No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

BRENNAN JAMES COMEAUX,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a court may uphold the National Firearms Act's requirement that a person obtain federal approval before making a silencer and register it, by presuming the requirement constitutional under footnote 9 of *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1 (2022), unless the challenger shows that it has been put toward abusive ends, without requiring the government to show that the requirement is consistent with the Nation's historical tradition of firearm regulation?

PARTIES TO THE PROCEEDING

Petitioner is Brennan James Comeaux, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

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JURISDICTION

The judgment of the court of appeals was entered on July 28, 2026. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Second Amendment to the United States Constitution 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.

26 U.S.C. § 5845(a) provides in relevant part:

> For the purpose of this chapter—
>
> (a) Firearm.—The term "firearm" means . . . (7) any silencer (as defined in section 921 of title 18, United States Code) . . . .

26 U.S.C. § 5822 provides:

> No person shall make a firearm unless he has (a) filed with the Secretary a written application, in duplicate, to make and register the firearm on the form prescribed by the Secretary; (b) paid any tax payable on the making and such payment is evidenced by the proper stamp affixed to the original application form; (c) identified the firearm to be made in the application form in such manner as the Secretary may by regulations prescribe; (d) identified himself in the application form in such manner as the Secretary may by regulations prescribe, except that, if such person is an individual, the identification must include his fingerprints and his photograph; and (e) obtained the approval of the Secretary to

make and register the firearm and the application form shows such approval. Applications shall be denied if the making or possession of the firearm would place the person making the firearm in violation of law.

26 U.S.C. § 5841 provides in relevant part:

> (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.

26 U.S.C. § 5861 provides in relevant part:

> 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 . . . .

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.

INTRODUCTION

In *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022), this Court held that when the Second Amendment's plain text covers an individual's conduct, "the Constitution presumptively protects that conduct," and "[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 24. The Fifth Circuit now applies a different rule to any law it considers a "shall-issue" licensing regime. Such a law is presumed constitutional on the strength of a footnote in *Bruen*, and the citizen loses unless he proves that the law "has been 'put toward abusive ends' through 'exorbitant fees' or 'lengthy wait times in processing license applications.'" *United States v. Peterson*, 161 F.4th 331, 340 (5th Cir. 2025) (quoting *Bruen*, 597 U.S. at 38 n.9), *cert. denied*, 146 S. Ct. 2558 (2026). Unless the citizen makes that showing, the government is never asked to carry its burden.

The Fifth Circuit framed the choice candidly when it first adopted the presumption: "What part of *Bruen* controls our evaluation of a firearm regulation? Its imposition of an historical showing to be made by the government? Or its various assurances that it did not disturb common-place regulations in shall-issue regimes?" *McRorey v. Garland*, 99 F.4th 831, 834 (5th Cir. 2024). It chose the footnote. The First, Fourth, and Ninth Circuits have made the same choice, and the presumption

now decides challenges to purchase licenses, background checks, waiting periods, and the National Firearms Act. The courts that apply it disagree about which step of *Bruen* it belongs to, who bears the burden under it, and what it takes to overcome it. Judges in the Fourth and Fifth Circuits have said it is wrong, and some of them have applied it anyway because circuit precedent required them to.

This case shows what the presumption does. Brennan Comeaux, who was not prohibited from possessing firearms, made five silencers at his home and kept them there. He did not apply for federal approval to make them. He was convicted of a felony under 26 U.S.C. § 5861(d) and sentenced to twenty-four months in prison. App. 013-15; ROA.82-84. The Fifth Circuit held that silencers are "Arms" protected by the Second Amendment. It then affirmed, because under the rule of orderliness it was bound by *Peterson* and Mr. Comeaux had not shown that the National Firearms Act was being put toward abusive ends. The challenge "fail[ed] at *Bruen* Step 1," and the government was never required to show any historical tradition for the requirement. App. 008; 179 F.4th at 302. Two of the three judges on the panel wrote separately to say that *Peterson* "erected a new 'half-step' between Step One and Step Two," that the rule "is incompatible with *Bruen*'s two-step method," and that "*Peterson* ought to be revisited." App. 009-11; 179 F.4th at 303-04 (Clement, J., joined by Duncan, J., concurring). The full court declined to poll.

