BRIEF FOR APPELLEE

DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 23-CF-514

TYREE BENSON, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

APPEAL FROM THE SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

Cr. No. 2022-CF2-5996

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TABLE OF CONTENTS

TABLE OF AUTHORITIES*

Cases

* Authorities upon which we chiefly rely are marked with asterisks.

Other References

ISSUES PRESENTED

I. Whether the trial court erred in denying appellant Benson's motion to suppress physical evidence and any statements to the police, where at the time police officers conducted an investigatory stop and frisk the officers had reasonable articulable suspicion that Benson was involved in criminal activity and that he was armed and dangerous.

II. Whether Benson's convictions for gun-related offenses must be reversed because they are based upon statutes that violate the Second Amendment in light of *New York State Rifle & Pistol Ass'n v. Bruen,* 142 S. Ct. 2111 (2022).

COUNTERSTATEMENT OF THE CASE

On November 17, 2022, Tyree Benson was charged by indictment with: (1) carrying a pistol without a license outside his home or place of business (CPWL) (D.C. Code § 22-4504(a)(1)); (2) possession of a large-capacity ammunition feeding device (PLCFD) (D.C. Code § 7-2506.01(b)); (3) possession of an unregistered firearm (UF) (D.C. Code § 7-2502.01(a)); and (4) unlawful possession of ammunition (UA) (D.C. Code § 7-2506.01(a)(3)) (Record on Appeal (R.) A at 5; R.7). On February 21, 2023, Benson filed a motion to dismiss the indictment on grounds that the statutes underlying these charges violated the Second Amendment (R.13). The same day, Benson filed a suppression motion, claiming that the physical evidence and any statements he made to the police were the products of a seizure and frisk that violated the Fourth Amendment (R.14). On March 8, 2023, the government opposed the motion to dismiss the indictment (R.16) and the suppression motion (R.15). On April 11, 2023, the Honorable Lynn Leibovitz held a hearing, and denied both motions (R.A at 11).[1]

Benson proceeded to a bench trial on stipulated facts at which Judge Leibovitz rendered a guilty verdict (4/11/23 Tr. 12, 90-92, 99, 101, 106-09; R.19; R.20). As

[1] This case was previously assigned to the Honorable Erik Christian, but it was transferred to Judge Leibovitz on the scheduled trial date (R.A at 10).

part of the stipulated trial, Benson preserved his right to appeal the denial of his motion to dismiss the indictment and his suppression motion (R.19).

On June 9, 2023, Benson was sentenced for CPWL to 12 months of incarceration and three years of supervised release (R.23). For PLCFD, he was sentenced to six months of incarceration and three years of supervised release (*id.*). He was sentenced to six-month terms of incarceration for UF and UA (*id.*). The court imposed each sentence concurrently, suspended the sentences, and imposed one year of supervised probation (*id.*; 6/9/23 Tr. 9). Benson noted a timely appeal (R.24).

The Motion to Dismiss the Indictment

The Parties' Arguments

In a motion to dismiss the indictment, Benson argued that the Supreme Court's decision in *New York State Rifle & Pistol Ass'n v. Bruen,* 142 S. Ct. 2111 (2022), invalidated the CPWL, PLCFD, UF, and UA statutes under which he was charged because they could not be justified by the Nation's historical tradition of firearms regulation at the time the Second Amendment was adopted in 1791, as *Bruen* required (R.13 at 1-5). Benson asserted that *Bruen* held that the Second Amendment right to possess and carry a firearm for self-defense extended outside the home, and that "may-issue" licensing schemes that grant officials discretion to deny licenses to carry pistols in public based on a perceived lack of need or suitability were unconstitutional (*id.* 2). He asserted that *Bruen* also required the use

of a "text-and-history" standard in analyzing Second Amendment challenges to firearms statute, which abrogated much of the pre-existing case law that upheld the District of Columbia's ("the District") firearms-regulation statutes (*id.* 2, 6-7).

More particularly, Benson argued that his CPWL, UF, and UA charges must be dismissed because they rested on an unconstitutional statutory requirement that all firearms be registered by their owners (R.13 at 5, 8). He claimed that this registration scheme could not survive scrutiny under *Bruen,* and that any prior case law upholding the firearm-registration requirements was not binding after *Bruen* (*id.* 5-8). Benson further claimed that the District's licensing scheme was unconstitutional because it granted the Chief of Police discretion to deny licenses based on a perceived lack of suitability, which he asserted was the type of "may-issue" scheme that *Bruen* held was unconstitutional (*id.* 9-11).

Additionally, Benson contended that the PLCFD statute violated the Second Amendment because it banned an entire class of "arms" that is in common use today for self-defense, and thus the statute could not withstand scrutiny under *Bruen* (R.13 at 11-18).

The government opposed the motion to dismiss the indictment, asserting that *Bruen* had not abrogated precedent upholding the District's firearms laws (R.16 at 2). Instead, the government explained, *Bruen* had found New York's "proper cause" requirement to violate the Second Amendment, and in doing so had applied, and

merely made "more explicit," the test set forth in *District of Columbia v. Heller,* 554 U.S. 570 (2008), by clarifying that courts should evaluate firearms law based only upon a "text and history" inquiry, without conducting an additional "interest-balancing, means-end inquiry" (*id.* 4-6). The government asserted that *Bruen* did not hold, or suggest, that license requirements implicated the Second Amendment's text, prohibit states from imposing licensing requirements, or abrogate prior precedent which upheld the District's firearms statutes, including the CPWL, UF, and UA statutes (*id.* 7-15).

The government argued that even if the District's firearms law were examined in light of *Bruen,* the CPWL, UF, and UA statutes would withstand a Second Amendment challenge (R.16 at 15-37). The government explained, inter alia, that *Heller* had invalidated the District's pre-2008 CPWL and UF statutes, which had, in effect, banned gun possession in the home (*id.* 15). However, neither *Heller* nor *Bruen* had suggested that the basic licensing and registration requirements meaningfully infringed on the Second Amendment (*id.* 16-18).

At the motion hearing, the government asserted that the District's statutory licensing requirements had survived *Bruen* (4/11/23 Tr. 9). It explained that *Bruen* had rejected a "special need for self-defense" as a statutory requirement for gun licensing, but in this jurisdiction *Wrenn v. District of Columbia,* 864 F.3d 650 (D.C. Cir. 2017) had rejected the special-need requirement before *Bruen* (4/11/23 Tr. 9-

10). The government noted that *Bruen* had not forbidden, or disapproved of, other licensing requirements, such as suitability requirements in other states that were comparable to, if not more expansive than, those in the District (*id.* 10).

Furthermore, the government asserted that the PLCFD statute was constitutional and was not undermined by *Bruen,* because, inter alia, large-capacity magazines (LCMs) were not "arms" under the Second Amendment, and were not commonly used for self-defense (R.16 at 37-48). The government asserted that even if LCMs were considered to be "arms," any burden the PLCFD statute place on the Second Amendment was minimal, and the statute was consistent with the Nation's history and tradition of firearms regulation (*id.* 49-54).[2]

The Trial Court's Ruling

The trial court denied Benson's motion to dismiss the indictment, finding that *Bruen* did not invalidate the District's gun laws (4/11/23 Tr. 12). First, the court noted that *Bruen* addressed a New York statute that did not mirror the District's gun laws, which had changed because of the *Wrenn* decision (*id.*). The court found that *Bruen* did not state, or suggest, that the District's licensing requirements violated the Second Amendment (*id.*). Nor did *Bruen* state, or suggest, that the District's magazine-capacity limitations violated the Second Amendment (*id.*). The trial court

[2] Defense counsel chose to rest on his written motion at the hearing (4/11/23 Tr. 12).

found that this Court's precedent had expressly upheld the constitutionality of the statutes at issue in this case (*id.*).

The Suppression Motion

The Parties' Arguments

Benson claimed that the physical evidence and any statements he made to the police were the products of an unconstitutional seizure and frisk (R.14). He asserted that police officers had converged on a black sports utility vehicle (SUV) near which he was standing, he ran down an alley, and officers pursued him (*id.* 1). Benson stated that he stopped and placed himself face-down on the sidewalk, and an officer handcuffed and frisked him, and found a gun in his pant leg (*id.* 1-2).

Benson asserted that he was seized for Fourth Amendment purposes when he stopped fleeing and submitted to police commands, and that the seizure violated the Fourth Amendment because the police lacked reasonable articulable suspicion of criminal activity (R.14 at 2-5), and that the frisk was unsupported by reasonable articulable suspicion that he was armed and dangerous (*id.* 5-6).

The government opposed suppression, asserting that the officers had reasonable articulable suspicion that Benson was involved in criminal activity, and that he was armed and dangerous, at the time of the investigatory stop (R.15 at 1-4).

The Evidentiary Hearing

On October 8, 2022, at approximately 5:12 p.m., Metropolitan Police Department (MPD) Investigator Bryan Madera was patrolling in plainclothes in an unmarked car with other police officers in the 2900 block of R Street, SE, because it was an area known for firearm-related offenses, and gunshots recently had been heard in that area, either the day before or earlier (4/11/23 Tr. 15-16, 45-47, 52, 56, 58). Investigator Madera had worked for MPD for over seven years, and he had been involved in hundreds of gun recoveries (*id.* 44-45).

As he was traveling uphill in the front passenger seat of the unmarked car, Investigator Madera saw at the top, left side of the hill a dark colored SUV that was facing downhill (4/11/23 Tr. 46, 50, 53, 55, DE1).[3] When the unmarked car was about five feet from the SUV, Investigator Madera saw through the SUV's windshield a driver with his hands on the steering wheel, and a passenger, both of whom were wearing face masks and latex gloves, and both of whom "were frantically moving inside the vehicle" (4/11/23 Tr. 46, 50-51).[4] A third person (later

[3] In police body-worn-camera (BWC) footage, the SUV appears to be black (Defense Exhibit (DE) 1). The court stated that the SUV was dark blue (4/11/23 Tr. 55).

[4] Investigator Madera testified that the weather at the time of the incident was "[l]ike spring weather I guess," and that "it was a warm day. It was warmer than usual in October." (4/11/23 Tr. 58.) BWC footage showed that while officers were waiting for Benson to be transported from the scene, Benson asked an officer to pull up the hood of his sweatshirt, the officer did so, and stated, "It's definitely cold over here" (*id.* 66-68; DE3).

identified as Benson), who was wearing a "hooded sweater," a mask, and latex gloves, was trying to enter the SUV (*id.* 24-25, 46-47).[5]

As Investigator Madera's vehicle approached, Benson started frantically trying to open the SUV's door (4/11/23 Tr. 46).[6] The SUV driver looked up, saw the police unmarked car, and sped off, and Benson "took unprovoked flight" toward the mouth of an alley (*id.* 46-47, 51). Other officers ran after Benson (*id.* 47).

Investigator Madera testified that initially, Benson ran with both hands moving freely (4/11/23 Tr. 57). Investigator Madera testified, however, that from a distance of about 25 feet, he saw Benson adjust the front of his waistband as Benson ran in the alley and the other officers chased him (*id.* 47-48). During redirect examination, Investigator Madera testified, consistent with his preliminary-hearing testimony, that before Benson ran down the alley, he grabbed his waistband (*id.* 63-64). Madera agreed that at the preliminary hearing he had testified that before

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[5] After watching BWC footage, Investigator Madera acknowledged that the person running in the alley (Benson) was not wearing gloves and that his prior recollection about Benson wearing gloves was incorrect (4/11/23 Tr. 53- 54; DE1 at 17:12:17-17:12:18). He later testified that although he could not recall seeing any person associated with the SUV being without latex gloves, he could have been mistaken about Benson wearing latex gloves because latex gloves were recovered from Benson's person after his arrest (4/11/23 Tr. 64-65).

[6] Investigator Madera testified that the two unmarked police cars were "stationed" across the yellow center line of the road (4/11/23 Tr. 57). BWC footage clarifies that only the driver's sides of the unmarked cars crossed the yellow center line of the road, not the entire cars (DE1 at 17:12:17).

fleeing, Benson grabbed his waistband and then turned toward the alley, "running down the alley with both arms swinging freely" (*id.* 63; see also 10/26/22 Tr. 8).[7]

Officer Joshua Anderson, a more than nine-year MPD veteran who had been involved in recovering over 100 firearms, was in uniform and was traveling as a passenger with other officers in an unmarked car, which was following Investigator Madera's car (4/11/23 Tr. 14-15, 18).

When Officer Anderson's car arrived on the scene, he saw Officers Marsh and Slabatoff running down the alley (4/11/23 Tr. 18). At that point, he did not know who was being chased or about people at and in the SUV before the chase (*id.* 28). Officer Anderson exited his car and ran with Officers Marsh and Slabatoff (*id.* 18).

As Officer Anderson entered the alley, he saw a person, whom he later identified as Benson, about "half a block" away from him, in front of Officer Marsh (4/11/23 Tr. 18, 24-25).[8] Benson then went down a steep embankment "into the

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[7] Just before this redirect-examination testimony, defense counsel cross-examined Investigator Madera about changes he made to his *Gerstein* affidavit at the preliminary hearing (4/11/23 Tr. 59-62). Pertinent to that topic, as defense counsel was formulating a question regarding whether Benson was swinging his arms freely or holding his waistband during the chase, the trial court interrupted and asked, "So isn't it correct that you never saw him adjust his waistband?" (*id.* 62). Investigator Madera responded, "Correct," and the prosecutor immediately stated, "Your Honor, that's not accurate what the transcript says" (*id.*). The court told the prosecutor, "[Y]ou can do the redirect" and "use the rest of the transcript as you choose" (*id.*).

[8] Officer Anderson's BWC footage corroborated this testimony (4/11/23 Tr. 26-28; Government Exhibit (GE) 1 at 17:12:15-17:12:29).

backyard of a residence" (*id.* 18-19). When Officer Anderson reached the point in the alley where Benson had "entered the embankment," he saw Benson, who had already gone down the embankment, "running in the side yard" of the building and turning the corner around the front of the building (*id.* 18, 41-42). For seconds, Officer Anderson could see that Benson had one arm positioned at the front of his body in his waistband area, and that Benson swung his other arm freely, as he ran (*id.* 19-21).[9] He acknowledged that he could not see whether the hand that Benson had in front of his body was pressed against his waistband (*id.*). Officer Anderson estimated that he was at least 40 yards from Benson at the time (*id.* 39-40).

