at odds with a prior appellate court decision, that does not provide the appellate court with a basis for departing from its prior decision." *United States v. Vega-Castillo*, 540 F.3d 1235,

1237 (11th Cir. 2008). In order to abrogate one of our precedents, a "later Supreme Court decision must 'demolish' and 'eviscerate' each of its 'fundamental props.'" *Del Castillo v. Sec'y, Fla. Dep't of Health*, 26 F.4th 1214, 1223 (11th Cir. 2022) (alterations adopted) (quoting *United States v. Petite*, 703 F.3d 1290, 1297-98 (11th Cir. 2013)). Accordingly, if this Court's precedent relied on "a line of Supreme Court precedents that the [Supreme] Court itself emphasizes in a later decision is not implicated by that later decision," the Supreme Court's "later decision cannot have" abrogated our precedent. *Id.* That said, however, the Supreme Court does not have to directly cite our precedent to abrogate it. *See Santiago-Lugo v. Warden*, 785 F.3d 467, 471–74 (11th Cir. 2015).

III. ANALYSIS

On appeal, Robinson reiterates the contentions he raised in his motion to dismiss. We address, and reject, each in turn.

A. The NFA's regulation of short-barreled rifles does not violate the Second Amendment

First, Robinson argues that the NFA violates the Second Amendment under *Bruen*. Robinson contends that the possession of a short-barrel rifle is presumptively protected by the Second Amendment, and constitutes "keeping or bearing arms." Specifically, he contends that short-barrel rifles are bearable arms that are "in common use" and are "typically possessed by law-abiding citizens for lawful purposes" because there is a large number of them in circulation and they are rarely used to commit crimes. He argues that *United States v. Miller*, 307 U.S. 174 (1939), does not compel a different conclusion because: (1) it is "unclear" whether *Miller*'s discussion on this issue "still

holds" in light of intervening Supreme Court precedent; and (2) *Miller* involved a short-barrel shotgun, not a short-barrel rifle. Finally, Robinson contends that the government cannot show a historical tradition of requiring prepossession registration of short-barrel rifles and that the NFA is like the unconstitutional New York licensing regime in *Bruen*.

In response, the government contends that precedent from this Court and the Supreme Court foreclose Robinson's argument on this issue. It also argues that, even if precedent does not foreclose Robinson's argument, the NFA's requirements for possessing a short-barreled rifle satisfy *Bruen*'s test and are constitutional under the Second Amendment.

The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. Section 5861(d) of Title 26 makes it unlawful for any person "to receive or possess a firearm that is not registered to" them in the NFRTR. 26 U.S.C. § 5861(d). The NFA defines "firearm" for the purpose of the provision as:

> (1) a shotgun having a barrel or barrels of less than 18 inches in length; (2) a weapon made from a shotgun if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 18 inches in length; (3) a rifle having a barrel or barrels of less than 16 inches in length; (4) a weapon made from a rifle if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 16 inches in length; (5) any other

> weapon, as defined in subsection (e); (6) a machinegun; (7) any silencer . . .; and (8) a destructive device.

Id. § 5845(a). The NFA also defines "rifle" and "shotgun." *Id.* § 5845(c), (d).

In *Miller*, the Supreme Court considered a Second Amendment challenge to the NFA brought by defendants indicted for transporting an unregistered short-barreled shotgun. 307 U.S. at 175. In rejecting the challenge, the Supreme Court held that, absent "any 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, [it could not] say that the Second Amendment guarantees the right to keep and bear such an instrument." *Id.* at 178. The Court also rejected "the objection that the [NFA] usurps police power reserved to the States," finding it "plainly untenable." *Id.*[2]

Nearly 70 years later, the Supreme Court struck down the District of Columbia's ban on the possession of usable handguns in *District of Columbia v. Heller*, 554 U.S. 570 (2008). In doing so, it "concluded, for the first time, that the Second Amendment guarantees an individual right to possess weapons unconnected with militia service." *United States v. Tagg*, 572 F.3d 1320,

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[2] Subsequently, the former Fifth Circuit rejected several constitutional challenges to the NFA on similar grounds, relying on *Miller*. *See United States v. Johnson*, 441 F.2d 1134, 1136 (5th Cir. 1971); *United States v. Williams*, 446 F.2d 486, 487 (5th Cir. 1971); *see also Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (*en banc*) (holding that all Fifth Circuit decisions issued by the close of business on September 30, 1981, are binding precedent in this Court).

1326 (11th Cir. 2009) (citing *Heller*, 554 U.S. at 573–619). Consequently, the Supreme Court displaced contrary circuit precedent which had rejected a similar argument. *See, e.g.*, *United States v. Wright*, 117 F.3d 1265, 1271–74 (11th Cir. 1997), *overruled in part by Heller*, 554 U.S. at 573–619. "The [*Heller*] Court emphasized, however, that the 'right secured by the Second Amendment is not unlimited,' and one 'important limitation' came from the Court's previous opinion in *Miller*." *Tagg*, 572 F.3d at 1326 (citing *Heller*, 554 U.S. at 626–27). Thus, the Supreme Court did not overrule *Miller* in *Heller*. *Id.*; *see also Heller*, 554 U.S. at 626–27.

