BRIEF FOR APPELLEE

DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 23-CF-175

WAYNE D. ROBERTSON, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

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

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Cr. No. 2022-CF2-4203

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ISSUES PRESENTED

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II. Whether the trial court erred by ruling that the prohibition on possession of a large capacity ammunition feeding device in D.C. Code § 7-2506.01(b) does not require the prohibited magazine to be operable, when the plain language is unambiguous and contains no such requirement, and the statutory scheme and legislative history are not to the contrary.

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COUNTERSTATEMENT OF THE CASE

By an indictment filed on September 14, 2022, appellant Wayne D. Robertson was charged with unlawful possession of a firearm (prior conviction) (UPF) (D.C. Code § 22-4503 (a)(1), (b)(1)); carrying a pistol without a license (outside home or place of business) (CPWL) (D.C. Code § 22-4504(a)); possession of a large capacity ammunition feeding device ("large capacity magazine" or LCM) (D.C. Code § 7-2506.01(b)); possession of an unregistered firearm (UF) (D.C. Code § 7-2502.01(a));

and unlawful possession of ammunition (UA) (D.C. Code § 7-2506.01(a)(3)) (Record on Appeal (R.) A:8, 10).

On October 14, 2022, Robertson moved to suppress the pistol and other weapons evidence recovered by police from his person, and the government opposed (R.10, 12). On November 7, 2022, the Honorable Sean C. Staples conducted an evidentiary hearing and denied Robertson's motion (R.A:12; 11-7-22 Tr. 178-80). On November 8, 2022, the parties entered into a stipulated trial, after which the court found Robertson guilty of UPF, CPWL, UF, and UA, and deferred its ruling on Robertson's motion for judgment of acquittal on LCM (R.A:13; 11-8-22 Tr. 9-17). After supplemental briefing by the parties (see R.20, 21), on December 15, 2022, the court denied Robertson's motion and found him guilty of LCM (R.A:14; 12-15-22 Tr. 7-11).

On March 3, 2023, Judge Staples sentenced Robertson to 36 months' incarceration for UPF, and imposed concurrent sentences of 19 months, nine months, six months, and six months, for CPWL, LCM, UF, and UA, respectively (R.25). That same day, Robertson timely noted his appeal (R.26).

The Motions Hearing

The trial court received into evidence a 911 call made to the Metropolitan Police Department (MPD) on July 22, 2022, at approximately 2:30 a.m. (11-7-22 Tr. 143, 153; Government Exhibit (GX) 3).[1] On the call, an apparently male caller identified himself as "Chris" and gave his phone number; he reported that he witnessed a couple yelling at someone at the bus stop at 7th and T Streets, NW, and that the male in the couple "flash[ed]" a gun at the person (GX.3 at 00:27, 00:38, 3:14). He described the gunman as a black male on a bike, wearing a black shirt and blue denim jeans; he was accompanied by a black female wearing a teal shirt and white pants with a shaved head and blonde hair (*id*. at 00:38-2:30). He stated that the couple were walking toward the Howard Theater (*id*. at 3:02).

MPD Officer Pablo Rosa testified that he and his partner, Officer [Luis] Castillo, were in a police car at approximately 2:30 a.m. when they received a radio call to respond to the 600 block of T Street, NW (11-7-22

[1] Copies of GX.1 (radio run), GX.2 (footage from Officer Rosa's body-worn camera), and GX.3 (911 call), received into evidence at the hearing, are attached to the government's motion to supplement the record on appeal.

Tr. 144-45). According to the radio run, received into evidence as GX.1, the officers were dispatched to 7th and T Streets, NW, for a man with a gun at the bus stop, walking with a female (GX.1). The dispatcher stated that the man had the gun physically on his person (*id.*). The dispatcher described the man as a black male, wearing a black shirt and blue jeans, and the woman as a black female in a teal blue shirt and white pants with a blonde low haircut (*id.*). The dispatcher stated that both persons were walking toward the Howard Theater (*id.*).

The court also received Officer Rosa's body-worn camera (BWC) footage (11-7-22 Tr. 147; GX.2). Officer Rosa testified that as his car approached the 600 block of T Street, NW, he observed a woman walking in a teal shirt and white pants, accompanied by a black male, whom Rosa identified as Robertson, wearing a black shirt and dark pants and holding a bicycle (11-7-22 Tr. 149-50, 154, 165; GX.2 at 2:16:17). The two officers got out of their car in the 600 block of T Street next to the Howard Theater; Officer Rosa said "yo, yo, yo," and Officer Castillo asked Robertson if he could talk to him; Robertson declined, and got on his bike and "began to take off pedaling fast" (11-7-22 Tr. 149-50, 160-62, 166-68). Officers Rosa and Castillo ran after him but could not keep up, so they

got into a different police car (*id.*). Robertson was stopped by police in the 500 block of R Street, NW; Rosa observed an L-shaped bulge in Robertson's right front pants pocket (11-7-22 Tr. 150-51, 165; GX.2 at 2:18:33; R.19). Police frisked Robertson and recovered a firearm (11-7-22 Tr. 151).

