BRIEF FOR APPELLEE

DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 23-CF-828

ANDRE MILLER, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

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

Cr. No. 2022-CF3-6440

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TABLE OF CONTENTS

TABLE OF AUTHORITIES*

Cases

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

Statutes & Regulations

Other References

ISSUES PRESENTED

I. Whether appellant Miller lacks standing to challenge the seizure of a gun magazine which police officers seized from his car because Miller abandoned the car and its contents; and, if Miller does have standing, whether the plain-view doctrine supports the seizure of that loaded magazine.

II. Whether sufficient evidence supports Miller's conviction for possession of a large-capacity ammunition feeding device (PLCFD), where circumstantial trial evidence showed that Miller knew the magazine found in plain view in his car was capable of holding more than 10 rounds of ammunition; and even if the evidence is now insufficient in light of this Court's post-trial decision regarding the knowledge element in *Bruce v. United States,* 305 A.3d 381 (D.C. 2023), the proper remedy is not to direct an acquittal, but to vacate the conviction and remand for a retrial of the PLCFD count.

III. Whether the trial court's jury instruction on the elements of PLCFD, which did not inform the jury that the government was required to prove that Miller knew the magazine at issue could hold more than 10 rounds of ammunition, requires reversal of Miller's PLCFD conviction under the plain-error standard of review.

IV. Whether Miller's undisputed felon status precludes him from challenging the constitutionality of the PLCFD statute; and, if he is not disqualified

from doing so, whether the trial court erred in denying his Second Amendment challenge on the merits.

COUNTERSTATEMENT OF THE CASE

On February 23, 2023, appellant Andre Miller was charged by indictment with: (1) unlawful possession of a firearm by a felon (D.C. Code §§ 22-4503(a)(1), (b)(1)) (UPF); (2) carrying a pistol without a license (D.C. Code § 22-4504(a)(2)) (CPWL); (3) two counts of possession of a large-capacity ammunition-feeding device (D.C. Code § 7-2506.01(b) (PLCFD); (4) possession of an unregistered firearm (D.C. Code § 7-2502.01(a)) (UF); and (5) unlawful possession of ammunition (D.C. Code § 7-2506.01(a)(3)) (UA) (Record on Appeal (R.) 3 75-76 (indictment)).[1]

On January 16, 2023, Miller moved to dismiss the anticipated indictment on Second Amendment grounds (R.2 325-344 (dismiss indmt. mtn.))[2] and filed a separate motion to dismiss a PLCFD charge in the anticipated indictment (R.2 352-361 (dismiss PLCFD mtn.)). The same day, Miller moved to suppress all tangible evidence in the case (R.2 345-351 (supp. mtn.)). On January 30, 2023, the government opposed the motions to dismiss the anticipated indictment and PLCFD

[1] All references to the record and appendix are to the PDF page numbers. The record on appeal is divided into four volumes. We refer to Record 341868 as "R.1"; Record 341869 as "R.2"; Record 341870 as "R.3"; and Record 34871 as "R.4."

[2] Miller's motion stated that he expected to be charged by indictment with CPWL, UF, and UA (R.2 325 (dismiss indmt. mtn. p.1)).

charge (R.2 447-501; R.3 1-21 (opp. dismiss indmt.)) and the suppression motion (R.3 22-42 (opp. supp.)). On March 1, 2023, the Honorable Jason Park denied Miller's motion to dismiss the indictment (which by then had been filed and included a PLCFD charge) (R.3 75-76, 123-144 (indictment & order)). Judge Park held an evidentiary hearing on the suppression motion on May 11-12, 2023, after which he denied the motion (R.1 21-22 (Sup. Ct. Dkt. pp.21-22)).

A jury trial began on July 17, 2023, at which Miller was convicted of one count of PLCFD and UA and acquitted of the remaining charges (R.1 28, 31-32 (Sup. Ct. Dkt. pp.28, 31-32); 7/21/23 Tr. 13, 18-19). On September 29, 2023, Judge Park sentenced Miller for PLCFD to 24 months of incarceration, and three years of supervised release, and imposed a concurrent one-year term of incarceration for UA (9/29/23 Tr. 11). Miller noted a timely appeal (R.4 212-213 (notice of appeal)).

The Motion to Dismiss the PLCFD Count

The Parties' Arguments

Miller moved pre-emptively "to dismiss any count of the indictment charging [PLCFD]" pursuant to D.C. Code § 7-2506.01(b) on grounds that the PLCFD statute, which prohibits possession of magazines capable of holding more than 10 rounds of ammunition, violated the Second Amendment pursuant to the "text-and-history test" of *New York State Rifle & Pistol Ass'n, Inc. v. Bruen,* 597 U.S. 1 (2022) (*Bruen*)

(R.2 352, 358 (dismiss PLCFD mtn. pp.1, 7)).[3] Miller claimed that "ammunition feeding devices" qualified as "arms" under the plain text of the Second Amendment and possession of a magazine capable of holding more than 10 rounds of ammunition was presumptively protected conduct under the Second Amendment (R.2 353-354 (dismiss PLCFD mtn. pp.2-3)). Thus, Miller argued, prosecuting him under the PLCFD statute would require the government to show that the statute was consistent with the Nation's historical tradition of regulating "dangerous and unusual weapons," which it could not do because such magazines are in common use today for the lawful purpose of self-defense (R.2 354-358 (dismiss PLCFD mtn. pp.3-7)).

In opposition, the government argued that Miller's prior felony conviction disqualified him from challenging the application of the District's firearms statutes, including the PLCFD statute, because the Second Amendment did not protect the right of convicted felons to possess firearms (R.2 482-483 (opp. dismiss indmt. pp.36-37)).

[3] Miller also argued that any UA charge must be dismissed because the UA statute, D.C. Code § 7-2506.01(a)(3), violated the Second Amendment (R.2 325, 329-330, 336-337 (dismiss indmt. mtn. pp.1, 5-6, 12-13)). He does not challenge the constitutionality of the UA statute on appeal. In the trial court, Miller additionally raised a Second Amendment challenge to any potential charges under the UPF, CPWL, and UF statutes (R.2 325, 329-342 (dismiss indmt. mtn. pp.1, 5-18)). Because Miller was acquitted of violating those statutes, we do not address those arguments.

The government asserted that in any event, *Bruen* did not undercut binding precedent affirming the constitutionality of the District's firearms laws (R.2 450-455 (opp. dismiss indmt. pp.3-9)), and that the PLCFD statute passed constitutional muster under *Bruen* (R.3 4-19 (opp. dismiss indmt. pp.59-74)). In particular, the government asserted that Miller had failed to show that *large-capacity* magazines (LCMs) were "arms" under the Second Amendment and that they were commonly used for self-defense (R.3 6-14 (opp. dismiss indmt. pp.61-69)). It asserted that in any event, the PLCFD statute was constitutional because any burden it imposed on law-abiding, responsible citizens' exercise of their Second Amendment rights was minimal, and the statute was consistent with the Nation's history and tradition of firearms regulation (R.3 14-19 (opp. dismiss indmt. pp.69-74)).

The Trial Court's Ruling

The trial court held that the PLCFD statute did not violate the Second Amendment (R.3 138, 143 (order pp.16, 21)). First, the court held that Miller had failed to show that LCMs were "arms" for Second Amendment purposes (R.3 139 (order p.17)). The court explained that although "arms" included both firearms and "parts necessary to use the firearms for their core lawful purpose of self-defense," "parts that merely enhance[d] the functionality of firearms" but were not necessary for that purpose did "not constitute 'arms' implicating the Second Amendment" (R.3 138-139 (order pp.16-17)). The court found that Miller's contention that many

popular firearms that are currently sold can accept, and are packaged with, extended magazines "offered nothing to indicate that such firearms cannot serve their lawful purpose of self-defense without an extended magazine" (R.3 139 (order p.17)). It also found that although Miller noted that LCMs were "in wide circulation nationwide," he had "offer[ed] little to indicate that LC[M]s [we]re necessary to the use of handguns for self-defense as compared to non-large capacity magazines" (R.3 140 (order p.18)). It found that because LCMs were "not necessary to the use of firearms for their core lawful purpose of self-defense, they [we]re not 'arms' implicating the Second Amendment" (R.3 141 (order p.19)).

Second, the court found that even assuming arguendo that LCMs were "arms," the PLCFD statute was "consistent with the Nation's historical tradition of firearm regulation" (R.3 141 (order p.19)). The court found it unsurprising that the government identified no regulation in existence in 1791 that was perfectly analogous to the PLCFD statute, noting that most firearms at that time could not fire more than one shot without being reloaded (R.3 141-142 (order pp.19-20)). The court found, however, that historical analogues identified by the government, namely founding-era regulations "aimed at the practice of rigging firearms to be fired with a string or similar method," and "restrictions on the amount of gunpowder that an individual could keep in his home," both of which "targeted enhancements to otherwise lawful firearms that posed heightened dangers to human life, imposed

"a burden on the core right of self-defense comparable to" the PLCFD statute (R.3 142 (order p.20)).

The court found that "the burden imposed by the prohibition on LC[M]s" was "comparably justified" (R.3 143 (order p.21)). It noted that other courts had acknowledged that LCMs had "played a disproportionate role in mass shootings," and that the District of Columbia Council had found that weapons containing LCMs posed "particular dangers to law enforcement" (*id.*). The court concluded that such "public safety concerns regarding the adaptation of quintessential home defense weapons to more dangerous uses mirror those underlying the historical regulations" regarding string-rigged firearms gunpowder limitations in the home (*id.*).

The Suppression Motion

The Parties' Arguments

Relevant to this appeal, Miller moved to suppress a 17-round Glock magazine recovered from his car on grounds that it was the fruit of an unlawful car search (R.2 345-346, 348 (supp. mtn. pp.1-2, 4)). He claimed that the police did not have probable cause to believe that the car would contain contraband, or evidence of a crime, when they searched it (R.2 348 (supp. mtn. p.4)). In particular, he argued that the officers had not seen illegal items in plain view inside the car before searching it (*id.*).

The government opposed suppression of the magazine found in Miller's car (R.3 22 (opp. supp. p.1)). The government stated its expectation that the evidence at a hearing would show that on October 28, 2022, around 9:40 p.m., Metropolitan Police Department (MPD) officers went to the 4000 block of 9th Street, SE, in response to a 911 call reporting a car crash caused by a person who had a gun (R.3 22-23, 27 (opp. supp. pp.1-2, 6)). At that location, officers encountered Miller, who fled from a crashed car after noticing the emergency lights on the police cars, and who tossed away a gray backpack as he ran (*id.*). The government stated that persons on the scene reported that Miller possessed a gun, including in his car (R.3 23-24, 27-28 (opp. supp. pp.2-3, 6-7)). Thus, the government asserted that the police were permitted to search Miller's car pursuant to *United States v. Ross,* 456 U.S. 798, 809 (1982), and *Arizona v. Gant,* 556 U.S. 332, 347 (2009), as interpreted by this Court in *United States v. Taylor,* 49 A.3d 818, 824 (D.C. 2012) (R.3 28-29 (opp. supp. pp.7-8)).