In 2009, after *Heller*, we upheld a conviction under the NFA—for aiding and abetting the unlawful possession of unregistered pipe bombs—citing to and relying on *Miller*. *See Tagg*, 572 F.3d at 1323–27. In 2020, we again considered whether the NFA exceeded Congress's taxing power and, therefore, violated the Tenth Amendment both facially and as applied. *United States v. Bolatete*, 977 F.3d 1022, 1031–36 (11th Cir. 2020). We held that precedent squarely upheld the constitutionality of the NFA as a valid exercise of Congress's taxing power because, facially, Section 5861(d) was an enforcement mechanism of a transfer-tax provision meant to discourage a transferor from transferring an unregistered firearm without paying the tax. *Id.* at 1033 (citing *United States v. Ross*, 458 F.2d 1144, 1145 (5th Cir. 1972)). We also held that, as applied, Section 5861(d) was a valid regulation aiding a revenue-raising purpose even though it punished transferees who had no obligation or opportunity to pay the transfer tax. *Id.* Then, under plain-error review, we held that the Supreme Court's fee jurisprudence cases did not establish plain error because neither the Supreme Court nor this

Court had applied those cases to the Second Amendment. *Id.* at 1035–36.

In *United States v. Wilson*, we again rejected a defendant's Second and Tenth Amendment challenges to the NFA. 979 F.3d 889, 903 (11th Cir. 2020). There, we explained that "the Supreme Court [had] squarely rejected Wilson's constitutional argument over 80 years ago" in *Miller* when it held that the "'Tenth Amendment objection that the National Firearms Act usurps police power reserved to the States is plainly untenable' and 'we cannot say that the Second Amendment guarantees the right to keep and bear' an unregistered sawed-off 'shotgun having a barrel of less than eighteen inches in length.'" *Id.* (alterations adopted) (quoting *Miller*, 307 U.S. at 175–78). We also noted that our previous holding in *Bolatete* supported the same conclusion: that the NFA is constitutional as an exercise of the taxing power. *Id.*

Subsequently, in *Bruen*, the Supreme Court addressed a challenge to New York's gun-licensing regime. 597 U.S. at 10–12. New York's statutory scheme prohibited citizens from obtaining a license to carry firearms outside their home unless they proved "a special need for self-defense." *Id.* at 11. The Supreme Court ruled New York's regime unconstitutional because "the Second and Fourteenth Amendments protect an individual's right to carry a handgun for self-defense outside the home.'" *Bruen*, 597 U.S. at 10. *Bruen* also rejected the second step of "a two-step test that then prevailed in most circuits" for analyzing Second Amendment challenges. *See Bruen*, 597 U.S. at 15–25.[3] Instead, the Supreme

[3] We had "never actually applied the second, means-end-scrutiny step" of this now-overruled two-step test. *See United States v. Dubois*, 94 F.4th 1284, 1292 (11th Cir. 2024) (citing *United States v.*

Court explained, the proper standard for assessing whether a challenged firearm regulation is:

> When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation. Only then may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command."

Bruen, 597 U.S. at 24 (quoting *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 50 n.10 (1961)).

Even so, *Bruen*—like *Heller*—did not overturn all prior caselaw addressing the Second Amendment. *See, e.g.*, *United States v. Rahimi*, 602 U.S. 680, 692–700 (2024). More importantly, the *Bruen* majority also did not pass on—let alone criticize—*Miller*. *See generally Bruen*, 597 U.S. at 8–71.[4]

In *Rahimi*, decided after Robinson filed this appeal, the Supreme Court held that § 922(g)(8)—which

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Jimenez-Shilon, 34 F.4th 1042, 1052-53 (11th Cir. 2022) (Newsom, J., concurring)), *vacated*, __U.S. __, 2025 WL 76413 (2025) (mem.).

[4] Two members of the *Bruen* majority—Justice Kavanaugh, joined by Chief Judge Roberts—wrote separately to reiterate that "[p]roperly interpreted, the Second Amendment allows a 'variety' of gun regulations." *Bruen*, 597 U.S. at 79–81 (Kavanaugh, J. concurring). In making this point, Justice Kavanaugh's opinion quoted *Heller*'s discussion of *Miller* as an "important limitation." *Id.* at 81 (quoting *Heller*, 554 U.S. at 626–27).

prohibits firearm possession by individuals subject to a domestic violence restraining order—was constitutional because the provision comported with the principles underlying the Second Amendment. 602 U.S. at 692–700. In reaching that conclusion, the Supreme Court explained that "some courts [had] misunderstood the methodology" of its "recent Second Amendment cases." *Id.* at 691. It clarified that *Bruen* does not require a regulation to have existed at the founding in an identical form: instead, "[t]he law must comport with the principles underlying the Second Amendment, but it need not be a 'dead ringer' or a 'historical twin.'" *Id.* at 692 (quoting *Bruen*, 597 U.S. at 30). The Supreme Court also reiterated that prohibitions on felons' possession of firearms are "presumptively lawful." *Id.* at 699 (quoting *Heller*, 554 U.S. at 626–27). It added that, in *Heller*, it had "recognized that the right [secured by the Second Amendment] was never thought to sweep indiscriminately." *Id.* at 691.

