No. 24-1259

In the
Supreme Court of the United States

JAMOND M. RUSH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

This Court's precedent makes clear beyond doubt that the Second Amendment's plain text "extends, prima facie, to all instruments that constitute bearable arms." *District of Columbia v. Heller*, 554 U.S. 570, 582 (2008); *accord New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 28 (2022). Yet the Seventh Circuit panel below denied that the National Firearms Act's registration and taxation requirements for short-barreled rifles even *implicate* the Second Amendment's text. Pet.App.13a. When the lower courts' Second Amendment jurisprudence deems ordinary long arms to fall outside of the text of the Amendment altogether, that is a sign that the jurisprudence has taken a dangerously wrong turn. This Court should intervene.

The Government does not defend the panel's refusal to recognize short-barreled rifles as "arms," and the feeble arguments it does advance in an attempt to justify the result below all fail. Its argument that Section 5861(d)'s regulation of short-barreled rifles "is consistent with the Nation's historical tradition of firearm regulation," U.S.Br.5-6 (cleaned up), is based on a smattering of laws enacted forty-five or more years after the Second Amendment was ratified, primarily by States in the slaveholding South, imposing limits that are not remotely analogous. Its contention that *United States v. Miller* necessitates rejection of Petitioner's challenge is equally unpersuasive: *Miller* in fact *confirms* that the relevant question is whether the arms in question are "of the kind in common use at the time," and its tentative determination that there was no "evidence tending to show" that this standard was satisfied by a different type of firearm

(short-barreled *shotguns*) at a different point in time (nearly 90 years ago) is irrelevant here. 307 U.S. 174, 178-79 (1939). And the Government's argument that Petitioner's facial challenge fails because Section 5861(d) may be lawfully applied to criminals who misuse the firearms rests on a flawed understanding of facial challenges that would mean that every facial Second Amendment challenge that has ever been brought must necessarily fail.

The Government concedes that the decision below raises fundamental questions about the application of the Second Amendment that have bedeviled the federal Courts of Appeals and that "may well warrant review" by this Court. U.S.Br.8. This case presents the Court with an opportunity to address and resolve one or more of those questions in the context of an anomalous federal law that restricts the possession of common firearms that no one can plausibly claim are unusually dangerous or especially susceptible to criminal misuse. The Court should grant the writ.

ARGUMENT

I. The decision below directly conflicts with this Court's Second Amendment precedents.

The Seventh Circuit panel below decided multiple important questions of constitutional law in ways that clearly flouted, ignored, or distorted this Court's binding precedents.

A. The panel below starkly departed from *Heller* and *Bruen* right out of the starting gates by grievously misapplying *Bruen*'s initial plain-text inquiry. The panel acknowledged that the key plain-text analysis

is "whether the firearm at issue—a short-barreled rifle—falls within the scope of 'arms' that individuals are entitled to 'keep and bear.' " Pet.App.9a. *Heller* itself addresses, and conclusively resolves, this question, unambiguously holding that the "prima facie" meaning of "Arms" extends "to all instruments that constitute bearable arms." 554 U.S. at 582. And *Bruen* expressly reaffirmed this holding. 597 U.S. at 28. Yet the panel below flagrantly departed from it. It specifically rejected Petitioner's contention "that the text of the Second Amendment extends to all 'bearable' arms," instead insisting that the Amendment's text is limited to those "firearm[s] 'in common use' for a lawful purpose like self-defense." Pet.App.10a (quoting *Bruen*, 597 U.S. at 32). It went on to distort and misapply that common-use test, as we discuss next, but its initial error was in employing the test at *Bruen*'s threshold, plain-text stage to begin with. For both *Heller* and *Bruen* could not have been clearer that the "common-use" test is part of the Second Amendment's "historical tradition," not the semantic meaning of the provision's text. *Heller*, 554 U.S. at 627; *see also Bruen*, 597 U.S. at 21.

Short-barreled rifles are plainly "bearable," and they are just as plainly "arms." *Heller*, 554 U.S. at 582. They are instruments that "a man … useth … to cast at or strike another," *id.* at 581, in the same basic way as any other firearm in 1791 or today: by pulling a trigger that ignites gunpowder and launches a metal projectile. Indeed, "the rifle of all descriptions" has long been understood to be among "the usual arms of the citizen of the country." *Andrews v. State*, 50 Tenn. 165, 179 (1871). The panel's holding that a restriction on possessing these firearms does not even implicate

the Second Amendment beggars all belief. The Government makes no effort to defend that conclusion, and the panel's grievous error on this basic point alone justifies this Court's review.

