Appeal No. 23-CF-514

DISTRICT OF COLUMBIA COURT OF APPEALS

TYREE BENSON,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the Superior Court of the District of Columbia
Criminal Division

BRIEF OF AMICUS CURIAE PUBLIC DEFENDER SERVICE IN SUPPORT OF APPELLANT

SAMIA FAM

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STATEMENT OF AMICUS CURIAE

This case presents Second Amendment challenges to various laws regulating the possession and carrying of firearms and ammunition in the District of Columbia. These issues are important to clients of the Public Defender Service (PDS). PDS files this brief as amicus curiae in support of the appellant pursuant to this Court's orders of April 12, 2024, and July 31, 2024.

PROCEDURAL HISTORY

Appellant Tyree Benson was charged with four counts of violating the District of Columbia's firearm and ammunition laws: carrying a pistol without a license (CPWL), in violation of D.C. Code § 22-4504(a)(1); possession of an unregistered firearm (UF), in violation of D.C. Code § 7-2502.01(a); unlawful possession of ammunition (UA), in violation of D.C. Code § 7-2506.01(a)(3); and possession of a large capacity ammunition feeding device (PLCFD), in violation of D.C. Code § 7-2506.01(b). R.7. Prior to trial, Mr. Benson moved to dismiss all charges as violations of the Second Amendment under *New York State Rifle & Pistol Association v. Bruen*, 597 U.S. 1 (2022). R.13. The trial court denied the motion "with great brevity and no scholarship whatsoever," reasoning only that "*Bruen* did not invalidate our gun laws," and the "D.C. Court of Appeals . . . has expressly upheld the constitutionality of the statutes at issue in this case." 4/11/23 Tr. 12. The court then convicted Mr. Benson of all charges in a stipulated bench trial and sentenced him to a suspended term of one year in prison. R.23.

On appeal, Mr. Benson renewed his Second Amendment claims in a brief filed December 29, 2023. The United States filed a responsive brief on March 20, 2024. On April 12, 2024, this Court granted PDS and the District of Columbia permission to participate in this case, and stayed the case pending the Supreme Court's decision in *United States v. Rahimi*, 144 S. Ct. 1889 (2024). *Rahimi* was decided on June 21, 2024, and the stay in this case was vacated on July 31, 2024.

ARGUMENT

I. Legal Framework

The Second Amendment commands that "the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court held "on the basis of both text and history" that the Second Amendment guarantees an "individual right to possess and carry weapons in case of confrontation." *Id.* at 592, 595. Fourteen years later, in *New York State Rifle & Pistol Association v. Bruen*, 597 U.S. 1 (2022), the Supreme Court "made the constitutional standard endorsed in *Heller* more explicit," *id.* at 31, by rejecting the "means-end scrutiny" that lower courts had been applying to Second Amendment challenges since *Heller*, *id.* at 19–24, and holding that "the standard for applying the Second Amendment is as follows:"

> 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."

Id. at 24. The Supreme Court recently applied and further clarified this text-and-history test in *United States v. Rahimi*, 144 S. Ct. 1889 (2024). Together, *Bruen* and *Rahimi* set forth several important constitutional principles that courts must apply when adjudicating Second Amendment challenges.

First, when the government regulates "conduct" covered by the Second Amendment's "plain text," "the Constitution presumptively protects that conduct," and the government bears the burden to "affirmatively prove" that its regulation is justified by historical precedent. *Bruen*, 597 U.S. at 17, 19, 24; *Rahimi*, 144 S. Ct. at

1897 ("[W]hen the Government regulates arms-bearing conduct, . . . it bears the burden to 'justify its regulation.'") (quoting *Bruen*, 597 U.S. at 24)).

Second, because "Constitutional 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) (emphasis in *Bruen*), the historical precedent identified by the government must reflect "the public understanding of the right [to keep and bear arms] when the Bill of Rights was adopted in 1791," *id.* at 37.[1] Thus, historical evidence that long predates or postdates the ratification of the Second Amendment will not satisfy the government's burden under *Bruen*. *Id.* at 34–37.[2] Nor will a few isolated or short-lived "outliers" suffice to show "the Nation's historical tradition of firearm regulation." *Id.* at 24, 70.[3]

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[1] Although *Bruen* acknowledged an "ongoing scholarly debate" about whether state firearm regulations can be justified by historical evidence from 1868, when the Fourteenth Amendment was ratified, *id.* at 37–38, that debate is irrelevant here, where the Second Amendment applies directly to the laws of the District of Columbia. *See Pernell v. Southall Realty*, 416 U.S. 363, 370 (1974); *Palmore v. United States*, 290 A.2d 573, 580 n.17 (D.C. 1972).

[2] *See also id.* at 36 ("[B]ecause post-Civil War discussions of the right to keep and bear arms 'took place 75 years after the ratification of the Second Amendment, they do not provide as much insight into its original meaning as earlier sources.'" (quoting *Heller*, 554 U.S. at 614)); *id.* at 39 ("'[T]he language of the Constitution cannot be interpreted safely except by reference to the common law and to British institutions *as they were when the instrument was framed and adopted*,' not as they existed in the Middle Ages."); *id.* at 66 (rejecting "late-19th-century evidence" based on its "temporal distance from the founding"); *id.* at 70 (rejecting "late-in-time outliers").