The same day the panel ruled, and again a week later, this Court restated the method the presumption sets aside. *Hemani* reaffirmed that once the plain text covers the conduct, the burden of historical justification falls on the government.

United States v. Hemani, 608 U.S. 772, 780 (2026). *Wolford* held that a law within the plain text that places "any restrictions" on keeping or bearing arms "is presumptively unconstitutional." *Wolford v. Lopez*, 609 U.S. 185, 195-96 (2026). The government itself acknowledged below that the burden shift "seems inconsistent with the two-step analysis announced in *Bruen*" at first glance. Gov't Fifth Cir. Resp. to Pet. for Reh'g En Banc 9. The courts of appeals have shown they will not resolve the conflict between a footnote and the test. This case, decided on the presumption alone and on a preserved record, presents it cleanly.

STATEMENT OF THE CASE

I. The National Firearms Act's making and registration requirements

The National Firearms Act defines "firearm" to include "any silencer." 26 U.S.C. § 5845(a)(7). A person who wishes to make one must first file a written application "to make and register the firearm," pay any tax due on the making, identify the firearm, identify himself with "his fingerprints and his photograph," and obtain "the approval of the Secretary to make and register the firearm." *Id.* § 5822. When Mr. Comeaux made his silencers, the making tax was $200 for each one. App. 003 & n.3; 179 F.4th at 300 & n.3. It is "unlawful for any person . . . to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record." 26 U.S.C. § 5861(d). A violation is a felony punishable by up to ten years' imprisonment. *Id.* § 5871.

II. Mr. Comeaux, the charge, and the motion to dismiss

Brennan Comeaux was a 48-year-old gun collector and gunsmith living in rural Iberia Parish, Louisiana. ROA.197. He was not a prohibited person under federal or Louisiana law. ROA.31. He owned numerous shotguns, rifles, and pistols, along with firearm accessories and the tools to fabricate them. ROA.200-01. Working by hand at home, he fashioned five firearm silencers. ROA.9-10, 200. He kept them at his home, and nothing in the record suggests he sold them or offered them for sale. ROA.199-200.

Mr. Comeaux was in a long-standing dispute with his neighbors, which resulted in law enforcement visiting his residence. He told deputies that he and his neighbors had long-standing problems, and that he believed they had vandalized his vehicles, put cooking oil in his equipment, and sprayed his yard with weed killer. ROA.201. When an ATF agent interviewed him, he admitted that he had manufactured the silencers and stated that "he needed them for protection from his neighbors." ROA.200.

The homemade silencers were the only "firearms" charged in the indictment. ROA.9-10; App. 002; 179 F.4th at 299. He was charged and convicted not for any use of the silencers, but for possessing them without having registered them or obtained the government's advance approval to make them.

A grand jury in the Western District of Louisiana charged Mr. Comeaux with possessing unregistered silencers in violation of 26 U.S.C. § 5861(d) (Count 1) and

possessing a firearm unidentified by a serial number in violation of § 5861(i) (Count 2). ROA.9-10. The district court had jurisdiction under 18 U.S.C. § 3231.

Mr. Comeaux moved to dismiss, arguing under *Bruen* that both provisions violate the Second Amendment "on their face and as applied to him." ROA.31. He argued that possessing the silencers is conduct the plain text protects and that the government could not show a historical tradition of requiring firearm registration. ROA.33-36. The government opposed. Among other things, it argued that "*Bruen* expressly did not disturb the 'shall issue' licensing laws that exist in 43 states." ROA.50. The district court denied the motion, holding that silencers are "dangerous and unusual weapons" and that the statutes are "lawful both facially and as applied in this case." ROA.52, 59.

III. The conditional plea and sentence

Mr. Comeaux pleaded guilty to the § 5861(d) count under a conditional plea agreement that reserved "his right to appeal the Court's adverse ruling as to his Motion to Dismiss." ROA.132. The agreement contains no appeal waiver. The district court sentenced him to twenty-four months of imprisonment and three years of supervised release, and dismissed the § 5861(i) count. App. 013-15; ROA.82-84. He timely appealed. ROA.88.