Furthermore, the government asserted that the police had probable cause to seize a gun magazine found in Miller's car under the plain-view exception to the warrant requirement because they had seen the magazine between the driver's seat and the car door while lawfully positioned outside Miller's car (R.3 29-30 (opp. supp. pp.8-9)).

Additionally, after the evidentiary hearing, the government argued that Miller had abandoned his car after crashing it, and thus he had abandoned the magazine found inside it (5/11/23 Tr. 137, 139). The government noted that the car was left unlocked, and asserted that leaving a crashed car in the middle of a public street was abandonment (5/12/23 Tr. 19).

Miller asserted that he had not abandoned the car, noting that he walked away from the car; the windows were rolled up; and he would not have closed the car door if he planned to abandon it and its contents (5/12/23 Tr. 3-4). He argued that he later told the police that the car belonged to him, and that he ran because he was afraid after someone pointed a gun at him (*id.* 4).

Furthermore, after the suppression hearing, Miller added to his argument that the government had failed to establish that the magazine was in plain view because the testimony and other evidence on that point was conclusory and the officer who discovered the magazine had not testified (5/12/23 Tr. 5, 7-11). Miller also claimed that even if the court assumed that the magazine was found between the door and the driver's seat as shown in a photo exhibit, the government could not show that it was immediately apparent that the magazine was contraband (*id.* 15-17, 22).

In response, the government asserted that body-worn-camera (BWC) footage from the officer who discovered the magazine (Officer Michael Strong) supported that it was in plain view because within seconds of shining his flashlight into the car,

he said there was "a mag in here" (5/12/23 Tr. 21). The government further asserted that it was immediately apparent that the magazine was contraband, noting that the photo of the magazine between the car seat and door showed it was clearly loaded with at least 15 bullets (*id.*). Thus, the government asserted, it was a large-capacity ammunition-feeding device (*id.* 22).

The Evidentiary Hearing

Seven-year MPD veteran Officer Ethan Way testified that on the night of October 28, 2022, he received a call to respond to a "traffic crash" in the 4000 block of 9th Street, SE (5/11/23 Tr. 19-20). Before leaving his location, the call was elevated to a "priority" call based on "a man with a gun" (*id.* 20-21).

When he arrived on the scene, Officer Way saw a "traffic crash" (5/11/23 Tr. 20). He saw Miller exit his car, a damaged silver Toyota Camry which was stopped diagonally in the middle of the street several car lengths from Officer Way's cruiser (*id.* 21-23, 36). No one else was in Miller's car (*id.* 23). Department of Motor Vehicle (DMV) records showed that the Camry was registered to Miller (*id.* 36).

Upon exiting from the driver's seat of his car, Miller walked across the street "with a purpose" (as opposed to running) carrying a backpack (5/11/23 Tr. 21-24, 27-28).[4] Miller crouched down and placed his backpack alongside the passenger side

[4] After Miller left his car, its doors and windows were closed (5/11/23 Tr. 28).

of a red SUV, and fled up 9th Street, first walking, and then running, away (*id.* 22-24, 27-28, 31, 68).

When Officer Way then exited his cruiser, a woman who was in the middle of the street yelled, "He's got a gun, he's got a gun," and "was pointing at him" (an apparent reference to Miller) (5/11/23 Tr. 21, 60-61, 118-19). Officer Way ordered Miller to stop and to show his hands (*id.* 25-26). Miller, whose back was toward Officer Way, showed his hands when he was "up the block on 9th Street," but he continued to flee from Officer Way (*id.* 26; Government Exhibit (GE) 11). Miller turned right onto Bellevue Street and entered a parking lot, where he surrendered to officers who had joined the pursuit (5/11/23 Tr. 31-33).

Officer Griffin, one of the officers who pursued Miller, returned to 9th Street and searched the backpack Miller had dropped in the grassy area next to the passenger side of the SUV, but he found "nothing of high value" inside (5/11/23 Tr. 32, 34-35, 43). Officers recovered a Glock-17 handgun from underneath the red SUV next to Miller's backpack (*id.* 42-43, 45, 47-48).[5] The firearm had a large 40-round capacity magazine which extended beyond the gun's handle and was loaded with 39 rounds of ammunition (*id.* 44-47; GE5; GE7; GE8).

[5] Officer Way acknowledged that he did not see anyone place the gun under the SUV and he did not know how long the gun had been there (5/11/23 Tr. 72). Registration records for the SUV did not reveal a connection to Miller (*id.* 49).

After the backpack search, Officer Strong found a magazine in plain view in Miller's car by looking through the car's closed window (5/11/23 Tr. 35-37). Officer Way testified that Officer Strong's BWC footage, which he had watched in preparing to testify, depicted Officer Strong next to the driver's side door shining a flashlight through Miller's car window, looking in, and saying there was a magazine in the car (*id.* 37-38). Officer Way agreed that was the point at which Officer Strong saw the magazine inside the car (*id.*). Officer Way testified that the magazine was a loaded 9mm magazine "for a Glock 17, 9-millimeter" (*id.* 38, 96).[6] The government played Officer Strong's BWC footage in which he stood next to the driver's door of the car and shined a flashlight into the driver's area and downward toward the driver's seat, including on the driver's door side (*id.* 131-33; GE12). Officer Strong then said, "it's a mag in here; it's a mag in here; I see it" (5/12/23 Tr. 28, 40; GE12).[7]

Officer Way agreed that other officers had looked into Miller's car using their flashlights (5/11/23 Tr. 86). He acknowledged that in a clip of BWC footage, Officer DeLoach twice shined his flashlight into different parts of the car without

[6] The government admitted a photo of the magazine between the driver's seat and the driver's side doorframe of Miller's car (5/11/23 Tr. 39-40; GE3). Another photo of the magazine taken on the scene showed that it was fully loaded with 17 rounds of ammunition (5/11/23 Tr. 40-42; GE4).

[7] Officer Way agreed that Officer Strong's BWC clip did not show a magazine, and because the BWC is worn on an officer's chest, the BWC clip did not show "the view from Officer Strong's eyes" (5/11/23 Tr. 95-96).

mentioning that he saw anything in plain view (*id.* 90-91). Officer Way acknowledged that Officer DeLoach could be heard in another BWC clip from the scene saying, "Not in plain view at least. We haven't been inside of it yet." (*Id.* 89.) Officer Way agreed with defense counsel's characterization that another BWC clip showed Officer Smiley "kind of shining her flashlight and looking into the car," without saying that she saw anything in plain view (*id.* 94).

The Trial Court's Ruling

The trial court found that Officer Way was a credible witness (5/12/23 Tr. 24). The court found that the officers had received a call for a traffic crash and a report of a person with a gun, and that when Officer Way arrived and exited his cruiser, a woman in the middle of the street was pointing at Miller and yelling, "he's got a gun, he's got a gun" (*id.* 26, 30-31).[8] Around that time, Miller had exited the driver's side of his car and was walking down 9th Street (*id.* 26). Miller then crouched behind a red SUV and dropped a gray backpack alongside the SUV in a grassy area beside the street, which was "a voluntary action" (*id.*).

[8] The court found that those facts provided at least a reasonable basis to conduct an investigatory stop of Miller and search him for weapons (5/12/23 Tr. 31). It also found that when Miller "moved away from the scene" and refused the officer's order to stop, there was probable cause to arrest him for leaving after colliding (*id.*).

The court found that Miller then continued to move away from Officer Way on 9th Street; he did not submit when Officer Way yelled at him to stop, and instead he began to run (5/12/23 Tr. 26-27). It found that Miller was stopped in a parking lot near the corner of Bellevue and 9th Streets, SE, less than a minute after Officer Way arrived on the scene (*id.* 25, 27). In the interim, Officer Griffin returned to the red SUV, recovered the gray backpack, and later searched it (*id.* 28). The court found that at a later point a Glock 17 firearm was found underneath the red SUV, "just a couple of feet from the curb" and "some feet away" from the gray backpack's location (*id.*).

The court found that other officers arrived on the scene and looked into the silver Camry that Miller had driven (5/12/23 Tr. 25, 28). Based on BWC clips admitted as defense exhibits, the court found that Officers DeLoach and Smiley arrived on the scene and "pointed their flashlights into the car" but "their searches didn't appear to be particularly extensive" (*id.* 28). The court found that "[t]he magazine being wedged against the driver's seat and door," it was "not surprising" that those two officers did not see the magazine (*id.* 34). However, the court found that at 9:47:24—the timestamp on Officer Strong's BWC footage—"Officer Strong look[ed] into the vehicle," shining his flashlight "through the window of the driver's seat" as he was standing "right next to the driver's seat" (*id.* 28, 33). The court found that Officer Strong's flashlight "appear[ed] to be pointed in a downward direction"

and the BWC footage captured Officer Strong saying "it's a mag in here; it's a mag in here; I see it" (*id.* 28, 40).

The court found that the magazine, which was pictured in GE3, was located "between the driver's door and the driver's seat of the car" (5/12/23 Tr. 29). The magazine was positioned so that the part facing upward showed "the numbers on the side and the holes where one can see whether or not there are rounds" inside (*id.*). The court found that "the incriminating evidentiary nature of [the magazine] was apparent to Officer Strong regardless of his training" (*id.* 34). It explained that "[f]rom the way that the magazine was positioned face up, it was very clear that it was a gun magazine," noting that even a person with as little experience with firearms as the judge "could see that" (*id.*). Furthermore, the magazine was for a Glock 17, which Officer Way had testified was the type of weapon MPD officers carried (*id.* 29, 34).

The court found that a preponderance of the evidence established that Officer Strong walked up to the car, looked down, and saw the magazine "wedged between the driver's seat and the door," which was captured on BWC footage (5/12/23 Tr. 34). It found that the car door "was opened and a magazine was visible on the driver's side of the car, between the driver's door and the driver's seat," which corroborated the conclusion that Officer Strong had seen the magazine there (*id.* 33-

35). Thus, the court found that the magazine's recovery was justified under the plain-view exception to the warrant requirement (*id.* 33, 35).[9]

The Trial

The Government's Evidence

Charles Stroud, who lived in the 4000 block of 9th Street, SE, testified that he and his son Los Stroud were at home watching television on the night of October 28, 2022, when Charles heard a crash outside (7/17/23 Tr. 74-76).[10] Los looked out the window, said, "[T]hat was my car," and ran outside (*id.* 76-77). Charles followed Los and saw that a silver Toyota had hit Los's "Crown Vic" so hard that it pushed it onto the curb (*id.* 76-78, 92).