The Trial Court's Ruling

The trial court found the 911 caller, who identified himself as Chris and left a phone number, reported seeing a black male flashing a gun at someone else (11-7-22 Tr. 178). The caller reported that the man was accompanied by a woman wearing a teal shirt, white pants, and blonde hair shaved close (*id.*). The court further found that the police radio run described a black male with a black top and blue jeans, with a gun on his person, accompanied by a woman with a teal shirt, white pants, and a blonde haircut (*id.*). Officers Rosa and Castillo responded, observed Robertson with a woman in a teal shirt and white pants, and Officer Castillo asked Robertson if he could talk to him (*id.* at 178-79). The court found that Robertson "fle[d] the moment they attempt[ed] to make contact with him" (*id.* at 179). The court found that the officers were trying to make contact with Robertson, Robertson's flight was

unprovoked, and the officers ran after Robertson "in response to his running from them" (*id.*).

The court found that the call was "not purely an anonymous tip" (11-7-22 Tr. 180). The court further found that the tip was "sufficiently detailed" and that the caller described how he had observed the man pull the weapon out (*id.*).

The court found that police did not stop Robertson until after his flight, at which time they possessed reasonable articulable suspicion to stop him (11-7-22 Tr 180). The court also found that once police observed the bulge in Robertson's pocket, they possessed reasonable articulable suspicion to pat him down and find the firearm (*id.*). Accordingly, the court denied the motion to suppress (*id.*).

The Stipulated Trial

The Evidence

The parties stipulated that on July 22, 2022, at approximately 2:20 a.m. in the 500 block of R Street, NW, Robertson possessed a firearm, a black Taurus G2C 9-millimeter pistol with a barrel length less than 12 inches (11-8-22 Tr. 9-10; see also R.19).

The parties further stipulated that:

> [T]he magazine inserted into the recovered firearm had a capacity of 15 rounds. When the firearm was recovered from the defendant, the spring and base plate of the magazine were protruding from the bottom of the magazine as depicted in Attachment A. MPD officers removed the spring from the magazine after recovering the firearm. The spring and base[]plate were separate from the magazine when documentary photos were taken at the station as depicted in Attachment B. (11-8-22 Tr. 10; R.19.)

Attachment A depicts the gun and magazine on Robertson's person upon his arrest (R.19 Exh. A). Attachment B depicts the gun, spring, base plate, and an unexpended cartridge after disassembly (R.19 Exh. B).

The parties also stipulated Robertson did not have a license to carry a pistol, that he did not have a valid registration certificate, and that the firearm recovered in this case was not registered to Robertson (11-8-22 Tr. 11; R.19). Robertson had previously been convicted of a crime of violence punishable by imprisonment for more than one year (11-8-22 Tr. 11; R.19). The parties agreed that Robertson's actions were intentional (11-8-22 Tr. 11; R.19).

The Trial Court's Ruling

On November 7, 2022, the trial court convicted Robertson on all counts except LCM, and deferred its ruling on that count pending further briefing on the sufficiency of the evidence (11-7-22 Tr. 17).

In supplemental briefing, Robertson urged that the evidence was insufficient as to LCM because the statute, D.C. Code § 7-2506.01(b), requires that the "large capacity ammunition feeding device" be operable, and the magazine recovered from Robertson could not feed rounds into the gun (R.21:2-4). Specifically, he contended: "That to be a high capacity feeding device, the thing must accept more than 10 cartridges and also feed them" (*id.* at 4). The government contended that the statute did not require operability, as long as the device (1) had "a capacity . . . to accept[] more than 10 rounds of ammunition," or (2) could be "readily restored or converted to accept[] more than 10 rounds of ammunition" (R.20 (quoting § 7-2506.01(b)). The government claimed that the evidence was sufficient on both grounds: (1) the recovered magazine had a capacity of 15 rounds; and (2) the recovered magazine could be easily restored to violate the law because all the component parts—the base plate, the spring, the follower, and the tube—were present upon arrest (*id.* at 4-5).