[3] *See also id.* at 46 ("[W]e doubt that *three* colonial regulations could suffice to show a tradition of public-carry regulation."); *id.* at 49 (rejecting reliance on a "solitary" colonial statute that survived for only eight years); *id.* at 69 (rejecting reliance on "short lived" territorial regulations that "appear more as passing regulatory efforts").

Finally, while the historical antecedents proffered by the government need not be identical to the challenged statute, they must be "relevantly similar" to the modern regulation in both *why* and *how* they burden the right to keep and bear arms. *Id.* at 29 ("[W]hether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified are '*central*' considerations when engaging in an analogical inquiry." (quoting *Heller*, 554 U.S. at 599) (emphasis in *Bruen*) (quotation marks omitted)); *Rahimi*, 144 S. Ct. at 1898 ("Why and how the regulation burdens the right are central to this inquiry.").

In sum, *Bruen* held that, when the government regulates the keeping and bearing of arms, it bears the burden to justify its regulation with historical analogues from the founding era that are "well-established," "representative," and "relevantly similar" to the modern regulation. *Bruen*, 597 U.S. at 29–30. To PDS's knowledge, this appeal presents the first opportunity for this Court to apply the *Bruen* text-and-history test to any of the District of Columbia's firearm and ammunition laws.

II. The Challenged Statutes Must Be Reassessed Under *Bruen*.

Bruen "requires courts to assess whether modern firearms regulations are consistent with the Second Amendment's text and historical understanding." *Id.* at 26. Contrary to the government's assertion, this Court's prior Second Amendment decisions in *Brown v. United States*, 979 A.2d 630 (D.C. 2009), and *Dubose v. United States*, 213 A.3d 599 (D.C. 2019), did not apply a "text-and-history analysis" to the District's registration and licensing scheme "in a manner that survives *Bruen*." Br. for Appellee at 39–40. Because those decisions rested on rationales that have been "substantially undermined by subsequent Supreme Court decisions," they have

been "implicitly overruled and thus stripped of [their] precedential authority." *Fallen v. United States*, 290 A.3d 486, 493 (D.C. 2023) (quoting *Lee v. United States*, 668 A.2d 822, 828 (D.C. 1995)).[4]

In upholding the CPWL statute in *Brown*, this Court did not even mention constitutional text and history, much less apply the text-and-history test prescribed in *Bruen*. Rather, *Brown* merely stated that, while the licensing statute "indisputably imposes a regulatory restriction on the right to bear arms," it does not violate the Second Amendment because it "does not stifle a *fundamental* liberty" and "does not appear as a *substantial* obstacle to the exercise of Second Amendment rights." *Brown*, 979 A.2d at 639 (emphases added).

Both strands of reasoning have been overruled by the Supreme Court. The Court held in *McDonald v. Chicago*, 561 U.S. 742 (2010), that the right to possess and carry firearms is indeed "fundamental." *Id.* at 778. And the Court held in *Bruen* that the constitutional validity of a firearm regulation depends *only* on whether it is consistent with the Second Amendment's text and history. *Bruen*, 597 U.S. at 17 ("*Only* if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's 'unqualified command." (emphasis added)); *see Rahimi*, 144 S. Ct. at 1924 (Barrett, J., concurring) ("A regulation is constitutional *only* if the government affirmatively proves that it is 'consistent with the Second Amendment's text and historical understanding.'" (emphasis added) (quoting *Bruen*, 597 U.S. at 26)); *id.* at 1928

[4] As the government recognizes, this Court has never addressed the constitutionality of the PLCFD statute. Br. for Appellee at 62.

(Jackson, J., concurring) ("[P]er *Bruen*, courts evaluating a Second Amendment challenge must consider history *to the exclusion of all else*."). Contrary to the government's suggestion, *Bruen* does not allow a court to pretermit the text-and-history test based on its own determination that the challenged firearm regulation does not impose a "substantial" burden on Second Amendment rights. Br. for Appellee at 45–46 (citing *Brown*, 979 A.2d at 639). Indeed, asking "whether the statute burdens a protected interest in a way or to an extent" that makes the Second Amendment's protection "*really worth* insisting upon" is exactly the sort of "judge-empowering" inquiry that *Heller* and *Bruen* "expressly rejected." *Bruen*, 597 U.S. at 22–23 (quoting *Heller*, 554 U.S. at 634). Because *Brown* rested on reasoning that has been "substantially undermined" by *Bruen*, it has been "implicitly overruled and thus stripped of its precedential authority." *Fallen*, 290 A.3d at 493.

The same is true of *Dubose*. In upholding the UF and UA statutes in *Dubose*, this Court did not engage in the "historical inquiry" or "analogical reasoning" that courts "must conduct" under *Bruen*, 597 U.S. at 28. Instead, *Dubose* relied on this Court's prior decision in *Lowery v. United States*, 3 A.3d 1169 (D.C. 2010), which simply asserted on plain error review, without any textual or historical analysis, that the District's firearm registration requirements "are compatible with the core interest protected by the Second Amendment." *Dubose*, 213 A.3d at 603 (quoting *Lowery*, 3 A.3d at 1176), *quoted in* Br. for Appellee at 55–56.