Here, we conclude that *Miller* remains binding as the Supreme Court has not overturned it. *Motorcity Ltd.*, 120 F.3d at 1143; *Khan*, 522 U.S. at 20. As a lower federal court, we must leave it to the Supreme Court to overturn its own precedent and to limit its own precedent's applicability. *Shalala*, 529 U.S. at 18. As shown by the history laid out above, the Court has yet to overturn or limit *Miller*. *Tagg*, 572 F.3d at 1326; *Heller*, 554 U.S. at 626–27. Accordingly, the NFA's registration requirement for short-barreled shotguns is constitutional, *Miller*, 307 U.S. at 175–78, and our precedent upholding the NFA against Second Amendment challenges and relying on *Miller*—such as *Tagg*, *Bolatete*, and *Wilson*—remains binding. *See Kaley*, 579 F.3d at 1255; *Vega-Castillo*, 540 F.3d at 1237; *Del Castillo*, 26 F.4th at 1223.

Given that the NFA's regulation of short-barreled shotguns is constitutional under *Miller*, we turn to whether the NFA's similar regulation of short-barreled rifles is similarly permissible under the Second Amendment. The district court explained that, in its view, there was "no meaningful distinction" between short-barreled rifles and short-barreled shotguns. Other courts have reached the same conclusion. *See United States v. Cox*, 906 F.3d 1170, 1186 (10th Cir. 2018) (concluding that a defendant had not showed a "meaningful distinction between the two" types of firearm); *United States v. Stepp-Zafft*, 733 F. App'x 327, 329 (8th Cir. 2018) (unpublished) (collecting cases). In our own caselaw, we have discussed the dangerousness of firearms covered by the NFA together, without drawing the distinction Robinson now asks us to draw. *See United States v. McGill*, 618 F.3d 1273, 1277–78 (11th Cir. 2010) ("[W]e recognize that there is a 'reasonable—indeed, very substantial—difference between possession of a generic "firearm" and possession of one of the specialized weapons singled-out for particularized treatment by the NFA.'") (alterations adopted) (quoting *United States v. Fortes*, 141 F.3d 1, 7 (1st Cir. 1998)). The Supreme Court has done the same. *See, e.g.*, *United States v. Thompson/Ctr. Arms Co.*, 504 U.S. 505, 517 (1992) (plurality opinion) ("It is of course clear from the face of the Act that the NFA's object was to regulate certain weapons likely to be used for criminal purposes, just as the regulation of short-barreled rifles, for example, addresses a concealable weapon likely to be so used."). *Cf. United States v. Jennings*, 195 F.3d 795, 799 n.4 (5th Cir. 1999) (concluding that "short-barreled shotguns[ ] and short-barreled rifles are primarily weapons of war and have no appropriate sporting use or use for personal protection" (quoting S. Rep. No. 90-1501, at 28 (1968))).

Indeed, Robinson cites no cases treating these two types of short-barreled firearms—regulated in neighboring subsections within the NFA—differently. *See* 26 U.S.C. § 5845(a), (c), (d). Bound by the logic of *Miller* and *Wilson*—and given Robinson's failure to present a distinction—we reach the same conclusion as the district court. *Cf. Rahimi*, 602 U.S. at 692 (explaining that a regulation on firearms "must comport with the principles underlying the Second Amendment, but it need not be a 'dead ringer' or a 'historical twin'" (quoting *Bruen*, 597 U.S. at 30)). A successful Second Amendment challenge to the NFA must distinguish itself from the challenge the Supreme Court rejected in *Miller*. *See id.*; *see also Murphy v. St. Paul Fire & Marine Ins. Co.*, 314 F.2d 30, 31 (5th Cir. 1963) (explaining that an appellant must show error); *Vetter v. Frosch*, 599 F.2d 630, 633 (5th Cir. 1979) (similar). Here, Robinson has not established how the distinctions between short-barreled rifles and short-barreled shotguns present a relevant and material difference that would make one regulation constitutional and the other not.

We also disagree with Robinson's contention that the NFA is akin to the licensing scheme found unconstitutional in *Bruen*. The NFA does not "require applicants to show an atypical need for armed self-defense" so they do not implicate the same concerns present in *Bruen*. *Compare Bruen*, 597 U.S. at 38 n.9 (distinguishing may-issue gun control licensing regimes from shall-issue licensing regimes), with 26 U.S.C. § 5812 ("Applications shall be denied if the transfer, receipt, or possession of the firearm would place the transferee in violation of law.").