Upon seeing Benson's arm at the front of his body, Officer Anderson repeatedly yelled, "waistband" to alert the other officers that Benson might have a firearm (4/11/23 Tr. 21; GE1).[10] Based on his experience, Officer Anderson testified that many people concealing firearms keep them in their waistbands and, if running,

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[9] Officer Anderson demonstrated what he was able to see, and the trial court described it as a view "straight on to his back so that what [the court] could see was . . . his right arm in a bent position with his hand concealed to the front of his body" (4/11/23 Tr. 20-21).

[10] Officer Anderson's BWC footage reflected that he slowed at the point in the alley where the embankment descended toward the back of two buildings (4/11/23 Tr. 29; GE1 at 17:12:35-17:12:39). As Officer Marsh started down the embankment, Officer Anderson, who was at the top of the embankment repeatedly yelled, "waistband" (4/11/23 Tr. 30; GE1 at 17:12:37-17:12:39). During this time, the footage also depicted Benson (in dark clothing) running through a sunny area between the two buildings (4/11/23 Tr. 30; GE1 at 17:12:36-17:12:38).

the firearm, which is typically heavy, "may become dislodged so they have to hold it" (4/11/23 Tr. 21-22). In his gun-recovery experience, Officer Anderson had commonly seen persons fleeing while holding their waistband (*id.* 22). Thus, when he saw Benson running in that manner, Officer Anderson believed that Benson was "armed with a weapon," "possibly a firearm" (*id.*).

Officer Anderson briefly lost sight of Benson "as he went around the front of the building" (4/11/23 Tr. 22). Officer Anderson descended the embankment and ran between the two buildings in the direction Benson had gone (GE1 at 17:12:38-17:12:48). He then ran across a street and "across a corner," and gained on Benson in the 2800 block of Q Street, SE (4/11/23 Tr. 18, 22). Benson slowed down, and after Officer Anderson quickly and repeatedly shouted at Benson to "stop" as Anderson approached, Benson lowered himself to the ground, and Anderson placed him in handcuffs (*id.* 18, 23; GE1 at 17:12:55-17:13:06).[11] At the time of the stop, Benson was wearing a dark blue hooded sweatshirt, black pants, and a black face mask that covered the top of his head and was capable of concealing everything but his eyes (4/11/23 Tr. 23-24; GE1 at 17:12:58-17:12:59).[12]

[11] Officer Anderson noted that Benson also may have lowered himself to the ground because Officer Tomasula was driving an unmarked car in the 2800 block of Q Street, as shown in BWC footage (4/11/23 Tr. 23, 33; GE1 at 17:12:54-17:12:58).

[12] Officer Anderson's BWC footage shows that Benson's eyes and nose were visible when he was stopped (GE1 at 17:12:58-17:12:59).

For his safety and that of the other officers, Officer Anderson conducted a "protective pat down" starting at Benson's front waistband area where he believed a firearm might be located (4/11/23 Tr. 23; GE1 at 17:13:08-17:13:11). As Officer Anderson moved to patting down Benson's upper legs, Benson stated, "It's in my pant leg" (4/11/23 Tr. 35; GE1 at 17:13:10-17:13:11). Officer Anderson then felt an object at the lower right leg near the cuff of Benson's pants that, based on his experience of carrying a firearm daily, Anderson immediately recognized as a firearm (4/11/23 Tr. 25, 35; GE1 at 17:13:11-17:13:12). Indeed, Officer Anderson's BWC footage showed a bulge consistent with a gun in Benson's lower right pant leg (4/11/23 Tr. 35; GE1 at 17:13:14-17:13:17). Officer Anderson announced, "right here, 1-800," indicating the presence of a gun (4/11/23 Tr. 38; GE1 at 17:13:11-17:13:12). He then unzipped the lower right leg of Benson's pants and, under leggings tucked into Benson's socks, found a semiautomatic handgun, which Anderson described as a "Glock 45, nine millimeter" with one round in the chamber and 30 rounds in the magazine (4/11/23 Tr. 25; GE1 at 17:13:16-17:14:05). He testified that the magazine was designed to hold 31 rounds (4/11/23 Tr. 25).

The Trial Court's Ruling

The court denied the motion to suppress the evidence seized from Benson (4/11/23 Tr. 90). The court also ruled that insofar as there was a motion to suppress

the statement Benson made before the gun was found, that statement was neither the product of custodial interrogation nor of any unlawful police action (*id.* 91).

The court found that two unmarked police cars drove into the 2900 block of R Street, SE, which the officers were patrolling due to gunshots there "in recent days" (4/11/23 Tr. 84). The court found that the unmarked police cars stopped parallel to an SUV, which was facing in the opposite direction, but "[s]ignificantly," the police cars did not block the SUV's path; they "were probably each a car's length away" from the SUV, with their tires "cross[ing] the yellow line" in the center of the street (*id.* 84-85).

The court found that two people were in the SUV's driver and passenger seats, and a third person, Benson, was outside the SUV (4/11/23 Tr. 84). All three people wore "balaclava style mask[s] with a full head covering with only the eyes exposed" (*id.*).[13] The court found that it was "a bright sunny day," and "the fact that the [unmarked] cars carried numerous [uniformed] officers was unmistakably visible to [Benson] as he stood outside" the SUV (*id.* 85).

The court credited Investigator Madera's testimony that the people inside the SUV made "frantic motions" and that Benson urgently, but unsuccessfully, tried to enter the SUV (4/11/23 Tr. 85). The court found that Benson then fled at full speed

[13] The court noted that it was not relying on the testimony about the people inside the SUV wearing gloves in making its findings (4/11/23 Tr. 84).

from the SUV and the officers who were then "outside the vehicles," and as visible in BWC footage, "[a]t first [Benson's] arms swung freely" (*id.*). Benson ran down an alley to the right of the SUV, "extremely fast, well ahead of the police officers chasing him" (*id.* 86). As Benson "took off," the SUV "also fled the scene" (*id.*).

The court credited Investigator Madera's testimony that he saw Benson clutch his waistband, noted Madera's inconsistency about where Benson was when he did so, and found that "where it occurred [wa]s immaterial" (4/11/23 Tr. 85-86).

The court credited Officer Anderson's testimony about chasing Benson and Anderson's courtroom demonstration that from a distance of around 40 yards, Anderson saw Benson running between two buildings, freely swinging one of his arms while Benson's other arm was bent at the elbow at about a 45-degree angle with his hand in front of him, and not moving, at his waistband (4/11/23 Tr. 86-87). The court credited Officer Anderson's testimony that Benson's motions were consistent with a person running with an unholstered gun in their waistband that "they were trying to keep from adjusting or falling" (*id.* 87). The court noted that Officer Anderson's demonstration of Benson's movements "illustrat[ed] that he could see [Benson] from the back" (*id.*).

The court found that Officer Anderson's BWC footage "fully corroborate[d] his testimony," noting that the footage showed Benson at a distance, "fully visible in the sunlight between two buildings," "swinging his left hand," with his right hand

"at the angle described" by Officer Anderson, "in front of his body at his waistband location" (4/11/23 Tr. 87). The court found that at that point in the footage, Officer Anderson was stating, "Waistband, waistband," which Anderson explained was, "for the benefit of others," to articulate that he had seen Benson's running position and had "concluded that [Benson] had a gun in his waistband" (*id.* 87-88).

The court found that in the 2800 block of R Street,[14] Officer Anderson got close enough to Benson to shout, "Stop, stop" (4/11/23 Tr. 88). Benson complied, "got down on the ground," and "was immediately handcuffed" (*id.*). The court found that officers began to pat down Benson, and Benson stated that his gun was beneath his pants at his ankle (*id.*). The police found a loaded firearm there and seized it (*id.*).

The court stated that the first issue it needed to decide was when the seizure occurred (4/11/23 Tr. 88). The court found that although Benson was chased by officers, his "flight was not provoked" (*id.*). The court found that although the two unmarked police cars were near, they did not block Benson or his flight path (*id.*). The court also found that although the officers' approach "was aggressive," it was "not such that a reasonable person would . . . have believed he was unable to leave," and, in fact, Benson "fled easily down an alley" (*id.*). Benson was chased for approximately 40 seconds; at one point, "he was at least 40 yards away" from the

[14] Officer Anderson testified that the stop occurred in the 2800 block of Q Street (4/11/23 Tr. 18).

officers; and he did not submit until Officer Anderson closed in on him (*id.* 88-89). Thus, the court found, Benson was not seized until he submitted to the command to stop (*id.* 89).

The court found that the officers had reasonable articulable suspicion to seize Benson when he submitted to the command to stop (4/11/23 Tr. 89, 90). The court cited *Pridgen v. United States,* 134 A.3d 297 (D.C. 2016), in which this Court found that the seizure and subsequent search of the defendant was lawful, where officers approached in two cars and spoke to the defendant about whether he had a gun, and the defendant fled while swinging one hand freely and holding his side, near his waistband, with his other hand (*id.* 89).

The court found that Benson's flight "was an indication of consciousness of guilt in that [Benson] clearly saw the arrival of the police," which Benson fled in response to when he could not quickly enter the SUV (4/11/23 Tr. 89-90). It found that although Benson swung his arms freely at the beginning of his flight, he "adjusted his waistband before taking off or about the time he took off," and once had "really gotten some distance on the police but was still in full view," he ran in a manner like the defendant in *Pridgen,* i.e., with one arm swinging freely and the other hand at his "waistband area" with his elbow bent at a 45-degree angle (*id.* 90). The court found this "[w]as not a natural pose while running"; it was "inconsistent

with free flight," and Officer Anderson testified credibly that it "was a position he had observed in his own experience in persons fleeing with firearms" (*id.*).

The court found that the officers had reasonable articulable suspicion for a frisk when they stopped Benson (4/11/23 Tr. 90). The area was one in which the police knew that gunfire had been heard "in the day or weeks prior" to the incident (*id.* 91). The court fully credited that when Officer Anderson stated "[w]aistband, waistband," when he saw Benson's running position, "that he certainly believed at that moment that [Benson] had a gun in his waistband" (*id.* 90). The court found that taking that along with all the other facts and circumstances, Officer Anderson's belief was reasonable at the point Benson was seized (*id.*).

The Stipulated Trial

Benson waived his right to a jury trial (R.20), and he and the government entered into a series of stipulations, as follows (R.19; 4/11/23 Tr. 102-04). The parties agreed that at approximately 5:10 p.m. on October 8, 2022, Benson possessed a firearm in the 2900 block of R Street, SE, carrying it in a location other than his home, place of business, or land or premises that he controlled (R.19 at ¶¶1-2). The firearm recovered in this case was a black Glock 45 9mm pistol with serial number BTYB009 and a barrel length of less than 12 inches (*id.* ¶3). It was designed to expel a projectile by means of an explosive and to be fired with a single hand (*id.*). The recovered firearm "had one round in chamber and 30 rounds in the magazine" (*id.*

¶4). The magazine that was "inserted into the recovered firearm had a capacity of 31 rounds" (*id.* ¶5).

The parties also agreed that as of October 8, 2022, Benson did not have a license to carry a pistol in the District of Columbia, or a valid registration certificate to possess a firearm or ammunition, both of which were required by District of Columbia law (R.19 at ¶¶6-7). The recovered firearm was not registered to Benson (*id.* ¶7). The parties also agreed that Benson's actions were voluntary and on purpose, and not by mistake or accident (*id.* ¶8).

After the trial court read aloud these stipulations, Benson agreed that the stipulations were true and correct (4/11/23 Tr. 102-04). Based on the facts that Benson had agreed to, the trial court found him guilty as charged (*id.* 107-09).

SUMMARY OF ARGUMENT

The trial court did not err in denying Benson's suppression motion. The trial court correctly found, based on the totality of the evidence presented, that when Benson was seized, the police had reasonable articulable suspicion that he was involved in criminal activity (justifying the stop), and that Benson was armed and dangerous (justifying the frisk).

Also, the trial court did not err in rejecting Benson's claim that the CPWL, PLCFD, UF, and UA statutes are facially unconstitutional. Benson's Second Amendment challenge to these statutes, which relies principally on the Supreme

Court's decision in *New York State Rifle & Pistol Ass'n v. Bruen,* 142 S. Ct. 2111 (2022), lacks merit.

ARGUMENT

I. The Trial Court Did Not Err in Denying Benson's Suppression Motion.

Benson claims that police lacked reasonable articulable suspicion of criminal activity to justify the stop, or that he was armed and dangerous to justify the frisk. Thus, he argues that the physical evidence recovered from his person and any resulting statements should have been suppressed as the fruits of a violation of his Fourth Amendment rights. These claims lack merit.[15]

[15] Benson does not challenge the trial court's finding that he was not seized until he submitted to Officer Anderson's command to stop (4/11/23 Tr. 88-89). Nor could he, since he asserted in his suppression motion that he was seized for Fourth Amendment purposes "once he stopped fleeing and submitted to the police commands" (R.14 at 2). "[T]here is no seizure without actual submission," and, at a minimum, submission requires "that a suspect manifest compliance with police orders." *Plummer v. United States,* 983 A.2d 323, 331 (D.C. 2009).

Furthermore, weeks before the suppression hearing, the government announced that it did not plan to use any statements by Benson at trial (3/31/23 Tr. 5), and indeed none were included in the trial stipulations (R.19). Thus, insofar as Benson currently argues that admitting into trial evidence any statements he made to the police violated the Fourth Amendment, the issue is moot. Accordingly, we do not separately address any argument regarding statements. Because, as shown infra, the police had reasonable articulable suspicion that Benson was involved in criminal activity and he was armed and dangerous, any statements he made to the police after he was stopped were not the product of a Fourth Amendment violation.

A. Standard of Review

In reviewing a suppression-motion ruling, "[e]ssentially [this Court's] role is to ensure that the trial court ha[d] a substantial basis for concluding that no constitutional violation occurred." *Thompson v. United States,* 745 A.2d 308, 312 (D.C. 2000). This Court accepts the trial court's factual findings unless they are clearly erroneous, and "review[s] the facts and reasonable inferences therefrom in the light most favorable to the prevailing party." *Hooks v. United States,* 208 A.3d 741, 745 (D.C. 2019). This Court gives "considerable deference to the fact-finder's ability to weigh the evidence, determine witness credibility and draw reasonable inferences." *Griffin v. United States,* 850 A.2d 313, 315 (D.C. 2004). This Court also gives "due weight" to inferences drawn from the historical facts "by local law enforcement officers." *(Jermal E.) Johnson v. United States,* 253 A.3d 1050, 1056 (D.C. 2021). This Court reviews legal conclusions de novo. *Hooks,* 208 A.3d at 745. This Court will reverse only where the motions judge reached legal conclusions contrary to existing law or made factual findings unsupported by the evidence. *See United States v. White,* 689 A.2d 535, 537-38 (D.C. 1997).