Los was standing near the silver Toyota, talking to Miller, who was in the driver's seat, alone inside the Toyota (7/17/23 Tr. 85, 93).[11] Charles used his cell phone to take a video of the Toyota's front license plate and Miller "in case it was a hit and run" (*id.* 78-80; GE1). Charles testified that Miller was "trying to get [the

[9] The court declined to rule on the government's claim that Miller had abandoned the car because the government first raised it after the evidentiary portion of the hearing had ended (5/12/23 Tr. 19-20, 35).

[10] For clarity, we refer to Charles and Los Stroud by their first names.

[11] DMV records showed that the Toyota was owned by, and registered to, Miller (7/18/23 Tr. 153, 156-58).

car] to move so he c[ould] get away, but the car wouldn't move" (7/17/23 Tr. 78).[12] Charles stopped recording the video because Miller reached to the open "armrest" in the center of the car and lifted a black gun (*id.* 82-83).[13] Charles thought Miller was going to shoot him (*id.* 82). Miller did not try to shoot him, however, and instead "he just kept messing with the car, kept trying to get away" (*id.*). Charles testified that Miller did not point a gun at him, or anyone else, but he "showed it to [Charles]" (*id.* 87, 89).[14]

Thereafter, Miller began running up 9th Street toward Bellevue Street as the police cars pulled onto the block, and the police chased Miller (7/17/23 Tr. 89).

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[12] Charles's video depicted Miller revving the car's engine, but the car did not move (GE1). An unredacted defense version of the video included a woman, who Charles testified was standing behind him, asking Miller if he was trying to leave and calling him a "bitch ass n-word" (DE41; 7/17/23 Tr. 113-15). The woman did not make threats against Miller (7/17/23 Tr. 122). Nor did Charles, Los, or the neighbors who were present (*id.* 122-23).

Charles agreed that the video did not show Miller holding a gun, but he testified that Miller was indeed holding a gun, which was not visible in the video because Charles stopped recording because he was scared and he needed to back up (7/17/23 Tr. 104, 123-24). The end of the video showed Miller reach his right hand toward the center of the car (GE1).

[13] Charles did not see a large extended magazine protruding from the gun (7/17/23 Tr. 116).

[14] Charles acknowledged that he had lied to the police on the night of the incident by saying that Miller had pointed a gun at him (7/17/23 Tr. 106).

Charles did not see a gun in Miller's hand, or see Miller put a gun under a car, as he ran (*id.* 90).

Officer Way testified consistently with his suppression-hearing testimony about seeing the crashed silver and black cars, seeing only Miller inside the silver car when he arrived on the scene, and seeing Miller exit the driver's seat of the silver car, cross the street to the passenger side of the red SUV, drop a gray backpack there, and flee up 9th Street (7/18/23 Tr. 22-32, 35-36, 144-45, 147).[15] Thereafter, Officer Way saw a gun with a large extended magazine underneath the red SUV, very close to where Miller discarded the backpack (*id.* 60, 147). The gun was a Glock 9mm, which was not rusty or weathered as if it had been exposed to the elements for "quite awhile" (*id.* 89, 150). In Officer Way's experience, people sometimes discard guns while evading the police (*id.* 148). Officer Way acknowledged that Miller was not connected with the red SUV and that it belonged to another man (*id.* 128-29).

Officer Way testified that although there was a group of people on the scene that night, there was only one woman in the street when he arrived (7/18/23 Tr. 125). He agreed that there was a period while he was chasing Miller than he was not watching Miller's car or the red SUV (*id.*). However, as soon as Officer Way ran

[15] Miller held the backpack in front to him as he crossed the street and, because Officer Way could see Miller's "side profile," he could only see one of Miller's hands as he crossed (7/18/23 Tr. 145-46).

past the backpack next to red SUV, he yelled to officers behind him to secure the backpack, and it was secured "fairly quickly" (*id.* 149). Officer Griffin returned with Officer Way to ensure that the scene was secured (*id.* 150).

MPD Officer Michael Strong testified that when he arrived in the 4000 block of 9th Street, SE, at around 9:45 p.m. in response to a call, another officer was on the sidewalk standing over a bag (7/18/23 Tr. 159-61).[16] Officer Strong went to the silver crashed vehicle, stood at the front driver's side door, and shined his flashlight inside the vehicle (*id.* 161-62). He pointed his flashlight down toward the driver's seat and saw a magazine between the driver's seat and the door frame (*id.* 162). The magazine appeared to be loaded; Officer Strong could see that there were bullets inside it because of "[t]he shine of the bullets" (*id.*). Officer Strong testified that the magazine appeared to him as it did in GE9 when he shined his flashlight inside the silver vehicle (7/18/23 Tr. 162-63).[17] Officer Strong did not touch the magazine after discovering it (*id.* 163).

Defense counsel elicited from Officer Strong that the magazine was in plain view between the driver's seat and door and that he was able to see the magazine

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[16] Officer Strong's BWC footage showed that he arrived on the scene at 9:44 p.m. and that at that time there was already a police officer standing over the gray backpack (7/18/23 Tr. 159-60, 167-71; GE30).

[17] GE9 is the same photo presented as GE3 at the suppression hearing. It displays the magazine as it was found by the police between the driver's seat and door frame of Miller's car. The photo is included at page 12 of Miller's opening brief.

right after he started looking through Miller's car window (7/18/23 Tr. 173).[18] Similarly, Officer Way agreed with defense counsel's statement that "the magazine was found just sitting in open view or plain view" and it was "wedged between the driver's seat and the driver's door" (*id.* 81).[19]

Officer Strong agreed that Miller's car doors were unlocked and he did not know whether anyone else entered Miller's car before the police did (7/18/23 Tr. 175). Officers Strong and Way testified that they did not know who put the magazine in the car or how long it had been there before he found it (*id.* 80, 178).

After discovering the magazine, Officer Strong's partner told him "there was something under the [red SUV]" (7/18/23 Tr. 163). In response, at 9:48 p.m., Officer Strong knelt near the driver's side door of the red SUV (which faced the street), shined his flashlight under the SUV, and "saw that it was a handgun under the vehicle," close to the curb (*id.* 163-66, 187). Officer Strong walked to the passenger door of the SUV and, using his flashlight, confirmed that it was a gun, and alerted other officers (*id.* 166). Officer Strong did not touch the gun (*id.* 167). He explained

[18] Officer Strong testified that the magazine also was clearly visible when the door was opened (7/18/23 Tr. 173).

[19] When Miller exited the car, Officer Way could not see the section of the car between the driver's seat and car's exterior because it was blocked by the door (7/18/23 Tr. 149).

that the gun under the red SUV was "right next to the bag" that another officer was standing over (*id.* 171-72).

Crime Scene Analyst Edward Shymansky photographed the scene that night (7/17/23 Tr. 137-39). He photographed Miller's car, showing that it was almost directly across the street from the red SUV under which the gun with the extended magazine was found (7/17/23 Tr. 141-42, 144-48; GE3; GE4; GE5). Shymansky photographed a 9mm Glock magazine that was found in Miller's car, which was loaded, as was apparent because a cartridge was visible at the top of the magazine and holes on the magazine made visible the additional cartridges inside (7/17/23 Tr. 143, 149, 151-53, 156, 180; GE3; GE6; GE8; GE9). After recovering the magazine from the silver car, Shymansky recovered 17 rounds of 9mm ammunition from inside the magazine (7/17/23 Tr. 156, 158-59, 162). The magazine had a 17-round capacity (*id.* 162, 180).[20]

The gun found under the red SUV was processed for fingerprints but none were found (7/19/23 Tr. 11-12). Miller's fingerprints were not found on either magazine (*id.* 20).

[20] Shymansky testified that the gun recovered from under the SUV was a 9mm Glock 17 firearm that was loaded with 39 rounds of 9mm ammunition (7/17/23 Tr. 156, 169-70). The magazine in that gun could hold 40 rounds of ammunition (*id.* 178).

The gun and its corresponding magazine found under the red SUV were swabbed for DNA, as was the magazine found in Miller's car (7/19/23 Tr. 5-6, 12-16, 19). The swabs from both magazines contained an insufficient amount of DNA to make any comparisons to Miller's DNA sample from Miller (*id.* 60-61, 69-70, 78-79).

Swabs from the gun revealed a DNA mixture from three people, including at least one male contributor (7/19/23 Tr. 70). An expert forensic DNA analyst, Ruben Ramos, testified that 53 percent of the total DNA in the mixture was contributed by Miller (*id.* 32-33, 38-39, 71, 87). Ramos testified that it was possible that Miller's DNA got onto the gun via direct transfer or secondary transfer (*id.* 88, 90). Ramos could not tell how Miller's DNA got onto the gun (*id.* 90).

The government established that on October 28, 2022, Miller did not have a firearms registration certificate for any firearm, including for the gun found under the red SUV (7/18/23 Tr. 189, 192-95, 197-98; GE31; GE32). Nor did Miller have a license to carry a pistol on October 28, 2022 (7/18/23 Tr. 193-94, 196-97; GE33). The parties stipulated that as of October 28, 2022, Miller had a prior felony conviction and that Miller knew of that conviction (7/19/23 Tr. 92).[21]

[21] Miller chose not to present defense evidence (7/19/23 Tr. 158).

SUMMARY OF ARGUMENT

Miller lacks standing to raise a Fourth Amendment challenge to the seizure of the loaded magazine found in his car, because he abandoned the car and its contents. In any event, the plain-view doctrine supports the seizure.

Miller's claim that insufficient evidence underlies his PLCFD conviction lacks merit. Even though *Bruce v. United States,* 305 A.3d 381 (D.C. 2023), in which this Court first held that a PLCFD conviction required the government to prove that the defendant knew the magazine at issue could hold more than 10 rounds of ammunition, was decided after Miller's trial, sufficient circumstantial evidence was presented at Miller's trial to satisfy this new element. Even if the evidence here is now insufficient in light of *Bruce's* post-trial change to the PLCFD elements, the proper remedy is not to direct an acquittal, but to vacate the conviction and remand for a retrial of the PLCFD count.

The trial court's jury instruction on the elements of PLCFD, which did not inform the jury that it was required to determine whether Miller knew that the magazine in his car could hold more than 10 rounds of ammunition, does not require reversal of his PLCFD conviction under the plain-error standard.

Fourth, Miller's undisputed felon status precludes him from challenging the constitutionality of the PLCFD statute. Even if Miller is not disqualified from

bringing that challenge, his claim that the PLCFD statute violates the Second Amendment lacks merit.

ARGUMENT

I. The Trial Court Properly Denied the Motion to Suppress the Magazine Found in Miller's Car.

Miller claims (at 20-26) that the trial court erred in finding that the plain-view doctrine justified the seizure of the magazine found in his car because there was no evidence that its "illegal capacity" was "immediately apparent" to the police officer who discovered it. This claim lacks merit.