Therefore, we affirm the district court's order on this issue.

B. The NFA is not an unconstitutional tax on the exercise of a constitutional right

Robinson also argues that the NFA is an unconstitutional tax on the exercise of a constitutional right. Although he concedes that neither this Court or the Supreme Court has applied "fee jurisprudence" principles, as set forth in *Cox v. New Hampshire*, 312 U.S. 569 (1941), and *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), to the Second Amendment, he points to two other circuits that had done so pre-*Bruen*: *Heller v. District of Columbia*, 801 F.3d 264, 278 (D.C. Cir. 2015); *Kwong v. Bloomberg*, 723 F.3d 160, 165 (2d Cir. 2013). He urges us to follow these decisions and to conclude that the Second Amendment should be subject to the same body of rules as the other rights in the Bill of Rights, such as the First Amendment.

The government argues that *Bruen* forecloses this application of fee jurisprudence, which sets out the proper framework for analyzing a Second Amendment challenge. We agree.

In *Murdock* and *Cox*, the Supreme Court established the "fee jurisprudence" principles—holding that the government "may not impose a charge for the enjoyment of a right granted by the federal constitution," although it may collect a fee to defray administrative costs associated with the exercise of a constitutional right. *Murdock*, 319 U.S. at 113; *Cox*, 312 U.S. at 576–77. These principles are "most often applied in the First Amendment context." *Bolatete*, 977 F.3d at 1035. The Supreme Court has since explained that these principles embody means-end scrutiny, *i.e.*, "the tax at issue in *Murdock* was invalid because it was unrelated to any legitimate state interest." *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 137 (1992). In *Bolatete*, we rejected a defendant's argument that

Murdock and *Cox* applied in the Second Amendment context, albeit under plain-error review, explaining that we "ha[d] not decided whether it is appropriate to apply the fee jurisprudence of *Murdock* and *Cox* in the context of Second Amendment rights. Nor ha[d] the Supreme Court." *Bolatete*, 977 F.3d at 1035.

Supreme Court precedent now leaves no room for Robinson's argument. As we explained above, in *Bruen*, the Supreme Court set out the framework to be applied to Second Amendment challenges. 597 U.S. at 19, 24. The Court expressly rejected the application of means-end scrutiny in a Second Amendment context—thus, the fee jurisprudence precedent, which is an implementation of means-end scrutiny, conflicts with the established Second Amendment framework. *Id.* at 16–24; *Murdock*, 319 U.S. at 113; *Cox*, 312 U.S. at 576–77; *Forsyth Cnty*, 505 U.S. at 137. Accordingly, we must reject Robinson's argument on this front as well.

C. The NFA does not exceed Congress's power under the Tenth Amendment

Finally, Robinson argues that the NFA exceeds Congress's power under the Tenth Amendment. However, he concedes that we rejected an identical argument in *Bolatete*, and he does not contend the Supreme Court has rendered any relevant decision addressing the Tenth Amendment since then. He instead preserves this issue for further appellate review. While we are not bound by a party's concession, *see, e.g.*, *United States v. Lee*, 586 F.3d 859, 866 (11th Cir. 2009), Robinson is correct that *Bolatete* forecloses his argument, *see* 977 F.3d at 1033–34. We, therefore, affirm on this issue as well.

IV. CONCLUSION

For the reasons we have explained, Robinson has not shown error, so we affirm his conviction.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

No. 3:22-cr-00026

UNITED STATES OF AMERICA

v.

DAVID ROBINSON JR., Defendant

Filed: Feb. 9, 2023

ORDER

PRESNELL, J.

This cause came on for consideration without oral argument on Defendant's Motion to Dismiss (Doc. 32) the Indictment (Doc. 1), the Government's Response in Opposition (Doc. 40), and Defendant's Reply (Doc. 48).

I. Background

On October 11, 2022, a grand jury returned a one-count indictment charging Defendant David Robinson, Jr. ("Defendant") with knowingly possessing a firearm—here, a rifle having a barrel less than 16 inches in length, as defined by 26 U.S.C. § 5845(a)(3)—which was not registered to him in the

National Firearms Registration and Transfer Record, as required by 26 U.S.C. § 5841. Doc. 1. The Defendant's alleged conduct violates 26 U.S.C. §§ 5841, 5861(d) and 5871. *Id.* Defendant filed the instant Motion to Dismiss on November 21, 2022, arguing that the National Firearms Act ("NFA") and its registration scheme for certain firearms—and, consequently, the instant indictment—are unconstitutional infringements on his Second Amendment right to bear arms. Doc. 32.