B. Applicable Legal Principles

Consistent with the Fourth Amendment, a police officer may conduct an investigatory stop when he has reasonable, articulable suspicion that an individual

is involved in criminal activity, *Pridgen,* 134 A.3d at 301. "To justify a *Terry*[16] stop, the police must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Jackson v. United States,* 805 A.2d 979, 988 (D.C. 2002) (internal quotation omitted). If, in the course of the stop, the officer has reasonable, articulable suspicion that the individual is armed and dangerous, then the officer may also conduct a protective frisk for weapons, which may entail the use of handcuffs to restrain the individual. *Pridgen,* 134 A.3d at 301.

"The requirement of reasonable suspicion is not an onerous one since it is substantially less than probable cause and considerably less than proof of wrongdoing by a preponderance of the evidence." *Umanzor v. United States,* 803 A.2d 983, 993 (D.C. 2002) (internal quotation marks and citation omitted); *see also United States v. Sokolow,* 490 U.S. 1, 7 (1989) (reasonable, articulable suspicion is substantially less than probable cause, but more than a mere hunch or generalized suspicion). The Fourth Amendment imposes "only some minimal level of justification" particularized to the individual stopped. *United States v. McMillian,* 898 A.2d 922, 937 (D.C. 2006). "The process does not deal with hard certainties, but with probabilities." *United States v. Cortez,* 449 U.S. 411, 418 (1981); *see also*

[16] *Terry v. Ohio,* 392 U.S. 1 (1968).

Umanzor, 803 A.2d at 993 ("suspicious conduct by its very nature is ambiguous, and the principal function of the investigative stop is to quickly resolve that ambiguity"). "[R]easonable suspicion" is a "commonsense, nontechnical conception[ ] that deal[s] with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Ornelas v. United States,* 517 U.S. 690, 695 (1996). "[T]he determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior." *Illinois v. Wardlow,* 528 U.S. 119, 125 (2000).

In determining whether a police officer had reasonable articulable suspicion for either an investigatory stop or a frisk, this Court looks to the totality of the circumstances "through the eyes of a reasonable and cautious police officer on the scene, guided by his experience and training." *(Walter O.) Johnson v. United States,* 33 A.3d 361, 368 (D.C. 2011); *Peay v. United States,* 597 A.2d 1318, 1320, 1322 (D.C. 1991) (en banc). "Even if each specific act by a suspect could be perceived in isolation as an innocent act, the observing police officer may see a combination of facts that make out an articulable suspicion." *Peay,* 597 A.2d at 1320. "[O]nly reason to suspect that the person *may* be armed—not reason to believe that he *is* armed—is necessary to justify the frisk." *(Walter O.) Johnson,* 33 A.3d at 368 (emphasis in original). In assessing reasonable suspicion, the issue is not whether the particular

officer in the case subjectively harbored a suspicion, but rather, whether a reasonable officer under the circumstances would have harbored such a suspicion. *Id.*

Reasonable articulable suspicion to justify an investigatory stop may be based on the collective knowledge of the police at the time of the stop. *McFerguson v. United States,* 770 A.2d 66, 72-73 (D.C. 2001). All the evidence necessary to support the reasonable articulable suspicion for a *Terry* stop need not have been communicated by one officer to the officer involved in the stop before it occurs. *In re M.E.B.,* 638 A.2d 1123, 1129 (D.C. 1993). Likewise, in assessing reasonable articulable suspicion for a frisk, this Court "may determine the facts available to the officer on the basis of police officers' collective knowledge, e.g., the facts available to other officers on the scene as well as those facts known to the officer who performed the search or seizure in question." *Germany v. United States,* 984 A.2d 1217, 1222 n.6 (D.C. 2009).

C. The Police Officers Had Reasonable Articulable Suspicion to Stop and Frisk Benson.

The police officers had reasonable articulable suspicion that Benson was involved in criminal activity, based on the totality of circumstances they encountered. As Investigator Madera explained, he and other officers were patrolling in the 2900 block of R Street, SE, because it was an area known for firearm-related offenses (4/11/23 Tr. 45). As Officer Anderson explained, he and other officers were

in that area in regard to the sound of "recent" gunshots there either the day before or earlier (*id.* 15-16). Although a defendant's presence in area of expected criminal activity, standing alone, is insufficient to support reasonable suspicion that he is committing a crime, "officers are not required to ignore the relevant characteristics of a location in determining whether the circumstances are sufficiently suspicious to warrant further investigation." *Wardlow,* 528 U.S. at 124.

When Investigator Madera's unmarked car was about five feet from the SUV, Madera saw that the SUV was occupied by a driver and a passenger, both of whom were wearing face masks, which the trial court described as balaclava-style masks; both occupants "were frantically moving inside the vehicle" (4/11/23 Tr. 46, 50-51, 55, 84). As the trial court found without clear error (*id.* 89-90), upon seeing the officers, Benson, who was also wearing a balaclava-style mask, started frantically trying to open the SUV's door (*id.* 24-25, 46-47, 84). Unsuccessful in entering the SUV, Benson fled on foot, unprovoked, toward the mouth of an alley (*id.* 47). The SUV's driver looked up, saw the police unmarked car, and sped off (*id.* 46, 51).

In *Wardlow,* 528 U.S. at 125, the Supreme Court held that "nervous, evasive behavior is a pertinent factor in determining reasonable suspicion." The Court further held that "[h]eadlong flight—wherever it occurs—is the consummate act of evasion: It is not necessarily indicative of wrongdoing, but it is certainly suggestive of such." *Id.* at 124. To be sure, "not every effort to avoid the police implies a guilty

conscience," given that "[c]itizens have no legal duty to talk to the police." *Hemsley v. United States,* 547 A.2d 132, 134 (D.C. 1988) (quotation omitted). However, as *Wardlow* explained:

> [U]nprovoked flight is simply not a mere refusal to cooperate. Flight, by its very nature, is not 'going about one's business'; in fact, it is just the opposite. Allowing officers confronted with such flight to stop the fugitive and investigate further is quite consistent with the individual's right to go about his business or to stay put and remain silent in the face of police questioning.

528 U.S. at 125.[17] Thus, "[i]n a host of opinions, this [C]ourt has recognized the 'general proposition that flight from authority – implying consciousness of guilt – may be considered among other factors justifying a *Terry* seizure."' *United States v.*

[17] Benson claims (at 23-24) that his flight in this case should not be deemed to be unprovoked as in *Wardlow*, and that instead his flight is akin to that of the defendant in *Miles v. United States,* 181 A.3d 633 (D.C. 2018). In *Miles,* this Court found that the defendant's flight, provoked by the police, was not sufficient to corroborate an anonymous tip to give rise to reasonable suspicion that he was the person who reportedly had fired a gun. *Id.* at 635, 642-43. This Court found that Miles's flight was not "unprovoked" as in *Wardlow,* because before fleeing, Miles was followed on foot by one police officer, and a second officer "literally . . . drove [his police cruiser] right onto the sidewalk," in front of Miles, blocking his path as he walked, and that officer exited his cruiser and told Miles to "stop." *Id.* at 643. This Court found that such an experience "would be startling and possibly frightening to many reasonable people," and thus concluded in that situation, Miles's flight could not reasonably be viewed as indicating consciousness of guilt. *Id.* at 644. Here, however, the record showed that two unmarked police cars drove up, stopped in the middle of the street and did not block the SUV's or Benson's egress (4/11/23 Tr. 57; DE1 at 17:12:17). There was no evidence that any officer spoke to Benson, and when two officers exited the first unmarked car, Benson fled into the alley unprovoked (4/11/23 Tr. 47; DE1).

Bennett, 514 A.2d 414, 416-17 (D.C. 1986) (citing cases).[18] Indeed, other courts have recognized that flight from police officers in an area known for gun crime presents reasonable articulable suspicion for an investigatory stop. *See United States v. Houston,* 920 F.3d 1168, 1172 (8th Cir. 2019) (defendant's flight from police officers in area known for gun-related crime sufficient to justify reasonable suspicion of criminal activity); *see generally Wardlow,* 528 U.S. at 125 (defendant's unprovoked flight upon noticing police in high-crime area is pertinent factor in determining reasonable suspicion). Similarly, an individual's unprovoked flight in an area known for weapons crimes weighs in favor of finding that the police have reasonable, articulable suspicion justifying a frisk. *See Henson v. United States,* 55 A.3d 859, 870 (D.C. 2012).

Also, the fact that both Benson and his associates fled immediately upon seeing the police weighs in favor of finding reasonable articulable suspicion of criminal behavior. *See United States v. Valentine,* 232 F.3d 350, 357 (3d Cir. 2000)

[18] *Wardlow* recognized that "flight is not necessarily indicative of ongoing criminal activity," but nonetheless permitted officers to consider a suspect's flight among the circumstances that may justify a brief investigatory detention, because the Fourth Amendment "accepts the risk that officers may stop innocent people." 528 U.S. at 126. *See also United States v. Jeter,* 721 F.3d 746, 755 (6th Cir. 2013) ("There are innocent reasons to flee, but *Terry* permits officers to detain the individuals to resolve the ambiguity.") (internal quotation marks and alterations omitted). Indeed, "[a] determination that reasonable suspicion exists" need not "rule out the possibility of innocent conduct." *United States v. Arvizu,* 534 U.S. 266, 277 (2002).

(that defendant and the two men with him immediately walked away when patrol car arrived is factor to be considered in totality of circumstances in finding reasonable articulable suspicion). Indeed, upon seeing the police officers arrive, the flight of Benson's companions—who wore masks like Benson did and were inside the SUV as Benson frantically tried to open the door—was relevant evidence that Benson was involved in criminal activity. *United States v. Briggs,* 720 F.3d 1281, 1291-92 (10th Cir. 2013) (where circumstances leading up to flight of defendant's companion suggested the two men acted in concert, companion's flight immediately upon seeing police officers was relevant evidence that defendant was involved in criminal activity); *see also Black v. United States,* 810 A.2d 410, 412-13 (D.C. 2002) (flight of defendant's companion, after officers saw him and defendant apparently exchanging money for unknown object, implied guilt of defendant and companion, thus, flight supported reasonableness of *Terry* stop of defendant).[19]

[19] Benson (at 25-26) cites *Posey v. United States,* 201 A.3d 1198 (D.C. 2019), to claim that "even unprovoked flight does not meet the requirement for particularized suspicion." The scenario in *Posey* is not akin to the totality of the circumstances here, and, as *Posey* acknowledged, "flight is viewed in the context of the specific facts and corroborating circumstances of each individual case." 201 A.3d at 1204. In *Posey,* officers who had heard a lookout for an armed-robbery suspect as "a black male dressed all in black," and a second lookout stating that "it was a group of black males" "last seen heading towards North Capitol Street," approached "a group of five or more black males who were mostly dressed in black jackets" about a block from the robbery site five to ten minutes after the robbery was reported. *Id.* at 1200. When officers approached the group, Posey did nothing that "drew any particular attention to him." *Id.* When Posey then ran off, an officer chased, stopped, and (continued . . .)

Additionally, the fact that all three men were wearing balaclava-style masks was also a factor supporting reasonable articulable suspicion that criminal activity was afoot. *See Golden v. United States,* 248 A.3d 925, 944 n.76 (D.C. 2021) ("where clothing itself is of a kind closely associated with crime and other circumstances make it likely that the item's only purpose is to conceal contraband or identity, such evidence may support reasonable suspicion and a *Terry* stop or frisk"); *State v. Hall,* 2017 WL 2875408, at *3 (N.J. Super. Ct. App. Div. July 6, 2017) (fact that defendant wore balaclava, and, upon seeing officer, he frantically knocked on door of nearby house, were among facts supporting reasonable suspicion for *Terry* stop, even before defendant fled); *State v. Matthews,* 799 N.W.2d 911, 914 (Wis. Ct. App. 2011) (where defendant wore ski mask, possibly to stay warm, mask was nonetheless a factor officers could objectively consider in determining that further investigation was warranted to ensure criminal activity was not afoot); *Thomas v. United States,* 553 A.2d 1206, 1207-08 (D.C. 1989) (presence of ski mask in rental car in July justified a stop, *as ski masks are "commonly used" in armed hold-ups,* and mask was unlikely innocently left in rental car since winter); *City of St. Paul v. Johnson,*

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frisked him. *Id.* It was in this context that this Court held "simply that a nondescript individual distinguishing himself from an equally nondescript crowd by running away from officers unprovoked does not, without more, provide a reasonable basis for suspecting that individual of being involved in criminal activity and subjecting him or her to an intrusive stop and police search." *Id.* at 1204.

179 N.W.2d 317, 317-20 (Minn. 1970) (where two men entered store wearing ski masks in non-severe weather, left after a purchase, and were found hiding in car, arrest and search upheld because probable cause existed for officer to believe he had interrupted attempted robbery).

Although Benson asserts (at 24, 25) that there was nothing suspicious about him, and the other two men, wearing balaclavas on a "cold day," that argument does not undermine the significance of the balaclavas here. Although Benson presented evidence that while awaiting the arrival of a transport vehicle, Benson asked an officer to pull up his hood and the officer stated, "It's definitely cold over here" (4/11/23 Tr. 66-68; DE3), that evidence of weather conditions that allegedly would make it unsuspicious to wear a balaclava was tempered by the fact that Benson was wearing a hooded sweatshirt, not winter outerwear, and that the officers in the BWC footage were dressed in, at most, sweatshirts, on that sunny, late afternoon of October 8 (DE3). In fact, Investigator Madera recalled the weather being "warmer than usual in October," and that it "wasn't cold" (4/11/23 Tr. 58). Furthermore, the fact that all three men, wore balaclavas in early October even though Benson's two associates were inside a vehicle on a sunny afternoon supported a reasonable inference that the balaclavas were not merely for keeping warm. The fact that the masked men in the SUV were moving frantically, while Benson in his mask was frantically trying to enter the SUV's door, further adds to the appropriateness of

considering the balaclavas in finding reasonable articulable suspicion that criminal activity was afoot.

