Appeal No. 23-CF-828

Regular Calendar: June 3, 2025

DISTRICT OF COLUMBIA COURT OF APPEALS

ANDRE MILLER,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

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

REPLY BRIEF FOR APPELLANT

JACLYN S. FRANKFURT

ALICE WANG

SHILPA S. SATOSKAR

*VICTORIA HALL-PALERM

PUBLIC DEFENDER SERVICE
633 3rd Street, NW
Washington, DC 20001
Telephone: (202) 628-1200

*Counsel for Oral Argument

CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

ARGUMENT

I. SUPPRESSION WAS REQUIRED BECAUSE THE GOVERNMENT FAILED TO MEET THE PLAIN VIEW EXCEPTION TO THE WARRANT REQUIREMENT.

The government bore the burden to justify its warrantless seizure of the magazine from Mr. Miller's car by demonstrating that the magazine's "incriminating character [was] immediately apparent" to Officer Strong. *Porter v. United States*, 37 A.3d 251, 256 (D.C. 2012). Because the government did not prove Officer Strong had probable cause to believe that the magazine had an unlawful capacity, it failed to establish the requirements of the plain view exception. And the government's new argument—that the magazine was evidence of a firearm—lacks merit.

A. The Court Should Not Indulge the Government's Untimely Alternative Argument for Affirmance.

This Court should not entertain the government's belated claim (at 25) that Mr. Miller relinquished his Fourth Amendment interest in his car and its contents by "abandoning" the car. The trial court expressly declined to consider this claim below because it was raised after the evidentiary hearing had ended, without any illumination of the facts relevant to abandonment. This Court should similarly reject the government's attempt to resurrect this fact-bound argument, which was raised too late for Mr. Miller to address it at the suppression hearing, as reaching it here would create procedural unfairness and require the Court to sit as factfinder.

The government first made the claim that Mr. Miller abandoned the car in its closing arguments at the suppression hearing. 5/11/23 Tr. 139. The trial court agreed with Mr. Miller's attorney that because the government had never "flagged" the

issue, defense counsel was "not . . . able to develop that in the record because they weren't anticipating that that was a justification" for the seizure. 5/12/23 Tr. 19–20. The court noted that had the government raised the argument earlier, defense counsel "would have asked a lot more questions," for example, "about the position that the car was in," but that, due to the government's failure, the facts relevant to abandonment were "just not in the record." *Id.* at 20. Thus, the court declined to address the government's belated argument, concluding that "it would not be appropriate" to rule on abandonment "because that would have been something . . . that the defense may well have . . . elicited some additional evidence about." *Id.* at 35.

This Court should do the same. Although this Court may generally affirm a judgment on any valid ground, it does not affirm on grounds that were not "raised or considered in the trial court" if doing so would be "procedurally unfair." *Evans v. United States*, 122 A.3d 876, 883 (D.C. 2015). Further, "it is not [this Court's] function to decide issues of fact," and it is "particularly inappropriate for this court to decide an essentially factual question raised for the first time on appeal, because such an approach would deprive [the appellant] of the opportunity to develop a record on that factual issue." *Id.* at 884.

Abandonment is just such an "essentially factual question," whose "primary concern is the individual's intent." *Spriggs v. United States*, 618 A.2d 701, 703 n.3 (D.C. 1992). The government must prove abandonment by "clear, unequivocal, and decisive evidence." *United States v. Boswell*, 347 A.2d 270, 275 (D.C. 1975). The intent to abandon one's property must be shown by reference to "[a]ll relevant circumstances existing at the time of the alleged abandonment," including words,

acts, and context. *Id.* at 274. Addressing this fact-bound question for the first time on appeal would result in procedural unfairness. As the trial court recognized, there were many relevant facts that Mr. Miller was unable to elicit or contest due to the government's failure to timely raise the issue.[1] A decision by this Court on this incomplete record would "deprive [Mr. Miller] of the opportunity to develop a record on" the key facts—the quintessential procedural unfairness. *Evans*, 122 A.3d at 884. Further, the lack of factual findings below makes this an improper issue to reach on appeal. This court sits as a "court of review, not of first view," *Johnson v. United States*, 302 A.3d 499, 500 (D.C. 2023), and "it is not [this Court's] function to decide issues of fact," *Evans*, 122 A.3d at 884. It is particularly inappropriate for this Court to embark, in the first instance, on "a factual inquiry," *Spriggs*, 618 A.2d at 703, when it lacks a firm factual record due to the government's failure to timely raise the issue below. This Court should not entertain this belated argument.

In any event, the new argument lacks merit. The government did not prove by clear, unequivocal evidence that the "relevant circumstances existing at the time of the alleged abandonment" showed Mr. Miller "relinquished his interest in the" car and its contents. *Spriggs*, 618 A.2d at 703 n.3. When he first left the car (the time of the alleged abandonment), he was walking, not running. 5/11/23 Tr. 23, 25.[2] He deliberately closed the driver's side door before walking away; all the doors were

[1] For example, the precise state of the car, whether Mr. Miller had other possessions in the car, whether he rolled up his window before exiting, and whether he secreted the keys in the rear of the car.

[2] He later began running after Officer Way ordered him to "freeze." *Id.* at 25–26.

closed; and the keys were taken out of the ignition and placed in the back seat. *Id.* at 28; 7/18/23 Tr. 175. These facts negate any inference that he intended to abandon the car and its contents.[3] None of the government's cases holds otherwise. It relies heavily on *United States v. Kyle*, 268 A.3d 1256, 1264 (D.C. 2022), to bolster its argument, but the facts of that case are far removed from the facts before this Court. There, the question was whether Mr. Kyle abandoned a backpack when he affirmatively threw it over a fence as he was running from police officers in hot pursuit. *Id.* And in *Spriggs*, the defendant discarded the key case, placing it on a public street. 618 A.2d at 703. But these cases, which deal with *discarding* an object of modest value, do not address what facts manifest an intent to relinquish ownership over (or, put another way, an intent to similarly *discard*) a car. This Court's cases have required some kind of affirmative disavowal of ownership, such as by affirmatively denying ownership of the car. *See Mills v. United States*, 708 A.2d 1003, 1008 (D.C. 1997); *compare id.*, *with Shreeves v. United States*, 395 A.2d 774, 777 (D.C. 1978) (defendant had not abandoned car, although it was left unattended for hours on someone else's property, miles from where defendant had last been seen). This Court's cases addressing cars have never suggested, let alone held, that merely exiting a car, closing the door, and walking away constitutes abandonment.