On December 15, 2022, the trial court ruled that the statute did not require operability as a matter of law, and it denied Robertson's motion (12-15-22 Tr. 7, 10). The court found that Robertson had possessed a magazine and that the magazine he possessed held more than 10 rounds

(*id*. at 10). The court further found, however, that the evidence was insufficient on the alternative ground pressed by the government—that the spring and base plate alone would have been sufficient to readily convert the magazine (*id*. at 9-11). Accordingly, the court found Robertson guilty on the LCM count (*id*. at 11).

SUMMARY OF ARGUMENT

The trial court did not err by denying Robertson's motion to suppress the gun and ammunition recovered from his pants pocket. Contrary to Robertson's claim, the identified-citizen caller, who described seeing a man with a gun, provided a detailed description of the man and the woman with him, and gave their location and direction of travel, provided police with a sufficient basis to stop Robertson, who matched the description and location. Robertson's unprovoked flight provided additional support for the stop.

Nor did the trial court err by ruling that the LCM statute does not require the government to prove that the large capacity magazine found on Robertson's person was operable. The LCM statute plainly requires only that a defendant possess a magazine, and that the magazine be capable of holding 10 rounds of ammunition; the trial court found without

clear error that both of those conditions had been met. On appeal, Robertson presents a new argument—that the statutory scheme and legislative history require reading an operability requirement into the statute. His arguments lack merit because the plain meaning of the statute is unambiguous and does not require operability; furthermore, neither the statutory scheme nor the legislative history supports his claim.

ARGUMENT

I. The Trial Court Did Not Err by Concluding that Police Possessed Reasonable Articulable Suspicion to Stop and Frisk Robertson.

Robertson claims (at 20-23) that the trial court erred by concluding police had reasonable articulable suspicion to stop him and, consequently, to frisk him. His claim lacks merit.

A. Standard of Review and Applicable Legal Principles

When reviewing the denial of a motion to suppress, "the facts and all reasonable inferences therefrom must be viewed in favor of sustaining the trial court ruling." *Plummer v. United States*, 983 A.2d 323, 330 (D.C. 2009) (citing *Shelton v. United States*, 929 A.2d 420, 423 (D.C. 2007)). In

addition, this Court "must defer to the motions court's findings of fact as to the circumstances surrounding the appellant's encounter with the police and [must] uphold them unless they are clearly erroneous." *Plummer*, 983 A.2d at 330 (citing *Shelton*, 929 A.2d at 423).

Reasonable articulable suspicion to support a stop can be based on an informant's tip. *Adams v. Williams*, 407 U.S. 143, 147 (1972). Information from an identified citizen is presumptively reliable. *Joseph v. United States*, 926 A.2d 156, 1161-62 (D.C. 2007); *see, e.g., (Marvin) Brown v. United States*, 590 A.2d 1008, 1016 (D.C. 1991) ("A person who does not hide behind the cloak of anonymity, but who voluntarily comes forward and identifies himself or herself, is more likely to be telling the truth because he or she is presumably aware of the possibility of being arrested for making a false report"). An anonymous tip may also provide reasonable articulable suspicion for a stop if the tip is "'reliable in its assertion of illegality' and 'in its tendency to identify a determinate person.'" *Jackson v. United States*, 109 A.3d 1105, 1107 (D.C. 2015) (quoting *Florida v. J.L.*, 529 U.S. 266, 272 (2000)).

B. Analysis

Contrary to Robertson's claim (at 20-23), the trial court did not err in concluding that police possessed reasonable articulable suspicion to stop (and frisk) Robertson. Robertson asserts no clear error in the court's factual findings. Indeed, the court's findings were amply grounded in Officer Rosa's testimony, as supported by the 911 call, the recorded radio run, and his own BWC, and were not therefore plainly wrong or without facts to support them. D.C. Code § 17-305(a).

To start, the tip from the identified citizen alone was sufficient basis for the stop. As the court found, the caller identified himself by first name and phone number (see 11-7-22 Tr. 178). Because the caller thus gave sufficient information that police could identify him, his tip was not from an anonymous caller but was from an identified citizen and thus was presumptively reliable. *Joseph*, 926 A.2d at 1161-62; *see also id*. at 1162 (caller who identified himself by last name, address, and telephone number removed case from the *Florida v. J.L.* line of cases involving unidentified informants); *United States v. Kehoe*, 893 F.3d 232, 239 (4th Cir. 2018) (caller who provided his first name and phone number not anonymous because that "crucial information allowed police to ascertain