Furthermore, consistent with his testimony at the preliminary hearing, Investigator Madera testified that before Benson ran down the alley, he grabbed his waistband (4/11/23 Tr. 63-64). At an earlier point in the suppression hearing, he testified that from a distance of about 25 feet, he saw Benson adjust the front of his waistband as he ran in the alley and other officers chased him (*id.* 47-48). Either action was consistent with having a gun. "It is quite apparent to an experienced police officer, and indeed it may almost be considered common knowledge, that a handgun is often carried in the waistband." *People v. Benjamin,* 414 N.E.2d 645, 648 (N.Y. 1980) (finding reasonable articulable suspicion for frisk); *see also W.H. v. State,* 928 N.E.2d 288, 295 (Ind. Ct. App. 2010).[20]

[20] Benson claims (at 25), citing *Maye v. United States,* 260 A.3d 638, 645 (D.C. 2021), that grabbing or adjusting his waistband was capable of too many innocent explanations to be suspicious behavior. However, this case is unlike *Maye.* The defendant in *Maye* only "did something with his waistband" and then put his hand in his pocket; he never fled the area where he stood in a group of friends who were merely gathered outside and were not otherwise acting suspiciously, and who had been approached by the police "with no specific cause." *Id.* at 640-41, 647-48. Benson's movement at his waist just before, or shortly after, he began to run was consistent with having a gun in his waistband, and was only one of the factors giving rise to reasonable articulable suspicion here. Indeed, *Maye* acknowledged that determining the existence of reasonable articulable suspicion must be based on a totality of the circumstances and even if each specific act at issue could be perceived as innocent in isolation, a "combination of facts" may still "make out an articulable suspicion." *Id.* at 647; *see also Peay,* 597 A.2d at 1320.

Later in Benson's flight, Officer Anderson saw Benson with one arm positioned at the front of his body in his waistband area, and his other arm swinging freely (4/11/23 Tr. 19-21). Although Officer Anderson could not see whether the hand in front of Benson's body was pressed against his waistband, based on his over nine years of MPD experience and involvement in recovering over 100 firearms, Officer Anderson testified that many people concealing firearms keep them in their waistbands, and because the firearm is typically heavy, it "may become dislodged so they have to hold it" while running (*id.* 14-15, 20-22). In his gun-recovery experience, Officer Anderson had commonly seen persons fleeing while holding their waistband (*id.* 22). Thus, when he saw Benson running in that manner, Officer Anderson reasonably suspected that Benson was "armed with a weapon," "possibly a firearm" (*id.*). Indeed, as confirmed by his BWC footage, upon seeing Benson's arm at the front of his body, Officer Anderson repeatedly yelled, "waistband" to alert the other officers that Benson might have a firearm (*id.* 21, 30; GE1 at 17:12:36-17:12:39). Benson's actions were consistent with his having a gun. *See Pridgen,* 134 A.3d at 303-04 (defendant running from police while holding hand against his side near jacket pocket the entire time and moving other arm back and forth, where experienced officer testified this action was indicative of holding gun in pocket or waistband, was important factor in finding reasonable articulable suspicion that defendant armed). In sum, the totality of the circumstances supported a reasonable

suspicion that Benson was involved in criminal activity, and that he was armed and dangerous. *See Hampleton v. United States,* 10 A.3d 137, 143 (D.C. 2010) ("Even if each specific act . . . could be perceived in isolation as an innocent act, the observing police officer may see a combination of facts that make out an articulable suspicion.").

Benson's claim (at 19-23) that the trial court erred in relying on *Pridgen* lacks merit. First, the trial court merely stated that it was "informed by" the *Pridgen* decision; it did not indicate that it was relying on *Pridgen* as a mirror image of this case (4/11/23 Tr. 89-90), and it relied on numerous other facts in finding reasonable suspicion (*id.* 84-90). Second, even though based on the particular facts in *Pridgen,* this Court did not find that, standing alone, the defendant running while holding his hand against his left side—a posture the experienced testifying officer recognized as consistent with carrying a firearm—this Court did find that running posture to be one of "most relevant" facts in establishing whether the officers had reasonable suspicion to stop and frisk the defendant. 134 A.3d at 303-04. This Court also recognized that although Pridgen's running posture was possibly to protect a valuable, non-contraband item, "the officers' reasonable suspicion of a gun did not depend on their being able to eliminate every conceivable innocent explanation for [Pridgen's] posture while running." *Id.* at 304 n.20. Thus, for these reasons, the trial court here did not err in considering *Pridgen* in finding that Officer Anderson at one

point seeing Benson running with one arm swinging freely as he held his other arm in front of him at his waistband to be a factor supporting reasonable articulable suspicion for the *Terry* stop (4/11/23 Tr. 87-90).[21]

Additionally, Benson's reliance on *Golden* is misplaced. The facts of *Golden* bear little resemblance to the facts here. The defendant in *Golden* did not flee, and the decision indicates that officers blocked the defendant's path with a car, questioned the defendant, a lone pedestrian walking at night, about whether he had any weapons, and apparently dissatisfied when the defendant answered, "no," asked him to expose his waist for inspection, revealing a bulge on the defendant's hip. 248 A.3d at 936-38, 941-42. This Court found that the totality of these facts, and others, failed to furnish an objectively reasonable basis for the police to suspect that the bulge was a weapon. *Id.* at 942. Given these quite different facts*, Golden* does not dictate that the officers who encountered Benson lacked reasonable articulable

[21] The fact that the defendant in *Pridgen,* kept his left hand at his left side while swinging his right arm in a normal running motion, possibly throughout his flight to the apartment building's door, *see* 134 A.3d at 299-301, does not mean that Officer Anderson seeing Benson make a similar motion during one point of his flight has no bearing on reasonable articulable suspicion here. Benson's movements at that point were, in Officer Anderson's experience, consistent with a person running with a firearm in their waistband that has become dislodged while running (4/11/23 Tr. 20-22). *Pridgen* recognized that such testimony from an experienced police officer was an important aspect of the analysis of reasonable articulable suspicion to believe a defendant is armed. 134 A.3d at 304 & n.18. There is no reason to discount Benson's movement, or the trial court's reliance on *Pridgen,* simply because Benson did not run in the same posture throughout his flight.

suspicion to frisk him. *See Arrington v. United States,* 311 A.2d 838, 840 (D.C. 1973) ("Particularly in this area of adjudication, two cases are seldom sufficiently alike for the first to be an absolute binding precedent for the second."); *see also Gomez v. United States,* 597 A.2d 884, 889 (D.C. 1991) ("Each case turns on its particular facts, and 'case matching' is of limited utility in Fourth Amendment analysis of street encounters between citizens and police officers[.]").

II. The Trial Court Did Not Err in Rejecting Benson's Second Amendment Challenge to the Statutes Under Which He Was Convicted.

Benson (at 29-35) seeks reversal of his convictions, claiming that the CPWL, PLCFD, UF, and UA statutes under which he convicted are facially unconstitutional. To achieve this sweeping result, he relies principally on *New York State Rifle & Pistol Ass'n v. Bruen,* 142 S. Ct. 2111 (2022), which held that New York's licensing regime violates the Second Amendment because the State "issues public-carry licenses only when an applicant demonstrates a special need for self-defense[.]" *Id.* at 2122. This ruling has no direct bearing on the District of Columbia's firearm laws.[22] However, Benson asserts that, under *Bruen*'s text-and-history mode of

[22] As *Bruen* noted, the District of Columbia's "analogue[]" to the "proper cause" standard "has been permanently enjoined since 2017." 142 S. Ct. at 2124 (citing *Wrenn,* 864 F.3d at 668). The District thus no longer enforces the "good cause" provision. *See* https://mpdc.dc.gov/firearms#LicensetoCarryaHandgun (last visited Mar. 18, 2024) ("Pursuant to the decision of the U.S. Court of Appeals for the (continued . . .)

analysis, the District's firearm laws violate the Second Amendment. Benson's claims fail.

A. Standard of Review

Benson's claim that he was prosecuted under facially unconstitutional statutes is a question of law that is reviewed de novo. *Gamble v. United States,* 30 A.3d 161, 164 n.6 (D.C. 2011); *In re Warner,* 905 A.2d 233, 237 (D.C. 2006).

B. *Bruen* Does Not Upend Binding Precedent Affirming the Constitutionality of the District's Firearm Laws.

Benson asserts (at 29-35) that under *Bruen,* the District's gun laws violate the Second Amendment. To the contrary, this Court's precedent upholding the District's gun laws remains binding.

1. *Bruen* and the Relevant Legal Framework

In *Bruen,* the Supreme Court considered a challenge made by two "law-abiding, adult citizens" to New York's requirement that, to obtain a license to carry a concealed firearm outside the home or place of business for self-defense, one must prove to the licensing officer that "proper cause exists" to issue it. 142 S. Ct. at 2123,

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District of Columbia Circuit [in] *Wrenn*[ ], applicants for a license to carry a concealed handgun in the District of Columbia no longer need to provide a good reason for carrying a handgun.").

2125. "Proper cause" was not defined by statute, but had been interpreted by New York courts to require proof of a "special need for self-protection distinguishable from that of the general community." *Id.* at 2123 (quotation marks and citation omitted). This was a "demanding" standard. Living or working in a high-crime area was not enough; instead, applicants typically needed "evidence of particular threats, attacks, or other extraordinary danger to personal safety." *Id.* (quotation marks and citations omitted).

The Supreme Court held that New York's "proper cause" requirement violates the Second Amendment. In doing so, the Court noted the then-prevailing two-step test fashioned by the lower courts after *District of Columbia v. Heller,* 554 U.S. 570 (2008), i.e., (1) determining whether the regulated conduct fell within "the original scope of the [Second Amendment] right based on its historical meaning," and if so, (2) engaging in a means-end balancing inquiry whether the challenged regulation could satisfy either strict or intermediate scrutiny, depending on whether the regulation burdened the "core" Second Amendment right. *Bruen,* 142 S. Ct. at 2125-26 (cleaned up). *Bruen* held:

> this two-step approach[ ] is one step too many. Step one of the predominant framework is broadly consistent with *Heller,* which demands a test rooted in the Second Amendment's text, as informed by history. But *Heller* and *McDonald* [*v. City of Chicago,* 561 U.S. 742 (2010),] do not support applying means-end scrutiny [i.e., step two,] in the Second Amendment context.

Id. at 2127. *Bruen* explained that it was applying, rather than expanding or otherwise altering, the same test set forth in *Heller* to assess Second Amendment claims: "The test that we set forth in *Heller* and apply today requires courts to assess whether modern firearms regulations are consistent with the Second Amendment's text and historical understanding." *Bruen,* 142 S. Ct. at 2131. *See also id.* (indicating that the Court was "[f]ollowing the course charted by *Heller*"). The Court simply made the *Heller* test "more explicit," by clarifying that courts should evaluate firearm laws based only upon a "text and history" inquiry, without conducting an additional interest-balancing, means-end inquiry. *Bruen,* 142 S. Ct. at 2128-30, 2134.

In applying the text-and-history test, the Supreme Court first concluded that the Second Amendment's text protected conduct governed by New York's "proper cause" requirement. The Court reiterated *Heller*'s holding that the text of the Second Amendment protected "'the right of law-abiding, responsible citizens to use arms' for self-defense," *Bruen,* 142 S. Ct. at 2131 (quoting *Heller,* 554 U.S. at 635). Moreover, the Court held that this right applies outside the home or place of business, such that the "proper cause" licensing requirement infringed upon it. *Id.* at 2134-35.

Second, because the Second Amendment's "text" protected conduct governed by the "proper cause" requirement, the Supreme Court considered whether New York could show that this requirement was "consistent with this Nation's historical

tradition of firearm regulation." *Bruen,* 142 S. Ct. at 2135. The Court agreed that "[t]hroughout modern Anglo-American history, the right to keep and bear arms in public has traditionally been subject to 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." *Id.* at 2138. Nonetheless, there was not "a tradition of broadly prohibiting the public carry of commonly used firearms for self-defense," or of "limiting public carry only to those law-abiding citizens who demonstrate a special need for self-defense." *Id.* Thus, the Court held, "[u]nder *Heller*'s text-and-history standard, the proper-cause requirement is therefore unconstitutional." *Id.*

Notably, however, the Supreme Court did not hold, or even suggest, that merely requiring a license would itself implicate the Second Amendment's text, so as to shift the burden to the government to justify it under the nation's historical tradition. As this Court has already recognized, "the [Supreme] Court's decision in *Bruen* 'does not prohibit States from imposing licensing requirements' for concealed-carry of a handgun for self-defense." *Abed v. United States,* 278 A.3d 114, 129 n.27 (D.C. 2022) (quoting *Bruen,* 142 S. Ct. at 2161 (Kavanaugh, J. concurring)). To the contrary, *Bruen* emphasized,

> To be clear, nothing in our analysis should be interpreted to suggest the unconstitutionality of the 43 States' "shall-issue" licensing regimes, under which a general desire for self-defense is sufficient to obtain a permit. Because these licensing regimes do not require applicants to

> show an atypical need for armed self-defense, *they do not necessarily prevent "law-abiding, responsible citizens" from exercising their Second Amendment right to public carry.* [ ]*Heller,* 554 U.S. [at] 635[ ]. Rather, it appears that these shall-issue regimes, which often require applicants to undergo a background check or pass a firearms safety course, *are designed to ensure only that those bearing arms in the jurisdiction are, in fact, "law-abiding, responsible citizens." Ibid.* And they likewise appear to contain only narrow, objective, and definite standards guiding licensing officials, rather than requiring the appraisal of facts, the exercise of judgment, and the formation of an opinion—features that typify proper-cause standards like New York's.

142 S. Ct. at 2138 n.9 (emphasis added) (cleaned up).[23]

2. Precedent Upholding the District's Gun Statutes Remains Good Law.

Bruen did not abrogate the post-*Heller* caselaw upholding the District of Columbia's gun laws. Rather, to the extent that the case precedent applied *Heller*'s "step one" text-and-history analysis, *Bruen* does not call these precedents into question at all. *See Bruen,* 142 S. Ct. at 2127 ("Despite the popularity of this two-step approach, it is one step too many. Step one of the predominant framework is broadly consistent with *Heller*, which demands a test rooted in the Second Amendment's text, as informed by history."). *Bruen* calls into question only those

[23] The Supreme Court's general approval of "shall-issue" licensing regimes thus did not turn on their historical pedigree; indeed, the Court noted that New York's licensing regime (which was flawed only because its "proper cause" requirement made it a "may-issue" jurisdiction) could be traced no farther back than "the early 20th century." *Bruen,* 142 S. Ct. at 2122.

decisions predicated solely upon the so-called "second step" interest balancing, means-end inquiry that *Bruen* rejected.