II. Legal Standard

"A party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial on the merits." Fed. R. Crim. P. 12(b)(1). Any motions asserting a "defect in the indictment or information" must be made before trial. *Id.* at 12(b)(3)(B). When ruling on a motion to dismiss an indictment under Rule 12, the analysis is "by-and-large contingent upon whether the infirmity in the prosecution is essentially one of law or involves determinations of fact." *United States v. Miller*, 491 F.2d 638, 647 (5th Cir. 1974)[1]. "If a question of law is involved, then consideration of the motion is generally proper." *United States v. Korn*, 557 F.2d 1089, 1090 (5th Cir. 1977).

Under Rule 7(c)(1), Federal Rules of Criminal Procedure ("Rule(s)"), an indictment must be a "plain, concise, and definite written statement of the essential facts constituting the offense charged[.]" A

[1] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*), the Eleventh Circuit adopted as binding precedent all the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

satisfactory indictment: "(1) presents the essential elements of the charged offense, (2) notifies the accused of the charges to be defended against, and (3) enables the accused to rely upon a judgment under the indictment as a bar against double jeopardy for any subsequent prosecution for the same offense." *United States v. Steele*, 178 F.3d 1230, 1233–34 (11th Cir. 1999) (internal citation and quotation omitted). An indictment is generally sufficient "if it sets forth the offense in the words of the statute." *Hamling v. United States*, 418 U.S. 87, 117, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974); *United States v. Adkinson*, 135 F.3d 1363, 1375 n.37 (11th Cir. 1998) ("An indictment need do little more than track the language of the statute. . .); *United States v. Yonn*, 702 F.2d 1341, 1348 (11th Cir. 1983) (an indictment that tracks the language of the statute is sufficient "as long as the language sets forth the essential elements of the crime").

Nevertheless, an indictment that follows the statute may be insufficient if it fails to adequately apprise the defendant of the charged offense. *United States v. Sharpe*, 438 F.3d 1257, 1263 (11th Cir. 2006). It must include enough facts and circumstances to inform the defendant of the specific offense being charged. *United States v. Bobo*, 344 F.3d 1076, 1083 (11th Cir. 2003). This is necessary "not only to give the defendant notice as guaranteed by the [S]ixth [A]mendment, but also to inform the court of the facts alleged to enable it to determine whether the facts are sufficient in law to support a conviction." *See Belt v. United States*, 868 F.2d 1208, 1211 (11th Cir. 1989).

An indictment need not "allege in detail the factual proof that will be relied upon to support the charges." *United States v. Crippen*, 579 F.2d 340, 342 (5th Cir. 1978). Additionally, "[i]t is well-settled that a court

may not dismiss an indictment . . . on a determination of facts that should have been developed at trial." *Sharpe*, 438 F.3d at 1263 (internal citation and quotation omitted). Notably, "[t]here is no summary judgment procedure in criminal cases. Nor do the rules provide for a pre-trial determination of sufficiency of the evidence." *United States v. Critzer*, 951 F.2d 306, 307 (11th Cir. 1992). However, "[i]t is perfectly proper, and in fact mandated, that [a] district court dismiss an indictment if the indictment fails to allege facts which constitute a prosecutable offense." *United States v. Coia*, 719 F.2d 1120, 1123 (11th Cir. 1983).

III. Analysis

A. Constitutionality Arguments

As a threshold matter, Defendant correctly contends that his constitutional arguments are properly before the Court on the instant Motion to Dismiss. *See* Doc. 48 at 1–2. While the Government's Response argues that the legal standard for reviewing a motion to dismiss a criminal indictment is restricted, it does not contend that this Court may not consider Defendant's constitutional challenges. *See, e.g.*, Doc. 40 at 2–4. The Court reiterates that "[a]ny defense or objection that the court can determine without a trial on the merits" may be raised before trial by motion. Fed. R. Civ. P. 12(b)(1); *see U.S. v. Covington*, 395 U.S. 57, 60 (1969); *U.S. v. Adkinson*, 135 F.3d 1363, n. 11 (11th Cir. 1998). As opposed to arguing the factual disposition of his case, the Defendant's instant Motion to Dismiss solely challenges the constitutionality of the NFA—the statute under which he is indicted—and is a question of law properly before this Court. *See Covington*, 395 U.S. at 60 ("A defense is thus 'capable of determination' if trial of the facts surrounding the commission

of the alleged offense would be of no assistance in determining the validity of the defense." *Adkinson*, 135 F.3d at n. 11[2].