The government's reliance on inapposite cases from other jurisdictions (at 25–26) does not support its position. In those cases, there was more objective

[3] The windows, too, were closed, but the record is silent as to whether they were open or closed during Mr. Miller's interaction with the Strouds—one of the missing facts relevant to abandonment, which Mr. Miller was deprived of elucidating.

manifestation of intent to relinquish the property—either the car was totaled and blocking an intersection, rendering it unusable and in need of towing, *State v. Montiel-Devale*, 468 P.3d 995 (Or. Ct. App. 2020), or the key was in the ignition, a clear sign the driver left it for anyone to take, *State v. Anderson*, 548 N.W.2d 40 (S.D. 1996), *People v. Childs*, 589 N.E.2d 819 (Ill. App. Ct. 1992). Here, there were no such signs of discarding. The car was functional and not blocking the street; its doors and windows were closed; the engine was off and the keys were hidden in the back seat. This record did not establish abandonment by clear, unequivocal evidence.

B. The Magazine's Incriminating Nature Was Not Immediately Apparent.

In its answering brief, the government scarcely attempts to contend with Mr. Miller's argument (at 24–26) that the evidence failed to establish that Officer Strong was aware when he saw the magazine that it had an unlawful capacity. The government does not dispute that neither Officer Strong's testimony nor his body-worn footage showed that he perceived the gun's capacity. It argues only that, according to Officer Strong, the magazine appeared to be loaded, based on the shine of the bullets. But the officer's awareness that the magazine contained bullets did not suggest that he saw how many bullets there were. Nor could the court "infer" that Officer Strong knew the capacity because Government Exhibit 9 (a photo taken by police) depicted the magazine as he saw it that night. That photograph was taken with the door open, the overhead light on, and focused in on the magazine. It did not show how the magazine looked to Officer Strong when he shined his flashlight down through a closed door and window.

Perhaps aware of the weakness of its argument that the magazine was

"immediately apparent contraband" because it was "loaded with at least 15 bullets," 5/12/23 Tr. 21, the government now shifts focus to a new set of contentions: first, that Officer Strong had probable cause to believe that the magazine was unlawfully possessed, "regardless of [its] capacity" (at 29), and second, that the magazine's "evidentiary value" was immediately apparent because police were responding to a call for a man armed with a gun (at 30–31). Both of these arguments fail for the same fundamental reason: They rest on the fiction that *any* gun or magazine possession is per se unlawful. That is not the case. The Supreme Court has held the District of Columbia's restrictions on handgun registration and licensure by ordinary citizens are invalid under the Second Amendment, *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008); and the D.C. Circuit has enjoined the regulations restricting the ability of citizens to register handguns, *Wrenn v. District of Columbia*, 864 F.3d 650, 667 (D.C. Cir. 2017). Because it is not presumptively unlawful to possess or carry a handgun or ordinary ammunition, the mere sighting of a gun or magazine, without more, does not constitute probable cause to suspect criminal wrongdoing. *See generally* Miller Br. 22–24 (collecting cases).[4] Officer Strong lacked probable cause to believe the magazine was contraband unless he could determine that there was something specific about it (*i.e.*, its capacity) that made it so. The record contained no facts from which he could have made such a determination.

[4] The cases the government cites uniformly predate *Wrenn*, and largely predate even *Heller*. *See* U.S. Br. 29 (citing *Zanders v. United States*, 75 A.3d 244 (D.C. 2013), *Andrews v. United States*, 922 A.2d 449 (D.C. 2007), and *White v. United States*, 763 A.2d 715 (D.C. 2000)). These cases have little, if any, applicability in light of the sea change in enforcement of the District's gun regulations.

Nor did Officer Strong have any reason to believe that the magazine was unlawfully possessed. The government argues that the firearm's position in the car and Mr. Miller's flight supported probable cause to believe he unlawfully possessed the magazine, but these facts have little, if any, relevance. The government's brief does not even attempt to explain why the fact that the magazine was loose in the car, even if arguably in violation of traffic rules, showed Mr. Miller "did not lawfully possess" the magazine. (U.S. Br. 30.)[5] And Mr. Miller's flight is simply capable of too many reasonable explanations to be probative of guilt, given that Mr. Miller ran after the surrounding bystanders yelled at him, and Officer Way had begun giving Mr. Miller commands. *See Miles v. United States*, 181 A.3d 633, 641 (D.C. 2018).

Finally, the government asserts (at 30) that the officer had probable cause to believe the magazine had "evidentiary value" because officers were responding to reports of a man with a gun. But this fails for the same reason. Officer Way did not testify that he was responding to a call of threats or assault, but merely a report that a man had a firearm, which is not a report of criminal activity in light of *Heller* and *Wrenn*. [6] Suppression was required because Officer Strong lacked probable cause to believe that the magazine was contraband or evidence of other criminality.

---

[5] To the extent the government suggests that this was a separate crime, the statute governs transportation of *firearms* and their accompanying ammunition—not magazines alone. *See* D.C. Code § 22-4504.02(b) ("If the transportation of the *firearm* is by vehicle . . . neither the firearm nor any ammunition being transported shall be readily accessible" (emphasis added)).

[6] Moreover, it was not clear that Officer Strong, who arrived later and testified that was responding only to "a call for, I think, assistance," 7/18/23 Tr. 161, would have had *any* reason to believe that the magazine was connected to a gun.

II. THE GOVERNMENT FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT MR. MILLER KNEW THE MAGAZINE'S CAPACITY.

The government concedes that to convict Mr. Miller of PLCFD, it was required to prove beyond a reasonable doubt "not only that [he] possessed a large capacity ammunition feeding device, D.C. Code § 7-2506.01(b), but also that he knew the device could hold more than 10 rounds of ammunition." U.S. Br. 34. As Mr. Miller explained in his initial brief (at 31–34), the government failed to prove the requisite knowledge. This requires reversal.

A. The Evidence Was Insufficient for Conviction.

The government's arguments in support of the conviction are uniformly meritless. First, the government's primary argument—that evidence that Mr. Miller "constructively possessed the magazine *in turn* support[ed] his knowledge of its characteristics," U.S. Br. 35 (emphasis added)—conflates the elements of constructive possession with the knowledge element of PLCFD, ignoring this Court's admonition that the "scienter requirement should apply to *each* of the statutory elements that criminalize otherwise innocent conduct." *Perez Hernandez v. United States*, 286 A.3d 990, 1001 (D.C. 2022) (en banc). Evidence that Mr. Miller constructively possessed the magazine, including that he knew that it was in the car, did not in prove he knew it could hold more than ten rounds of ammunition.

Bruce itself underscores the flaws in the government's logic. There, this Court affirmed Bruce's convictions for UF and UA based on evidence that he constructively possessed a pistol, equipped with a fully loaded 12-round magazine, that was located in the room he had just exited, was surrounded by his other possessions, and had his DNA on it. *Bruce v. United States*, 305 A.3d 381, 393–95 (D.C. 2023).