This Court has repeatedly upheld the CPWL, UF, and UA statutes generally, against Second Amendment challenges in a manner that survives *Bruen*. For example, in *Dubose v. United States,* 213 A.3d 599 (D.C. 2019), this Court upheld the UF and UA statutes. In doing so, this Court discussed the history of such provisions, but also held that a felon restriction on registration, as well as licensing and registration generally, did not infringe upon the right protected by the Second Amendment at all. *See, e.g., id.* at 603-605 & n.4 ("certain qualifications for firearms registration 'are compatible with the core interest protected by the Second Amendment'" (quoting *Lowery v. United States,* 3 A.3d 1169, 1176 (D.C. 2010)).

Nor does *Bruen* undermine case law upholding the District's CPWL statute. In *Brown v. United States,* 979 A.2d 630 (D.C. 2009), this Court upheld the CPWL statute. This Court explained that "*Heller* did not . . . invalidate any of the District's individual gun control laws," but instead the Supreme Court directed the District to allow Heller to obtain a license and registration if he met other regulatory requirements. *Id.* at 638-39. "Thus, in *Heller*, the Court neither held nor implied that a law requiring a license to carry a pistol on its face violates the Second Amendment." *Id.* at 639. *Brown* then held that the CPWL statute was not invalid on its face, because "the licensure requirement that the CPWL statute imposes does not

appear as a substantial obstacle to exercise of Second Amendment rights." *Id.*, *quoted in Plummer,* 983 A.2d at 339, *as amended on denial of reh'g and reh'g en banc* (May 20, 2010). Because this Court relied upon a text-and-history inquiry, *Bruen* does not abrogate these binding decisions.

The same is true in the D.C. Circuit. For example, in *Wrenn,* which *Bruen* cited with approval as having invalidated the District's "good reason" licensing criterion, 142 S. Ct. at 2124, the D.C. Circuit confirmed that the Second Amendment protected the right of "law-abiding, responsible" people to carry firearms in self-defense. 864 F.3d at 657. The D.C. Circuit repeatedly invoked *Heller*'s holding that the scope of the Second Amendment's protections did not include felons. *Id.* at 657, 659, 662. All of this came before, and independently of, the Circuit's consideration of "whether [it] should subject [the 'good reason' requirement] to the tiers of scrutiny familiar from other realms of constitutional law." *Id.* at 664. Indeed, *Wrenn* refused to apply those "tiers of scrutiny," and instead invalidated the District's "good reason" requirement based on the first step, without engaging in any second-step interest-balancing inquiry. Notably, the D.C. Circuit expressly cited "licensing requirements" as an example of "restrictions" that did not implicate the right to bear arms in self-defense protected by the Second Amendment. *Id.* at 667.

Furthermore, in *Heller v. District of Columbia* (*Heller II*), 670 F.3d 1244, 1253 (D.C. Cir. 2011), the D.C. Circuit held "that basic registration of handguns is

deeply enough rooted in our history to support the presumption that a registration requirement is constitutional." Even assuming, arguendo, that *Bruen* would discount the Circuit's reliance on post-ratification history,[24] *Heller II* also found that the registration requirement "does not impinge upon the right protected by the Second Amendment" because "basic registration requirements are self-evidently de minimis, for they are similar to other common registration or licensing schemes, such as those for voting or for driving a car, that cannot reasonably be considered onerous." 670 F.3d at 1254-55. This rationale was not abrogated in any way by *Bruen*. Instead, as *Bruen* emphasized, such requirements, specifically including, e.g., "requir[ing] applicants to undergo a background check or pass a firearms safety course, are designed to ensure only that those bearing arms in the jurisdiction are, in fact, 'law-abiding, responsible citizens,'" and thus fall outside the scope of the Second Amendment's text because they "do not necessarily prevent 'law-abiding, responsible citizens' from exercising their Second Amendment right to public carry." 142 S. Ct. at 2138 n.9. Because this Court (and the D.C. Circuit) have

[24] *Bruen* generally endorsed "the course charted by *Heller*" in considering "whether 'historical precedent' from before, during, and even after the founding evinces a comparable tradition of regulation." 142 S. Ct. at 2131-32 (citing *Heller,* 554 U.S. at 631). In holding that the Second Amendment protects an individual's right to bear arms without regard to militia service, *Heller* looked to analogous state constitutional provisions adopted during the 1789-1820 period and the interpretation of those provisions by courts and commentators in the 19th century. 554 U.S. at 602-03.

approved the District's license and registration requirements based upon an analysis of the history and scope of the Second Amendment at step one, this precedent continues to bind this Court.

C. The District's Firearm Laws Would Survive Renewed Scrutiny After *Bruen* in Any Event.

1. Legal Standards

Even if this Court were inclined to take a fresh look at the District's firearm laws in light of *Bruen*'s analytical framework, Benson's Second Amendment challenge would fail. "State statutes, like federal ones, are entitled to the presumption of constitutionality until their invalidity is judicially declared." *Davies Warehouse Co. v. Bowles,* 321 U.S. 144, 153 (1944). Facial attacks "rarely succeed" because the challenger must "establish that no set of circumstances exists under which the act would be valid, i.e., that the law is unconstitutional in all of its applications." *Plummer,* 983 A.2d at 338 (cleaned up) (citing, inter alia, *Washington State Grange v. Washington State Republican Party,* 552 U.S. 442 (2008)). A defendant "may not challenge a statute by arguing that it could not be constitutionally applied to other defendants, differently situated." *Gamble,* 30 A.3d at 166-67 (citing, inter alia, *Sabri v. United States,* 541 U.S. 600, 609-10 (2004)). Here, Benson bears the burden to show that the challenged statutory provisions infringe upon the Second Amendment right of law-abiding citizens to bear arms in

self-defense.[25] Only then does "the burden fall[] on [the government] to show that [the challenged regulation] is consistent with this Nation's historical tradition of firearm regulation." *Bruen,* 142 S. Ct. at 2135.

2. The CPWL, UF, and UA Statutes Do Not Violate the Second Amendment.

The CPWL, UF, and UA statutes are constitutional, because "they do not necessarily prevent 'law-abiding, responsible citizens' from exercising their Second Amendment right[s]." *Bruen,* 142 S. Ct at 2138 n.9.

Bruen explained that a "central consideration" in assessing the validity of a firearms regulation is the "burden on the right of armed self-defense" that the regulation imposes. 142 S. Ct. at 2133. Thus, in *Heller*, the Supreme Court invalidated the District's pre-2008 CPWL and UF laws, which, at the time, in effect "totally ban[ned] handgun possession in the home." 554 U.S. at 628. *See also id.* at 629 ("Few laws in the history of our Nation have come close to the severe restriction

[25] In explaining the proper Second Amendment analysis, *Bruen* analogized to "the freedom of speech in the First Amendment, to which *Heller* repeatedly compared the right to keep and bear arms." *Id.* at 2130 (citing *Heller,* 554 U.S. at 582, 595, 606, 618, 634-35). Under the First Amendment's burden-shifting framework, the party challenging a regulation has the burden to show that the challenged provision implicates the First Amendment right, after which the government bears the burden to justify the purported restriction on the freedom of speech. "[I]t is the obligation of the person desiring to engage in assertedly expressive conduct to demonstrate that the First Amendment even applies." *Clark v. Community for Creative Non-Violence,* 468 U.S. 288, 293 n.5 (1984).

of the District's handgun ban."). In contrast, *Heller* approved safety-related firearm regulations because such laws "do not remotely burden the right of self-defense as much as an absolute ban on handguns." 554 U.S. at 632. Similarly, *Heller* did not question the constitutionality of a law imposing a fine for firing a gun without a license, because, inter alia, this law "in any event amounted to at most a licensing regime[.]" *Id.* at 632-33. *Bruen* followed the same line of analysis. There, the Court invalidated New York's "proper cause" licensing requirement because none of antecedent historical regulations cited by the respondents "imposed a substantial burden on public carry analogous to the burden created by New York's restrictive licensing regime." *Bruen,* 142 S. Ct. at 2145. Applying the same reasoning, this Court upheld the CPWL statute in *Brown,* 979 A.2d at 639, finding that "the licensure requirement that the CPWL statute imposes does not appear as a substantial obstacle to exercise of Second Amendment rights." *Id., quoted in Plummer,* 983 A.2d at 339.

Heller and *Bruen* did not suggest that basic licensing and registration requirements meaningfully infringe upon the Second Amendment. Despite holding that the District's pre-2008 laws violated the Second Amendment "right of law-abiding, responsible citizens to use arms in defense of hearth and home," *Heller,* 554 U.S. at 635, the Supreme Court did not suggest that requiring a license or registration was of itself unconstitutional. To the contrary, as discussed supra, the Court defined

the scope of the Second Amendment right and discussed a nonexclusive list of factors that might disqualify someone from obtaining a license or registration. It then explained that, "[a]ssuming that *Heller* is not disqualified from the exercise of Second Amendment rights, the District must permit him to register his handgun and must issue him a license to carry it in the home." *Id.* The Court thus viewed licensing and registration regimes as permissible, so long as they were not administered in a way that prevented law-abiding people from exercising their Second Amendment rights.

As discussed supra, *Bruen* did not suggest that merely requiring a license or registration would necessarily infringe upon the Second Amendment, so as to require historical justification. Instead, New York's demanding "proper cause" requirement infringed upon the Second Amendment because it "condition[ed] handgun carrying in areas 'frequented by the general public' on a showing of nonspeculative need for armed self-defense in those areas," 142 S. Ct. at 2135, and thus required historical justification. In contrast to New York's strict rules, the Supreme Court clarified that the mere existence of a licensing requirement did not infringe upon Second Amendment rights. Instead, "shall-issue" licensing regimes are constitutional because they "do not require applicants to show an atypical need for armed self-defense, [and thus] they do not necessarily prevent 'law-abiding, responsible citizens' from exercising their Second Amendment right to public carry." *Bruen,* 142

S. Ct. at 2138 n.9 (quoting *Heller,* 554 U.S. at 635). "Rather, it appears that these shall-issue regimes, which often require applicants to undergo a background check or pass a firearms safety course, are designed to ensure only that those bearing arms in the jurisdiction are, in fact, 'law-abiding, responsible citizens.'" *Id.*

a. CPWL

Benson cannot argue that the District of Columbia cannot require licenses to carry firearms given *Bruen*'s express endorsement of the practice. *See also Abed,* 278 A.3d at 129 n.27 ("*Bruen* 'does not prohibit States from imposing licensing requirements' for concealed-carry of a handgun for self-defense") (quoting *Bruen,* 142 S. Ct. at 2161 (Kavanaugh, J. concurring)). Instead, Benson argues (at 33-34) that the CPWL statute violates the Second Amendment to the extent that it (1) requires that an applicant be "a suitable person," as set forth in the regulations defining suitability criteria, and (2) affords discretion to the issuing official to deny a license, even if the licensing statute's requirements are met.

The term "suitable person" in the CPWL statute, as defined in D.C. Mun. Reg. § 24-2335, states:

> 2335.1 A person is suitable to obtain a concealed carry license if he or she:
>
> (a) Meets all of the requirements for a person registering a firearm pursuant to the Act;

> (b) Has completed a firearms training course, or combination of courses, conducted by an instructor (or instructors) certified by the Chief;
>
> (c) Is not presently an alcoholic, addict, or habitual user of a controlled dangerous substance, unless the habitual use of a controlled dangerous substance is under licensed medical direction;
>
> (d) Has not exhibited a propensity for violence or instability that may reasonably render the person's possession of a concealed pistol a danger to the person or another; and
>
> (e) Does not currently suffer nor has suffered in the previous five (5) years from any mental disorder, illness or condition that creates a substantial risk that he or she is a danger to himself or herself or others, or if the Chief has determined that the person is suitable based upon documentation provided by the person pursuant to § 2337.3.

Benson argues (at 34) that the District's "suitable person" requirement suffers from the same deficiency as the "proper cause" requirement invalidated in *Bruen*. But he misreads *Bruen*. Benson relies (at 33-34) on *Bruen*'s language faulting "may-issue" jurisdictions for granting licensing officials discretion "to deny licenses based on a perceived lack of need or suitability." But as the footnotes in *Bruen* accompanying that language make clear, what matters in distinguishing between (permissible) "shall-issue" and (impermissible) "may-issue" jurisdictions is not the use of the word "suitable," but the criteria by which suitability is assessed.

Bruen included both Connecticut and Rhode Island in its list of permissible "shall-issue" jurisdictions, and explained that these jurisdictions complied with the

Second Amendment notwithstanding the fact that both states have a "suitability" requirement:

> Although Connecticut officials have discretion to deny a concealed-carry permit to anyone who is not a "suitable person," see Conn. Gen. Stat. § 29–28(b), *the "suitable person" standard precludes permits only to those "individuals whose conduct has shown them to be lacking the essential character of temperament necessary to be entrusted with a weapon." Dwyer v. Farrell,* 193 Conn. 7, 12, 475 A.2d 257, 260 (1984) (internal quotation marks omitted). . . . Rhode Island has a suitability requirement, see R.I. Gen. Laws § 11–47–11, but the Rhode Island Supreme Court has *flatly denied that the "[d]emonstration of a proper showing of need" is a component of that requirement. Gadomski v. Tavares,* 113 A.3d 387, 392 (2015).

Bruen, 142 S. Ct. at 2123 n.1 (emphasis added). Thus, *Bruen* expressly approved, as part of a "shall-issue" regime, a suitability definition in Connecticut that did not require a showing of need (and indeed is far less specific than the District's suitability criteria); and a suitability requirement in Rhode Island, *because* it did not require a showing of special "need" as a suitability factor. By contrast, in the footnote listing impermissible "may-issue" jurisdictions, the Court focused on the requirement to demonstrate "cause or suitability," and exclusively faulted those regimes requiring a showing of a particular *need* to carry arms in self-defense. *Id.* at 2124 n.2 (California: "good cause"; District of Columbia: "proper reason," i.e., "special need for self-protection"; Hawaii: "exceptional case"; Maryland: "good and substantial reason"; Massachusetts: "good reason"; New Jersey: "justifiable need"). *See also id.* at 2138 n.9 (noting that the 43 shall-issue jurisdictions pass

constitutional muster "[b]ecause these licensing regimes do not require applicants to show an atypical need for armed self-defense").