IV. The court of appeals

While the appeal was pending, the Fifth Circuit decided *Peterson*. Its first opinion held that silencers are not arms. That opinion was withdrawn, and the court ultimately assumed without deciding that silencers are protected and held that the

National Firearms Act's silencer requirements are a "shall-issue" licensing regime that is presumptively constitutional under *Bruen*'s footnote 9. *See United States v. Speed*, 175 F.4th 272, 285 (4th Cir. 2026) (recounting *Peterson*'s history); *Peterson*, 161 F.4th at 339-41. The court held that Peterson had not overcome the presumption because he had not shown that the regime had been "put toward abusive ends." 161 F.4th at 340-41. This Court denied certiorari. 146 S. Ct. 2558 (2026). Mr. Comeaux's appeal was held in abeyance during the *Peterson* proceedings, and the court of appeals heard argument on June 1, 2026.

The panel affirmed in a published opinion. App. 001-08; 179 F.4th 297. It first held that silencers are Second Amendment "Arms," because they serve "critical functions that make firearms both safer and more effective for their core lawful purpose of self-defense." App. 006-07; 179 F.4th at 301-02. It then held itself bound under the rule of orderliness by *Peterson*, "which requires a challenger to the NFA's shall-issue silencer-registration regime show that the system 'has been "put toward abusive ends" through "exorbitant fees" or "lengthy wait times in processing license applications."'" App. 008; 179 F.4th at 302 (quoting *Peterson*, 161 F.4th at 340). Because Mr. Comeaux "does not in any way rebut the presumption that the NFA's shall-issue regime is lawful by asserting that it is being put 'toward abusive ends,'" his "challenge fails at *Bruen* Step 1." *Id.* The panel rejected the facial challenge on the ground that "an application of § 5861(d) was upheld in *Peterson*." App. 005-06 n.4; 179 F.4th at 301 n.4.

Judge Clement, joined by Judge Duncan, concurred. She agreed that silencers are protected, but wrote "to address a problem with our decision in *United States v. Peterson*." App. 009; 179 F.4th at 303. In her view *Peterson*'s reading "overextends *Bruen*'s dictum in footnote nine and, in turn, flips *Bruen*'s two-step analytical method on its head." *Id. Peterson*, she wrote, "traded history for dictum," and "erected a new 'half-step' between Step One and Step Two" that "resurrects a repudiated form of interest-balancing." App. 010-11; 179 F.4th at 303-04. She concluded: "I urge the en banc court to recalibrate our Second Amendment jurisprudence to reflect text, history, and tradition—not interest-balancing." App. 011; 179 F.4th at 304.

Mr. Comeaux petitioned for rehearing en banc on the question whether *Peterson*'s footnote 9 presumption conflicts with *Bruen*'s method. The court called for a response, and the government filed one. On July 28, 2026, the court denied panel rehearing and denied rehearing en banc because no judge requested a poll. App. 012.

V. How the question was raised and decided

Mr. Comeaux raised his Second Amendment challenge by pretrial motion and preserved it by conditional plea. ROA.29-39, 132. The government invoked footnote 9 in the district court. ROA.50. The court of appeals held that he preserved both his facial and as-applied challenges, reviewed them de novo, and decided both on the basis of the *Peterson* presumption. App. 003 & n.2, 005-06 n.4, 008; 179 F.4th at 299 & n.2, 301 n.4, 302. His guilty plea does not bar the challenge. *Class v. United States*, 583 U.S. 174, 176 (2018).

REASONS FOR GRANTING THE WRIT

I. A footnote has displaced *Bruen*'s test in the courts of appeals, and the error is entrenched beyond their power to correct

A. The presumption now governs a wide range of firearm laws, including the National Firearms Act

In *Bruen*, this Court held New York's may-issue carry licensing law unconstitutional. In a footnote, it added that "nothing in our analysis should be interpreted to suggest the unconstitutionality of the 43 States' 'shall-issue' licensing regimes," which it described as appearing to contain "only 'narrow, objective, and definite standards' guiding licensing officials." 597 U.S. at 38 n.9. The footnote went on: "That said, because any permitting scheme can be put toward abusive ends, we do not rule out constitutional challenges to shall-issue regimes where, for example, lengthy wait times in processing license applications or exorbitant fees deny ordinary citizens their right to public carry." *Id.*