Despite concluding that the jury could reasonably infer that Bruce knew the gun was loaded, this Court held that the government had presented insufficient evidence to prove he knew *how many bullets* the gun was loaded with. *See id.* at 397–99. It reversed the PLCFD conviction, noting that a "magazine's capacity [is] a characteristic that is not always readily visible." *Id.* at 397. *Bruce* therefore refutes the government's contention that evidence showing constructive possession of a loaded weapon—evidence that the defendant "knew of [its] location and had the ability and intent to exercise dominion and control over" it, *Dorsey v. United States*, 154 A.3d 106, 113 (D.C. 2017)—is tantamount to evidence of specific "characteristic[s]," including its capacity. And as the Massachusetts courts have recognized, there is a vast difference between visibly extended magazines of 30 or more rounds, *e.g.*, *Commonwealth v. Cassidy*, 96 N.E.3d 691, 700 (Mass. 2018), and magazines of 12, 15, or 17 rounds, that appear the same size as standard magazines, *e.g.*, *Commonwealth v. Resende*, 113 N.E.3d 347, 354 (Mass. App. Ct. 2018).

The government's attempts (at 38–39) to distinguish *Bruce* and the Massachusetts cases are unavailing. The government stresses that in several cases, including *Bruce*, the magazine was inserted into the firearm, unlike the loose magazine here. *But see Commonwealth v. Cintron*, 119 N.E.3d 357, 2018 WL 6816193, at *2 (Mass. Ct. App. 2018).[7] But this is a distinction without a difference. Although the magazine

[7] The government attempts to distinguish *Cintron* by stressing that the magazine was found covered in a box. But the *Cintron* court did not conclude that the owner did not constructively possess the magazine—and so know it existed—it concluded that despite constructively possessing the magazine, there was nothing about its small size that suggested that the owner would know its unlawful capacity. *Id.* at *2.

in *Bruce* was not visible because it was inserted into the gun, the Court did not conclude that Mr. Bruce did not know it was there because it was hidden from view. To the contrary, the Court concluded that there was sufficient evidence Bruce constructively possessed the magazine inside the gun (and thus knew it was there), *and* knew it was loaded, but still concluded that the jury required more evidence to show that he knew the magazine's capacity. 305 A.3d at 397. The ultimate question was whether the capacity was "readily visible," *id.*—or, as other cases have put it, whether it was "obviously" large, such that the mere fact of possession would allow the factfinder to infer beyond a reasonable doubt that the owner knew it could hold more than ten rounds, *Resende*, 113 N.E.3d at 354. The 17-round magazine here, like the magazines discussed in *Resende*, would not have protruded past the grip of the firearm had it been inserted. And no testimony from *any* of the witnesses suggested that the 17-round magazine was "obviously" large.

Contrary to the government's assertion, there was no other evidence that the magazine's capacity was "readily visible" to Mr. Miller. *Bruce*, 305 A.3d at 397. The government repeatedly asserts (34–35) that because Mr. Miller constructively possessed the magazine, and because it was found in his car next to the driver's seat, he knew its capacity. But nothing about how Officer Strong found the magazine, nor the magazine's location, sheds any light on how closely Mr. Miller observed the magazine, let alone whether he was able to tell that it had a capacity of more than ten rounds.[8] The government relies entirely on Officer Strong's testimony that he

[8] The government also invokes two wholly inapposite constructive possession cases to bolster its claim. *See* U.S. Br. 35–36 (citing *United States v. Alexander*, 331 F.3d

saw the magazine wedged between the driver's seat and door when he stood directly above the magazine and shined his flashlight straight down at the magazine, 7/18/23 Tr. 161–63, and a photograph of the magazine taken with the door open and overhead lights on. (U.S. Br. 36–37.) But testimony from a seasoned officer about what *he* could see and infer with the benefit of his flashlight and from his vantage point is not evidence of what *Mr. Miller* could see and infer from his viewpoint. Instead, the jury would need to make an unstable daisy-chain of inferences: (1) The lighting in the car and surrounding area permitted Mr. Miller to see the magazine in detail; (2) the angle from which he could see the magazine permitted him to see the holes specifically;[9] (3) he looked closely at the magazine; and (4) he knew that the number of holes in the magazine corresponded to its capacity.

The government failed to offer *any* evidence at trial to substantiate any one of those predicates, let alone the ultimate inference of knowledge of the magazine's capacity. No witness testified that the magazine or the number of holes in it would have been visible to a person sitting in the driver's seat, as Mr. Miller was. No witness testified that Mr. Miller had spent time in the car with the overhead light on,

---

116 (D.C. Cir. 2003), and *West v. United States*, 100 A.3d 1076, 1090 (D.C. 2014)). Neither case involved charges requiring proof that the defendant knew any *specific characteristics* of the items he was charged with possessing.

[9] The government's brief reveals the importance of the particular angle from which a viewer saw the magazine. The government asserts that Government Exhibit 9 and Suppression Exhibit 3 are the same. U.S. Br. 31. This is inaccurate: They were taken from slightly different angles. In Suppression Exhibit 3, nearly all of the bullet holes are visible, while in Government Exhibit 9—the exhibit presented to the jury—which appears to have been taken from farther back, several holes are obscured.

or that they saw him looking down in the direction of the magazine. And no evidence suggested that Mr. Miller was familiar enough with guns to know what the holes on the magazine meant, even if he could see them. Instead, the jury could infer his knowledge only by "enter[ing] the forbidden territory of conjecture and speculation." *Rivas v. United States*, 783 A.2d 125, 134 (D.C. 2001).

Finally, the gun and 40-round magazine found under the SUV did not support an inference that Mr. Miller knew that the magazine *in the car* was an LCM. (U.S. Br. 37.) There was no credible testimony that Mr. Miller handled the gun, no evidence that he was familiar with the characteristics of the gun or magazine under the SUV, and no evidence that the two magazines were similar in size or appearance, or related in any way other than both fitting a Glock firearm.[10] Indeed, the 40-round magazine's size only underscores how *different* the two magazines were: Multiple witnesses referred to the notable size of the LCM under the SUV, while no one remarked on the size of the magazine in the car.[11] The much larger size of the magazine under the SUV suggests only that someone who saw both magazines would have perceived the much smaller magazine in the car as having a much smaller, perhaps lawful, capacity. *Compare, e.g.*, *Cassidy*, 96 N.E.3d at 701 (30-round magazine was "obviously large"), *with Resende*, 113 N.E.3d at 354 (14-round magazine was not).

---

[10] It also bears noting that the jury acquitted Mr. Miller of all charges relating to that firearm, demonstrating the weakness of the evidence connecting him to the gun.

[11] Crime scene analyst Edward Shymansky testified he could tell that the magazine in the gun under the SUV "protrude[d] past the grip of the firearm." 7/17/23 Tr. 148, 161. And Officer Way described it as "extremely large" and "protrud[ing] out of the bottom of the gun." 7/18/23 Tr. 13, 60.

B. Acquittal Is the Appropriate Remedy.

There is no support for the government's novel assertion that, even if the evidence was insufficient to prove PLCFD, the government should be permitted a second chance to prove Mr. Miller's guilt at a retrial. "[W]hen a defendant obtains a reversal of his or her conviction on the basis of evidentiary sufficiency, the Double Jeopardy Clause bars a retrial." *Kelly v. United States*, 639 A.2d 86, 88 (D.C. 1994). This Court has always treated cases (like this one) that challenge the sufficiency of the government's evidence on an essential element of the crime, even if that element had not been construed by this Court at the time of trial, as presenting standard sufficiency challenges. And the remedy for a conviction without sufficient proof of an element of the crime is acquittal. *See, e.g.*, *In re D.R.*, 96 A.3d 45, 52 (D.C. 2014).