Bruen's approval of the suitability requirements in Connecticut and Rhode Island is fatal to defendant's claim that the District's suitability requirement violates the Second Amendment. Instead, as *Bruen* said approvingly of the "shall-issue" jurisdictions, those requirements "do not necessarily prevent 'law-abiding, responsible citizens from exercising their Second Amendment right to public carry," but "[r]ather . . . require[ments for] applicants to undergo a background check or pass a firearms safety course[ ] are designed to ensure only that those bearing arms in the jurisdiction are, in fact, 'law-abiding, responsible citizens.'" *Id.* at 2138 n.9. Thus, the Supreme Court has expressly approved one of the District's suitability criteria (i.e., requiring a firearms-safety course), and has approved other criteria, such as those in Connecticut and Rhode Island, because those jurisdictions do not require a showing of specialized need. Accordingly, *Bruen* provides no basis for invalidating the CPWL statute's "suitable person" requirement.

Benson's attack on the CPWL statute's provision indicating that a licensing official "may" (rather than "shall") issue a license if the eligibility criteria are met fares no better. Benson offers no evidence that the District's licensing officials have, in fact, refused to issue licenses even where the statutory criteria are met. Mere "speculation about possible vagueness in hypothetical situations not before the

[c]ourt" will not support a facial attack on a statute that is "valid 'in the vast majority of its intended applications.'" *Hill v. Colorado,* 530 U.S. 703, 733 (2000) (quoting *United States v. Raines,* 362 U.S. 17, 23 (1960)).

Moreover, as *Bruen* recognized, the presence of the term "may" in a firearm-licensing statute does not necessarily invalidate the provision. In the same *Bruen* footnote listing the approved "shall-issue" jurisdictions, the Court noted that three of those states "have discretionary criteria but appear to operate like 'shall issue' jurisdictions." 142 S. Ct. at 2123 n.1. In addition to Connecticut[26] and Rhode Island, as discussed supra, the Court noted that Delaware "has thus far processed 5,680 license applications and renewals in fiscal year 2022 and has denied only 112." *Id.*[27]

[26] Connecticut's licensing statute does not require that a licensing official "shall" issue a permit to suitable persons; instead, it states that the official "may" do so. Conn. Gen. Stat. § 29-28(b) (2021).

[27] Moreover, what might be called Delaware's suitability criteria are comparable to those in the District, and in some respects less specific. For example, Delaware provides that an applicant "of good moral character" "may" be licensed, 11 Del. Code § 1441, and must submit, inter alia, "a certificate of *5 respectable citizens* . . . clearly stat[ing] that the applicant is a person of full age, *sobriety and good moral character*, that the applicant *bears a good reputation for peace and good order* in the community[.]" *Id.* (emphasis added). In *Bruen*, the Court clearly examined the eligibility criteria of the 50 states, and specially discussed Delaware's regime. Nonetheless, the Court did not appear to find Delaware's use of the word "may," or any of its eligibility criteria, as problematic in classifying it as a "shall-issue" state, or in holding that the invalidation of New York's "proper cause" requirement did not "suggest the unconstitutionality" of any "shall-issue" state, including Delaware.

Here, as set forth supra, D.C. Mun. Reg. § 24-2335's specific and objective suitability criteria operate in much the same way as the criteria in Connecticut, which *Bruen* effectively approved. And, like Rhode Island, the District's suitability requirement does not require any showing of special need, given that *Wrenn* has stricken that requirement from the statute. And, as compared with Delaware's denial rate, defendant offers no evidence that the District's licensing officials are relying solely on the "may" language to deny licenses to applicants who otherwise meet the District's criteria for obtaining one, much less that the rate of such denials meaningfully exceeds that in Delaware.[28]

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[28] Moreover, given that the District's statute is not facially invalid, and it is not statutorily impossible for a law-abiding citizen to get a license, defendant cannot mount an as-applied attack on the statute without showing that it has in fact been unconstitutionally applied to him. *See, e.g., Dubose,* 213 A.3d at 605 (Dubose's failure to register his pistol meant that he was not "otherwise qualified" to obtain a license, which "is fatal to any as-applied challenge to his CPWL conviction") (cleaned up). As the Supreme Court explained in *Poulos v. New Hampshire,* 345 U.S. 395, 409 n.13 (1953) (quoting *United States v. Slobodkin,* 48 F. Supp. 913, 917 (D. Mass. 1943)):

> It is well settled that where a licensing ordinance, valid on its face, prohibits certain conduct unless the person has a license, one who without a license engages in that conduct can be criminally prosecuted without being allowed to show that the application for a license would be unavailing. . . . In short, the individual is given the choice of securing a license, or staying out of the occupation, or, before he acts, seeking a review in the civil courts of the licensing authority's refusal to issue him a license. Likewise in the case at bar the defendants are given the choice of complying with the regulation, or not engaging in the

(continued . . .)

Given *Bruen*'s classification of Connecticut, Rhode Island, and Delaware as "shall-issue" jurisdictions based on their suitability criteria and denial rate, the Court appears to have used the shorthand terms "may-issue" and "shall-issue" to distinguish between jurisdictions that "grant open-ended discretion to licensing officials . . . [and] require a showing of special need apart from self-defense" and those that do not. 142 S. Ct. at 2162 (Kavanaugh, J., concurring). Accordingly, the District's use of the word "may" does not violate the Second Amendment.

In any event, even if the defendant could show that the word "may" in the CPWL statute vests undue discretion in licensing officials to deny licenses to "law-abiding, responsible" persons, he is not entitled to relief. Instead, the Court must sever the offending portion of the challenged provision to preserve its constitutionality. The D.C. Council explicitly adopted a severability provision for the firearms statutory scheme. *See* D.C. Code § 22-4516 ("If any part of this chapter is for any reason declared void, such invalidity shall not affect the validity of the remaining portions of this chapter."); D.C. Code § 7-2507.10 (providing that "[i]f

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> regulated activity, or, before they act, petitioning the appropriate civil tribunals for a modification of or exception from the regulation.

The *Poulos* Court specifically noted "purchas[ing] firearms" as an example of this principle's application. *Id.* at 409. Although this Court declined to apply this principle in *Plummer*, that was because, under the then-existing prohibition of registering guns not registered before 1976, a private citizen "*could not have* registered his handgun." 983 A.2d at 340 (emphasis added). This requirement no longer applies to persons seeking to possess a handgun for self-defense.

any provision of this unit [including the UF statute] or the application thereof to any person or circumstance is held invalid, the remainder of this unit and the application of such provision to other persons not similarly situated or to other circumstances shall not be affected thereby").[29]

Courts routinely enforce such severability provisions. Courts "ordinarily give effect to the valid portion of a partially unconstitutional statute so long as it remains fully operative as a law" and "so long as it is not evident from the statutory text and context that [the legislature] would have preferred no statute at all." *Executive Benefits Ins. Agency v. Arkison,* 573 U.S. 25, 36-37 (2014) (internal citations and quotations omitted). Indeed, this Court applied severability principles to save the CPWL statute from constitutional challenge following the D.C. Circuit's decision in *Wrenn*. *See Dubose,* 213 A.3d at 604 (severing the "good reason" provision). Severability would save the CPWL provision here: the statute would remain fully operational if the Court excised the discretionary term "may," and it defies credulity

[29] These severability provisions comport with the D.C. Council's general preference to salvage statutes wherever possible. *See* D.C. Code § 45-201(a) ("if any provision of any act of the Council of the District of Columbia or the application thereof to any person or circumstance is held to be unconstitutional or beyond the statutory authority of the Council of the District of Columbia, or otherwise invalid, the declaration of invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of each act of the Council of the District of Columbia are deemed severable").

to conclude that the D.C. Council would have preferred no licensing requirements at all in the event that the discretionary language failed constitutional scrutiny.[30]

b. UF and UA

As discussed supra, the case law upholding the District's UF and UA statutes has not been abrogated by *Bruen*. That precedent remains binding on this Court. *See, e.g., Dubose,* 213 A.2d at 603 ("Registration remains a prerequisite for lawfully possessing a firearm or ammunition in the District of Columbia. Nothing in *Wrenn* or Supreme Court precedent has invalidated the provisions [for UF and UA] requiring registration of a firearm.") (citing *Lowery,* 3 A.3d at 1175-76 (approving registration requirement and restrictions based on, e.g., criminal record, age, mental health, vision, physical defect, firearms negligence, and firearms safety knowledge, as "compatible with the core interest protected by the Second Amendment")).

Indeed, *Bruen* approved licensing regulations that "do not require applicants to show an atypical need for armed self-defense," including requirements such as "undergo[ing] a background check or pass[ing] a firearms safety course." 142 S. Ct.

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[30] See Council of the District of Columbia, Comm. on Jud. & Pub. Safety, Report on Bill 20-930, "License to Carry a Pistol Amendment Act of 2014," at 2 (Nov. 24, 2015) (summarizing long history of strict gun regulation in the District and emphasizing the Council's intention "to ensure that the District's laws and regulations would be in compliance with the [*Palmer v. District of Columbia,* 59 F. Supp. 3d 173 (D.D.C. 2014),] decision while also balancing the government's interest in public safety" which is "heightened given the District's role as the nation's capital").

at 2138 n.9. Such regulations do not fall within the scope of the Second Amendment's text at all, because "they do not necessarily prevent 'law-abiding, responsible citizens' from exercising their Second Amendment right to public carry." *Id.* (quoting *Heller,* 554 U.S. at 635). Instead, they "are designed to ensure only that those bearing arms in the jurisdiction are, in fact, law-abiding citizens," and "contain only narrow, objective, and definite standards." *Id.* (quotation marks and citations omitted). This rationale thus reinforces, rather than undermines, *Lowery*'s holding that the UF statute's requirements, and the UA statute, are "compatible with the core interest protected by the Second Amendment." 3 A.3d at 1175-76.[31]

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[31] In his dissent in *Heller II*, then-Judge Kavanaugh argued that "citizens may not be forced to register in order to exercise certain other constitutionally recognized fundamental rights, such as to publish a blog[.]" 670 F.3d at 1295 n.19 (citing Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense*, 56 U.C.L.A. Law Rev. 1443, 1546 (2009)). Interestingly, however, Professor Volokh's primary thesis in that segment of his article was that "a person is just as free to defend himself with a registered gun as he would be if the gun were unregistered." 56 U.C.L.A. Law Rev. at 1546. Professor Volokh also noted that, although generally, licenses for speakers would not pass constitutional muster, it is nonetheless true that parades need permits, political contributors must disclose their identities, and couples need to get marriage licenses. *Id.*

In addition, then-Judge Kavanaugh agreed that "the government may require registration for voting," but only because this "serve[s] the significant government interest" of preventing voter fraud. *Heller II,* 670 F.3d at 1295 n.19. But this argument proves too much: to suggest that the Second Amendment right should be treated like the right to vote, and to then predicate voting registration's constitutionality on whether (and to what degree) it "serves" a "significant

(continued . . .)

Similarly, and separate from its finding that such restrictions were "longstanding," *Heller II* held that the registration requirement "does not impinge upon the right protected by the Second Amendment" because "basic registration requirements are self-evidently de minimis, for they are similar to other common registration or licensing schemes, such as those for voting or for driving a car, that cannot reasonably be considered onerous."[32] 670 F.3d at 1254-55. This rationale was not abrogated in any way by *Bruen*. Indeed, *Bruen*'s approval of background checks and safety courses abrogated *Heller II*'s characterization of certain registration requirements as "novel" and "not de minimis," including that an applicant "demonstrate knowledge about firearms, be fingerprinted and photographed, take a firearms training or safety course, meet a vision requirement, and submit to a background check," *see Heller II,* 670 F.3d at 1255. *See also Bruen,* 142 S. Ct. at 2162 (Kavanaugh, J., concurring) (approving, e.g., "fingerprinting, a background check, a mental health records check, and training in firearms handling and in laws regarding the use of force, among other possible requirements"). Accordingly, the

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government interest," is to engage in the very means-end inquiry that *Bruen* rejected. Instead, if voting registration is like gun registration, it is because neither requirement prevents law-abiding people from exercising those rights.

[32] Although then-Judge Kavanaugh dissented from *Heller II*'s upholding of the district's UF law, this was predicated largely on his view, which the majority expressly rejected, that the registration requirement was different from, because "significantly more onerous" than, e.g., "traditional licensing requirements." 670 F.3d at 1294 (Kavanaugh, J., dissenting).

UF statute, and thus the provisions in the UA and PLCFD statutes requiring registration as a prerequisite to possessing ammunition and a large-capacity magazine, do not fall within the scope of the Second Amendment's text.

c. There is Historical Support for the District's CPWL, UF, and UA Laws.

Even if a historical pedigree were required to justify the District's licensing and registration regime, that test is met. Here, as discussed supra, *Heller* endorsed founding-era safety-related firearm laws, and expressly approved laws that "in any event amounted to at most a licensing regime[.]" 554 U.S. at 632-33. *Bruen* expressly endorsed regulatory measures, such as licensing requirements in shall-issue jurisdictions, because those rules "do not necessarily prevent 'law-abiding, responsible citizens' from exercising their Second Amendment right to public carry," but instead "are designed to ensure only that those bearing arms in the jurisdiction are, in fact, "law-abiding, responsible citizens." 142 S. Ct. at 2138 n.9 (citations omitted). Even more broadly, *Bruen* recognized that "[t]hroughout modern Anglo-American history, the right to keep and bear arms in public has traditionally been subject to 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." *Id.* at 2138.[33] Because the District's licensing and registration requirements are "relevantly similar" to those provisions in purpose and effect, it is part of the "familiar thread" of historically permissible regulations, and thus "analogous enough to pass constitutional muster." *Id.* at 2133.