Although *Dubose* also cited the D.C. Circuit's conclusion in *Heller v. District of Columbia* (*Heller II*), 670 F.3d 1244 (D.C. Cir. 2011), that "[b]asic registration of handguns is deeply enough rooted in our history to support the presumption that a

registration requirement is constitutional," *Dubose*, 213 A.3d at 603 (quoting *Heller II*, 670 F.3d at 1253), that conclusion does not survive *Bruen*. As then-Judge, now-Justice Kavanaugh explained in his dissent, *Heller II*'s historical analysis rested on "several state laws" from "the beginning of the 20th Century" that "required record-keeping by gun *sellers*, not registration of all lawfully possessed guns by gun *owners*." *Heller II*, 670 F.3d at 1292 (Kavanaugh, J., dissenting) (citing *Heller II*, 670 F.3d at 1253–54 (majority opinion)). These "commercial" laws "provide no support for D.C.'s registration requirement" under "the Supreme Court's history-and tradition-based test," *id.* at 1292, 1294, as they were not "relevantly similar" in why and how they burdened the keeping and bearing of arms, *Bruen*, 579 U.S. at 29, and they came more than a century too late to reflect the original meaning of the Second Amendment, *id.* at 66 (rejecting "late-19th-century evidence" based on its "temporal distance from the founding"); *see Heller II*, 670 F.3d at 1294 (Kavanaugh, J., dissenting) ("D.C.'s law requiring registration of all lawfully possessed guns in D.C. is not part of the tradition of gun regulation in the United States").[5]

Because this Court's prior Second Amendment decisions rested on rationales that conflict with the constitutional principles announced in *Bruen*, those decisions

[5] Recognizing that "*Bruen* would discount the [D.C.] Circuit's reliance on post-ratification history," the government contends that *Heller II* nevertheless survives *Bruen* because it separately held that the District's "basic registration requirements are self-evidently de minimis" and "cannot reasonably be considered onerous." Br. for Appellee at 42 (quoting *Heller II*, 670 F.3d at 1254–55). But as explained in the above discussion of *Brown*, *see supra* pp. 6–7, that rationale has been abrogated by *Bruen*'s holding that the validity of a firearm regulation is determined *only* by constitutional text and history.

have been implicitly overruled, and this Court must apply the *Bruen* test for the first time to the firearm and ammunition laws challenged in this case.

III. The D.C. Firearm Registration and Licensing Scheme Fails the *Bruen* Test.

A. The Challenged Scheme Regulates Arms-Bearing Conduct.

In the "text" portion of the text-and-history test, the sole inquiry is whether the challenged statute regulates "conduct" covered by "the Second Amendment's plain text." *Bruen*, 597 U.S. at 24. If the statute "regulates arms-bearing conduct," then the government "bears the burden to 'justify its regulation.'" *Rahimi*, 144 S. Ct. at 1897; *see id.* at 1896 ("In *Bruen*, we explained that when a *firearm regulation* is challenged under the Second Amendment, the Government must show that the restriction 'is consistent with the Nation's historical tradition of firearm regulation.'" (emphasis added) (quoting *Bruen*, 597 U.S. at 24)).

Here, there can be no dispute that the CPWL, UF, and UA statutes regulate the keeping and bearing of arms. *See Brown*, 979 A.2d at 639 (acknowledging that the CPWL statute "indisputably imposes a regulatory restriction on the right to bear arms"). The statutory scheme requires everyone in the District of Columbia to obtain a registration certificate and license before possessing and carrying a firearm and ammunition, *see* D.C. Code §§ 7-2502.01(a), 7-2506.01(a)(3), 22-4504(a)(1), and imposes numerous qualifications, conditions, and fees for doing so, *see id.* § 7-2502.03; 24 D.C.M.R. §§ 2307–2338. Because the District's firearm registration and licensing scheme unquestionably "regulates arms-bearing conduct," the government "bears the burden to 'justify its regulation.'" *Rahimi*, 144 S. Ct. at 1897.

The government attempts to avoid that burden by misreading the "text" portion of the text-and-history test. According to the government, the District's registration and licensing scheme does not implicate the Second Amendment's plain text—and thus does not "require historical justification"—because it does not impose a "substantial" burden on the right of "law-abiding, responsible citizens" to keep and bear arms. Br. for Appellee at 44–47. The government's embellishments on the threshold textual inquiry in the *Bruen* test are unfounded.