A. Standard of Review and Legal Principles

In reviewing a suppression-motion ruling, this Court reviews legal issues de novo. *Mayo v. United States*, 315 A.3d 606, 616 (D.C. 2024). This Court defers to the trial court's factual findings unless they are clearly erroneous, *id.*, 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

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).

This Court may affirm the denial of a suppression motion on grounds other than those articulated by the trial court. *Harris v. United States,* 260 A.3d 663, 684 (D.C. 2021). In the absence of express findings on an issue, this Court determines whether a suppression-motion denial is supportable under any reasonable view of the evidence. *Brooks v. United States,* 367 A.2d 1297, 1304 (D.C. 1976), *cited in Peay v. United States,* 597 A.2d 1318, 1320 (D.C. 1991) (en banc). Furthermore, in deciding whether suppression motion has been properly denied, this Court may consider undisputed trial testimony. *(Thomas) West v. United States,* 604 A.2d 422, 427 (D.C. 1992).

The plain-view doctrine permits the warrantless seizure of evidence in plain sight when: (1) "an officer did not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed"; (2) the incriminating character of the evidence was "immediately apparent"; and (3) the officer had "a lawful right of access to the object itself." *Porter v. United States,* 37 A.3d 251, 256 (D.C. 2012). In determining whether a search or seizure was legal, 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).

B. Discussion

1. Miller Lacks Standing to Challenge the Seizure of the Magazine Found in His Car.

When "an individual abandons property, the person no longer has a legitimate expectation of privacy in it and thus lacks standing to challenge its search or seizure." *Spriggs v. United States,* 618 A.2d 701, 703 n.3 (D.C. 1992). Here, as the government argued in the trial court, and showed by a preponderance of the evidence,[22] Miller abandoned his car and its contents, including the magazine, by fleeing the scene of the car crash. *See, e.g., State v. Montiel-Devale,* 468 P.3d 995, 998-99, 1002-03 (Or. Ct. App. 2020) (where occupants of damaged car involved in crash on public street "took off on foot," defendant driver to whom car was registered had no reasonable expectation of privacy in car, even if he subjectively expected, or hoped, car "might remain undisturbed until and unless he saw fit to return for it"); *Mills v. United States,* 708 A.2d 1003, 1008 (D.C. 1997) (defendant abandoned car merely by "respond[ing] negatively" when police officer asked him "whether or not [the white Mustang] was his car"); *Spriggs,* 618 A.2d at 702-03 (defendant

[22] *See Nix v. Williams,* 467 U.S. 431, 444 n.5 (1984) ("[T]he controlling burden of proof at suppression hearings should impose no greater burden than proof by a preponderance of the evidence.").

abandoned for Fourth Amendment purposes an opaque key case filled with valuable drugs when, as officers approached her, she placed key case on curb of public sidewalk and walked four to seven feet away from it).[23]

The fact that the driver's door and window of Miller's car were closed when Officer Strong looked into the car does not undercut that the car and its contents had been abandoned for Fourth Amendment purposes. *See, e.g., Kyle,* 268 A.3d at 1264 (fact that backpack defendant threw over fence was closed and thus was not an obviously incriminating item was relevant, but insufficient, factor in assessing whether he had objectively reasonable privacy interest in backpack). Indeed, at trial defense counsel elicited from Officer Strong that Miller's car doors were unlocked, and the keys were in the back of the car (7/18/23 Tr. 175). This showed that he had no objectively reasonable privacy right in the car when he left it in the middle of the road. *See, e.g., State v. Anderson,* 548 N.W.2d 40, 44 (S.D. 1996) (car deemed abandoned when driver fled accident scene on foot, leaving disabled car on public road with keys in it); *People v. Childs,* 589 N.E. 2d 819, 820-22 (Ill. App. Ct. 1992)

[23] Abandonment for Fourth Amendment purposes is not the same as abandonment "in the strict property-right sense," because it is possible to retain a property interest in an item, yet simultaneously relinquish "any reasonable expectation of privacy for purposes of obtaining suppression." *United States v. Kyle,* 268 A.3d 1256, 1259 (D.C. 2022) (citations omitted).

(affirming that driver defendant abandoned car during traffic stop when he walked away from car, and then ran from police officer, leaving ignition key inside).

2. In Any Event, the Plain-View Doctrine Justified the Seizure of the Magazine.

Miller claims that the plain-view doctrine could not justify the magazine's seizure because without direct evidence that Officer Strong could see that the magazine could hold more than 10 rounds of ammunition, there was insufficient evidence that the illegal nature of the magazine was immediately apparent. This claim lacks merit.

"The plain view doctrine authorizes seizure of illegal or evidentiary items visible to a police officer whose access to the object has some prior Fourth Amendment justification and who has probable cause to suspect that the item is connected with criminal activity." *Illinois v. Andreas,* 463 U.S. 765, 771 (1983). Miller inaccurately contends that the plain-view doctrine supported seizure of the magazine only if Officer Strong immediately realized that it was an LCM, and thus that it was an illegal item.

As the suppression-hearing evidence established, Officer Way went to the 4000 block of 9th Street based on radio calls to respond to a "traffic crash" and to "a man with a gun" (5/11/23 Tr. 19-21). As he arrived, Officer Way saw Miller—who was the sole occupant of a silver Camry that appeared to have been in a crash—exit

that vehicle (*id.* 20-23, 36). Miller crossed the street, holding a backpack; he crouched down and dropped his backpack at the passenger side of a parked red SUV; and he then fled up 9th Street (*id.* 21-25, 27-28, 31, 68). When Officer Way exited his cruiser, a woman in the middle of the street pointed at Miller and yelled, "he's got a gun, he's got a gun" (*id.* 21, 60-61, 118-19).

Thereafter, when Officer Strong shined his flashlight into Miller's car, he saw a magazine in plain view inside and announced that there was a "mag" in the car (5/11/23 Tr. 35-38). Officer Strong's BWC footage showed that he stood next to the driver's door of the car and shined his flashlight into the driver's area of the car and downward toward the driver's seat, including on the driver's door side and then said, "it's a mag in here; it's a mag in here; I see it" (*id.* 131-33; 5/12/23 Tr. 28, 40; GE12). Officer Way testified that the magazine was a loaded magazine "for a Glock 17, 9-millimeter" (5/11/23 Tr. 38, 96).

Additionally, at trial, Officer Way agreed with defense counsel's statement that "the magazine was found just sitting in open view or plain view" (7/18/23 Tr. 81). Officer Strong added to the trial testimony regarding this magazine, stating that upon arriving on the scene, he went to the silver crashed vehicle, stood at the front driver's side door, and shined his flashlight inside (*id.* 161-62). He pointed his flashlight down toward the driver's seat and saw a magazine between the driver's seat and the door frame (*id.* 162). On cross-examination, defense counsel elicited

from Officer Strong that the magazine was in plain view between the driver's seat and door and that he was able to see the magazine right after he started looking through Miller's car window (*id.* 173). Moreover, as Officer Strong testified, the magazine appeared to be loaded; he could see that there were bullets inside it because of "[t]he shine of the bullets" (*id.* 162).

Accordingly, regardless of the magazine's capacity, Officer Strong had probable cause to believe that the magazine and ammunition were unlawfully possessed by Miller and thus could seize them. *See, e.g., Zanders v. United States,* 75 A.3d 244, 247-49 (D.C. 2013) (finding probable cause when an officer observed in plain view an "ammunition clip of a gun protruding from under the front passenger seat" of a car; officer lawfully positioned outside vehicle "who sees a gun (or other contraband) in plain view inside that vehicle has probable cause to seize it"); *Andrews v. United States,* 922 A.2d 449, 454, 457 n.13 (D.C. 2007) (once officer saw in plain view black ammunition magazine protruding beneath driver's seat on floorboard of car, the police had probable cause to seize and search the car); *(Larry) White v. United States,* 763 A.2d 715, 721-22 (D.C. 2000) (officer who used flashlight to illuminate inside of car and saw gun in plain view on driver's floorboard, shortly after driver was removed from car, had probable cause to seize gun as contraband). This is particularly true given that upon arriving on the scene, Officer Way had seen Miller immediately exit his car, and ultimately flee the scene

after placing his backpack next to the red SUV. *See Illinois v. Wardlow,* 528 U.S. 119, 124 (2000) ("[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."). And the presence of a loaded magazine lying next to the driver's seat in the passenger compartment of the car violated District of Columbia law regarding the proper transport of ammunition and firearms. *See* D.C. Code § 22-4504.02(a)-(b); *see also* 24 D.C.M.R. §§ 2320.9-2320.10; *Ward v. United States,* 318 A.3d 520, 528 (D.C. 2024) (prohibiting transport of firearms and ammunition in manner readily or directly accessible from passenger compartment of transporting vehicle). This improper manner of transporting the loaded magazine provided additional reason for the police to believe that Miller did not lawfully possess the ammunition and magazine.

Furthermore, the evidentiary value of the magazine was immediately apparent regardless of whether it was an LCM, and thus it was not necessary that Officer Strong immediately realized that it was an LCM. In this situation, the police were responding to a call for a man with a gun, and a woman on the scene when Officer Way arrived immediately pointed at Miller and yelled that he had a gun, and Miller fled after crouching and dropping his backpack alongside a parked SUV. See supra at pp. 9-10. The magazine in Miller's car provided evidentiary support for the reports that Miller was armed with a gun, and thus, its evidentiary value was immediately

apparent, which satisfied the requirement of the plain-view doctrine. *Andreas,* 463 U.S. at 771.

Additionally, the trial evidence supported the reasonable inference that Officer Strong could immediately see that the magazine had a capacity of more than 10 rounds. As Officer Strong testified, the magazine appeared to be loaded; he could see that there were bullets inside it because of "[t]he shine of the bullets" (7/18/23 Tr. 162). Officer Strong, who did not touch the magazine after discovering it, testified that when he shined his flashlight inside Miller's car, the magazine appeared to him as it did in trial exhibit GE9 (*id.* 162-63). GE9, which was the same photo presented as GE3 at the suppression hearing, displayed the magazine as Crime Scene Analyst Shymansky observed it between the driver's seat and door frame of Miller's car (7/17/23 Tr. 139, 151-52). It showed that the side of the magazine with the holes through which the ammunition was visible was facing upward in a position that could be viewed by the driver, as well as by Officer Strong (GE9). The photo depicted more than 10 cartridges that were visible through those holes and an additional cartridge obviously protruding from the top of the magazine (*id.*). Thus, it is reasonable to infer that Officer Strong could see that the magazine was an LCM immediately upon discovering it.

II. Sufficient Evidence Supports the PLCFD Conviction.

Miller does not dispute that at the time of trial, the evidence was sufficient to prove PLCFD. Instead, Miller claims (at 26-34) only that the evidence was insufficient to prove that he knew the magazine in his car was an LCM, as required by this Court's subsequent ruling in *Bruce v. United States,* 305 A.3d 381 (D.C. 2023). This claim lacks merit.