This Court's decisions in *D.R.* and *Bruce* itself are paradigmatic examples of this settled law. In *D.R.*, this Court construed for the first time the language "their person" in the statute prohibiting carrying a dangerous weapon, holding that it required the government to prove "that a defendant would have been capable of actually concealing her weapon on or about her person . . . [as] an element of the offense." *Id.* at 50–51. This Court then assessed the sufficiency of the evidence presented on that element and concluded that the "adjudication was not supported by sufficient evidence." *Id.* at 51. Accordingly, this Court reversed the conviction, noting explicitly that "[t]he double jeopardy clause bars a new trial of this offense" after a finding of insufficient evidence. *Id.* at 51–52 (citing *Kelly*, 639 A.2d at 88).

This Court also acquitted in *Bruce* itself, contrary to the government's odd assertion (at 39) that the "proper remedy" in cases such as *Bruce* is "retrial rather

than acquittal." In *Bruce,* this Court addressed for the first time the *mens rea* requirement for PLCFD and, following binding rules of statutory construction set forth in *Carrell v. United States*, 165 A.3d 314 (D.C. 2017) (en banc), and *Perez Hernandez*, held that the government was required to prove the defendant knew the capacity of the magazine. Even though this was the first time the Court articulated the *mens rea* requirement in this particular statute, it "reverse[d] appellant Bruce's conviction of this charge" outright for insufficient evidence of knowledge. 305 A.3d at 399.[12]

In the face of this well-established and constitutionally required remedy for successful sufficiency challenges, the government's reliance (at 40–41) on a footnote from *Osborne v. District of Columbia*, 169 A.3d 876, 887 n.12 (D.C. 2017), is misplaced. Unlike *D.R.*, *Bruce*, or this case, *Osborne* announced a "new rule[] for the conduct of criminal prosecutions." *Id.* at 887 (quoting *Boone v. United States*, 769 A.2d 811, 824 (D.C. 2001)). Mr. Osborne did not contest binding precedent holding that a conviction for operating a motor vehicle after the driver's license had been revoked required no proof of *mens rea*. *Id.* at 881 & n.5. Instead, he argued that because he "fairly raise[d] the issue" that he "did not receive notice of revocation," the government was required to prove that "sufficient notice of revocation was given," as required by D.C. regulations. *Id.* at 881, 887. This Court agreed, announcing its "new rule" that "when a defendant claims that he or she did not receive notice of revocation and the evidence fairly raises the issue, the District bears the burden of proving beyond a reasonable doubt that sufficient notice of revocation

[12] On remand, the court entered a new order omitting the PLCFD count. *See* Amended Judgment & Commitment Order, 2020 CF2 699 (Feb. 12, 2024).

was given." *Id.* at 886–87. In light of this "post-trial change in the law," the Court remanded for a new trial, explaining that any failure to prove notice of revocation at trial was "caused by the subsequent change in the law" concerning the government's burden of proof. *Id.* at 887 n.12 (quoting *United States v. Ellyson*, 326 F.3d 522, 533 (4th Cir. 2003)); *see also United States v. Weems*, 49 F.3d 528, 530–31 (9th Cir. 1995) (quoted in *Osborne*) (allowing retrial where prior "clear rulings by this court" gave the government "no reason to introduce such evidence," but intervening Supreme Court ruling changed circuit law).

Osborne does not support the government's claim that, simply because *Bruce* was decided after Mr. Miller's trial, the remedy for its failure to prove his *mens rea* is retrial. Whereas the *Osborne* Court announced a "new rule[] for the conduct of criminal prosecutions" that "altered the elements of proof," 169 A.3d at 887 & n.12, the *Bruce* Court's articulation of the mens rea element of PLCFD was by no means a "new rule" or an "alteration" of proof. To the contrary, *Bruce* construed the PLCFD statute for the first time and held *based on existing precedent* that "the government was required to prove" that Bruce "knew that the magazine could hold more than 10 rounds of ammunition," 305 A.3d at 399. This Court explained that its holding was dictated by the "definitive rule of construction that [it was] required to follow" from *Carrell*, which "require[d] a clear statement from the legislature before we will conclude that a defendant may be found guilty of a crime without regard to his subjective state of mind," *Bruce*, 305 A.3d at 398 (quoting *Carrell*, 165 A.3d at 321); *see also id.* at 398 (quoting *Perez Hernandez*, 286 A.3d at 1001 (the presumption of a scienter requirement "should apply to each of the statutory elements that

criminalize otherwise innocent conduct")). Because the *Bruce* Court did not break with prior law, as the government wrongly claims, it reversed outright for insufficient evidence. As in *Bruce*, the government here had every reason to believe at the time of trial, under *Perez Hernandez* and *Carrell*, that it needed to prove *mens rea*, and outright reversal is also the proper remedy here.[13]

III. THE ERRONEOUS JURY INSTRUCTIONS REQUIRE REVERSAL.

The government agrees that the trial court's instructions to the jury on the PLCFD count were plainly erroneous. (U.S. Br. 42.) It nonetheless maintains that this plain error, which wholly omitted a scienter requirement, does not require reversal because Mr. Miller did not satisfy the third and fourth prongs of plain-error review. This argument cannot be squared with the record or this Court's precedent.

Mr. Miller has shown substantial prejudice under the third prong of the plain error analysis, because the record shows that there was "a reasonable probability that but for the error the factfinder would have had a reasonable doubt respecting guilt." *Malloy v. United States*, 186 A.3d 802, 815–16 (D.C. 2018); *see* Miller Br. 36–38.

[13] The government's retrial argument seems to be another attempt to revive its unsuccessful argument—raised and rejected in *Bruce*—that Mr. Miller's claim is not properly cognizable as a sufficiency claim. *Compare* Brief for Appellee, *Bruce*, 305 A.3d 381 (No. 22-CF-463), 2023 WL 3303670, at *20–21 (D.C. Mar. 3, 2023) (arguing that "a sufficiency claim is a non sequitur," citing *United States v. Reynoso*, 38 F.4th 1083, 1090 (D.C. Cir. 2022)), *with* U.S. Br. 41 & n.25. This Court has repeatedly made clear that sufficiency challenges may properly be raised, even with respect to elements that the law did not yet require the government to prove. *See, e.g.*, *Carrell*, 165 A.3d at 321. Rather, these challenges are "simply a challenge to the sufficiency of the evidence to sustain [the] conviction," *Newby v. United States*, 797 A.2d 1233, 1237 (D.C. 2002), for which the remedy is an acquittal, *In re D.R.*, 96 A.3d at 51–52.