his identity"); *State v. Miller*, 815 N.W.2d 349, 364-65 (Wis. 2012) (informant "not truly anonymous" where he provided his first name and phone number and thus risked being tracked down by police). Moreover, the identified caller described witnessing a crime—a man flashing an illegal gun at a third person (11-7-22 Tr. 178). As the court found, his description was particular, not only of the suspect (black male, black top, blue jeans, with a gun on his person) but of his companion (black female wearing a teal shirt, white pants, with blonde hair cut shaved close) (*id.*). The 911 caller additionally stated that the man brandishing the gun was on a bike (GX.3). The caller gave a specific location (700 block of T Street at the bus stop) and direction of travel (toward the Howard Theater) (*id.*). When police arrived, each of these details proved accurate: Robertson was in the 600 block of T Street next to the Howard Theater wearing a black shirt and dark pants and holding a bicycle; he was accompanied by a woman in a teal shirt and white pants (11-7-22 Tr. 149-50, 154, 165, 178; GX.2 at 2:16:17). Viewing these facts in the light favorable to sustaining the trial court's ruling, *see Plummer*, 983 A.2d at 330, the identified-citizen tip alone supported Robertson's stop. *See Joseph*, 926 A.2d at 1161 (call from citizen who provided last name, address, and

phone number, and described seeing man with a gun at specific location wearing gray sweatshirt, blue jeans, and brown Timberland boots sufficient to support stop and frisk); *Groves v. United States*, 504 A.2d 602, 604-05 (D.C. 1986) (same; caller gave name, described man with a gun in "white over green" Pontiac, and gave location of the car at the time of the call).

Even if analogized to an anonymous tip—which this was not—the call and police observations upon first encountering Robertson provided reasonable articulable suspicion for the stop. The caller claimed eyewitness knowledge, the timeline of events suggested he reported the incident soon after seeing it, and he used a 911 system known to employ features for tracing and identifying callers. *Jackson*, 109 A.3d at 1108. Moreover, the caller described the suspect, his companion, and their location and direction of travel with accuracy and particularity. His tip, therefore, was "reliable both in its assertion of illegality and in its tendency to identify a determinate person." *Id.*; *see id.* at 1108-09 (anonymous tip sufficient for stop; caller called 911, reported seeing a black male wearing brown windbreaker and black hat pull a revolver from his pocket, and gave location and direction of travel).

Furthermore, as the court properly found (11-7-22 Tr. 179-80), Robertson's flight was unprovoked. This consciousness-of-guilt evidence provided further support for the stop. *See Illinois v. Wardlow*, 528 U.S. 119, 124 (2000) ("Headlong flight—wherever it occurs—is the consummate act of evasion: It is not necessarily indicative of wrongdoing, but it is certainly suggestive of such."); *see, e.g., Wade v. United States*, 173 A.3d 87, 90, 92 (D.C. 2017) (finding reasonable articulable suspicion for stop where anonymous 911 caller reported seeing man with a gun in his waistband, described man and person with him, and defendant and second man, who matched the caller's descriptions, began running when police approached).

Robertson relies (at 22) on *Miles v. United States*, 181 A.3d 633 (D.C. 2018), but that case does not aid him. In *Miles*, the source of the call was unclear, and the caller left no callback number; the description was vague (blue army jacket) and inaccurate (the jacket was gray); and the defendant's flight was provoked by a police officer who pulled his cruiser onto the sidewalk in front of him and told him to "stop." 181 A.3d at 641-44. Here, by contrast, the citizen called 911 and left his name and

phone number, the description he provided of both parties was detailed and accurate, and Robertson's flight was unprovoked.[2]

Finally, Robertson briefs no freestanding challenge to the frisk, and has therefore abandoned such a claim. *See Bardoff v. United States*, 628 A.2d 86, 90 n.8 (D.C. 1993). Even so, police stopped Robertson in response to a reliable and particular firearms tip, and, upon stopping him, observed an L-shaped bulge in his pants (11-7-22 Tr. 178-80). The court did not err in concluding (see *id.* at 180) that, on the strength of these facts, police had ample basis to frisk Robertson and recover the gun. *See Singleton v. United States*, 998 A.2d 295, 302 (D.C. 2010) (bulge consistent with firearm in defendant's pocket sufficient to support frisk). For these reasons, the trial court did not err in denying Robertson's motion.

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[2] Nor do the other cases on which Robertson relies (at 22-23) aid him. *Armstrong v. United States*, 164 A.3d 102, 108 (D.C. 2017), describes a robbery lookout not a tip, and the description was vague ("white car, possibly a Mercury Sable, with tinted windows and two black males"). In *Cauthen v. United States*, 592 A.2d 1021 (D.C. 1991), the citizen tip contained no description (three to four persons selling drugs at a location), police did not arrive for 15 minutes, and the defendant merely walked away from police "at a brisk pace." *Id.* at 1021-22. *Mayo v. United States*, 266 A.3d 244, 257 (D.C. 2022), has been vacated. *See* 284 A.3d 403 (D.C. 2022).