The courts of appeals have built on that footnote a doctrine it does not state. The First Circuit extended the presumption to a waiting period, reasoning that such laws "delay, but do not deny, licenses" and that "our analysis should not proceed past step one of *Bruen*." *Beckwith v. Frey*, 171 F.4th 560, 570 (1st Cir. 2026). The en banc Fourth Circuit held that "non-discretionary 'shall-issue' licensing laws are presumptively constitutional and generally do not 'infringe' the Second Amendment right to keep and bear arms under step one of the *Bruen* framework," *Maryland Shall Issue, Inc. v. Moore*, 116 F.4th 211, 222 (4th Cir. 2024) (en banc), *cert. denied*, 145 S. Ct. 1049 (2025), and later applied that rule to § 5861(d), *Speed*, 175 F.4th at 286. The

Fifth Circuit held that "*Bruen*'s footnote 9 plainly forecloses" a challenge to the background checks preceding a firearm purchase, *McRorey*, 99 F.4th at 837, and then that "*Bruen*'s presumption of constitutionality for shall-issue licensing regimes applies to the NFA's application procedures," *Peterson*, 161 F.4th at 341. The Ninth Circuit held that "Footnote 9 in *Bruen* creates a presumption of constitutionality" and joined *Speed* and *Peterson*. *United States v. DeBorba*, 177 F.4th 1005, 1012-13 (9th Cir. 2026) (also holding, in the alternative, that silencers are not "arms"). The Tenth Circuit applies a related presumption, drawn from *Heller*'s description of "conditions and qualifications on the commercial sale of arms" as presumptively lawful, and treats footnote 9's abusive-ends language as its limit. *Rocky Mountain Gun Owners v. Polis*, 121 F.4th 96, 119-22 (10th Cir. 2024).

The presumption has traveled well beyond the state carry licenses footnote 9 described. It now reaches federal criminal statutes, purchase conditions, and waiting periods, and it is applied by courts covering a large part of the country. The National Firearms Act is where it has gone furthest. A requirement that a citizen obtain federal approval before making an arm, register it in a national record, and face a ten-year felony if he does not is about as far from a state carry license as a licensing law can get. If footnote 9 supports a presumption of validity for that requirement, it supports one for any law a court is prepared to call shall-issue. Deciding the question presented will therefore settle how the presumption operates for the other laws as well.

B. The courts that apply the presumption disagree about its place in *Bruen*'s framework, its burden, and what overcomes it

The courts applying the presumption do not agree on what it is. They divide first on where it belongs. The First Circuit, the Fourth Circuit majority, and the Fifth Circuit place it at step one, so that a challenge to a presumptively valid law fails before the government must offer any history. *Beckwith*, 171 F.4th at 570; *Maryland Shall Issue*, 116 F.4th at 222; App. 008; 179 F.4th at 302. The Second Circuit took a different route. It read footnote 9 as "addressing laws that combine discretion with a special-need requirement," and upheld New York's licensing requirement on the historical record, though it also agreed that this type of licensing law "is presumptively constitutional." *Antonyuk v. James*, 120 F.4th 941, 985 n.32, 994, 997 (2d Cir. 2024). Three judges of the en banc Fourth Circuit would have treated footnote 9 as part of the historical inquiry at step two. *Maryland Shall Issue*, 116 F.4th at 229-36 (Rushing, J., concurring in the judgment). In this case, the government itself told the court of appeals that footnote 9 "is better understood as involving *Bruen*'s second, historical step," not the first step on which the panel decided the case. Gov't Fifth Cir. Resp. to Pet. for Reh'g En Banc 10 n.1.

They divide next on who bears the burden. The Fourth and Fifth Circuits require the challenger to prove abusive ends. *Maryland Shall Issue*, 116 F.4th at 222-23; *Peterson*, 161 F.4th at 340-41. The Tenth Circuit has expressly reserved the question. *Rocky Mountain Gun Owners*, 121 F.4th at 122 n.8.