B. *New York Rifle & Pistol Assoc., Inc., v. Bruen*

The United States Supreme Court's ("Supreme Court('s)") recent holding in *New York State Rifle & Pistol Assoc., Inc., v. Bruen* abrogated New York's public carry licensing regime requirement that individuals show a special need for self-protection in order to carry arms in public. 142 S.Ct. 2111, 2156 (2022). In doing so, the Supreme Court discarded the two-step framework for evaluating the constitutionality of firearms regulations formerly employed by each of the United States Courts of Appeals to have addressed the question. *See id.* at 2128–30, n. 4. Instead, it declared that, "when the Second Amendment's plain text covers an individual's conduct . . . [t]he government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Id.* at 2129–30. In its opinion, the Supreme Court cautioned that the Second Amendment is not "a regulatory

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[2] The Court recognizes that another judge in this division has concluded that whether a firearms regulation "is 'consistent with this Nation's historical tradition of firearm regulation' is a question of fact, unanswerable by this Court on a Rule 12 motion." Doc. 50, Attach. A at 5. However, this Court respectfully declines to follow that approach. As recanted above, defenses are capable of pre-trial determination if, as is the case here, "trial of the facts surrounding the commission of the alleged offense would be of no assistance in determining the validity of the defense." *Covington*, 395 U.S. at 60; see also Fed. R. Crim. P. 12(b)(3)(B) (a defendant must raise any objection contending a defect in the indictment before trial).

straightjacket" and that "analogical reasoning requires only that the government identify a well-established and representative historical *analogue*, not a historical *twin*." *Id.* at 2133 ("So even if a modern-day regulation is not a dead ringer for historical precursors, it still may be analogous enough to pass constitutional muster.").

While the *Bruen* court restructured judicial review of firearms regulations, it reaffirmed its interpretation in *District of Columbia v. Heller*, 554 U.S. 570 (2008), that the "Second Amendment is not unlimited" and that "the right [is] not a right to keep and carry any weapon whatsoever in any manner whatsoever for whatever purpose." *Bruen*, 142 S.Ct. at 2128 (quoting *Heller*, 554 U.S. at 626–27). The remainder of Justice Thomas' opinion, steeped in historical dissertation, focused entirely on whether New York's requirement that public carry licensees demonstrate a special need was consistent with the historical regulation of firearms. *See generally id.* at 2134–56. The opinion makes no mention of the NFA and only addresses the broader issue of the constitutionality of firearms registration requirements in brief: "To be clear, nothing in our analysis should be interpreted to suggest the unconstitutionality of the 43 States' 'shall-issue' licensing regimes . . . Because these licensing regimes do not require applicants to show an atypical need for armed self-defense, they do not prevent 'law-abiding, responsible citizens' from exercising their Second Amendment right to public carry." *Id.* at n. 9.

C. Defendant's Motion to Dismiss

Arguing principally from the premise that *Bruen* "marks a dramatic shift in Second Amendment law,"

the Defendant makes four constitutional arguments[3]. Doc. 32 at 2. The Court addresses these challenges in turn.

1. The NFA does not violate the Second Amendment

Defendant first argues that "the NFA is a twentieth-century innovation" and, under *Bruen*, cannot survive constitutional scrutiny. Doc. 32 at 3. However, as noted above, *Bruen*'s holding does not address the NFA nor do its holdings raise any presumption that prior decisions upholding the constitutionality of the NFA have been called into question—it expressly counsels the opposite. *See, e.g.*, 142 S.Ct. at n. 9 ("To be clear, nothing in our analysis should be interpreted to suggest the unconstitutionality of . . . 'shall-issue' licensing regimes.").

In upholding the constitutionality of the NFA in *United States v. Miller*, the Supreme Court explicitly held that the Second Amendment does not guarantee the right to keep and bear unregistered short-barreled shotguns[4]. 307 U.S. 174, 178 (1939); *see also United States v. Wilson*, 979 F.3d 889, 903 (11th Cir. 2020 (". . . and we cannot say that the Second Amendment guarantees the right to keep and bear an unregistered

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[3] Though Defendant moved this Court to dismiss "for lack of jurisdiction, lack of specificity, and failure to state offenses[,]" he makes no arguments related to this Court's jurisdiction over the case nor any challenging the specificity of the indictment. Doc. 32 at 1; *see generally id.* Consequently, the Court, finding no infirmities in its jurisdiction, responds to Defendant's arguments that the NFA is unconstitutional.

[4] "[A] shotgun having a barrel of less than eighteen inches in length." 26 U.S.C. §§ 1132(d) (1934).

sawed-off shotgun having a barrel of less than eighteen inches in length."). This holding was confirmed in *Heller* when the Supreme Court stated that "the Second Amendment right . . . extends only to certain types of weapons." 554 U.S. at 623.

While, in the instant matter, Defendant has been indicted for possession of an unregistered short-barreled *rifle*, as opposed to a short-barreled *shotgun*, the Government need only identify a "historical *analogue*, not a historical *twin,*" to pass constitutional muster. *Bruen*, 142 S.Ct. at 2133. The Supreme Court has plainly held that unregistered short-barreled shotguns are not protected by the Second Amendment and this Court discerns no meaningful distinction when it comes to short-barreled rifles. *See Heller*, 554 U.S. at 627; *Bruen*, 142 S.Ct. at 2128.