B. The panel also misunderstood the common-use test. This Court's cases indicate that common use is an inquiry into the practices of the American people. *Heller*, 554 U.S. at 627; *accord Caetano v. Massachusetts*, 577 U.S. 411, 420 (2016) (Alito, J., concurring); *Friedman v. City of Highland Park*, 577 U.S. 1039, 1041 (2015) (Thomas, J., dissenting from the denial of certiorari); *Snope v. Brown*, 145 S. Ct. 1534, 1534 (2025) (Kavanaugh, J., respecting the denial of certiorari). There are over 850,000 short-barreled rifles in circulation, BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, FIREARMS COMMERCE IN THE UNITED STATES: STATISTICAL UPDATE 2024 at 12 (2024), https://perma.cc/9J58-8LWM, and they are legal for ordinary citizens to possess in a large majority of States, satisfying any plausible threshold of commonality, *see Caetano*, 577 U.S. at 420 (Alito, J., concurring); *Snope*, 145 S. Ct. at 1534 (Kavanaugh, J., statement respecting denial of certiorari). Yet the Seventh Circuit expressly "rejected this type of commonality reasoning," insisting that the "common use" test requires a showing of "what short-barreled rifles are commonly used *for*." Pet.App.21a-22a. That conclusion, too, is impossible to square with *Heller*, which repeatedly referred to the "common use" of firearms as encompassing their lawful *possession*. 554 U.S. at 625, 627. Indeed, given that the Second Amendment guarantees the right to "keep" arms as well as "bear" them, the notion that only those arms commonly *fired*

for a particular purpose are protected should be a non-starter.

C. The panel's assessment of "this Nation's historical tradition of firearm regulation" also conflicts with this Court's decisions. *Bruen*, 597 U.S. at 17. It invoked the "historical tradition" of restricting "dangerous and unusual weapons," as opposed to those "in common use," *Heller*, 554 U.S. at 627, but as just discussed, that tradition cannot justify Section 5861(d), because short-barreled rifles *are* in common use.

The Government's attempts to rehabilitate the panel's historical analysis are equally mistaken. It points to severe, outlier restrictions relating to Bowie knives and other, similar weapons that a minority of (largely Southern) States enacted in the mid-to-late nineteenth century. U.S.Br.6. But those scattered laws fail to establish any enduring tradition of regulation for multiple reasons. They began to crop up over four decades after the Second Amendment's ratification—too late to shed meaningful light on its historically understood scope; they were never adopted by a majority of States; they almost exclusively arose in the slaveholding (or ex-Confederate) South—an unlikely place to look for a mainstream constitutional tradition; and they departed from the mainstream of regulating activity such as the concealed carry of such arms or their sale to minors. *See* David B. Kopel & Joseph G.S. Greenlee, *The History of Bans on Types of Arms Before 1900*, 50 J. LEGIS. 223, 298-328 (2024).

The Government's attempt to conjure a tradition of "regulat[ing] the size of firearms," U.S.Br.6, comes up even shorter. Its only evidence for this supposed tradition is comprised of laws in *two States*—

Arkansas and Tennessee—banning the sale of "pocket pistols." *Id.* (citing Kopel & Greenlee, *supra*, at 288-89). It is not clear why these laws should be read as "regulat[ing] the size of firearms" to begin with. *Id.* And more fundamentally, if these two outlier pistol bans did not justify the ban on handguns in *Heller*, they plainly cannot justify Section 5861(d)'s restrictions on *rifles*.

In any event, Section 5861(d) is not remotely analogous to any of these nineteenth-century laws in terms of "how and why the regulations burden a law-abiding citizen's right to armed self-defense." *Bruen*, 597 U.S. at 29. The challenged restrictions require registration of all short-barreled rifles and subject them to a special tax (a draconian $200, when the NFA was adopted in 1934, though recent legislation has zeroed this tax out), enforceable by a felony conviction, up to 10 years' imprisonment, and a $250,000 fine. This is not a "comparable burden" to that imposed by any of the historical laws invoked by Respondent. *Id.* Even the scattered nineteenth-century state taxes on Bowie knives or similar weapons—perhaps the most similar regulations of the bunch—are not analogous. Those laws *did not require registration*, the principal regulatory burden inflicted by Section 5861(d) today; they applied to arms that were likely dangerous and unusual at the time, not in common use like short-barreled rifles, *see supra*, pp. 4-5; and they generally imposed penalties far less oppressive than the NFA's, *see* Pet.33-34.