They divide last on what overcomes the presumption. The Fourth and Fifth Circuits look for exorbitant fees or lengthy wait times. *Speed*, 175 F.4th at 286;

Peterson, 161 F.4th at 340-41. And in two preliminary-injunction appeals involving waiting periods, the First and Tenth Circuits reached opposite results. The First Circuit vacated a preliminary injunction against Maine's 72-hour waiting period, holding that the analysis should not proceed past step one. *Beckwith*, 171 F.4th at 570. The Tenth Circuit held that New Mexico's seven-day waiting period was not a presumptively lawful condition on sale and was likely unconstitutional, adding that even if the presumption applied, a condition that broad is itself "put toward an abusive end." *Ortega v. Grisham*, 148 F.4th 1134, 1149 n.7 (10th Cir. 2025), *reh'g en banc denied*, 162 F.4th 1056 (10th Cir. 2025). The Eighth Circuit has noted that the constitutionality of shall-issue regimes, and the manner of analyzing it, "has been the subject of some debate." *McCoy v. Jacobson*, 176 F.4th 1055, 1057 n.2 (8th Cir. 2026). A doctrine that ends Second Amendment cases is being applied by different courts at different steps, with different burdens and different standards for rebuttal. The result is that similar laws can be sustained without historical analysis in one circuit and held likely unconstitutional after historical analysis in another.

C. Judges bound by circuit precedent have said the presumption is wrong, and only this Court can correct it

The presumption has drawn sustained criticism from judges who have nonetheless been required to apply it. In the Fourth Circuit, Judge Richardson, joined by Judge Agee, explained that "read in context, Footnote Nine's role was much more modest." *Maryland Shall Issue*, 116 F.4th at 242 (Richardson, J., dissenting). When the presumption reached the National Firearms Act in that circuit, Judge Richardson concurred because "Circuit precedent binds me," and called the presumption a "half-

step" between *Bruen*'s two steps. *Speed*, 175 F.4th at 290-91 (Richardson, J., concurring).

In this case, two of the three judges on the panel agreed. App. 009-11; 179 F.4th at 303-04 (Clement, J., joined by Duncan, J., concurring). The panel said it was "bound by *Peterson*" under the rule of orderliness. App. 008; 179 F.4th at 302. The concurrence urged the en banc court to revisit *Peterson*. The full court declined to poll. App. 012.

That sequence shows why the question will not resolve itself. Panels bound by circuit precedent cannot correct it, and the en banc courts in the Fourth and Fifth Circuits have either adopted the presumption or declined to reconsider it. *Maryland Shall Issue*, 116 F.4th at 222; Order Denying Reh'g En Banc, *United States v. Peterson*, No. 24-30043, Doc. 197-2 (5th Cir. Dec. 9, 2025); App. 012. Nor is the question going away. In the Fifth Circuit alone, the presumption has decided this case, *Peterson*, and *McRorey*. The presumption will continue to decide Second Amendment cases until this Court decides whether footnote 9 displaces *Bruen*'s test.

II. The presumption cannot be reconciled with *Bruen*, *Rahimi*, *Hemani*, and *Wolford*

A. This Court's method places the burden on the government once the plain text covers the conduct

Bruen set the standard in plain terms: "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." 597 U.S. at

24. The government "must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." *Id.* at 19. And the Court was clear that it was not obligated to do that work for the government: "Of course, we are not obliged to sift the historical materials for evidence to sustain New York's statute. That is respondents' burden." *Id.* at 60.

The Court has repeated that allocation since. In *Rahimi*, it explained that "when the Government regulates arms-bearing conduct, as when the Government regulates other constitutional rights, it bears the burden to 'justify its regulation.'" *United States v. Rahimi*, 602 U.S. 680, 691 (2024). Last Term, in *Hemani*, decided the same day as the decision below, the Court said that if the Amendment's terms cover the conduct, "the Constitution 'presumptively' protects it," and "[t]o overcome that presumption, the government then bears the burden of showing its regulatory efforts are 'consistent with the Nation's historical tradition of firearm regulation.'" 608 U.S. at 780. A week later, *Wolford* broke the first step into three questions, the third of which asks whether "the law place[s] any restrictions on either the 'keep[ing]' (i.e., possession) or the 'bear[ing]' (i.e., carrying) of arms," and held that a law within the plain text "is presumptively unconstitutional." 609 U.S. at 195-96.

Under that method, the only question at the first step here is whether the plain text covers Mr. Comeaux's conduct. The court of appeals answered it: silencers are arms, App. 006-07; 179 F.4th at 301-02, and a requirement that a person obtain federal approval and register a silencer before possessing it, enforced by a ten-year felony, plainly places a restriction on keeping it. At that point the Constitution

presumptively protected the conduct, and the government had to justify the requirement by history. The court of appeals never asked it to.