Insofar as Benson asserts (at 32-33), based upon then-Judge Kavanaugh's dissent in *Heller II,* 670 F.3d at 1292-93, that the District's registration requirement meaningfully differs from licensing rules for Second Amendment purposes, *Bruen* undercuts that claim. *Bruen* endorsed shall-issue regimes because those requirements are "designed to ensure only that those bearing arms in the jurisdiction are, in fact, 'law-abiding, responsible citizens.'" 142 S. Ct. at 2138 n.9. The

[33] Similarly, "colonial governments substantially controlled the firearms trade." *Teixeira v. County of Alameda,* 873 F.3d 670, 685 (9th Cir. 2017). For example, "a 1652 New York law outlawed illegal trading of guns, gun powder, and lead by private individuals." Robert J. Spitzer, *Gun Law History in the United States and Second Amendment Rights,* 80 Law & Contemp. Probs. 55, 77 (2017) ("Spitzer, *Gun Law History*"). "A 1631 Virginia law required the recording not only of all new arrivals to the colony, but also 'of arms and munitions.'" *Id.* In the early 17th century, Connecticut banned residents from selling firearms outside the colony. *Teixeira,* 873 F.3d at 685. Virginia provided that people were at "liberty to sell armes and ammunition to any of his majesties loyall subjects inhabiting this colony." *Id.* at 685 n.18. And other colonies "controlled the conditions of trade" in firearms. *Id.* at 685. States continued to enact laws governing "the manufacture, sale, [and] transport" of guns and ammunition in the 18th and 19th centuries. Spitzer, *Gun Law History* at 74. For example, in 1814, "Massachusetts required that all musket and pistol barrels manufactured in the state be first tested," and appointed a state inspector "to oversee or conduct the testing." *Id.* Likewise, in 1820, "New Hampshire created and appointed state gunpowder inspectors to examine every storage and manufacturing site." *Id.*

District's registration requirement serves that same valid purpose for those individuals who wish to keep a weapon only inside the home, who need not satisfy the concealed-carry licensing requirements.[34]

Although then-Judge Kavanaugh's *Heller II* dissent asserted that there "is no tradition in the United States of gun registration being imposed on all guns," 670 F.3d at 1292, that statement overlooks that "the historical background of the [S]econd [A]mendment seems inconsistent with any notion of anonymity or privacy insofar as the mere fact of one's possessing a firearm is concerned." Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment,* 82 Mich. L. Rev. 204, 266 (1983). Indeed, "[u]nder the militia laws (first colonial, then state and eventually federal), every household, and/or male reaching the age of majority, was required to maintain at least one firearm in good condition. To prove compliance these firearms had to be submitted for inspection periodically." *Id.* at

[34] Then-Judge Kavanaugh noted, 670 F.3d at 1292, that gun sellers must comply with record-keeping requirements at the time of purchase. However, that process does not reach gun owners who may have obtained their weapons in a non-commercial setting. And it is the fact of record-keeping about the gun owner and the gun, not whether it is collected from the citizen directly by the government or through an intermediary such as the seller acting at the government's direction, that matters for constitutional purposes. Given the constitutionality of the government delegating to sellers the obligation to record information about the buyer and the firearm, and to maintain those records for government inspection, the direct collection of such information from individual buyers by the government is similarly constitutional.

265.[35] Accordingly, even if the District's registration requirement "is not a dead ringer for historical precursors, it still [is] analogous enough to pass constitutional muster." *Bruen,* 142 S. Ct. at 2133.[36]

3. The PLCFD Statute is Constitutional Under *Bruen*.

Benson seeks reversal of his PLCFD conviction, claiming that the PLCFD

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[35] Then-Judge Kavanaugh dismissed this point, 670 F.3d at 1293, because (1) "[i]n general, men over age 45 and women did not have to comply with such laws," and (2) "militia members were required to submit for inspection only one or a few firearms, not all of their firearms. That's because the purpose of those early militia requirements was *not* registration of firearms, but rather simply to ensure that the militia was well-equipped." But such objections miss the mark. However broadly applied, and for whatever purpose, the founders did not view requiring citizens to identify, and to submit for government inspection, a firearm in their possession as infringing upon the right protected by the Second Amendment. To suggest, as then-Judge Kavanaugh did, that these requirements were constitutional only because they were *narrowly* applied to serve a *worthy* government "purpose" would seem to rely upon the same kind of "second step" means-end inquiry that *Bruen* rejected. Instead, as noted supra, *Heller* did not invalidate the registration requirement, but simply directed that "[a]ssuming that Heller is not disqualified . . . , the District must permit him to register his handgun and must issue him a license[.]" 554 U.S. at 635.

[36] In a post-*Bruen* D.C. Superior Court case, the Honorable Marisa Demeo rejected a Second Amendment challenge to the District's CPWL statute, finding that the CPWL statute is consistent with the Nation's historical tradition of firearm regulation. *United States v. Green,* No. 2021-CF1-5206 (D.C. Super. Ct. July 28, 2023) (Demeo, J.); *see also United States v. Hill,* No. 2021-CF2-3581 (D.C. Super. Ct. Sept. 9, 2022) (Park, J.) (same as to CPWL, UF, UA, and PLCFD statutes); *United States v. Miller,* No. 2022-CF3-6440 (D.C. Super. Ct. Mar. 18, 2023) (Park, J.) (same as to those statutes and unlawful possession of a firearm by a person convicted of a crime punishable by more than a year in prison (D.C. Code § 22-4503(a)(1), (b)(1))).

statute is facially unconstitutional. He asserts (at 34) that large capacity magazines (LCMs) constitute "an entire class of arms"; that they are commonly used for self-defense; and that they are presumptively protected by the Second Amendment. These assertions are wrong in every respect. And even if all these assertions were correct, the PLCFD statute is consistent with the Nation's historical tradition of firearm regulation.

a. Case Law Upholding PLCFD Statutes Remains Persuasive.

Although this Court has not ruled on the constitutionality of the District's PLCFD statute, each of the seven federal Circuit courts to have considered the question has rejected Second Amendment challenges to comparable PLCFD statutes. *See, e.g., Duncan v. Bonta,* 19 F.4th 1087, 1099 (9th Cir. 2021) (citing *Worman v. Healey,* 922 F.3d 26 (1st Cir. 2019); *Association of New Jersey Rifle & Pistol Clubs v. Attorney General of New Jersey ("ANJRPC"),* 910 F.3d 106 (3d Cir. 2018); *Kolbe v. Hogan,* 849 F.3d 114 (4th Cir. 2017); *New York State Rifle & Pistol Ass'n v. Cuomo ("NYSRPA"),* 804 F.3d 242 (2d Cir. 2015); *Friedman v. City of Highland Park,* 784 F.3d 406 (7th Cir. 2015); *Heller II,* 670 F.3d 1244), *judgment vacated,* 142 S. Ct. 2895 (2022), *and vacated and remanded,* 49 F.4th 1228 (9th Cir.

2022).[37]

To the extent these cases relied on the now-rejected interest-balancing "second step," their holdings have been abrogated by *Bruen*. Most of the federal cases upholding LCM regulations found it unnecessary to resolve the text-and-history question.[38] However, those cases discussed text and history in a way that remains persuasive post-*Bruen*.

[37] On remand, the district court in *Duncan* found that California's PLCFD statute violated the Second Amendment. *Duncan v. Bonta,* 2023 WL 6180472 (S.D. Cal. Sept. 22, 2023). However, the Ninth Circuit subsequently granted a stay of that ruling pending appeal, after finding that "the Attorney General is likely to succeed on the merits," based on "strong arguments that [California's PLCFD statute] comports with the Second Amendment under *Bruen.*" *Duncan v. Bonta,* 83 F.4th 803, 805-06 (9th Cir. 2023) (noting that "ten other federal district courts have considered a Second Amendment challenge to large-capacity magazine restrictions since *Bruen* was decided. Yet only one of those courts—the Southern District of Illinois—granted a preliminary injunction, finding that the challenge was likely to succeed on the merits. . . . In that case, the Seventh Circuit subsequently stayed the district court's order pending appeal—the very relief the Attorney General seeks here.") (citing cases).

[38] In *Kolbe v. Hogan,* 849 F.3d 114 (4th Cir. 2017), *abrogated on other grounds by Bruen,* 142 S. Ct. 2111, the Fourth Circuit rejected a Second Amendment challenge to Maryland's LCM statute independently on the surviving first-step text-and-history analysis, *see Kolbe,* 849 F.3d at 130 ("[LCMs] are *not* constitutionally protected arms" under the Second Amendment) (emphasis in original), and in the alternative under the interest-balancing second step that *Bruen* rejected.

b. Benson's Second Amendment Challenge to the PLCFD Statute Fails.

i. The Plain Text of the Second Amendment Does Not Apply to LCMs.

Benson's facial challenge to the PLCFD statute fails at the outset. He does not show that the plain text of the Second Amendment applies to LCMs.

(a). Benson Fails to Show That LCMs are "Arms."

Benson fails to show that LCMs are "arms" under the Second Amendment. To be sure, restrictions on the possession of parts that are *necessary* to the use of firearms for self-defense may implicate the Second Amendment. *See Jackson v. City & County of San Francisco,* 746 F.3d 953, 967-68 (9th Cir. 2014) ("without bullets, the right to bear arms would be meaningless," and thus "[a] regulation *eliminating* a person's ability to obtain or use ammunition" would infringe upon the Second Amendment by "mak[ing] it *impossible* to use firearms for their core purpose" of self-defense) (emphasis added). Although a magazine may be required for some firearms to operate, a *large capacity* magazine is not. Indeed, Benson does not assert that any firearm will be rendered inoperable by using a magazine of less than 11 rounds.

Accordingly, LCMs are in the category of accessories that are not necessary for a firearm to function and thus outside the Second Amendment's protection. *See,*

e.g., United States v. Cox, 906 F.3d 1170 (10th Cir. 2018) (upholding law banning sale of unregistered silencers; "[a] silencer is a firearm accessory; it's not a weapon in itself," and so it is not "a type of instrument protected by the Second Amendment"). Like silencers, scopes, bumpstocks, or "giggle switches,"[39] LCMs may provide an additional feature to an already fully-functional firearm—the ability to fire more bullets in rapid succession—but they are not *necessary* for the firearm to function for its core purpose of self-defense. *See, e.g., Duncan,* 19 F.4th at 1107 n.5 (rejecting analogies that "start from the false premise that a ban on [LCMs] somehow amounts to a ban on the basic functionality of all firearms"; "[a] ban on [LCMs] cannot reasonably be considered a ban on firearms any more than a ban on leaded gasoline, . . . or speed limits[,] could be considered a ban on cars"), *judgment vacated,* 142 S. Ct. 2895, *and vacated and remanded,* 49 F.4th 1228. Accordingly, the PLCFD statute's "prohibition on [LCMs] is entirely different from the handgun ban at issue in *Heller*. The law at issue here does not ban any firearm at all. It bans merely a subset (large-capacity) of a part (a magazine) that some (but not all)

[39] A giggle switch is an accessory attachment that enables a semiautomatic pistol to fire continuously while the trigger is held down. See, e.g., *Illegal Device Makes Semiautomatic Pistols Fully Automatic,* https://www.nbcwashington.com/news/local/illegal-device-makes-semiautomatic-pistols-fully-automatic/2712262/ (last visited Mar. 18, 2024).

firearms use." *Duncan,* 19 F.4th at 1107, *judgment vacated,* 142 S. Ct. 2895, *and vacated and remanded,* 49 F.4th 1228.

That some firearms may be sold in tandem with LCMs is immaterial. If retailers began selling firearms in tandem with silencers, that product-bundling choice would not transform a silencer from an accessory to an "arm" for Second Amendment purposes. For the same reasons, the overall number of LCMs in circulation is immaterial to the question of whether they are "arms" under the Second Amendment.[40]

(b). Benson Fails to Show That LCMs Are Commonly Used for Self-Defense.

Benson also fails to show that LCMs are commonly used for self-defense.[41] Other than to quote a snippet of *Bruen,* 142 S. Ct. at 2134, which did not pertain to

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[40] Instead, their prevalence is more properly considered as to the independent question of whether they are commonly used for self-defense, as discussed infra. But the answer to that question is immaterial as well, because LCMs are not "arms" under the Second Amendment.

[41] Benson misstates the role of the "in common use for self-defense" inquiry. He appears to believe that it is dispositive of the "history" portion of *Bruen*'s text-and-history test, declaring (at 34) that, because LCMs are (in his view) "in common use today for self-defense," their total prohibition under the PLCFD statute is unconstitutional. To the contrary, as *Bruen* explained, the question of whether a regulated item is "in common use for self-defense" is antecedent not only to the question of whether there is a historical analogue to its regulation, but also to the question of whether the Second Amendment applies to the regulated conduct at all.

(continued . . .)

LCMs and merely stated that the parties to that case did not dispute that "handguns are weapons 'in common use today' for self-defense," Benson cites no support for his summary assertion (at 34) that because LCMs holding more than 10 rounds of

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See Bruen, 142 S. Ct. at 2134 (starting its analysis by noting that it is undisputed that (1) petitioners there are part of "the people" under the Second Amendment, and that "handguns are [(2)] weapons [(3)] 'in common use' today for self defense. *We therefore turn to whether the plain text of the Second Amendment protects [petitioners'] proposed course of conduct,*" and if it does, whether the government can show that the regulation is consistent with the historical tradition of firearm regulation) (emphasis added). As discussed infra, the PLCFD statute is consistent with the historical tradition of firearm regulation. Benson provides no support for his conclusory "in common use for self-defense" argument.

On appeal, Benson's "in common use for self-defense" argument does not repeat his trial court reliance on David B. Kopel, *The History of Firearm Magazines and Magazine Prohibitions*, 78 Alb. L. Rev. 849 (2015). In any event, there is nothing to suggest that LCMs were in common use for self-defense at that time. To the contrary, Kopel's article merely indicates that rudimentary LCMs had been invented by the time of the founding, and by that time were in limited military use, including "by elite units" in European armies. 78 Alb. L. Rev. at 852-53. But even by Kopel's definition of "in common use," which does not consider *Bruen*'s subsequent requirement of common use *for self-defense*, LCMs were *uncommon* until "the mid-nineteenth century" for rifles; "1935" for handguns; and "the mid-1960s" for handgun LCMs exceeding 15 rounds. *Id.* at 883.