Nor are Section 5861(d) and these nineteenth-century laws "comparably justified." *Bruen*, 597 U.S. at 29. Indeed, the inclusion of short-barreled rifles in the NFA has no rational justification whatsoever. No

one has plausibly claimed, in 1934 or today, that these firearms are particularly dangerous, suited to misuse, or disproportionately employed by criminals. To the contrary, statistical surveys demonstrate that short-barreled rifles are rarely used by criminals. Joseph G.S. Greenlee, *The Tradition of Short-Barreled Rifle Use & Regulation in America*, 25 WYO. L. REV. 111, 141 (2025). And the NFA's legislative history indicates that short-barreled rifles were swept into the Act not because of any such considerations but merely to ensure that an earlier draft's inclusion of pistols and "other firearms capable of being concealed" would not reach 18-inch-long deer rifles. *See id.* at 130-32; *see also* 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). Given that the Act's application to pistols was subsequently removed, the inclusion of short-barreled rifles in the law as passed was apparently nothing more than a drafting oversight, and the challenged limit is left with no discernable justification at all.

D. This Court's 1939 decision in *Miller* likewise does not support the challenged restriction on short-barreled rifles. *Contra* Pet.App.23a; U.S.Br.5. To the contrary, it provides further support for the restriction's invalidity. As *Heller* explained, "*Miller* stands only for the proposition that the Second Amendment right … extends only to certain types of weapons": "those 'in common use at the time.' " 554 U.S. at 623, 627 (quoting *Miller*, 307 U.S. at 179)). And indeed, *Miller*'s discussion of that proposition itself "positively suggests[ ] that the Second Amendment confers an individual right to keep and bear"

those common arms. *Id.* at 622. As discussed, short-barreled rifles are in common use. They are thus constitutionally protected under both *Heller* and *Miller*.

To be sure, *Miller* also concluded that short-barreled shotguns were not in common use at that time. 307 U.S. at 178. But that conclusion, on its face, says nothing about the commonality—or constitutional protection—of the wholly different type of firearm at issue in this case, the short-barreled *rifle*. The Government says that Petitioner has failed to "meaningfully distinguish" between the two types of arms, but the functional difference between shotguns and rifles is obvious and well-known, evident from the NFA's own statutory definitions, *compare* 26 U.S.C. § 5845(c), *with id.* § 5845(d), and also apparent from the statute's legislative history, which repeatedly described short-barreled *shotguns* as especially dangerous and prone to criminal misuse but never raised any such concerns about short-barreled rifles, *see* Halbrook, *supra*, at 166-71. And in any event, the undisputed evidence shows that the two types of arms *are* distinct in the one respect that matters: short-barreled rifles are over *five times as common* as short-barreled shotguns even today. SAF Amicus at 18.

Finally, even if *Miller* had spoken to the commonality of short-barreled rifles in 1939 (and it did not), that would still say nothing about their commonality *today*, over eight decades later. *See Bruen*, 597 U.S at 47. The Government resists this point, too, citing the purported lack of "evidence establishing any material change in the use of short-barreled rifles or short-barreled shotguns since this Court decided *Miller* or since it reaffirmed that decision in *Heller*." U.S.Br.5. But evidence regarding the change in the number of short-

barreled *rifles* from 1939 to today is absent because *Miller* involved short-barreled *shotguns*, not rifles. And evidence regarding any change in commonality of short-barreled rifles from when *Heller* was handed down in 2008 to today is immaterial. For while *Heller* "reaffirmed" *Miller*'s articulation of the common-use *test*, it certainly did not "reaffirm" *Miller*'s *application* of that test to short-barreled rifles, because *Miller* concerned only shotguns.