A. Additional Background

As Miller acknowledges (at 26-27 & n.17), at the time of his trial, this Court had not yet held that to convict a defendant for violating the PLCFD statute, the government was required to prove that the defendant knew the magazine could hold more than 10 rounds of ammunition. This Court so held for the first time in *Bruce v. United States,* 305 A.3d 381 (D.C. 2023), months after Miller's trial. Thus, consistent with the then-prevailing interpretation of the PLCFD statute, as reflected in the standard jury instruction for PLCFD (to which Miller did not object), the court instructed that the government was required to prove beyond a reasonable doubt that Miller: (1) "possessed a large capacity ammunition feeding device"; and (2) "he did so voluntarily and on purpose and not by mistake or accident" (7/19/23 Tr. 175). *See* Criminal Jury Instructions for the District of Columbia, No. 6.505(B) (5th ed. 2022). The jury was not instructed that to convict Miller of PLCFD, the government needed

to prove that he knew the magazine in his car had an ammunition capacity of more than 10 rounds.

B. Standard of Review and Legal Principles

This Court reviews sufficiency challenges de novo. *Hughes v. United States,* 150 A.3d 289, 305 (D.C. 2016). This Court views the evidence "in the light most favorable to the government, giving full play to the right of the fact-finder to determine credibility, weigh the evidence, and draw justifiable inferences of fact, and making no distinction between direct and circumstantial evidence." *(Dominic A.) White v. United States,* 207 A.3d 580, 587 (D.C. 2019). "The evidence need not compel a finding of guilt or negate every possible inference of innocence." *Lattimore v. United States,* 684 A.2d 357, 359 (D.C. 1996); *accord (James) Miller v. United States,* 115 A.3d 564, 570 (D.C. 2015). The government need only present some probative evidence on each element of the crime. *Jennings v. United States,* 431 A.2d 552, 555 (D.C. 1981). This Court can reverse a conviction "only where the government has produced no evidence from which a reasonable mind might fairly infer guilt beyond a reasonable doubt." *(James) Miller,* 115 A.3d at 570.

The PLCFD statute prohibits the "possess[ion] . . . any large capacity ammunition feeding device regardless of whether the device is attached to a firearm." D.C. Code § 7-2506.01(b). The statute defines "large capacity ammunition feeding device" to include "a magazine . . . that has a capacity of . . . more than 10

rounds of ammunition." *Id.* To convict Miller of PLCFD, the government was required to prove 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. *Bruce,* 305 A.3d at 397, 399.

Contraband "can be actually or constructively possessed." *Dorsey v. United States,* 154 A.3d 106, 112 (D.C. 2017). "Actual possession is the ability of a person to knowingly exercise direct physical custody or control over the property in question." *(Courtney H.) Johnson v. United States,* 40 A.3d 1, 14 (D.C. 2012). "To prove constructive possession of contraband, the evidence must show that the accused (1) had knowledge of its presence and (2) had both the ability and the intent to exercise dominion and control over it." *Smith v. United States,* 55 A.3d 884, 887 (D.C. 2012). Possession "may be proven by direct or circumstantial evidence." *Rivas v. United States,* 783 A.2d 125, 129 (D.C. 2001) (en banc).

C. Sufficient Evidence Supports the New Knowledge Element.

There was sufficient evidence that Miller knew the magazine could hold more than 10 rounds of ammunition. First, Miller does not dispute that the evidence of constructive possession was sufficient. Indeed, there was ample evidence of that. The magazine was found in plain view between the driver's door and the driver's seat where Miller, the car's sole occupant, had been sitting when Officer Way arrived

on the scene (7/18/23 Tr. 22-28). DMV records established that Miller owned the car (*id.* 153, 156-58). Miller alit from his car when Officer Way arrived and exited his cruiser (*id.* 27-28). Miller then crossed the street "with purpose" holding a gray backpack in front of his body, crouched down alongside the red SUV, placed the backpack on the ground next to passenger side of the SUV, and fled up 9th Street (*id.* 28-30, 35-36, 147). Officer Way agreed with defense counsel's statement that "the magazine was found just sitting in open view or plain view" and it was "wedged between the driver's seat and the driver's door" (*id.* 81). Officer Strong explained that the magazine was alone and was in plain view between the driver's seat and the door frame when he stood at the front driver's side door and shined his flashlight inside the car down toward the driver's seat (*id.* 161-63; GE9). Officer Strong testified that the magazine was also clearly visible when the car door was opened (7/18/23 Tr. 173). All this evidence supports that Miller constructively possessed the magazine, which in turn supports his knowledge of its characteristics. *See, e.g., (Bernard) West v. United States,* 100 A.3d 1076, 1090 (D.C. 2014) (fact that PCP vial was found in plain view on uncluttered backseat floorboard of defendant's vehicle, and defendant was sole occupant of vehicle, supported that he constructively possessed the vial). Indeed, "[i]t is usually easy to establish that the owner of a car . . . has constructive possession of illicit items recovered from the car," and Miller's "close proximity" to the magazine "in plain view is certainly probative in

determining" whether he knew of, and had the ability to exert control over, the magazine, and "whether he had the necessary intent to control . . . [its] use or destiny." *Id.* at 1091 (cleaned up); *see also United States v. Alexander,* 331 F.3d 116, 127 (D.C. Cir. 2003) (evidence showing defendant's "evasive conduct . . . coupled with proximity [to item] may suffice" to establish constructive possession of item) (internal quotation marks omitted), *quoted in Dorsey,* 154 A.3d at 112*; see also Bruce,* 305 A.3d at 394 (same).

Moreover, there was other circumstantial evidence from which the jury could infer that Miller knew the magazine had a capacity of more than 10 rounds. *See, e.g., Tucker v. United States,* 421 A.2d 32, 35 (D.C. 1980) ("[I]t is not necessary that the government offer direct proof of knowledge; the jury may infer knowledge from circumstantial evidence."). As shown supra at pp. 18-19, the magazine was immediately visible to Officer Strong when he shined his flashlight down towards the driver's seat of Miller's car. This supports the reasonable inference that Miller likewise would have seen the magazine next to him while he was in the driver's seat. The fact that the magazine was also clearly visible when the driver's door was opened, supports the reasonable inference that Miller would have seen the magazine when he entered and exited his car.

Moreover, the evidence discussed supra at pp. 18-19, that provided grounds for the reasonable inference that Officer Strong immediately saw the magazine,

provided the jury with sufficient evidence to support the reasonable inference that Miller also saw that the magazine was an LCM because the holes through which the ammunition was visible were facing upward in a manner that could be viewed by the driver (GE9; 7/18/23 Tr. 162-63). The photo of the magazine showed that more than 10 light-colored cartridges were visible through those holes and that a cartridge was obviously protruding from the top of the magazine (GE9; 7/17/23 Tr. 152-53). Additionally, the gun found under the red SUV, which bore Miller's DNA and had an LCM attached to it, was located close to where Miller placed his backpack before fleeing the scene. This constituted further evidence that he constructively possessed the magazine in his car and knew that it was an LCM.[24] See supra at pp. 17, 19-20. *Cf., e.g., Evans v. United States,* 122 A.3d 876, 891 (D.C. 2015) ("[T]he inference of constructive possession as to each gun is to a degree supported by the presence of the other."); *United States v. Dykes,* 406 F.3d 717, 721 n.5 (D.C. Cir. 2005) ("where a defendant is charged with unlawful [constructive] possession of something,

[24] The fact that the jury acquitted Miller of the charges related to that gun does not preclude that gun's consideration in assessing the sufficiency of the PLCFD evidence. *See, e.g., Kelly v. United States,* 281 A.3d 610, 616 (D.C. 2022) (acquittal on weapons convictions did not undercut sufficiency of evidence for robbery conviction); *Francis v. United States,* 256 A.3d 220, 234 n.49 (D.C. 2021) (in evaluating sufficiency of evidence, this Court considers all the evidence admitted at trial); *Jones v. United States,* 716 A.2d 160, 164 (D.C. 1998) ("So long as the evidence was sufficient to support the conviction in question, the fact that the jury acquitted the appellant of certain related counts does not invalidate the conviction.").

evidence that he possessed the same or similar things at some other time is quite relevant to his knowledge and intent with regard to the crime charged").

This case differs factually from *Bruce,* in which this Court found there was insufficient evidence that the defendant knew the magazine at issue was an LCM. 305 A.3d at 399. In *Bruce,* the 12-round magazine at issue was loaded into a gun, and the decision mentioned no evidence indicating that the magazine, or its capacity characteristics, were visible. *See id.* at 388 (stating only that a pistol "loaded with a full 12-round magazine" and its barrel pointed downward was found propped against other items on a kitchen shelf). Unlike the scenario in *Bruce,* as discussed supra, the magazine here was lying alone in plain view next to the driver's seat of Miller's car, and more than 10 cartridges were visible through holes in the magazine and another cartridge protruded from the top of the magazine (GE9). For the same reasons, this case is factually distinguishable from other cases cited by Miller in which Massachusetts courts found insufficient evidence that the defendants knew the guns or magazines at issue were capable of holding more than 10 rounds of ammunition. *See United States v. Franklin,* 560 F. Supp. 3d 398, 403 n.4 (D. Mass. 2021) (finding insufficient evidence for supervised-release revocation based on possession of large-capacity firearm where guns found in defendant's possession were loaded, and one was large-capacity firearm capable of holding 13 bullets, but there was no further evidence of defendant's knowledge of that fact); *Commonwealth v. Thompson,* 168

N.E.3d 387, 2021 WL 2010821, at *2 (Mass. App. Ct. 2021) (unpublished) (insufficient evidence that defendant knew he possessed large-capacity ammunition feeding device where, because police officer testified magazine was inserted in firearm, the size of magazine would not be apparent); *Commonwealth v. Cintron,* 119 N.E.3d 357, 2018 WL 6816193, at *2 (Mass. Ct. App. 2018) (unpublished) (insufficient evidence that defendant knew he possessed large-capacity ammunition feeding device where empty device, which was capable of holding 13 rounds but was not noticeably larger than magazine that holds 10 rounds, was inside closed ammunition box, wrapped in a bandana with a firearm, resting on top of box of bullets); *Commonwealth v. Resende,* 113 N.E.3d 347, 354 (Mass. App. Ct. 2018) (magazine found inside gun was not "obviously large," and based on photographs and testimony, when magazine was inserted into the gun, "the size of the magazine would not be apparent").