B. Footnote 9 does not create a presumption that displaces the test

Footnote 9 does not say what the presumption requires it to say. It says that "nothing in our analysis should be interpreted to suggest the unconstitutionality" of the 43 States' shall-issue carry regimes, and that the Court did "not rule out constitutional challenges" to such regimes where wait times or fees "deny ordinary citizens their right to public carry." 597 U.S. at 38 n.9. That is a statement that the Court's holding about may-issue discretion did not decide the validity of shall-issue regimes. It is not a rule that any law resembling a shall-issue regime is presumed valid until the citizen proves abuse, and it says nothing about who bears the burden of history. As Judge Richardson explained, the footnote "clarified that shall-issue licensing regimes are not necessarily unconstitutional just because may-issue regimes are." *Maryland Shall Issue*, 116 F.4th at 242 (Richardson, J., dissenting).

Justice Kavanaugh's concurrence in *Bruen* does not supply the missing rule. It observed that shall-issue licensing regimes are "constitutionally permissible, subject of course to an as-applied challenge if a shall-issue licensing regime does not operate in that manner in practice." 597 U.S. at 80 (Kavanaugh, J., concurring). That statement, like footnote 9, concerned the States' licenses to carry handguns in public. It was written by a Justice who joined the Court's opinion placing the burden of historical justification on the government. And it says that such regimes may be challenged as applied, not that a court may presume any law valid at the first step

and require the citizen to disprove its validity before the government must say anything about history.

Reading the footnote as a rule of decision also runs the presumption in the direction *Bruen* rejected. Comparing New York's law with the historical surety statutes, the Court observed that "[w]hile New York presumes that individuals have no public carry right without a showing of heightened need, the surety statutes presumed that individuals had a right to public carry that could be burdened only if another could make out a specific showing of 'reasonable cause to fear an injury, or breach of the peace.'" 597 U.S. at 56. The *Peterson* presumption runs the way New York's law did: it presumes the law valid and requires the citizen to make a showing before the right is recognized. As the concurrence below put it, "*Peterson* traded history for dictum," and the resulting half-step "resurrects a repudiated form of interest-balancing." App. 010-11; 179 F.4th at 303-04 (Clement, J., concurring). An inquiry into whether a law's fees are "exorbitant" or its wait times "lengthy" asks how heavily the law burdens the right, which is the kind of judgment *Bruen* removed from the analysis.

The government's response below conceded the tension. It acknowledged that "[a]t first glance, placing this burden on a challenger seems inconsistent with the two-step analysis announced in *Bruen* and applied in cases like" *Rahimi*, *Hemani*, and *Wolford*, and that "even a shall-issue regime seemingly implicates the Second Amendment's plain text and shifts the burden to the government to justify the law based on history." Gov't Fifth Cir. Resp. to Pet. for Reh'g En Banc 9. It then argued

that footnote 9 "implicitly" resolved the historical question and that the footnote belongs at step two rather than at step one, where the panel applied it. *Id.* at 10 & n.1. But a footnote that expressly declined to analyze shall-issue regimes cannot have resolved their history, and certainly not the history of a federal requirement that a citizen obtain approval and register an arm before making it in his own home.

C. The footnote does not describe the requirement applied here

The presumption also changed the outcome here, because footnote 9 does not describe the requirement applied to Mr. Comeaux. The footnote described state licenses to carry handguns in public, designed "to ensure only that those bearing arms in the jurisdiction are, in fact, 'law-abiding, responsible citizens.'" 597 U.S. at 38 n.9. The National Firearms Act instead requires a person to obtain "the approval of the Secretary to make and register the firearm" before making it, 26 U.S.C. § 5822, under provisions the D.C. Circuit has read to impose no limit, beyond their mandatory-denial clauses, on "the Secretary's broad power to grant or deny applications," *Lomont v. O'Neill*, 285 F.3d 9, 17 (D.C. Cir. 2002). And it enforces the requirement not by denying a license but with a felony carrying up to ten years in prison. 26 U.S.C. § 5871; *see Staples v. United States*, 511 U.S. 600, 616 (1994) (describing "[t]he potentially harsh penalty attached to violation of § 5861(d)—up to 10 years' imprisonment").