Ultimately, this Court is bound by Supreme Court precedent to hold that, by its "plain text," the Second Amendment does not cover short-barreled rifles and, if it did, the NFA's registration requirement for short-barreled rifles is consistent with the historical regulation of firearms[5]. *See Miller*, 307 U.S. at 177-82; *Heller*, 554 U.S. at 627; *Bruen*, 142 S.Ct. at 2128. As the statutory provision at issue here—and the NFA generally—imposes only a registration requirement "and do[es] not require applicants to show an atypical need for armed self-defense, [it] do[es] not prevent

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[5] In his argument against reliance on *Miller*, Defendant chastises its purportedly thin historical analysis. Doc. 48 at 3. The *Miller* opinion, however, is devoted almost entirely to historical analysis—an analysis that bears a striking resemblance to the Supreme Court's historical appraisal in *Bruen*, only the *Miller* court reached a different conclusion than did its successors. *See Miller*, 307 U.S. at 177-82.

'law-abiding, responsible citizens' from exercising their Second Amendment rights . . ." *Bruen*, 142 S.Ct. at n. 9.

2. The NFA exceeds Congress's taxing authority and violates the 10th Amendment

Despite nearly one hundred years of federal jurisprudence, Defendant argues that the NFA is an unconstitutional departure from Congress's authority to tax and violates the Tenth Amendment. Doc. 32 at 14–15. Defendant has acknowledged that his argument has been rejected by the Eleventh Circuit Court of Appeals. *See, e.g.*, *United States v. Spoerke*, 568 F.3d 1236, 1245 (11th Cir. 2009); *United States v. Bolatete*, 977 F.3d 1022, 1031 (11th Cir. 2020). The Supreme Court held more then *eighty-five years ago* that, "[a]s [the NFA] is not attended by an offensive regulation, and since it operates as a tax, it is within the national taxing power." *Sonzinsky v. United States*, 300 U.S. 506, 514 (1937). Defendant's argument that the *Bruen* opinion—which does not contain a single mention of the word "tax" or even the NFA—may abrogate *Sonzinsky* is unpersuasive. The NFA is therefore a permissible exercise of Congress's power to tax, both facially and as-applied[6].

[6] Defendant alleges no facts to support of the NFA's unconstitutionality as applied to him. *See* Doc. 32 at 14–22. Consequently, the Court finds no indication that the NFA's application against the Defendant violated any recognizable constitutional standards.

3. If the NFA is a tax, it unconstitutionally infringes on his Second Amendment right

Defendant's next argument finds even less support. First, having found that short-barreled rifles are not protected by the Second Amendment, *see infra* III.B.1., the NFA tax on his short-barreled rifle cannot be an infringement on his rights. Even if short-barreled rifles fall within the "plain text" of the Second Amendment, however, his argument is presumptively foreclosed by *Bruen* itself. 142 S.Ct. at n. 9. The Supreme Court took special care to explicitly state that "nothing in our analysis should be interpreted to suggest the unconstitutionality of…licensing regimes [which] do not require applicants to show an atypical need for armed self-defense" because "they do not prevent 'law-abiding, responsible citizens' from exercising their Second Amendment right." *Id.*

Defendant dubiously contends that First Amendment fee jurisprudence should apply in the Second Amendment context— an undecided question in the Eleventh Circuit. *See* Doc. 32 at 22–24. However, since the Supreme Court in *Bruen* decided to discard the scrutiny regime historically applied in the context of constitutional rights, like those protected by the First Amendment, *see, e.g.*, *Americans for Prosperity Foundation v. Bonta*, 141 S.Ct. 2373, 2382–83 (2021), it follows that First Amendment fee jurisprudence would likewise by inapplicable in the Second Amendment context. *See Bruen*, 142 S.Ct. at 2130. In the absence of a clear directive from the Supreme Court or the Eleventh Circuit, this Court finds that the *Bruen* Court's assurance that "shall-issue licensing regimes" do not offend the constitution is sufficient to foreclose Defendant's argument that the NFA constitutes an

unconstitutional fee or tax on his Second Amendment right to bear arms. *Id.* at n. 9.

4. The NFA is not unconstitutionally vague

Finally, Defendant argues that the NFA is void for vagueness. Doc. 32 at 25. Under binding Eleventh Circuit precedent, the void-for-vagueness doctrine "requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *United States v. Marte*, 356 F.3d 1336, 1342 (11th Cir. 2004) (citation and quotations omitted). "Except where First Amendment rights are involved, vagueness challenges must be evaluated in the light of the facts of the case at hand." *Id*. In *Johnson v. United States*, the Supreme Court reaffirmed that due process protections are violated when a "criminal law [is] so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." 576 U.S. 591, 595 (2015)[7].