D. If There Were Error, the Proper Remedy Would Be Retrial, Not Acquittal.

Miller does not dispute that any evidentiary insufficiency was due solely to a post-trial change in the law, i.e., this Court's ruling in *Bruce* requiring proof that Miller knew of the magazine's ability to hold more than 10 rounds. As this Court has held, the proper remedy in such cases is retrial rather than acquittal. Specifically, in *Osborne v. District of Columbia*, 169 A.3d 876 (D.C. 2017), this Court reversed

Osborne's criminal conviction for operating a motor vehicle after his driver's license had been revoked (OAR). This Court framed the issue as "whether . . . the elements of OAR should be expanded to require proof that the District sent notice of revocation to a driver." After holding for the first time that such proof was required if the defense claimed lack of notice (which Osborne had claimed), this Court found that the trial evidence was insufficient to prove that element. This Court thus vacated Osborne's conviction, but did not direct an acquittal. Instead, it remanded for retrial, explaining,

> We reject Mr. Osborne's suggestion that a retrial should be precluded because the evidence did not establish that the District sent him notice that his license had been revoked. *Like many other courts, we decline to prohibit retrial where a post-trial change in the law has altered the elements of proof. See, e.g., United States v. Robison*, 505 F.3d 1208, 1225 (11th Cir. 2007); *United States v. Ellyson*, 326 F.3d 522, 533 (4th Cir. 2003) ("Any insufficiency in proof was caused by the subsequent change in the law . . . , not the government's failure to muster evidence."); *United States v. Wacker*, 72 F.3d 1453, 1465 (10th Cir. 1996) [("Whenever a conviction is reversed solely for failure to produce evidence that was not theretofore generally understood to be essential to prove the crime, double jeopardy does not bar reprosecution.") (cleaned up) (citing *Lockhart v. Nelson*, 488 U.S. 33 (1988)]; *United States v. Weems*, 49 F.3d 528, 530–31 (9th Cir. 1995) [(same)]. "Remanding for retrial in this case does not give the government the opportunity to supply evidence it 'failed' to muster at the first trial. . . . The government had no reason to introduce such evidence because, at the time of trial, under the law of our circuit, the government was not required to prove [the new element]." *Weems*, 49 F.3d at 531.

Id. at 887 n.12 (emphasis added).[25]

Accordingly, under *Osborne*, if the evidence here is now insufficient in light of *Bruce's* post-trial change to the elements of PLCFD, the proper remedy is not to direct an acquittal, but to vacate the conviction and remand for a retrial of the PLCFD count.

III. The Trial Court's Erroneous Jury Instruction on PLCFD Does Not Require Reversal.

Miller claims (at 34-39) that the trial court's failure to instruct the jury that the government was required to prove that he knew the magazine held more than 10 rounds necessitates reversal of his PLCFD conviction. Despite the error, his claim lacks merit.

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[25] Other courts have held that such situations, the claim is not properly viewed as a sufficiency claim at all, but as a legal challenge to the jury instructions regarding the elements. *See, e.g., United States v. Reynoso,* 38 F.4th 1083, 1090-91 (D.C. Cir. 2022) (after defendant's trial for violating felon-in-possession statute, 18 U.S.C. § 922(g)(1), Supreme Court required for first time that government prove defendant knew he had previous felony conviction; "No participant in Reynoso's trial—neither the trial judge, the prosecution, the jury, nor Reynoso himself—recognized knowledge of felon status as an element the government needed to prove. In that situation, a sufficiency claim is a non sequitur"; instead, "if the jury, consistent with then-prevailing law, is never asked to find the existence of something later established to be an offense element, there is no freestanding insufficiency-of-the-evidence claim as to that element"; "[r]ather, the challenge is 'properly understood as a claim of trial error' in failing to instruct the jury on the omitted element") (quoting *United States v. Johnson,* 979 F.3d 632, 637 (9th Cir. 2020)).

A. Standard of Review

Miller acknowledges (at 34) that he did not object to the PLCFD jury instruction at trial, and thus plain-error review applies. To establish plain error, Miller must demonstrate (1) error, (2) which is "plain" or "obvious," and (3) which "affects substantial rights." *United States v. Olano,* 507 U.S. 725, 732, 734 (1993); *Spencer v. United States,* 991 A.2d 1185, 1190 (D.C. 2010). Even then, this Court will not exercise its discretion to correct such forfeited error unless the error "seriously affects the fairness, integrity, or public reputation of the judicial proceedings." *Olano,* 507 U.S. at 732; *Spencer,* 991 A.2d at 1190. "[T]he plain-error exception is cold comfort to most defendants pursuing claims of instructional error." *Wilson v. United States,* 785 A.2d 321, 326 (D.C. 2001).

B. Discussion

Although *Bruce* was issued after Miller's trial, the failure to instruct the jury that it was required to determine whether the government had proven that Miller knew the magazine could hold more than 10 rounds of ammunition was obvious error. *See (Francisca) Miller v. United States,* 209 A.3d 75, 78-79 (D.C. 2019) (error is plain if it is clear or obvious at the time of appeal).

However, Miller has not met his burden on the third and fourth prongs of plain-error review. *See Lowery v. United States,* 3 A.3d 1169, 1173 (D.C. 2010) (defendant "bears the burden on each of the four prongs of the plain error standard").

To show substantial prejudice under the third prong, Miller must demonstrate that the erroneous omission of the magazine-capacity knowledge instruction was "of such a character that viewed in the context of trial, 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). This Court will reverse a conviction "'only in an extreme situation in which the defendant's substantial rights [are] so clearly prejudiced that the very fairness and integrity of the trial is jeopardized'—essentially the application of *Kotteakos*[26] non-constitutional error." *Id.* at 816 (quoting *Comford v. United States*, 947 A.2d 1181, 1189 (D.C. 2008)). "An instruction that omits an element of the offense does not necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Neder v. United States,* 527 U.S. 1, 4 (1999).

Miller overlooks the strong circumstantial evidence that he knew the magazine in his car had the capacity to hold more than 10 rounds of ammunition, discussed supra at 17-20, 36-37. The facts here are unlike the threats in *Malloy*, on which Miller heavily relies to claim substantial prejudice. As discussed supra at pp. 17-20, 36-37, the evidence regarding Miller's knowledge that the magazine's capacity was greater than 10 rounds was strong, whereas the questions the defendant

[26] *Kotteakos v. United States,* 328 U.S. 750 (1946).

posed in *Malloy* "were not inherently threats in the traditional sense." 186 A.3d at 816.

Furthermore, by finding Miller guilty of PLCFD for the magazine in his car pursuant to the jury instructions provided, the jury necessarily found that the magazine could hold more than 10 rounds of ammunition. Given that the government proceeded on a constructive possession theory on that PLCFD count (7/20/23 Tr. 12), and applying the court's instructions on constructive possession, the jury necessarily found that Miller knowingly possessed the magazine in his car (7/19/23 Tr. 175-76) and rejected the defense theory that someone planted the magazine after Miller exited his car (7/20/23 Tr. 41-42). Given those jury findings, and the evidence that the ammunition within the magazine would have been visible to Miller, discussed supra at pp. 18-19, 36-37, there is no reason to believe that the jury, if properly instructed, would not have concluded that Miller knew the magazine was capable of holding more than 10 rounds.

Also, unlike *Malloy,* 186 A.3d at 820, the jury deliberations in this case do not reflect specific difficulties in reaching a verdict on the PLCFD count based on the magazine in Miller's car, much less difficulties arising from his knowledge of the magazine's capacity. Whereas in *Malloy,* the jury sent two notes expressing specific difficulty regarding the evidence, and its ability to reach a verdict, on the threats charge at issue on appeal, 186 A.3d at 820, here the jury sent no notes reflecting

particular concerns regarding the PLCFD charge based on the magazine in Miller's car.

The jury's first note regarding its ability to reach verdicts, which it sent after deliberating for approximately three hours and 45 minutes on the first day, and approximately one hour on the second day, stated only that it was "at an impasse on all six counts" and asked the court whether it should "continue on with deliberations" (7/20/23 Tr. 63-67; 7/21/23 Tr. 2-5). The court found that this period of deliberations was not unusual in a case like this and noted that, given the tenor of the jury's note, it was appropriate to ask the jury to deliberate further (7/21/23 Tr. 5-6).

The jury's second note regarding its ability to reach verdicts, which was delivered after approximately another three hours and 20 minutes of deliberations,[27] and the partial verdict it delivered immediately thereafter, showed that it did not have difficulty with, and had reached guilty verdicts on, the PLCFD and UA charges based on the magazine in Miller's car (7/21/23 Tr. 9, 12-13). The fact that the jury had deliberated for approximately eight hours at that point (*id.* 10) does not show that it had difficulty reaching a verdict on this PLCFD charge. In fact, the trial court noted that the presentation of arguments and testimony at the trial had taken eight hours over the course of three days, and that "a significant number of exhibits . . .

[27] This estimate may be high because the transcript does not reflect the customary lunch break that would be expected between those two notes.

went back" with the jury (*id.* 10-11). Indeed, the jury's later acquittals on all the remaining charges, which pertained to the gun found under the red SUV, indicate that the most reasonable inference to be drawn from any difficulties the jury had in reaching verdicts at earlier points were tied to these charges (*id.* 18-19).

Finally, for substantially the same reasons, Miller has not shown that the omission of the now-required magazine-capacity knowledge instruction "impugn[ed] the integrity or public reputation of the judicial proceeding against" him. *Kidd v. United States,* 940 A.2d 118, 128-29 (D.C. 2007). Miller had a fair opportunity (with skilled counsel who achieved acquittals on the majority of the charges) to present his case to the jury, and reasonable jurors would conclude based on the evidence presented that Miller knew the magazine in his car had an ammunition capacity of more than 10 rounds. *See id.* (cited in *Malloy,* 186 A.3d at 821 n.91).

IV. The Trial Court Did Not Err in Rejecting Miller's Second-Amendment Challenge to the PLCFD Statute.

A. Miller's Status as a Felon, and His Failure to Claim That He Possessed the LCM for the Purpose of Lawful Self-Defense, Precludes His Second-Amendment Challenge.

Miller seeks to overturn his PLCFD conviction, claiming (at 39-48) that the District's PLCFD statute is facially unconstitutional. However, at trial, the parties stipulated that as of October 28, 2022, Miller had a prior felony conviction, and that

Miller knew of that conviction (7/19/23 Tr. 92). This prior felony conviction precludes Miller from challenging to the constitutionality of the PLCFD statute, because as a felon he was precluded from possessing a firearm, and thus the PLCFD statute is constitutional as applied to him.