Whether that requirement fits the Nation's historical tradition is a question the government has never had to answer, and there is reason to doubt it can. As one scholar has documented, "there were no restrictions on the manufacture of arms for

personal use in America during the seventeenth, eighteenth, or nineteenth centuries." Joseph G.S. Greenlee, *The American Tradition of Self-Made Arms*, 54 St. Mary's L.J. 35, 78 (2023). The Court need not resolve that question now. The point is that, under the correct method, it would have decided this case, and the presumption allowed the court of appeals to avoid it.

III. This case is the right vehicle, and the record's silence on abusive ends is the point, not an obstacle

The question presented was pressed and decided below. The government invoked footnote 9 in the district court, ROA.50; the court of appeals held both of Mr. Comeaux's challenges preserved and reviewed them de novo, App. 003 & n.2; 179 F.4th at 299 & n.2; and the presumption was the only ground of decision for both the as-applied and facial rulings, App. 005-06 n.4, 008; 179 F.4th at 301 n.4, 302. The conditional plea reserved the challenge without any appeal waiver. ROA.132. If the presumption falls, the judgment cannot stand on the ground the court of appeals gave.

Preservation also distinguishes this case from *Peterson*, in which this Court denied review. The defendant there conceded at argument that the National Firearms Act is a shall-issue regime, did not cite *Bruen* in his merits brief, and raised footnote 9 only after argument. *Peterson*, 161 F.4th at 339-40. Mr. Comeaux litigated under *Bruen*'s method from his motion to dismiss forward, and he challenged the statute both on its face and as applied. ROA.29-39. Since *Peterson* was denied, two more circuits have applied the presumption to the National Firearms Act, *Speed*, 175 F.4th at 286; *DeBorba*, 177 F.4th at 1012-13; two of the three judges below have called for

Peterson to be revisited; the full court has declined to do so; and this Court has decided *Hemani* and *Wolford*.

The government will say that the record contains nothing about fees or wait times. That is true. Mr. Comeaux told the court of appeals as much, acknowledging that the record contains no evidence that he applied for approval to make the silencers and no evidence about processing times. Appellant's Letter Br. 1-2 (Oct. 24, 2025). He has never claimed that the government would have denied him approval had he applied. Under the presumption, that ends the case. Under *Bruen*, it is beside the point: a citizen whose conduct the plain text covers owes no showing at all, and the government owes a historical one. That is why the empty record is the point of the petition, not a reason to deny it. The presumption decided this case because it required Mr. Comeaux to prove something the Constitution does not require him to prove, and it relieved the government of the showing the Constitution does require.

The government also argued below that § 5861(d) would survive *Bruen*'s second step, pointing to nineteenth-century taxes on particular weapons and to colonial regulation of commerce in arms, and that the as-applied challenge fails because of Mr. Comeaux's conduct toward his neighbors. Gov't Fifth Cir. Br. 20-37, 41-42; Gov't Fifth Cir. Resp. to Pet. for Reh'g En Banc 11-15. The court of appeals reached neither argument. App. 008; 179 F.4th at 302. Neither is an alternative ground for the judgment, and both are for the court of appeals to consider on remand under the correct framework.

Nor do the changes in the silencer tax since Mr. Comeaux's offense affect the question. Congress reduced the tax on making or transferring a silencer to $0 effective January 1, 2026. 26 U.S.C. §§ 5811(a), 5821(a); App. 003 n.3; 179 F.4th at 300 n.3. The Ninth Circuit has treated a challenge to the fee as moot for that reason, *DeBorba*, 177 F.4th at 1012 n.2, and a district court has held the National Firearms Act's registration provisions beyond Congress's enumerated powers as applied to untaxed firearms and enjoined their enforcement as to the plaintiffs and their members and customers, *Silencer Shop Found. v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, No. 6:25-CV-056-H, 2026 WL 2255460, at *1, *30 (N.D. Tex. Aug. 5, 2026). None of that reaches this case. Mr. Comeaux's conviction rests on the statute as it stood in 2022, when the tax was $200 for each silencer; *Silencer Shop* did not reach the Second Amendment, *id.* at *26; and the requirements to obtain approval and register, and the felony that enforces them, remain in the statute. 26 U.S.C. §§ 5822, 5841, 5861(d), 5871.

More fundamentally, the question is about method. The presumption that decided this case is the same one that now decides challenges to purchase licenses, background checks, and waiting periods across the country. This case presents it on a preserved record, in a published decision.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted this October 26, 2026,

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