Contrary to the government's position, the Supreme Court has never held that the Second Amendment's text covers only "law-abiding, responsible citizens." Although the Court used that phrase in *Heller* and *Bruen* "to describe the class of ordinary citizens who *undoubtedly* enjoy the Second Amendment right," it "said nothing" about whether the right is *limited* to that class of citizens, as that "question was simply not presented." *Rahimi*, 144 S. Ct. at 1903 (emphasis added) (citing *Heller*, 554 U.S. at 635, and *Bruen*, 597 U.S. at 70).[6] Rather, as the Court explained in *Heller* and reiterated in *Bruen*, the Second Amendment's plain text protects a right of "the people," a term used consistently throughout the Constitution[7] to refer to "all Americans," "not an unspecified subset." *Heller*, 554 U.S. at 579–81; *see Bruen*,

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[6] As discussed below, *see infra* p. 13, *Rahimi* also rejected the government's contention that the Nation's historical tradition of firearm regulation justifies disarming anyone the government deems "irresponsible."

[7] *See* U.S. Const. amend. II (protecting "the right of *the people* to keep and bear arms" (emphasis added); *id.* amend. I (protecting "the right of *the people* peaceably to assemble, and to petition the Government for a redress of grievances" (emphasis added)); *id.* amend. IV (protecting "[t]he right of *the people* to be secure . . . against unreasonable searches and seizures" (emphasis added)).

597 U.S. at 70 ("the right to bear commonly used arms in public" is "guaranteed to 'all Americans'" (quoting *Heller*, 554 U.S. at 581)); *Kanter v. Barr*, 919 F.3d 437, 453 (7th Cir. 2019) (Barrett, J., dissenting) ("*Heller* itself . . . interpreted the word 'people' as referring to 'all Americans'" (quoting *Heller*, 554 U.S. at 580–81)).

Nor has the Supreme Court ever held that only "substantial" burdens on arms-bearing conduct implicate the text of the Second Amendment. As explained above, *see supra* p. 9, the only inquiry under the "text" portion of the text-and-history test is whether the challenged statute "regulates arms-bearing conduct." *Rahimi*, 144 S. Ct. at 1897. In conducting that threshold textual inquiry, the Supreme Court has never asked whether the statute's burden on arms-bearing conduct is "substantial." Rather, as the government's own quotation of *Bruen* reveals, it is only in the "history" portion of the text-and-history test, when assessing "whether modern and historical regulations impose a comparable burden on the right of armed self-defense," that the extent of the burden becomes a "central consideration." *Bruen*, 597 U.S. at 29 (emphasis and quotation marks omitted), *quoted in* Br. for Appellee at 44; *see also id.* at 50, *quoted in* Br. for Appellee at 45.[8]

Because the District's registration and licensing scheme regulates the keeping and bearing of firearms, it implicates "the Second Amendment's plain text," *Bruen*, 597 U.S. at 24, and "the government bears the burden to 'justify its regulation,'" *Rahimi*, 144 S. Ct. at 1897.

[8] As discussed above, *see supra* pp. 6–7, *Bruen* precludes this Court from exempting a firearm regulation from the text-and-history test based on its own conclusion that the burden on Second Amendment rights is not "substantial."

B. The Challenged Scheme Lacks Historical Precedent.

In the "history" portion of the text-and-history test, the government bears the burden to show that the challenged statute is "consistent with the Nation's historical tradition of firearm regulation." *Bruen*, 597 U.S. at 24. While the challenged statute need not "precisely match its historical predecessors," *Rahimi*, 144 S. Ct. at 1898, it must be "'relevantly similar' to those founding era regimes in both *why* and *how* it burdens the Second Amendment right," *id.* at 1901 (emphases added) (quoting *Bruen*, 597 U.S. at 29). "For instance, when a challenged regulation addresses a general societal problem that has persisted since the 18th century, the lack of a *distinctly similar* historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment. Likewise, if earlier generations addressed the societal problem, but did so through *materially different means*, that also could be evidence that a modern regulation is unconstitutional." *Bruen*, 597 U.S. at 26–27 (emphases added); *see Rahimi*, 144 S. Ct. at 1898 ("For example, if laws at the founding regulated firearm use to address particular problems, that will be a strong indicator that contemporary laws imposing *similar restrictions for similar reasons* fall within a permissible category of regulations. Even when a law regulates arms-bearing for a permissible reason, though, it may not be compatible with the right if it does so to an *extent beyond* what was done at the founding." (emphases added)).

The government first contends that, because the District's firearm registration and licensing scheme is "designed to ensure only that those bearing arms in the jurisdiction are, in fact, 'law-abiding, responsible citizens,'" it is justified by the

Nation's historical tradition of "well-defined restrictions governing the intent for which one could carry arms, the manner of carry, or the exceptional circumstances under which one could not carry arms." Br. for Appellee at 58–59 (quoting *Bruen*, 597 U.S. at 38 & n.9). But contrary to the government's theory, these historical means of addressing "firearms violence," *Rahimi*, 144 S. Ct. at 1899, do not justify "laws denying firearms on a categorical basis to any group of persons a legislature happens to deem, as the government puts it, not 'responsible,'" *id.* at 1910 (Gorsuch, J., concurring) (quotation marks omitted). Indeed, the United States advanced that same argument in *Rahimi*, but "[n]ot a single Member of the Court adopt[ed] the Government's theory." *Id.* (citing *Rahimi*, 144 S. Ct. at 1903 (majority opinion) ("[W]e reject the Government's contention that Rahimi may be disarmed simply because he is not 'responsible.'"), and quoting *id.* at 1944 (Thomas, J., dissenting) (rejecting government's argument that "the Second Amendment allows Congress to disarm anyone who is not 'responsible' and 'law-abiding,'" as that theory "lacks any basis in our precedents and would eviscerate the Second Amendment altogether").