The lion's share of the government's argument is devoted to rehashing the same evidence it relies on to argue that the evidence was sufficient to show knowledge of the magazine's capacity. The government's argument is even weaker here because even if the evidence were sufficient (it is not), that is not the relevant standard. On the third prong of plain-error review, this Court asks "not whether the evidence was sufficient but whether there is a reasonable probability that the jury's verdict would have been swayed by the erroneous instruction." *Malloy*, 186 A.3d at 819. The government's scant evidence of knowledge, which consisted of speculative inferences unsupported by the record, was "far from overwhelming and uncontroverted," as is required to excuse the erroneous omission of the scienter requirement. *Id.*; *see supra* pp. 8–12.[14]

The government's attempts to distinguish *Malloy* fall flat. The government claims that *Malloy* does not support reversal because, in that case, the government's evidence was weaker than here and the jury's difficulty in reaching a verdict was greater than here. (U.S. Br. 44–45.) Neither is true. First, in *Malloy*, the Court concluded that although the testimony of three eyewitnesses to the interactions between Mr. Malloy and the complaining witness constituted sufficient evidence that the threats were made with the requisite intent, that evidence was insufficiently "overwhelming" because the witnesses were impeached and the jury *could* have

[14] The government's assertion (at 44) that by finding that Mr. Miller constructively possessed the magazine, "the jury necessarily found that the magazine could hold more than 10 rounds of ammunition," is correct but beside the point. There was no evidence—let alone overwhelming evidence—to support an inference beyond a reasonable doubt that Mr. Miller *knew* the magazine could hold more than 10 rounds.

discredited all of them. 186 A.3d at 819. Here, in contrast, the government hangs its hat not on *any* direct evidence, but rather on inferences that it claims could have been drawn from *one* officer's testimony that he saw the magazine by flashlight and from a close-up photograph taken of the magazine—neither of which illustrated what *Mr. Miller* could see, or what *Mr. Miller* knew. This evidence was far weaker than the direct evidence in *Malloy*. Second, the jury here evinced just as much difficulty in convicting as the jury in *Malloy*, which also delivered a partial acquittal. While the jury did not specifically identify the PLCFD charge in its notes, it sent two deadlock notes saying that it could not reach a verdict on *any* count. 7/21/23 Tr. 2, 9. And the fact that the jury was able to return a verdict on the PLCFD charge shortly after the second note does not change the fact that the jury deliberated for roughly nine hours (for a case with just eight hours of evidence) before returning that verdict. *Id.* at 10. All this shows that the jury struggled "reconciling the evidence with guilt." *Malloy*, 186 A.3d at 820.

The government's argument (at 46) that the "most reasonable inference to be drawn" from the jury's long deliberations and repeated notes is that jurors struggled *only* with the charges related to the gun, of which they acquitted Mr. Miller, lacks support in law or fact. The question is not which inference was "most reasonable," but whether there was a "reasonable probability" of a different outcome where the jury evinced "difficulty reconciling the evidence with guilt." *Malloy*, 186 A.3d at 820. Nor is there any support in the record for the government's contention that the jury spent nine hours grappling solely—or even largely—with the gun charges, as opposed to the PLCFD count. Instead, the lengthy deliberations demonstrated only

that jurors were thoroughly weighing the evidence and struggling to reach a conclusion as to some, several, or all of the counts. Had the jury been properly instructed, its obviously careful deliberations might have led to acquittal on the PLCFD count, too. Mr. Miller has satisfied the third prong of the plain error test.

The error also seriously undermined the fairness and integrity of the proceedings under prong four. The government gestures at the competence of Mr. Miller's attorney and his partial acquittal, but they are no response. (U.S. Br. 46.) This Court has repeatedly held that failure to instruct the jury on an essential element of the offense is an error of "constitutional dimension" that, if prejudicial to the outcome of the trial, "necessarily affects the integrity of [the] proceeding" and warrants correction to prevent the wrongful conviction of an innocent defendant. *Malloy*, 186 A.3d at 821–22; *see also, e.g.*, *Vaughn v. United States*, 93 A.3d 1237, 1270 (D.C. 2014). Reversal is required.

IV. THE PLCFD STATUTE IS UNCONSTITUTIONAL UNDER *BRUEN*.

Finally, Mr. Miller's conviction for PLCFD must be reversed because the statute violates the Second Amendment. The statute plainly regulates arms-bearing conduct, and the government has failed to point to a relevant historical tradition justifying the ban.[15]

A. Mr. Miller Properly Raises Both Facial and As-Applied Challenges.

By challenging the legality of his conviction, Mr. Miller has raised both a

[15] On December 12, 2024, the Court heard arguments on a facial challenge to the validity of the same statute, D.C. Code § 7-2506.01(b), in *Benson v. United States*, No. 23-CF-514, which is still pending.

facial and an as-applied challenge to the PLCFD statute.[16] Before turning to the merits, Mr. Miller addresses the United States' and the District's threshold objections to his challenge.

The District asserts (at 16) that Mr. Miller's facial challenge fails because there is *some* magazine capacity greater than ten—whether 30, 50, or 100 rounds—that could lawfully be banned, and therefore that Mr. Miller cannot prove that the statute is unlawful in all its applications. This argument misapprehends precedent addressing how facial challenges are analyzed. All parties agree that a facial challenge to the statute requires that the statute be unconstitutional "in every case." (D.C. Br. 15.) But in a challenge, such as this one, to the overbreadth of the statute, the District cannot defend the text of *this* statute by arguing that it covers some conduct that could have lawfully been regulated by *a better-drawn statute*. Rather, as this Court explained:

> We look only to whether the statute properly proscribes criminal conduct; [not] whether appellant's conduct *could have been* criminalized under a *hypothetical statute*. Thus, in a facial challenge, the claimed constitutional violation inheres in the terms of the statute, not its application. . . . Appellant must demonstrate that the terms of the statute, measured against the relevant constitutional doctrine, and independent of the constitutionality of particular applications, contain[] a constitutional infirmity that invalidates the statute in its entirety.

Conley v. United States, 79 A.3d 270, 277 (D.C. 2013) (emphases added).

[16] *See, e.g.*, *Citizens United v. FEC*, 558 U.S. 310, 330–31 (2010) (noting the overlap between facial and as-applied challenges where resolving either claim "implicates the facial validity" of the statute).

Conley's assessment of a facial challenge to the District's law criminalizing being present in a motor vehicle containing a firearm illuminates precisely the flaw in the District's approach. There, the government argued that the facial challenge failed because the law surely had *some* constitutional applications—for example, if applied to a person who intended to be in the car with a firearm. But this Court stressed that the question was not whether some other hypothetical statute that was more narrowly tailored might have survived; the Court had to look at the *actual* "terms of the statute" and "measure[]" those terms "against the relevant constitutional doctrine." *Id.* And this Court has elsewhere stressed that where a statute as written is unconstitutionally broad, "then the appellant has carried his burden of showing that every application of the statute is unconstitutional—even if a validly written statute could have reached the appellant's particular conduct." *Valdez v. United States*, 320 A.3d 339, 383 (D.C. 2024).[17] In other words, the statute necessarily has no valid applications. As applied here, then, the question whether the District could lawfully have written a "hypothetical statute" barring possession of magazines greater than 30 rounds is beside the point. *Conley*, 79 A.3d at 277. The only question is whether the statute the District *actually wrote*—banning "more than ten rounds"—passes muster under *Bruen*'s test. It does not, as explained below.