A defendant "may not challenge a statute by arguing that it could not be constitutionally applied to other defendants, differently situated." *Gamble v. United States,* 30 A.3d 161, 166-67 (D.C. 2011) (citing, inter alia, *Sabri v. United States,* 541 U.S. 600, 609-10 (2004)); *see also Sims v. United States,* 963 A.2d 147, 150 n.2 (D.C. 2008) ("Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court.") (quoting *Broadrick v. Oklahoma,* 413 U.S. 601, 610 (1973)). A defendant's trial stipulation that, prior to the alleged offense, he had been convicted of a felony, precludes him from bringing a facial challenge against the District's firearms statutes. *See Chew v. United States,* 314 A.3d 80, 84-86 (D.C. 2024) (because defendant stipulated that he had a prior felony conviction, it was not clear that he was eligible to bring a claim that District's firearms-registration statute, D.C. Code § 7-2502.01(a), and firearms-licensing statute, D.C. Code § 22-4506(a), were facially unconstitutional).

Even more recently, this Court has stated that "[f]or a defendant to bring a Second Amendment challenge in this jurisdiction, he must not be "disqualified from the exercise of Second Amendment rights" by reason of factors such as "age, *criminal history*, mental capacity, and vision," and that "*Bruen* does not appear to have disturbed this practice." *Ward,* 318 A.3d at 533 (citations omitted; emphasis added). In light of Miller's conceded prior felony conviction, he cannot challenge the PLCFD statute on Second Amendment grounds, because at the very least it is constitutional as applied to felons.

Alternatively, Miller's Second Amendment claim fails at the outset because, unlike the petitioners in *Bruen,* Miller has never proffered that he possessed the LCM for the purpose of lawful self-defense. Instead, in the trial court Miller denied possessing an LCM for any purpose, let alone for self-defense purposes (7/20/23 Tr. 40-42 (suggesting in closing argument that bystander planted magazine in car)). *See Bruen*, 597 U.S. at 32-33 (course of conduct protected by the Second Amendment is that of "armed self-defense"; "self-defense is 'the central component of the [Second Amendment] right itself') (quoting *District of Columbia v. Heller,* 554 U.S. 570, 599 (2008) (emphasis in *Heller*)). Nor is he entitled to a presumption to that effect, given that under *Bruen* he must first show that the Second Amendment regulates his proposed conduct. *See* 597 U.S. at 22-24. *See also, e.g., Lowery*, 3 A.3d at 1177 (refusing, on plain error review, to "erect a presumption that a defendant is an

'ordinary citizen,' entitled to exercise Second Amendment rights unless disqualifying information affirmatively appears on the record").

B. Even If This Court Addresses Miller's Claim, It Fails on the Merits.

Even if this Court were to address Miller's claim that his PLCFD conviction should be reversed because the PLCFD statute is facially unconstitutional, that claim lacks merit.

1. Standard of Review

Miller's claim that he was prosecuted under a facially unconstitutional PLCFD statute is a legal question subject to de novo review. *Gamble,* 30 A.3d at 164 n.6; *In re Warner,* 905 A.2d 233, 237 (D.C. 2006).

2. *Bruen, Rahimi,* and the Relevant Legal Framework

In asserting that the PLCFD statute is unconstitutional, Miller relies principally on *New York State Rifle & Pistol Ass'n v. Bruen,* 597 U.S. 1 (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 11. This ruling has no direct bearing on the

District of Columbia's firearm laws.[28] However, Miller asserts that, under *Bruen,* the District's PLCFD statute violates the Second Amendment. Miller's claim fails. Neither *Bruen,* nor the Supreme Court's later decision in *United States v. Rahimi,* 144 S. Ct. 1889 (2024), establish that the District's PLCFD statute is unconstitutional. Indeed, the PLCFD statute fits comfortably within the historical tradition of firearm regulation, because it is "consistent with the principles that underpin our regulatory tradition." *Rahimi,* 144 S. Ct. at 1898.[29]

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. 597 U.S. at 12, 15-17. "Proper cause" was not defined by statute but had been interpreted by New

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[28] As *Bruen* noted, the District of Columbia's "analogue[]" to the "proper cause" standard "has been permanently enjoined since 2017." 597 U.S. at 15 (citing *Wrenn v. District of Columbia,* 864 F.3d 650, 668 (D.C. Cir. 2017)). The District thus no longer enforces the "good cause" provision. See https://mpdc.dc.gov/firearms#LicensetoCarryaHandgun (last visited Oct. 15, 2024) ("Pursuant to the decision of the U.S. Court of Appeals for the 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.").

[29] To the extent our arguments herein address claims or arguments not raised or argued by Miller, we do not waive Miller's failure to raise these challenges. Instead, we address them here in an abundance of caution in the event this Court chooses to consider them.

York courts to require proof of a "special need for self-protection distinguishable from that of the general community." *Id.* at 12 (quotation marks and citation omitted). This was a "demanding" standard. *Id.* 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.* at 13 (cleaned up).

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), under which courts would (1) determine whether the regulated conduct fell within "the original scope of the [Second Amendment] right based on its historical meaning," and if so, (2) engage 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,* 597 U.S. at 17-18 (cleaned up). *Bruen* disapproved this two-step test. Specifically, *Bruen* held that

> 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 19. *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,* 597 U.S. at 26. *See also id.* at 27 (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. *Id.* at 20-24, 31.

In applying the text-and-history test in *Bruen,* 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,* 597 U.S. at 26 (cleaned up). 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 31-34.

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,* 597 U.S. at 33-34. 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 38. 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.* Accordingly, the Court held, "[u]nder *Heller*'s text-and-history standard, the proper-cause requirement is therefore unconstitutional." *Id.* at 39.

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,* 597 U.S. at 79 (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.

Bruen, 597 U.S. at 38 n.9 (emphasis added) (cleaned up).[30]

In *United States v. Rahimi,* 144 S. Ct. 1889 (2024), the Supreme Court further clarified the proper inquiry. *Rahimi* involved a Second Amendment challenge to 18 U.S.C. § 922(g)(8), which disarms individuals subject to certain domestic violence protective orders. In upholding that law, the Supreme Court observed that "some courts have misunderstood the methodology of our recent Second Amendment cases." *Rahimi,* 144 S. Ct. at 1897. Those cases, the Court explained, "were not meant to suggest a law trapped in amber." *Id.* Instead, "the appropriate analysis involves considering whether the challenged regulation is consistent with the *principles* that underpin our regulatory tradition." *Id.* at 1898 (emphasis added). For instance, "if laws at the founding regulated firearm use to address particular problems, that will be a strong indicator that contemporary laws imposing similar

[30] 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,* 597 U.S. at 11.

restrictions for similar reasons fall within a permissible category of regulations." *Id.* But even "when a challenged regulation does not precisely match its historical precursors, it still may be analogous enough to pass constitutional muster," so long as the law "comport[s] with the principles underlying the Second Amendment[.]" *Id.* In applying this standard, the Court reiterated that "many . . . prohibitions, like those on the possession of firearms by 'felons and the mentally ill,' are 'presumptively lawful.'" *Id.* at 1902 (quoting *Heller,* 554 U.S. at 626, 627 & n.26).

As to § 922(g)(8), the Court held that its constitutionality was supported by historical surety laws, which authorized magistrates to "require individuals suspected of future misbehavior to post a bond," and by historical "going armed" laws, which "provided a mechanism for punishing those who had menaced others with firearms." *Rahimi,* 144 S. Ct. at 1900-01. "Taken together," the Court explained, "the surety and going armed laws confirm what common sense suggests: When an individual poses a clear threat of physical violence to another, the threatening individual may be disarmed." *Id.* at 1901. Although § 922(g)(8) "is by no means identical to these founding era regimes," it nevertheless "fits neatly within the tradition the surety and going armed laws represent." *Id.* Because the provision was constitutional as applied to Rahimi, the Court also rejected his facial challenge. *Id.* at 1898.

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

Miller seeks reversal of his PLCFD conviction, claiming that the PLCFD statute is unconstitutional. He claims (at 39-44) that LCMs constitute "arms"; that they are commonly used for self-defense; and that they are presumptively protected by the Second Amendment, because they "facilitate" armed self-defense. 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.

4. 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)), *judgment vacated,* 142 S. Ct. 2895 (2022), *and vacated and remanded,* 49 F.4th 1228 (9th Cir. 2022) [31]; *Association of*

[31] 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] (continued . . .)

New Jersey Rifle and Pistol Clubs, Inc., 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, Inc. v. Cuomo ("NYSRPA"),* 804 F.3d 242 (2d Cir. 2015); *Friedman v. City of Highland Park,* 784 F.3d 406 (7th Cir. 2015); *Heller v. District of Columbia,* 670 F.3d 1244 (D.C. Cir. 2011) (*Heller II*).

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.[32] However, those cases discussed text and history in a way that remains persuasive post-*Bruen.*

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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).

[32] In *Kolbe v. Hogan,* 849 F.3d 114 (4th Cir. 2017), *abrogated on other grounds by Bruen,* 597 U.S. 1 (2022), 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.

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

Miller's challenge to the PLCFD statute fails at the outset. Miller fails to show that the plain text of the Second Amendment applies to LCMs.

a. Miller Fails to Show That LCMs Are "Arms."

Miller fails to show that LCMs are "arms" under the Second Amendment. At the outset, we note that in *Herrington v. United States,* 6 A.3d 1237 (D.C. 2010), this Court held that *ammunition* generally are "arms" under the Second Amendment, since it would be "impossible" to use a gun without ammunition. And federal cases have held that an ammunition feeding device generally is a Second Amendment "arm" for the same reason. 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 and 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, Miller 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,"[33] 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

[33] 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 Oct. 15, 2024).

merely a subset (large-capacity) of a part (a magazine) that some (but not all) 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.[34]

Miller thus errs in claiming (at 41-44) that any firearm accessory that "facilitates" self-defense is an "arm." In arguing for this overbroad definition, Miller overreaches in arguing (at 41) that banning LCMs "would permit a ban on an entire class of firearms commonly possessed for self-defense (such as semiautomatic pistols), so long as other types of firearms (such as revolvers) remained legal[.]" This straw man argument relies on at least one of two false premises: (1) LCMs (as opposed to standard magazines) are necessary to a semiautomatic pistol's operation;

[34] 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.

or (2) *LCM-enhanced* semiautomatic handguns are "an entire class of firearms" distinct from non-LCM-enhanced semiautomatic handguns.

Because neither premise holds, Miller's position is not supported by *Bruen*'s comment that the definition of "arms" "covers modern instruments that facilitate armed self-defense." 597 U.S. at 28. As the context of that comment (and indeed the context of Miller's argument (at 41)) makes clear, the Court's language came in noting that the definition of "arms" was not limited to 18th century weapons, but instead included modern weapons such as handguns. The comment cannot fairly be read to suggest that where a modern weapon (such as a semiautomatic handgun) is further enhanced, that enhancement must enjoy constitutionally protected status. *See, e.g., United States v. Price*, 111 F.4th 392, 407-08 (4th Cir. 2024) (en banc) (upholding statute prohibiting possession of a firearm with an obliterated serial number; "Regardless of any originally lawful nature, a shotgun becomes contraband once its barrel is modified to be less than eighteen inches. The fact that such contraband was created using an originally lawful item is irrelevant.").