As the Supreme Court explained in *Bruen* and *Rahimi*, early Americans relied on several "well-defined," "distinct legal regimes" to address "firearms violence": (1) prohibitions on "affray," or "going armed" "in a way that spreads 'fear' or 'terror' among the people," (2) "laws that proscribed the concealed carry of pistols and other small weapons" but allowed open carry, and (3) "surety statutes" requiring anyone "reasonably accused of intending to injure another or breach the peace" to "post a bond before carrying weapons in public." *Bruen*, 597 U.S. at 38, 50–52, 55, 57; *Rahimi*, 144 S. Ct. at 1899–1901. The District's registration and licensing scheme

does not fit within this well-defined historical tradition because, to the extent it seeks to address the same "societal problem" of firearms violence, it does so "through materially different means." *Bruen*, 597 U.S. at 26.

Unlike the "affray" and "concealed-carry" prohibitions discussed in *Bruen*, the District's registration and licensing statutes do not regulate "the *intent* for which one could carry arms" or "the *manner* of carry." *Id.* at 38 (emphases added); *see also id.* at 50–52 (explaining that "affray" and "going armed" laws prohibited "only the carrying of such weapons 'for the *purpose* of an affray, and in such *manner* as to strike terror to the people'" (emphases added)). Rather, the District's registration requirement applies to *all* purposes and manners of firearm possession, including keeping a handgun in the home for self-defense. And while the District's licensing scheme regulates the carrying of *concealed* pistols, it does not fit within the Nation's historical tradition of prohibiting concealed carry because it does not "le[ave] open the option to carry *openly*." *Id.* at 59 (emphasis added); *see id.* at 53 ("the history reveals . . . that concealed-carry prohibitions were constitutional only if they did not similarly prohibit *open* carry"). Thus, the challenged statutory scheme is not justified by historical restrictions on the *purpose* and *manner* of carrying firearms in public.

Nor is the registration and licensing scheme justified by the historical tradition of "surety and going armed laws," which "temporarily" disarmed individuals "found by a court to pose a credible threat to the physical safety of another." *Rahimi*, 144 S. Ct. at 1903. In holding that the federal restriction on firearm possession in 18 U.S.C. § 922(g)(8)(C)(i) "fits neatly within [this] tradition," *Rahimi* emphasized that the restriction "applies only once a court has found that the defendant 'represents a

credible threat to the physical safety' of another," and lasts only "so long as the defendant 'is' subject to a restraining order." *Id.* at 1901–02 (quoting 18 U.S.C. § 922(g)(8)(C)(i)). But the same is not true of the District's registration and licensing regime, which requires *all* people in the District of Columbia to undergo registration and licensing before exercising their Second Amendment rights, and disarms numerous groups of people who have *not* been individually "found by a court to pose a credible threat to the physical safety of another." *Rahimi*, 144 S. Ct. at 1903. For example, the registration statute *permanently* disarms anyone who has been convicted of any offense punishable by more than one year in prison, D.C. Code § 7-2502.03(a)(2), and disarms for five years anyone who has been "[v]oluntarily admitted to a mental health facility," *id.* § 7-2502.03(a)(6)(A)(1)—disqualifications that do not require *any* finding that the person poses a credible threat to the physical safety of another, much less for five years or for the rest of the person's life. And unlike the "surety and going armed laws" discussed in *Rahimi*, "which involved *judicial* determinations of whether a particular defendant likely would threaten or had threatened another with a weapon," *Rahimi*, 144 S. Ct. at 1902 (emphasis added), the District's licensing statute conditions the exercise of Second Amendment rights on a determination by the *Chief of Police* that the person is "suitable" to be licensed, D.C. Code § 22-4506(a). Because the District's registration and licensing regime regulates the keeping and bearing of arms "to an extent beyond what was done at the founding" to address the societal problem of firearms violence, *Rahimi*, 144 S. Ct. at 1898, it does not fit within that historical tradition of firearm regulation.

The government next observes in a footnote that "colonial governments substantially controlled the firearm trade" by prohibiting the sale of firearms outside the colony, and requiring safety inspections for the manufacturing of pistols and the storage of gunpowder. Br. for Appellee at 59 n.33. But these historical "conditions and qualifications on the commercial sale of arms" are not even remotely analogous to the District's registration and licensing scheme, as they regulated only the *sale* and *manufacturing* of firearms, not the *possession* and *carrying* of firearms. *Heller II*, 670 F.3d at 1292 (Kavanaugh, J., dissenting) (quoting *Heller*, 554 U.S. at 627).