[17] The District quotes the oft-repeated language that the challenger must "establish that no set of circumstances exists under which the Act would be valid." D.C. Br. 15 (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)). But as the Supreme Court has explained, even leaving aside "the viability of *Salerno*'s dictum," this strict threshold is used in federal court as a type of third-party standing doctrine, but "state courts need not apply" this "prudential" limitation. *City of Chicago v. Morales*, 527 U.S. 41, 55 n.22 (1999).

Appellees also maintain that Mr. Miller's prior felony convictions, which preclude him from validly registering a firearm or ammunition, doom his as-applied challenge. (D.C. Br. 13–14; U.S. Br. 46–48.) But this, too, misapprehends the proper scope of an as-applied challenge.[18] The statute Mr. Miller was convicted under—the only statutory text that is relevant—prohibits *anyone*, regardless of criminal history, mental illness, or any other characteristic, from possessing magazines of greater than ten rounds. D.C. Code § 7-2506.01(b). The statute, therefore, criminalized his possession of a 17-round magazine regardless of his criminal history, and the jury was not required to find any facts about his criminal history to find that he violated it.[19] His status as a convicted felon was wholly irrelevant to the statute's application

---

[18] Although the United States pitches this as a standing argument, suggesting that Mr. Miller is not "eligible" to bring a Second Amendment challenge (U.S. Br. 47), it is properly understood an argument on the *merits* of his claim, not as a challenge to his standing. Mr. Miller undoubtedly has standing as a person who was convicted under this allegedly unconstitutional statute. *Plummer v. United States*, 983 A.2d 323, 342 (D.C. 2009) (Plummer "had standing to raise the Second Amendment issue as a defense to the criminal charges against him"). The government's two cases in support are inapposite, as both addressed challenges to the District's *registration* scheme—to which the appellants' prior felony convictions were directly relevant, because those convictions bar them from registering guns. *See Chew v. United States*, 314 A.3d 80 (D.C. 2024); *Ward v. United States*, 318 A.3d 520, 533 (D.C. 2024). Neither case held that the appellant lacked standing to raise constitutional challenges—rather, each addressed the challenger's eligibility to register his gun (relevant to the claim's merits), not his eligibility to raise the arguments. This makes sense, because the language the government quotes about being "disqualified" stems from *Heller* itself, and arose in the context of asking whether a person is qualified *to register their gun*, not raise a constitutional claim. *See* 554 U.S. at 635 ("Assuming that Heller is not disqualified from the exercise of Second Amendment rights, the District must permit him to register his handgun").

[19] It is no answer to say that, because Mr. Miller could not validly register any firearm

to him. Appellees' argument is simply another attempt to suggest that some *other* "validly written statute could have reached [his] conduct." *Valdez*, 320 A.3d at 383.

B. The Statute Fails *Bruen*'s Text and History Test.

Since Mr. Miller filed his opening brief, the Supreme Court has reaffirmed *Bruen*'s test for assessing the constitutionality of firearm regulations: "[W]hen the government regulates arms-bearing conduct," it "bears the burden to justify its regulation." *United States v. Rahimi*, 602 U.S. 680, 691 (2024). To do so, the government must "demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's unqualified command." *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 17 (2022)). Although the historical analogue need not be identical, the government must point to "laws imposing similar restrictions for similar reasons" in order to justify a firearm regulation. *Rahimi*, 602 U.S. at 692. Whether considered on its face (barring more than 10 rounds) or as applied to Mr. Miller (barring 17 rounds), the District's PLCFD statute fails.

i. *The Statute Regulates Arms-Bearing Conduct.*

First, the statute plainly "regulates arms-bearing conduct," *Rahimi*, 602 U.S. at 691, and so requires historical justification. Both the United States and the District argue otherwise, but these arguments cannot be squared with Supreme Court

---

or ammunition due to his conviction, he could not validly possess an LCM. The government *separately* convicted Mr. Miller of possessing unregistered ammunition under D.C. Code § 7-2506.01(a)(3). It cannot point to his prior felony conviction to justify convicting him of a wholly unrelated crime under section (b), too.

precedent or common sense.[20] Appellees first argue that large-capacity magazines ("LCMs") are not "arms," and thus that prohibiting their use does not even trigger Second Amendment scrutiny, because they are not "necessary for a firearm to function." (U.S. Br. 58–59; D.C. Br. 17–21.) But the Supreme Court has held that "arms" for Second Amendment purposes are "instruments that *facilitate* armed self-defense," *Bruen*, 597 U.S. at 28 (emphasis added), not instruments "necessary" for a gun to function. In any event, this argument proves too much. Appellees' would-be test would permit the government to ban *all* magazines, regardless of capacity, as no magazines are *necessary* for a firearm's operation because bullets can be loaded directly into the chamber. As courts have recognized, however, this implausibly strict requirement would too narrowly limit the Second Amendment right. Rather, magazines are properly considered "arms" because they "facilitate armed self-defense," *id.*, and therefore "make meaningful an individual's right to carry a handgun for self-defense," *Hanson v. District of Columbia*, 120 F.4th 223, 232 (D.C. 2024).[21]

---

[20] Appellees assert that at this step, Mr. Miller bears the burden of proof. Not so: Neither *Bruen* nor *Rahimi* ruled on this question, as the weapons at issue were conceded to be "arms." The *Bruen* Court's analogy to the First Amendment context, however, indicates that the government's "burden to justify its regulation," *Rahimi*, 602 U.S. at 691, includes showing that the conduct at issue falls *outside* the plain text, *see Bruen*, 597 U.S. at 24 (analogizing to First Amendment, where the government's "burden includes showing whether the expressive conduct falls outside of the category of protected speech"). In any event, the burden at this threshold step is not heavy—it asks only whether the law addresses weapons, implicating the Second Amendment at all.

[21] Separately, the District appears to argue (at 18) that because a magazine is "little more than a box-like shell," it is not itself something that would be used against

Nor is there any merit to Appellees' contention that the question is not whether "magazines" are arms, but whether "LCMs," in particular, are arms. (D.C. Br. 20.) This argument makes little sense: "Large-capacity" is simply a label that some states have placed on certain magazines, and reflects a different in *degree*, not in *kind*. All magazines are fundamentally the same objects, for purposes of the constitutional classification "arms," regardless whether they hold 5 bullets or 25. *See, e.g.*, *Hanson*, 120 F.4th at 232 (concluding that magazines are arms and drawing no distinction between magazines based on their capacity). Indeed, the government's argument would have the paradoxical result that the *more bullets* a magazine can hold, the *less likely* it can be deemed an "arm." To be sure, the difference in capacity of various magazines is relevant to the independent question of whether those magazines are in "common use for self-defense," *see infra* pp. 27–29, but is not a proper consideration in the threshold analysis of whether magazines are "arms" at all. The PLCFD statute plainly regulates arms-bearing conduct.