Miller cites *ANJRPC,* 910 F.3d at 116, *abrogated by Bruen*, 597 U.S. 1, but that case supports the government's position rather than his own. Specifically, the Third Circuit found it unnecessary to determine whether LCMs, as opposed to standard magazines, are Second Amendment "arms." Instead, the court generally held only that "[b]ecause *magazines* feed ammunition into certain guns, and

ammunition is *necessary* for such a gun to function as intended, *magazines* are 'arms' within the meaning of the Second Amendment." *Id.* (emphasis added). The court then "assume[d] without deciding that LCMs are . . . entitled to Second Amendment protection," and held that "[a]ssuming that the [LCM prohibition] implicates an arm subject to Second Amendment protection," it survived the means-end scrutiny later rejected in *Bruen*. *Id.* at 117. Before applying the means-end test, however, it first assessed the degree to which the LCM statute supposedly burdened the Second Amendment right, which remains part of the test under *Bruen*, 597 U.S. at 29 (looking to "how . . . the [challenged] regulations burden a law-abiding citizen's right to armed self-defense," and whether historical analogues "impose a comparable burden"). The court rejected the very arguments made by Miller here, explaining that

> The [LCM] Act here *does not severely burden the core Second Amendment right to self-defense* . . . for five reasons. First, the Act . . . *does not categorically ban a class of firearms*. The ban applies only to magazines capable of holding more than ten rounds and thus restricts possession of only a subset of magazines. . . .
>
> Second, unlike the ban in *Heller*, the Act is not a prohibition of an entire class of arms *that is overwhelmingly chosen by American society for self-defense*. The firearm at issue in *Heller*, a handgun, is one that the Court described as the quintessential self-defense weapon. The record here demonstrates that *LCMs are not well-suited for self-defense*.
>
> Third, also unlike the handgun ban in *Heller*, a prohibition on large-capacity magazines *does not effectively disarm individuals or substantially affect their ability to defend themselves*. Put simply, the Act here does not take firearms out of the hands of law-abiding citizens,

> which was the result of the law at issue in *Heller*. The Act allows law-abiding citizens to retain magazines, and it has no impact on the many other firearm options that individuals have to defend themselves in their home.[35]
>
> Fourth, the Act *does not render the arm at issue here incapable of operating as intended*. New Jersey citizens may still possess and utilize magazines, simply with five fewer rounds per magazine.
>
> Fifth, *it cannot be the case that possession of a firearm in the home for self-defense is a protected form of possession under all circumstances*. By this rationale, any type of firearm possessed in the home would be protected merely because it could be used for self-defense.
>
> For these reasons, *while the Act affects a type of magazine one may possess, it does not severely burden, and in fact respects, the core of the Second Amendment right*.

ANJRPC, 910 F.3d at 117-18 (cleaned up; emphasis added).

Miller's reliance on a district court opinion in *Hanson v. District of Columbia*, 671 F. Supp. 3d 1 (D.D.C. 2023), fares no better. There, the district court found that LCMs are Second Amendment "arms," but did so on the basis of cases finding

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[35] Relatedly, in a footnote the court disclaimed any reliance on the idea, rejected in *Heller*,

> "that it is permissible to ban the possession of handguns so long as the possession of other firearms (i.e., long guns) is allowed." 554 U.S. at 629. However, as discussed above, *the handgun ban at issue in Heller, which forbade an entire class of firearms, differs from the LCM ban here*, *which does not prevent law-abiding citizens from using any type of firearm* provided it is used with magazines that hold ten rounds or fewer.

ANJRPC, 910 F.3d at 118 (cleaned up; emphasis added).

"magazines" to be arms based on their *necessity* to a firearm's operation, including *ANJRPC.* Even in quoting *Bruen*'s "facilitate" comment, Hanson did so only in support of its holding that the Second Amendment protects firearm components "that make a firearm operable." 671 F. Supp. 3d at 10. In any event, the district court upheld the PLCFD statute after finding that LCMs are not commonly used for self-defense. *Id.* at 10-16.[36]

b. Miller Fails to Show That LCMs Are Commonly Used for Self-Defense.

Miller also fails to show that LCMs are commonly used for self-defense.[37] For

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[36] Hanson's appeal from that ruling is currently pending before the D.C. Circuit in *Hanson v. District of Columbia*, No. 23-7061 (oral argument held Feb. 13, 2024).

[37] The "in common use for self-defense" inquiry is not dispositive of the "history" portion of *Bruen's* text-and-history test. 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. *See Bruen,* 597 U.S. at 31-32 (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.

Although rudimentary LCMs had been invented by the time of the founding, *see* David B. Kopel, *The History of Firearm Magazines and Magazine Prohibitions,* 78 Alb. L. Rev. 849 (2015), 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

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example, *Duncan,* 19 F. 4th at 1097, *judgment vacated,* 142 S. Ct. 2895, *and vacated and remanded,* 49 F.4th 1228, noted that "most" current pistols are sold with magazines that can hold more than ten rounds, and that according to "some experts," approximately half of all privately-owned magazines can hold more than ten rounds. But *Duncan* attached little significance to this data, and instead "question[ed] whether circulation percentages of a part that comes standard with many firearm purchases meaningfully reflect an affirmative choice by consumers." 19 F.4th at 1107, *judgment vacated,* 142 S. Ct. 2895, *and vacated and remanded,* 49 F.4th 1228.

"More to the point," *Duncan* explained, *Heller's* characterization of handguns as "the quintessential self-defense weapon" was premised on the fact that

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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*"); Robert J. Spitzer, *Gun Law History in the United States and Second Amendment Rights,* 80 Law & Contemp. Probs. 55, 69-72 (2017) ("Spitzer, *Gun Law History*") (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.

"consumers overwhelmingly chose to purchase handguns *for the purpose of self-defense*[.]" *Duncan,* 19 F.4th at 1107 (cleaned up; emphasis in original) (citing *Kolbe,* 849 F.3d at 138 (same)), *judgment vacated,* 142 S. Ct. 2895, *and vacated and remanded,* 49 F.4th 1228. By contrast, *Duncan* noted, there was "little evidence that [LCMs] are commonly used, or even suitable, for that purpose." *Id.* 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. Miller offers no evidence that LCMs are useful for self-defense, much less that they are "commonly" used for that purpose.[38] Instead, as

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[38] Miller's reliance (at 46 n.29) on a study by William English is of little value, as serious questions have been raised as to both Dr. English's objectivity and the integrity of his research. *See* Mike McIntyre & Jodi Kantor*, The Gun Lobby's Hidden Hand in the 2nd Amendment Battle*, New York Times (Jun. 18. 2024), https://www.nytimes.com/2024/06/18/us/gun-laws-georgetown-professor.html (last visited Oct. 15, 2024). His study was not submitted for peer-reviewed publication, but instead was posted directly to the Internet via "the Social Science Research Network site, where virtually anyone can upload unpublished academic papers." *Id.* This manner of distribution is perhaps unsurprising, as the academic community has been harshly critical of his work, both for its ethical opacity and for using a "methodology [that] yielded 'absurd' estimates" and "findings on self-defense [that] 'strain credulity'" and that "vastly overstated" gun use for self-defense. *Id.* The article noted that among other faults, he failed to disclose that his study "arose out of expert witness work in a pro-gun lawsuit, []or how the national survey was paid for, a standard disclosure in academic research"; explain "how the online respondents were chosen or why they are representative of the country"; disclose that he worded survey questions in a way as to "elicit answers overstating defensive gun use," while then following a "pattern of omission" in removing the suggestive language in reporting his results"; and disclose that he "cherry-picked pro-gun responses." *Id.* For example, as relevant to LCMs, the Times article noted that "Dr. English quotes about 30 gun owners attesting to the usefulness of large-capacity magazines for self-defense — but only two reported actually firing a gun, both at animals. *He did not quote any of the hundreds of negative responses from gun*

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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.[39] Accordingly, LCMs are not commonly used for lawful self-defense, and thus are outside the scope of the Second Amendment.

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owners, including: 'There is no reason to have a magazine like that unless you're fighting in a war.'" *Id.* (emphasis added).

[39] 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 ambit of the Second Amendment[.]" 849 F.3d at 136 (quoting *Heller,* 554 U.S. at 627) (cleaned up). Thus, any reliance on practices among law-enforcement agencies would support the government's position rather than Miller's. *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

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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'" citizens from exercising their Second Amendment rights. *Bruen,* 597 U.S. at 38 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. 597 U.S. at 29. *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," 597 U.S. at 50, and upheld "may issue" licensing regimes on the same basis. Applying the same reasoning, this Court upheld the CPWL statute in *Brown v. United States,* 979 A.2d 630, 639 (D.C. 2009), finding that "the licensure requirement that the CPWL statute imposes does not appear as a

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> [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.

substantial obstacle to exercise of Second Amendment rights." *Id., quoted in Plummer v. United States,* 983 A.2d 323, 339 (D.C. 2009), *as amended on denial of reh'g and reh'g en banc* (May 20, 2010). 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,* 597 U.S. at 50. Instead, for all the reasons discussed supra in *ANJRPC,* 910 F.3d at 117-18, *abrogated by Bruen*, 597 U.S. 1, the PLCFD statute "does not severely burden, and in fact respects, the core of the Second Amendment right." 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.

6. 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,* 597 U.S. at 17. "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., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives,* 700 F.3d 185, 200 (5th Cir. 2012), *abrogated on other grounds by Bruen,* 597 U.S. 1. 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 people' to whom they were guaranteeing the right to arms") (cleaned up); 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." Robert J. 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) (Cornell & DeNino, *A Well-Regulated Right*) ("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.[40] As the trial court noted in refusing to dismiss the PLCFD charges against Miller, such gunpowder restrictions "were crafted not only to meet the needs of public safety in the storage of gunpowder, but also to 'provide[] a check on the creation of a private arsenal'" (R.3 142 (order p.20) (quoting Cornell & DeNino, *A Well-Regulated Right* at 510-11)). The trial court found that "[l]ike the PLCFD statute, these [gunpowder] restrictions appear to have been designed in part to prevent an individual from utilizing a quintessential home defense weapon to a purpose more suited to a military-type use" (R.3 142 (order p.20) (citing Cornell & DeNino, *A Well-Regulated Right* at 510-11; and *Kolbe,* 849 F.3d at 137 (stating that LCMs are "most useful in military service" because they "enable a shooter to hit multiple human targets very rapidly; contribute to the unique function of any assault

[40] 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." 597 U.S. at 30.

weapon to deliver extraordinary firepower; and are a uniquely military feature of both the banned assault weapons and other firearms to which they may be attached") (cleaned up)).

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 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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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, Victoria Hall-Palerm, Esq., on this 16th day of October, 2024.

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