That timing corresponds closely to the enactment of regulations on the ability of firearms to rapidly shoot many bullets without reloading. As these features became more widespread and posed risks to public safety, many states started to regulate firing capacity in various ways, including by regulating weapons defined "by the number of rounds that could be fired without reloading or by the ability to receive bullet feeding devices." *See* Robert J. Spitzer, *Gun Accessories and the Second Amendment*, 83 Law & Contemp. Probs. 231, 238 (2020) ("Spitzer, *Gun Accessories*"); Spitzer, *Gun Law History* at 69-72 (collecting regulations of semiautomatic weapons, including magazine limits). In total, between 1927 and 1934, at least 18 states regulated "magazines or similar feeding devices, and/or round capacity." Spitzer, *Gun Accessories*, at 237-38.

ammunition are "in common use today for self-defense . . . and standard issue with most popular handguns used for self-defense by law enforcement and civilians alike, their total prohibition violates the Second Amendment." Benson offers no evidence that LCMs are useful for self-defense, much less that they are "commonly" used for that purpose.

Indeed, other courts have questioned whether LCMs are commonly used for self-defense. For example, *Duncan* noted, there was "little evidence that [LCMs] are commonly used, or even suitable, for [the purpose of self-defense]." 19 F.4th at 1107, *judgment vacated,* 142 S. Ct. 2895, *and vacated and remanded,* 49 F.4th 1228. Indeed, *Duncan* found,

> Experts in this case and other cases report that "most homeowners only use two to three rounds of ammunition in self-defense." *ANJRPC,* 910 F.3d at 121 n.25. The use of more than ten bullets in defense of the home is "rare," *Kolbe,* 849 F.3d at 127, or non-existent, *see Worman,* 922 F.3d at 37 (noting that neither the plaintiffs nor their experts "could . . . identify even a single example of a self-defense episode in which ten or more shots were fired"). An expert in this case found that, using varying methodologies and data sets, more than ten bullets were used in either 0% or fewer than 0.5% of reported incidents of self-defense of the home. Even in those situations, the record does not disclose whether the shooter fired all shots from the same weapon, whether the shooter fired in short succession such that reloading or replacing a spent cartridge was impractical, or whether the additional bullets had any practical effect after the first ten shots. In other words, the record here, as in other cases, does not disclose whether the added benefit of a large-capacity magazine—being able to fire more than ten bullets in rapid succession—has ever been realized in self-defense in the home. *See ANJRPC,* 910 F.3d at 118 ("The record here demonstrates that [large-capacity magazines] are not well-suited for self-defense."); *Kolbe,* 849 F.3d at 138 (noting the "scant evidence ... [that] large-capacity

> magazines are possessed, or even suitable, for self-protection"); *Heller II,* 670 F.3d at 1262 (pointing to the lack of evidence that "magazines holding more than ten rounds are well-suited to or preferred for the purpose of self-defense or sport"). Indeed, Plaintiffs have not pointed to a single instance in this record (or elsewhere) of a homeowner who was unable to defend himself or herself because of a lack of a large-capacity magazine.

19 F.4th at 1104-05, *judgment vacated,* 142 S. Ct. 2895, *and vacated and remanded,* 49 F.4th 1228. *Duncan* thus "decline[d] to read *Heller*'s rejection of an outright ban on the most popular self-defense weapon as meaning that governments may not impose a much narrower ban on an accessory that is a feature of some weapons and that has little to no usefulness in self-defense." *Id.* at 1108.

The same is true here. Benson offers no evidence that LCMs are useful for self-defense, much less that they are "commonly" used for that purpose. Instead, as *Duncan* found, the "[e]vidence supports the common-sense conclusion" that LCMs, which "were originally designed and produced for military assault rifles," and "provide significant benefit to soldiers and criminals who wish to kill many people rapidly. But the magazines provide at most a minimal benefit for civilian, lawful purposes." 19 F.4th at 1105-06 (cleaned up), *judgment vacated,* 142 S. Ct. 2895, *and vacated and remanded,* 49 F.4th 1228.[42] Accordingly, LCMs are not commonly used for lawful self-defense, and thus are outside the scope of the Second Amendment.

[42] For the same reasons, as the Fourth Circuit held in *Kolbe,* LCMs are "like M-16 rifles, i.e., weapons that are most useful in military service, and thus outside the (continued . . .)

(c). Any Burden on the Second Amendment is Minimal.

Even if LCMs are considered "arms" that are commonly used for self-defense, the PLCFD statute is constitutional, because it "do[es] not necessarily prevent 'law-abiding, responsible citizens' from exercising their Second Amendment right[s]." *Bruen,* 142 S. Ct at 2138 n.9.

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ambit of the Second Amendment[.]" 849 F.3d at 136 (quoting *Heller,* 554 U.S. at 627) (cleaned up). Thus, Benson's assertion (at 34) that LCMs are "standard issue with the most popular handguns used for self-defense by law enforcement" supports the government's position rather than his own. *See, e.g., Friedman,* 784 F.3d at 410 (noting that, unlike in the civilian context, "[s]ome of the weapons prohibited by the [upheld] ordinance are commonly used for military and police functions;" but in keeping with *Heller,* states are "allowed to decide when civilians can possess *military-grade* firearms") (emphasis added).

As in *Kolbe,* 849 F.3d at 136 n.10, it is unnecessary to determine whether LCMs are also "dangerous and unusual," which would furnish yet another basis to find that LCMs are outside the scope of the Second Amendment under *Heller*. But for the reasons herein, if this Court were to reach that question here, LCMs are properly considered "dangerous and unusual," and thus outside the scope of the Second Amendment. In contrast with the minimal (at most) use of LCMs for self-defense described supra,

> [i]n the past half-century, [LCMs] have been used in about three-quarters of gun massacres with 10 or more deaths and in 100 percent of gun massacres with 20 or more deaths, and more than twice as many people have been killed or injured in mass shootings that involved a [LCM] as compared with mass shootings that involved a smaller-capacity magazine.

Duncan, 19 F.4th at 1096, *judgment vacated,* 142 S. Ct. 2895, *and vacated and remanded,* 49 F.4th 1228.

Bruen explained that a "central consideration" in assessing the validity of a firearms regulation is the "burden on the right of armed self-defense" that the regulation imposes. 142 S. Ct. at 2133. *Heller* approved safety-related firearm regulations because such laws "do not remotely burden the right of self-defense as much as an absolute ban on handguns." 554 U.S. at 632. Similarly, *Bruen* noted that none of antecedent historical regulations cited by the respondents "imposed a substantial burden on public carry analogous to the burden created by New York's restrictive licensing regime," 142 S. Ct. at 2145, and upheld "may issue" licensing regimes on the same basis. Applying the same reasoning, this Court upheld the CPWL statute in *Brown,* 979 A.2d at 639, finding that "the licensure requirement that the CPWL statute imposes does not appear as a substantial obstacle to exercise of Second Amendment rights." *Id., quoted in Plummer,* 983 A.2d at 339. And in keeping with this rationale, *Heller II* held that the District's registration statute "does not impinge upon the right protected by the Second Amendment" because "basic registration requirements are self-evidently de minimis, for they are similar to other common registration or licensing schemes, such as those for voting or for driving a car, that cannot reasonably be considered onerous." 670 F.3d at 1254-55.

For the same reasons, the PLCFD statute does not "impose[ ] a substantial burden on [the right to armed self-defense] analogous to the burden created by New York's restrictive licensing regime." *Bruen,* 142 S. Ct. at 2145. The PLCFD statute

does not make it impossible to use a handgun for self-defense. Indeed, it does not affect that ability whatsoever, other than in the extreme (and as discussed supra, almost purely theoretical) situation where a person wishes to fire more than ten shots in self-defense without reloading.

ii. The PLCFD Statute is Consistent With the Nation's History and Tradition of Firearm Regulation.

Even assuming, arguendo, that LCMs qualify as "arms" that are commonly used for self-defense within the Second Amendment's scope, the PLCFD statute is consistent with "this Nation's historical tradition of firearm regulation[.]" *Bruen,* 142 S. Ct. at 2126. "The historical record shows that gun safety regulation was commonplace in the colonies, and around the time of the founding, a variety of gun safety regulations were on the books." *National Rifle Ass'n of Am. v. Bureau of Alcohol, Tobacco, Firearms & Explosives,* 700 F.3d 185, 200 (5th Cir. 2012), *abrogated on other grounds by Bruen,* 142 S. Ct. 2111. Those regulations "included safety laws . . . disarming certain groups and restricting sales to certain groups." *Id.* This included "persons who refused to swear an oath of allegiance to the state or to the nation," *id.*; felons, *see generally* Don B. Kates & Clayton E. Cramer, *Second Amendment Limitations and Criminological Considerations,* 60 Hastings L.J. 1339, 1360 (2009) ("there is every reason to believe that the Founding Fathers would have deemed persons convicted of any of the common law felonies not to be among 'the

[virtuous] people' to whom they were guaranteeing the right to arms") (internal citations and footnotes omitted); illegal aliens, *United States v. Portillo-Munoz,* 643 F.3d 437, 439-40 (5th Cir. 2011); persons under domestic-violence protective orders, *United States v. Bena,* 664 F.3d 1180, 1184 (8th Cir. 2011); and unlawful drug users, *United States v. Patterson,* 431 F.3d 832, 836 (5th Cir. 2005).

The PLCFD statute is consistent with other safety-related analogues. During the founding era, for example, governments enacted regulations "aimed in part at pistols and offensive knives." Spitzer, *Gun Law History* at 67. In the early 19th century, many states specifically outlawed public carry of "Bowie Knives" and other particularly dangerous and unusual knives. See David B. Kopel et. al., *Knives and the Second Amendment,* 47 U. Mich. J.L. Reform 167, 184 n.95, 184-87 (2013). States also regulated "the practice of rigging firearms to be fired with a string or similar method . . . without an actual finger on the firearm trigger," also known as "trap guns" or "infernal machines." Spitzer, *Gun Law History* at 67. Like LCMs, such weapons posed special dangers to human life and were accordingly regulated. *See id.*

Likewise, the Nation has historically placed limits on gunpowder storage, given the obvious risks to public safety. *Brown v. Maryland,* 25 U.S. 419, 443 (1827), *abrogated on other grounds as recognized by Oklahoma Tax Comm'n v. Jefferson Lines, Inc.,* 514 U.S. 175, 180 (1995). *See* Saul Cornell & Nathan DeNino,

A Well-Regulated Right: The Early American Origins of Gun Control, 73 Fordham L. Rev. 487, 510-11 (2004) ("by the close of the eighteenth century, there was already a tradition of statutes regulating the storage and transport of gunpowder"; "[l]imits on the amount of gunpowder a person could possess were common") (collecting statutes). There appears to have been no concern at the time that such laws somehow interfered with the right of armed self-defense, e.g., by limiting the number of times a gun could be fired before running out of gunpowder.[43]

In sum, LCMs are not Second Amendment "arms." LCMs instead are military-inspired accessories associated in the civilian context with mass shootings and public terror, and are not commonly used for self-defense. The PLCFD imposes no burden whatsoever on the possession of handguns for self-defense, or on the number of bullets or standard-capacity magazines. The statute places "at most a minimal burden, if any burden at all, on the right of [armed] self-defense[.]" *Duncan,* 19 F.4th at 1107, *judgment vacated,* 142 S. Ct. 2895, *and vacated and remanded,* 49

[43] Indeed, the LCM restriction (which does not impair a gun's operability at all, in that consumers may use as many standard-capacity magazines as they like) is far less of a limitation on firing ability than traditional eighteenth-century gunpowder restrictions, where exhausting the permissible supply of powder would render the gun inoperable. Nonetheless, as *Bruen* said in approving "sensitive places" statutes, "we are aware of no disputes regarding the lawfulness of such prohibitions. We therefore can assume it settled" that the founding-era gunpowder regulations were "consistent with the Second Amendment." 142 S. Ct. at 2134.

F.4th 1228. In any event, any such burden is consistent with the Nation's history and tradition of firearm regulation.

CONCLUSION

WHEREFORE, the government respectfully submits that the judgment of the Superior Court should be affirmed.

Respectfully submitted,

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Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (amended May 2, 2023), this certificate must be filed in conjunction with all briefs submitted in all criminal cases designated with a "CF" (criminal felony), "CM" (criminal misdemeanor), "CT" (criminal traffic), and "CO" (criminal other) docketing number. Please note that although briefs with above designations must comply with the requirements of this redaction certificate, criminal sub-case types involving child sex abuse, cruelty to children, domestic violence, sexual abuse, and misdemeanor sexual abuse will not be available for viewing online.

If you are incarcerated, are not represented by an attorney (also called being "pro se"), and not able to redact your brief, please initial the box below at "G" to certify you are unable to file a redacted brief. Once Box "G" is checked, you do not need a file a separate motion to request leave to file an unredacted brief.

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21, amended May 2, 2023, and Super. Ct. Crim. R. 49.1, and removed the following information from my brief:

A. All information listed in Super. Ct. Crim. R. 49.1(a) has been removed, including:

(1) An individual's social-security number
(2) Taxpayer-identification number
(3) Driver's license or non-driver's' license identification card number
(4) Birth date
(5) The name of an individual known to be a minor as defined under D.C. Code § 16-2301(3)
(6) Financial account numbers

(7) The party or nonparty making the filing shall include the following:

(a) the acronym "SS#" where the individual's social-security number would have been included;
(b) the acronym "TID#" where the individual's taxpayer identification number would have been included;
(c) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
(d) the year of the individual's birth;
(e) the minor's initials;
(f) the last four digits of the financial-account number; and (g) the city and state of the home address.

B. Any information revealing the identity of an individual receiving mental health services and/or under evaluation for substance-use disorder services. *See* DCCA Order No. M-274-21, May 2, 2023, para. No. 2.

C. All pre-sentence reports (PSRs); these reports were filed as separate documents and not attached to the brief as an appendix.

D. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

E. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

F. Any other information required by law to be kept confidential or protected from public disclosure.

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G. I certify that I am incarcerated, I am not represented by an attorney (also called being "pro se"), and I am not able to redact this brief. This form will be attached to the original filing as record of this notice and the filing will be unavailable for viewing through online public access.

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23-CF-514
Case Number(s)

Katherine M. Kelly
Name

3/20/2024
Date

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Email Address

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have caused a copy of the foregoing Brief for Appellee to be served by electronic means, through the Court's EFS system, upon counsel for appellant, Sicilia C. Englert, Esq., on this 20th day of March, 2024.

_____/s/_____
KATHERINE M. KELLY
Assistant United States Attorney