Finally, Appellees attempt to add an additional step to this threshold stage, insisting that Mr. Miller must separately show that the arms are in common use for self-defense. (D.C. Br. 21; U.S. Br. 64.) While some courts have analyzed this question as part of this initial step, others have not. *Compare, e.g.*, *Hanson*, 120 F.4th at 232 (first step), *with, e.g.*, *Bevis v. City of Naperville*, 85 F.4th 1175, 1998 (7th Cir. 2023) (second step). The better reading of the case law is that the "common use

---

another, and is better analogized to a "cartridge box[]" than to a part of the weapon. This argument ignores reality. The magazine is no passive container—it helps the gun function by actively *feeding* the bullets into the gun, thereby facilitating its use. *See Duncan v. Becerra*, 970 F.3d 1133, 1146 (9th Cir. 2020).

for self-defense inquiry" is not part of the first-step analysis, but rather arises as part of the historical tradition analysis in the second step. The *Bruen* Court discussed common use largely in its historical analysis, "f[inding] it 'fairly supported by the historical tradition of prohibiting the carrying of "dangerous and unusual weapons"' that the Second Amendment protects the possession and use of weapons that are 'in common use at the time.'" 597 U.S. at 21 (quoting *Heller*, 554 U.S. at 627).

This approach is the only one consistent with *Bruen*'s text-and-history framework. "[T]he step-one inquiry is based on whether the 'plain text' of the Second Amendment covers an individual's conduct. That text protects the right to keep and bear 'Arms'—'not Arms in common use at the time.'" *Bianchi v. Brown*, 111 F.4th 438, 501 (4th Cir. 2024) (Richardson, J., dissenting) (quoting *Bevis*, 85 F.4th at 1209). Weapons can be uncommon and still be "[w]eapons of offence." *Heller*, 554 U.S. at 581. But the government will have little trouble *at the historical step* in demonstrating a historical justification for regulating them if they are truly dangerous and unusual. *See Bruen*, 597 U.S. at 47. The common use limitation is therefore properly considered part of the historical analysis. And for the reasons discussed below, magazines of greater than ten rounds are doubtless in common use for self-defense.

ii. *The Government Has Not Identified a Relevant Historical Tradition.*

Because the PLCFD statute "regulates arms-bearing conduct," the government "bears the burden to justify its regulation." *Rahimi*, 602 U.S. at 691. To carry that burden, it must identify a "proper historical analogue" for its prohibition on magazines greater than ten rounds, *id.* at 699, that, while not required to be a

historical twin, must be "relevantly similar" in both "how and why" it burdens the Second Amendment right, *Bruen*, 597 U.S. at 29. Because Appellees have failed to identify any "relevantly similar" historical tradition, the statute is unconstitutional.

Appellees begin by pointing to the tradition of limiting "dangerous and unusual" weapons. (D.C. Br. 34; U.S. Br. 72.) [22] For the reasons explained in Mr. Miller's opening brief (at 45–47), however, LCMs are wholly unlike the bowie knives, trap guns, or sword-canes that were banned in the founding era, because they are not *both* dangerous *and* unusual. *Caetano*, 577 U.S. at 417 (Alito, J., concurring).[23] To the contrary, magazines capable of holding more than ten rounds are ubiquitous—a fact Appellees cannot and do not contest. (*See* Miller Br. 42–44.) Appellees have no serious response to the fact that over 200 million LCMs are in circulation, including as standard equipment in the majority of the most popular handguns.[24] This fact alone dooms any attempt to ban LCMs: "It is enough" that "[w]hatever the reason," LCMs "are the most popular" style of magazine "chosen

---

[22] The District's argument (at 34) that "dangerous and unusual" means "unusually dangerous," should be rejected out of hand. "A weapon may not be banned unless it is *both* dangerous *and* unusual." *Caetano v. Massachusetts*, 577 U.S. 411, 417 (2016) (Alito, J., concurring) (emphasis in original).

[23] *Hanson v. District of Columbia*, on which Appellees heavily rely, is not to the contrary: There, the D.C. Circuit focused entirely on weapons of what it dubbed "unprecedented lethality," without in any way analyzing those weapons' societal prevalence. 120 F.4th at 237. This failure renders *Hanson*'s analysis of the purported historical analogues unpersuasive, as its analysis failed to grapple with half of the "dangerous and unusual" test and runs afoul of *Bruen* and *Caetano*.

[24] Nat'l Shooting Sports Found., *Detachable Magazine Report 1990–2021* (2024), https://nssfresearch.s3.amazonaws.com/Detachable-Magazine-NSSFReport.pdf.

by Americans for self-defense in the home, and a complete prohibition of their use is invalid." *Heller*, 554 U.S. at 629.

Because Appellees cannot dispute the sheer volume of LCMs in national use, they seek to graft on a number of additional requirements that are found nowhere in the Supreme Court's precedents—namely, that more than ten bullets *actually be fired* for self-defense, and that LCMs be *more useful* for self-defense than for other purposes. First, the argument that LCMs must be "actually used for self-defense" has no support in the case law, which is why Appellees cite no authority for such a test. (D.C. Br. 21; U.S. Br. 67.) The law on "common use" instead focuses on whether the weapon in question is "typically *possessed* by law-abiding citizens for lawful purposes." *Heller*, 554 U.S. at 625 (emphasis added). In neither *Heller* nor *Bruen* did the Court address how often the possessors of these firearms actually discharged, or even brandished, their weapons.[25] The mere *possession* of an instrument with which a person could defend herself sufficed to satisfy the judicial inquiry. And this makes sense: One need not actually fire eleven rounds (or even one round) to have "used" a gun equipped with an LCM in self-defense. Merely brandishing it, or communicating to attackers that one could fire if need be, may be a method of self-defense or means of deterring attacks in the first place. *See Bruen*, 597 U.S. at 32 (the right to bear arms encompasses "the purpose . . . of being armed and ready'" (quoting *Heller*, 554 U.S. at 584)); *see also* David B. Kopel, *The History*

[25] *See, e.g.*, *Heller*, 554 U.S. at 629 ("It is enough . . . that the American people have considered the handgun to be the quintessential self-defense weapon."); *Caetano*, 577 U.S. at 420 (2016) (Alito, J., concurring) (finding it sufficient that "[h]undreds of thousands of Tasers and stun guns have been sold to private citizens").

of Firearm Magazine Prohibitions, 78 Alb. L. Rev. 849, 851-52 (2015) [hereinafter Kopel, *History*]. And the District's suggestion (at 29) that it may make judgments for its citizens about how many bullets are really "needed" for self-defense—in the face of overwhelming evidence that consumers *want* more than ten rounds—is precisely the kind of decision *Bruen* took "out of the hands of government." 597 U.S. at 23.