Finally, the government cites early American laws requiring members of the militia "to maintain at least one firearm in good condition." Br. for Appellee at 60. But these "militia requirements were a far cry from a registration requirement for all firearms" in both why and how they regulated firearms. *Heller II*, 670 F.3d at 1293 (Kavanaugh, J., dissenting). As to *why* they regulated firearms, "the purpose of those early militia requirements" was "simply to ensure that the militia was well-equipped," not to prevent firearms violence by private citizens. *Id.* And as to *how* they regulated firearms, the laws "applied only to militiamen, not to all citizens," and required inspection of "only one or a few firearms [kept for militia use], not all . . . firearms [kept for personal use]." *Id.* Thus, the government's "attempt to analogize its registration law to early militia laws is seriously flawed." *Id.*

Because the government fails to show that the District's firearm registration and licensing scheme is consistent with the Nation's historical tradition of firearm regulation, the CPWL, UF, and UA statutes fail the *Bruen* test.

IV. The PLCFD Statute Fails the *Bruen* Test.

A. The PLCFD Statute Regulates Arms-Bearing Conduct.

The District's PLCFD statute prohibits the possession of any firearm magazine or other "ammunition feeding device" capable of holding more than ten rounds of ammunition. D.C. Code § 7-2506.01(b)–(c). Because many modern firearms—including "the most popular weapon[s] chosen by Americans for self-defense," *Heller*, 554 U.S. at 629—rely on magazines to load ammunition into the firing chamber, the District's restriction on magazine capacity "regulates arms-bearing conduct" covered by the Second Amendment's plain text, *Rahimi*, 144 S. Ct. at 1897. *See Ass'n of N.J. Rifle & Pistol Clubs v. Att'y Gen. N.J.*, 910 F.3d 106, 116 (3d Cir. 2018) ("The law challenged here regulates magazines, and so the question is whether a magazine is an arm under the Second Amendment. The answer is yes. . . . Because magazines feed ammunition into certain guns, and ammunition is necessary for such a gun to function as intended, magazines are 'arms' within the meaning of the Second Amendment."), *abrogated on other grounds by Bruen*, 597 U.S. 1; *Hanson v. District of Columbia*, 671 F. Supp. 3d 1, 9–10 (D.D.C. 2023) (holding that "large capacity magazines" are "arms" because they "*facilitate* armed self-defense" by "feed[ing] ammunition into certain guns" (quoting *Bruen*, 597 U.S. at 28, and *Ass'n of N.J. Rifle & Pistol Clubs*, 910 F.3d at 116) (emphasis in *Hanson*)); *Fyock v. City of Sunnyvale*, 25 F. Supp. 3d 1267, 1276 (N.D. Cal. 2014) (holding that "large capacity magazines" are "arms" because "they are integral components to vast categories of guns"); *Duncan v. Bonta*, 695 F. Supp. 3d 1206, 1221 (S.D. Cal. 2023) (holding that magazines are "arms" because "[i]t is hard to imagine something

more closely correlated to the right to use a firearm in self-defense than the ability to effectively load ammunition into the firearm");. *Cf. Herrington v. United States*, 6 A.3d 1237, 1243 (D.C. 2010) (holding that "the right to keep and bear arms extends to the possession of handgun ammunition").

The government argues that, because "a *large capacity* magazine" is not "*necessary* for [a] firearm to function for its core purpose of self-defense," the District's PLCFD statute does not regulate "arms" within the meaning of the Second Amendment. Br. for Appellee 64–65.[9] But the Second Amendment's protection of "arms" covers all "modern instruments that *facilitate* armed self-defense"—not just those *necessary* for armed self-defense. *Bruen*, 597 U.S. at 28 (emphasis added). *Cf. Ezell v. City of Chicago*, 651 F.3d 685, 704 (7th Cir. 2011) ("the right to possess firearms for protection implies a corresponding right to acquire and maintain proficiency in their use; the core right wouldn't mean much without the training and practice that *make it effective*" (emphasis added)).

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[9] The government's definition of "arms" would "allow it to ban *all* magazines," as "a firearm technically does not require *any* magazine to operate; one could simply fire the single bullet in the firearm's chamber." *Hanson*, 671 F. Supp. 3d at 10. Similarly, under the government's logic, a ban on the most common caliber of handgun ammunition would require no justification under the Second Amendment, so long as other ammunition remained legal—a theory that the Supreme Court has already rejected. *See Heller*, 554 U.S. at 629 ("It is no answer to say . . . that it is permissible to ban the possession of handguns so long as the possession of other firearms (*i.e.*, long guns) is allowed. It is enough to note . . . that the American people have considered the handgun to be the quintessential self-defense weapon."); *Caetano v. Massachusetts*, 577 U.S. 411, 421 (2016) (Alito, J., concurring in the judgment) (concluding that stun guns are "arms" within the meaning of the Second Amendment, and emphasizing that "the right to bear *other* weapons is 'no answer' to a ban on the possession of protected arms").