E. That leaves the Government's contention that Petitioner has challenged Section 5861(d) on its face, and that this section may constitutionally be applied "to individuals who [use short-barreled rifles for] unlawful purposes," thus purportedly defeating the facial challenge under the *Salerno* standard. U.S.Br.5 (emphasis omitted). That line of argument is based on a flawed understanding of facial challenges that would take that type of constitutional litigation completely off the table in the Second Amendment context. Given that the Second Amendment does not protect the right of *all* people to keep and bear *all* firearms, government defendants will *always* be able to hypothesize at least one set of circumstances—involving dangerous criminals or unusual weapons—where any given firearm restriction could constitutionally be applied. Indeed, the Government's argument would have defeated facial challenges in every Second Amendment case this Court has ever decided. *Heller* itself was a facial case, *see City of Los Angeles v. Patel*, 576 U.S. 409, 415 (2015), yet there the Court facially invalidated D.C.'s handgun ban while suggesting that a subset—automatic handguns—could be banned. That would not have been possible were the Government's conception of facial challenges correct.

Where this Court has rejected facial challenges it has instead been because the challenged statute could be validly applied to a set of circumstances that could be identified and isolated *based on the language of the statute*. Thus in *United States v. Rahimi*, the facial nature of the petitioner's challenge to Section 922(g)(8) allowed the Court to uphold the constitutionality of Section 922(g)(8)(i)'s restriction on persons actually found to pose "a credible threat to the physical safety" of others without addressing the constitutionality of Section 922(g)(8)(ii)'s textually separable restriction on those not necessarily subject to such a finding. 602 U.S. 680, 693 (2024). There is nothing like that here. Nothing in the text of Section 5861(d), or any other relevant provision of the NFA, singles out those who use firearms for "unlawful purposes," U.S.Br.4-5, or distinguishes the Act's application to such individuals from anyone else. The Government is free to enact a statute specifically imposing the same limits as Section 5861(d) on such individuals, and such a statute might well pass constitutional muster. But the NFA is not such a law. If a facial challenge is not available here, facial challenges no longer exist.

II. This case is a good vehicle for resolving multiple important questions of Second Amendment jurisprudence that have confused and divided the federal Courts of Appeals.

This Court's review is also urgently needed to address the conflict and confusion that has developed in the lower federal courts, following *Bruen*, over multiple fundamental questions concerning the application of that case's framework to blanket arms restrictions. As detailed in the Petition, the federal Courts of

Appeals have divided over whether all bearable firearms fall within the Second Amendment's plain text, *compare, e.g.*, *United States v. Price*, 111 F.4th 392, 406 (4th Cir. 2024) (en banc), *and* Pet.App.10a, *with United States v. Bridges*, 150 F.4th 517, 524 (6th Cir. 2025); whether the "common use" test is located at the text or history stage of the *Bruen* framework, *compare, e.g.*, *Bridges*, 150 F.4th at 526, *with Antonyuk v. James*, 120 F.4th 941, 981 (2d Cir. 2024); how to determine whether an arm is "in common use" rather than "dangerous and unusual," *compare, e.g.*, *Bianchi v. Brown*, 111 F.4th 438, 460-61 (4th Cir. 2024) (en banc), *and* Pet.App.21a-22a, *with Hanson v. District of Columbia*, 120 F.4th 223, 233 (D.C. Cir. 2024); and whether arms "most useful in military service" are protected, *compare, e.g.*, *Bevis v. City of Naperville*, 85 F.4th 1175, 1194 (7th Cir. 2023), *with Hanson*, 120 F.4th at 233.

These questions are of critical import. Defining the category of instruments that qualify as "arms" the people are entitled to "keep" and "bear" is one of the most basic and important tasks in policing the Second Amendment's right, U.S. CONST. amend. II, and yet many lower courts are invoking supposed ambiguity over this fundamental question to uphold blanket bans on common arms that are so "severe" that "[f]ew laws in the history of our Nation have come close," *Heller*, 554 U.S. at 629. Indeed, the Government acknowledges that these questions "may well warrant review" by this Court. U.S.Br.8. It merely insists that this case is "a poor vehicle for addressing those issues," *id.*, because Petitioner's challenge to Section 5861(d) fails, according to the Government, for the reasons discussed above. But as shown, the

Government's efforts to defend the panel's decision are all unpersuasive. And the starkness of the Seventh Circuit's departure from this Court's precedent—combined with the peculiar and anomalous nature of the restrictions on short-barreled rifles at issue—in fact make this case a particularly suitable vehicle for resolving one or more of these fundamental methodological questions.

CONCLUSION

The Court should grant the writ.

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Respectfully submitted,

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