Second, Appellees insist that because LCMs are used by police officers, members of the military, and criminals, they are not *also* in common use for self-defense. This, too, is incorrect. *Heller* made clear that the fact that the handgun was "the overwhelmingly favorite weapon of armed criminals," 554 U.S. at 682 (Breyer, J., dissenting), was irrelevant in the face of evidence that "the American people have considered the handgun to be the quintessential self-defense weapon," *id.* at 629 (majority opinion). And in discussing "weapons that are most useful in military service," the *Heller* Court did not conclude that weapons used by the military were per se unprotected by the Second Amendment—rather, the Court said that the government could regulate "sophisticated arms that are highly unusual in society at large." *Id.* at 627. Appellees cannot escape the undisputed fact that LCMs are commonplace, which dooms the government's attempt to ban them outright.

LCMs' sheer ubiquity in society also renders Appellees' numerous purported historical analogues unpersuasive. The government has offered no evidence that bowie knives or trap guns were anywhere near commonplace among law-abiding citizens in the 1800s. Moreover, most of the bowie knife regulations either prohibited only the concealed carry of such knives or enhanced punishments for crimes

committed with them, but did not ban their possession altogether.[26] The slender history of prohibiting "the concealed carrying of a subset of dangerous" weapons (D.C. Br. 35), provides no support for an outright *ban* on the possession of LCMs. These laws uniformly differ from the PLCFD statute, either in how they operated (limiting a method of use) or what they regulated (dangerous, unusual weapons possessed only by those on the fringes of society). These much narrower laws are not "relevantly similar" in *how* or *why* they burden the right. *Bruen*, 597 U.S. at 29.

Neither are the gunpowder storage regulations. These regulations instructed owners on how to *store* their gunpowder (in seven-pound tins); they did not affect how much gunpowder an owner could load into his gun or could acquire. (D.C. Br. 36.) And they were motivated by concerns of *fire safety*, not misuse of firearms, as the District concedes. (D.C. Br. 37 ("[T]he laws protected the public by quelling the risk of catastrophic fire and explosion . . . .").) This is not "relevantly similar" in "how [or] why" it burdens the Second Amendment right. *Bruen*, 597 U.S. at 29; *see also Hanson*, 120 F.4th at 235 (dubbing this analogy "silly").

The District attempts (at 40–42) to equate LCMs with machine guns, arguing that a historical tradition of banning "fully automatic weapons" justifies the ban on LCMs. But this analogy overreaches. First, the District points to just seven states with bans beginning in the late 1920s, hardly a historical tradition. "[P]ost-ratification adoption . . . of laws that are *inconsistent* with the original meaning of the constitutional text obviously cannot overcome or alter that text." *Bruen*, 597 U.S.

[26] *See* David Kopel, *Bowie Knife Statutes 1837–1899*, Volokh Conspiracy (Nov. 20, 2022), https://reason.com/volokh/2022/11/20/bowie-knife-statutes-1837-1899.

at 36 (quoting *District of Columbia v. Heller* (*Heller II*), 670 F.3d 1244, 1274 n.6 (D.C. Cir. 2011) (Kavanaugh, J., dissenting)). These statutes are simply "a few late-in-time outliers." *Id.* at 70. Second, all of these laws were soon either repealed or replaced with laws that restricted *only* fully automatic firearms (which never permeated society to the same extent as LCMs). *See* Kopel, *History*, at 864–65 & nn.131–33. By contrast, no state banned LCMs until the end of the 20th century, and to date 36 states (the vast majority) still have no restriction on magazine capacity. And finally, the District's argument that these bans prove that LCMs have "always been" viewed as unusual falls flat. Whatever society in the 1920s thought about fully automated weapons, it is not evidence of what society *today* thinks about LCMs. *See Bruen*, 597 U.S. at 47 ("Whatever the likelihood that handguns were considered 'dangerous and unusual' during the colonial period, they are indisputably in 'common use' for self-defense today."). With over 200 million LCMs in circulation today, it defies common sense to argue that they are "unusual."

Finally, perhaps sensing that none of its purported analogues passes muster, the District asks this Court to apply a "nuanced approach to analogical reasoning" because of the rise in gun violence. (D.C. Br. 45.) It is true that *Bruen* left some room for legislatures to respond to "dramatical technological changes." 597 U.S. at 27. And some courts have improperly seized upon this stray dictum to conclude that *any* updates in technology mean that *Bruen*'s rigorous historical approach must be softened. *See, e.g.*, *Hanson*, 120 F.4th at 241–42. But these courts ignore that *Bruen* limited this approach to only "dramatic" and "unprecedented" changes. *Bruen*, 597 U.S. at 27. It cannot be that *any* technological change—such as, say, the move from

a long gun to a semiautomatic pistol, contemplated in *Heller*—automatically means the analysis is no longer rooted in historical tradition. And it flouts Supreme Court guidance to use this language as a catch-all to blow a hole through the Court's logic in *Bruen*. *See Hanson*, 120 F.4th at 274 (Walker, J., dissenting) ("This single stray line of dicta from *Bruen* is . . . a slender reed compared to a *holding* of *Heller* that the government cannot ban arms in common use for lawful purposes."). Rather, this "nuanced approach" must be reserved for only those exceptional or "unprecedented" circumstances in which history can truly provide no guide. *Bruen*, 597 U.S. at 27. And adding more capacity to firearms is hardly "dramatic" or "unprecedented," as *Bruen* requires. The first firearm able to fire over ten rounds without reloading was a sixteen-shooter dating back to *1580*, *see* Kopel, *History*, at 852, illustrating that there has long been the potential for societal concerns about excess ammunition. Today's 17-round magazine is hardly a "dramatic" or "unprecedented" leap, and so the so-called "nuanced" approach is inappropriate here.[27]

Respectfully submitted,

/s/ Jaclyn S. Frankfurt
Jaclyn S. Frankfurt
Bar No. 415252

[27] This Court should decline the United States' request that it reimpose the very test *Bruen* rejected, by holding that the "[b]urden on the Second Amendment is [m]inimal." U.S. Br. 69. Any inquiry that asks "how close the law comes to the core of the Second Amendment right and the severity of the law's burden on that right" is simply asking the wrong questions. *Bruen*, 597 U.S. at 19.

/s/ Shilpa Satoskar
Shilpa Satoskar
Bar No. 457263

/s/ Alice Wang
Alice Wang
Bar No. 495098

/s/ Victoria Hall-Palerm
Victoria Hall-Palerm
Bar No. 1736054

PUBLIC DEFENDER SERVICE
633 3rd Street, NW
Washington, DC 20001
Telephone: (202) 628-1200

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing reply brief has been served electronically via the Appellate E-Filing System upon Chrisellen R. Kolb and Katherine M. Kelly, of the U.S. Attorney's Office for the District of Columbia, and Caroline Van Zile and Tessa Gellerson, of the Office of the Attorney General for the District of Columbia, on this 20th day of May, 2025.

/s/ Victoria Hall-Palerm
Victoria Hall-Palerm