There can be no question that firearm magazines—including those capable of holding more than ten rounds of ammunition—are "instruments that *facilitate* armed self-defense." *Bruen*, 597 U.S. at 28 (emphasis added); *see Facilitate*, *Black's Law Dictionary* (5th ed. 1979) ("To make easier or less difficult"). By enabling a person to fire more than one shot at her attacker without stopping to manually reload the firearm each time, a magazine makes a firearm far more effective for self-defense, especially if the person is not a practiced shooter or is attacked by more than one assailant.[10] For that reason, among the 145 million handguns owned in the United States ("the most popular weapon chosen by Americans for self-defense," *Heller*, 554 U.S. at 629), 70 percent, or 102 million, are pistols (which utilize magazines).[11]

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[10] *See* Matthew Larosiere, *Losing Count: The Empty Case for "High-Capacity" Magazine Restrictions*, Cato Institute, Legal Policy Bulletin, July 17, 2018, at 12, https://www.cato.org/sites/cato.org/files/pubs/pdf/legal-policy-bulletin-3-updated.pdf ("novice shooters have a 39 percent hit probability over typical engagement distances," which, "combined with the fact that an assailant is rarely stopped by a single bullet, makes magazine capacity all the more important for effective defensive use of firearms"); David B. Kopel, *The History of Firearm Magazines and Magazine Prohibitions*, 78 Alb. L. Rev. 849, 851–52 (2015) (a "constant goal has been to design firearms able to fire more rounds without reloading," because "[w]hen the defender is reloading, the defender is especially vulnerable to attack); *Kolbe v. Hogan*, 849 F.3d 114, 129 (4th Cir. 2017) (en banc) ("[Gun owners] regard large-capacity magazines as especially useful for self-defense, because it is difficult for a civilian to change a magazine while under the stress of defending herself and her family from an unexpected attack. Moreover, a civilian firing rounds in self-defense will frequently miss her assailant, rendering it 'of paramount importance that she have quick and ready access to ammunition in quantities sufficient to provide a meaningful opportunity to defend herself and/or her loved ones.'"), *abrogated on other grounds by Bruen*, 597 U.S. 1.

[11] John Berrigan et al., *The Number & Type of Private Firearms in the United States*, 704 Annals Am. Acad. Pol. & Soc. Sci. 70, 75 (Nov. 2022) ("Among handguns, 70 percent were pistols (102 million) and 30 percent revolvers (43 million).").

And among those 102 million pistols, more than half—including the three most popular models of handguns in the United States[12]—are designed for use with magazines that hold more than ten rounds of ammunition.[13] Thus, while neither magazines in general nor "large capacity" magazines in particular are strictly "necessary" to the use of firearms in self-defense, they unquestionably "facilitate armed self-defense" and indeed are integral components of some of "the most popular weapon[s] chosen by Americans for self-defense." *Heller*, 554 U.S. at 629.[14]

B. The PLCFD Statute Lacks Historical Precedent.

Because the PLCFD statute regulates arms-bearing conduct, the government bears the burden to justify its regulation with historical precedent. *Bruen*, 597 U.S. at 24; *Rahimi*, 144 S. Ct. at 1897. The historical firearm regulations cited by the government do not meet this burden.

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[12] The three top-selling handguns in 2023 were the Sig Sauer P365 (12 rounds), the Sig Sauer P320 (17 rounds), and the Glock G19 (15 rounds). Gun Genius, *Top 10 Handguns of 2023*, https://www.gungenius.com/top-selling/guns/top-10-handguns-of-2023/ (last visited July 31, 2024).

[13] *See Duncan v. Bonta*, 19 F.4th 1087, 1097 (9th Cir. 2021) (en banc) ("Most pistols are manufactured with magazines holding ten to seventeen rounds."), *cert. granted, vacated on other grounds*, 142 S. Ct. 2895 (2022); Larosiere, *supra* note 10, at 3 ("Most pistols sold in the United States come equipped with magazines that hold between 10 and 17 rounds," and "those holding 10 rounds are generally compact or subcompact models.").

[14] The government contends that, even if the PLCFD statute regulates "arms," it does not require historical justification because it does not impose a "substantial" burden on armed self-defense. Br. for Appellee 70–72. As explained above, *see supra* pp. 7–8, 11, that argument conflicts with *Bruen*'s text-and-history framework, which leaves no room for a court to decide that a statute's burden on Second Amendment rights is not "substantial" enough to require historical justification.

The government first cites the Nation's historical tradition of "disarming certain groups and restricting sales to certain groups," such as "persons who refused to swear an oath of allegiance to the state or to the nation." Br. for Appellee at 72. But these historical restrictions on *who* may possess firearms are not "relevantly similar" to the PLCFD statute, *Bruen*, 579 U.S. at 29, which regulates the capacity of firearm magazines possessed by *all* people, not just "certain groups."

Nor does the PLCFD statute fit within the historical tradition of prohibiting certain weapons and uses of weapons that "posed special dangers to human life," such as "'Bowie Knives' and other particularly dangerous and unusual knives," and "the practice of rigging firearms to be fired with a string or similar method . . . without an actual finger on the firearm trigger." Br. for Appellee at 73. While the Supreme Court has recognized a "historical tradition of prohibiting the carrying of 'dangerous and unusual weapons,'" *Heller*, 554 U.S. at 627, it has also emphasized that "[a] weapon may not be banned unless it is *both* dangerous *and* unusual," *Caetano v. Massachusetts*, 577 U.S. 411, 417 (2016) (Alito, J., concurring in the judgment), and a weapon is not "dangerous and unusual" if it is "in common use today," *Bruen*, 597 U.S. at 47 (quoting *Heller*, 554 U.S. at 627).