Defendant contends that the Supreme Court's holding in *Johnson* invalidates *Marte*'s binding precedent, but makes no coherent argument to substantiate his claim. *See* Doc. 32 at 24–25. He states that "[a]fter *Johnson*, a defendant need not show that the statute is vague in all of its applications in order to successfully mount a facial challenge." *Id.* Yet Defendant does

[7] The remainder of the opinion entirely and exclusively focused on resolving ambiguities in the residual clause of the Armed Career Criminal Act. *Id.* at 601-02 ("Nine years' experience trying to derive meaning from the residual clause convinces us that we have embarked upon a failed enterprise.")

not point to even a *single* application of the statute which could be considered vague. *See id.* Likewise, Defendant appears to argue that even if *Marte* is binding, this Court should deploy the review it applies under First Amendment cases. *See id.*; *see also Marte*, 356 F.3d at 1342. However, he makes no legal or factual argument whatsoever for how these disjointed contentions apply to either the NFA or to his indictment.

The Supreme Court expressly abrogated aspects of two of its prior decisions in *Johnson*[8], 576 U.S. at 606, but there is no indication that it might impact the Eleventh Circuit's holding in *Marte*. 356 F.3d at 1342. In the absence of *any* argument as to how 26 U.S.C. §§ 5841, 5861(d), 5845(a)(3) are vague—facially, as-applied, or as a consequence of *Johnson* (or any other case for that matter)—this Court finds that any ordinary person reading the statutory language would clearly understand that possession of an unregistered rifle with a barrel shorter than sixteen inches in length is prohibited conduct. Indeed, this Court struggles to conjure a more potent example of a statute which is not vague. The relevant statutory language of the NFA gives plain notice of the conduct which is prohibited and leaves no discernible void for arbitrary or discriminatory enforcement. See Marte, 356 F.3d at 1342.

IV. Conclusion

Therefore, and in light of the Court's rejection of Defendant's constitutional challenges, the Court finds that the indictment (Doc. 1) satisfactorily presents the essential elements of the charged offense, notifies the

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[8] *Sykes v. United States*, 564 U.S. 1 (2011) and *James v. United States*, 550 U.S. 192 (2007).

accused of the charges to be defended against, and enables the accused to rely upon a judgment under the indictment as a bar against double jeopardy for any subsequent prosecution for the same offense. *See Steele*, 178 F.3d at 1233–34.

Accordingly, it is **ORDERED** that Defendant's Motion to Dismiss (Doc. 32) is hereby **DENIED.**

DONE and **ORDERED** in Orlando, Florida on February 9, 2023.

APPENDIX C

1. U.S. Const. art. I, § 8, cl. 1 provides:

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.

2. U.S. Const. amend. II provides:

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

3. U.S. Const. amend. X provides:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

4. 26 U.S.C. § 5811 provides, in relevant part:

(a) Rate.—There shall be levied, collected, and paid on firearms transferred a tax at the rate of $200 for each firearm transferred . . . .

(b) By whom paid.—The tax imposed by subsection (a) of this section shall be paid by the transferor.

(c) Payment.—The tax imposed by subsection (a) of this section shall be payable by the appropriate stamps prescribed for payment by the Secretary.

5. 26 U.S.C. § 5841 provides:

(a) Central registry.—The Secretary shall maintain a central registry of all firearms in the United States which are not in the possession or under the control of the United States. This registry shall be known as the National Firearms Registration and Transfer Record. The registry shall include—

(1) identification of the firearm;

(2) date of registration; and

(3) identification and address of person entitled to possession of the firearm.

(b) By whom registered.—Each manufacturer, importer, and maker shall register each firearm he manufactures, imports, or makes. Each firearm transferred shall be registered to the transferee by the transferor.

(c) How registered.— Each manufacturer shall notify the Secretary of the manufacture of a firearm in such manner as may by regulations be prescribed and such notification shall effect the registration of the firearm required by this section. Each importer, maker, and transferor of a firearm shall, prior to importing, making, or transferring a firearm, obtain authorization in such manner as required by this chapter or regulations issued thereunder to import, make, or transfer the firearm, and such authorization shall effect the registration of the firearm required by this section.

(d) Firearms registered on effective date of this Act.— A person shown as possessing a firearm by the records maintained by the Secretary pursuant to the National Firearms Act in force on the day immediately prior to the effective date of the National Firearms Act of 1968 shall be considered to have registered under this

section the firearms in his possession which are disclosed by that record as being in his possession.

(e) Proof of registration.—A person possessing a firearm registered as required by this section shall retain proof of registration which shall be made available to the Secretary upon request.

6. 26 U.S.C. §§ 5845(a)(3) and (c) provide:

(a) Firearm.—The term "firearm" means . . . (3) a rifle having a barrel or barrels of less than 16 inches in length . . . .

. . .

(c) Rifle.—The term "rifle" means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed cartridge to fire only a single projectile through a rifled bore for each single pull of the trigger, and shall include any such weapon which may be readily restored to fire a fixed cartridge.

7. 26 U.S.C. § 5861(d) provides:

It shall be unlawful for any person— . . . (d) to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record . . . .

8. 26 U.S.C. § 5871 provides:

Any person who violates or fails to comply with any provision of this chapter shall, upon conviction, be fined not more than $10,000, or be imprisoned not more than ten years, or both.