As already explained above, *see supra* p. 20, magazines capable of holding more than ten rounds of ammunition are not "highly unusual in society at large," and instead are commonly "possessed by law-abiding citizens for lawful purposes." *Heller*, 554 U.S. at 625, 627. Indeed, courts have long recognized that such "large

capacity" magazines are "in common use,"[15] and a recent national survey estimated that nearly half of American gun owners (roughly 39 million people) have owned such magazines for lawful purposes such as self-defense.[16] Because magazines that hold more than ten rounds of ammunition "belong[] to a class of arms commonly used for lawful purposes," their "relative dangerousness . . . is irrelevant." *Caetano*, 577 U.S. at 418 (Alito, J., concurring in the judgment).

The government contends that "large capacity" magazines are not "commonly used for self-defense," noting that "most homeowners only use two to three rounds of ammunition in self-defense," and "[t]he use of more than ten bullets in defense of the home is 'rare.'" Br. for Appellee at 68 (quoting *Duncan*, 19 F.4th at 1104). But those statistics say nothing about the *capacity* of magazines commonly used for self-defense, as a defender could fire only a few shots from a twelve-round magazine and still "use" that magazine for self-defense. In any event, when invalidating bans on handguns and stun guns in *Heller* and *Caetano*, respectively, the Supreme Court did not consider how often such weapons are *actually used* in self-defense. Rather, the Court simply cited the popularity and widespread ownership of such weapons as sufficient indication that they are "typically *possessed* by law-abiding citizens for lawful purposes," *Heller*, 554 U.S. at 625 (emphasis added), and "accepted as a legitimate means of self-defense across the country," *Caetano*, 577 U.S. at 420

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[15] *See Heller II*, 670 F.3d at 1261; *N.Y. State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d 242, 255 (2d Cir. 2015); *Fyock v. Sunnyvale*, 779 F.3d 991, 998 (9th Cir. 2015).

[16] William English, Georgetown University, McDonough School of Business, *2021 National Firearms Survey: Updated Analysis Including Types of Firearms Owned* (May 13, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4109494.

(Alito, J., concurring in the judgment) (explaining that state ban on stun guns violated the Second Amendment because, although "less popular than handguns, stun guns are widely owned," with "[h]undreds of thousands of Tasers and stun guns hav[ing] been sold to private citizens" (first alteration in original)).

In short, it simply does not matter whether a typical person defending herself from an armed attacker will ever *need* to fire—or will ever *actually* fire—more than ten rounds of ammunition. *See Fyock*, 25 F. Supp. 3d at 1276 ("the standard is whether the prohibited magazines are 'typically *possessed* by law-abiding citizens for lawful purposes,' not whether the magazines are *used* for self-defense" (quoting *Heller*, 554 U.S. at 625) (emphasis in *Fyock*)); *Duncan*, 695 F. Supp. at 1225 ("[T]o be protected, an arm needs only to be regarded as *typically* possessed or carried, or *commonly* kept, by citizens to be ready for use, if needed. The Supreme Court has not said that the actual firing of a gun is any part of the test."). "It is enough" that, "[w]hatever the reason," pistols equipped with "large capacity" magazines are "the most popular weapon[s] chosen by Americans for self-defense." *Heller*, 554 U.S. at 629. Because such magazines are widely owned and possessed by tens of millions of presumptively law-abiding Americans for presumptively lawful purposes, their complete prohibition does not fit within the Nation's historical tradition of banning "dangerous and unusual weapons."

Finally, the PLCFD statute is not justified by the Nation's historical tradition of "regulating the storage and transport of gunpowder." Br. for Appellee at 73–74 (quoting Saul Cornell & Nathan DeNino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 Fordham L. Rev. 487, 510–11 (2004)). Unlike

the PLCFD statute, "[t]he point of these statutes was, as they themselves proclaimed, to protect communities from fire and explosion." Cornell & DeNino, *supra*, at 512. While these "safe storage" laws may have also incidentally "provided a check on the creation of a private arsenal," they were "clearly crafted to meet the needs of public safety" in storing flammable materials, and not to limit the number of shots that an individual could fire with a gun. *Id.* Because these gunpowder storage regulations were not "relevantly similar" to the PLCFD statute in both why and how they regulated Second Amendment rights, *Bruen*, 579 U.S. at 29, they do not satisfy the government's burden under the *Bruen* test.

CONCLUSION

The CPWL, UF, UA, and PLCFD statutes fail the constitutional standard set forth in *Bruen*. Accordingly, Mr. Benson's convictions must be vacated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this brief has been served, by this Court's electronic filing system, on Sicilia Englert, Esq., Counsel for Appellant; Chrisellen Kolb, Esq., and Katherine Kelly, Esq., Counsel for Appellee; and Caroline Van Zile, Esq., and Marcella Coburn, Esq., Counsel for District of Columbia, this 5th day of August, 2024.

/s/
Alice Wang