II. The Trial Court Did Not Err by Concluding that the LCM Statute Does Not Require the Government to Prove Operability.

Robertson claims (at 10-20) that the trial court erred by concluding that the government was not required to prove that the magazine was "operable" to support a conviction under the LCM statute, D.C. Code § 7-2506.01(b). His claim lacks merit.

A. Standard of Review and Applicable Legal Principles

This Court reviews de novo questions of statutory construction. *In re T.L.*, 996 A.2d 805, 810 (D.C. 2010).

1. Statutory Construction

"The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used." *Solon v. United States*, 196 A.3d 1283, 1287 (D.C. 2018) (quoting *Peoples Drug Stores v. District of Columbia*, 470 A.2d 751, 753 (D.C. 1983) (en banc)) (cleaned up); *see also Brownlee v. District of Columbia Dep't of Health*, 978 A.2d 1244, 1249 n.8 (D.C. 2009) ("Statutory or regulatory construction begins with the plain language of the statute or regulation.") (cleaned up). "When the plain meaning of the statutory language is

unambiguous, the intent of the legislature is clear, and judicial inquiry need go no further." *District of Columbia v. Gallagher*, 734 A.2d 1087, 1091 (D.C. 1999) (internal quotation marks omitted).

The Court may appropriately look beyond plain meaning where (1) "a review of the legislative history or an in-depth consideration of alternative constructions" of the statutory language reveals ambiguities that the court must resolve; (2) the literal meaning of the statute "produces absurd results"; (3) the plain meaning construction leads to an "obvious injustice"; or (4) refusal to adhere to plain meaning is necessary in order to "effectuate the legislative purpose" of the statute as a whole. *Dobyns v. United States*, 30 A.3d 155, 159–61 (D.C. 2011) (quoting *Peoples Drug Stores*, 470 A.2d at 753).

2. The LCM Statute

In 2009, the D.C. Council added a new provision to D.C. Code § 7-2506.01, prohibiting the possession of a "large capacity ammunition feeding device":

> (b) No person in the District shall possess, sell, or transfer any large capacity ammunition feeding device regardless of whether the device is attached to a firearm. For the purposes of this subsection, the term "large capacity ammunition feeding device" means a magazine, belt, drum, feed strip, or similar device that has a capacity of, or that can be readily

> restored or converted to accept, more than 10 rounds of ammunition. The term "large capacity ammunition feeding device" shall not include an attached tubular device designed to accept, and capable of operating only with, .22 caliber rimfire ammunition.

§ 7-2506.01(b); *see* Firearms Registration Amendment Act of 2008, D.C. Law 17-372, § 3(n), 56 D.C. Reg. 1365 (eff. Mar. 31, 2009). The statute was modeled on a similar provision in the federal assault weapons ban, 18 U.S.C. § 922(a)(30), (w)(1) (1994), which lapsed in 2004, and a similar California statute. *See* D.C. Council Comm. on Public Safety and the Judiciary, Rep. on Bill 17-843, the "Firearms Registration Amendment Act of 2008," at 2, 8 (Nov. 25, 2008) ("2008 Firearms Registration Amendment Act Report") (Appendix to Appellant's Brief (App.) 64); *see also United States v. Little*, 780 Fed. App'x 719, 723 (11th Cir. 2019).

B. Analysis

As we have noted, the trial court found that the magazine possessed by Robertson had the capacity to hold more than 10 rounds and convicted him under the language that prohibited possession of a "a magazine, belt, drum, feed strip, or similar device that has a capacity of . . . more than 10 rounds of ammunition" (12-15-22 Tr. 9-11). Robertson does not challenge the court's factual finding that the magazine had a capacity of

more than 10 rounds (*id.* at 10; see 11-8-22 Tr. 10 (magazine had capacity of 15 rounds)). He contends, however, that the court erred by concluding that the portion of the statute under which he was convicted does not require the government to prove the magazine was "operable" (Brief for Appellant at 10-20). Although on appeal, Robertson does not specify what he believes the term "operable" means, we understand his challenge to allege, as he claimed before the trial court, "[t]hat to be a high capacity feeding device, the thing must accept more than 10 cartridges *and also feed them*" (R.21:4) (emphasis added). Because the spring and base plate of the magazine in this case were protruding from the bottom of the magazine (11-8-22 Tr. 10), we concede there was no evidence that Robertson's magazine could feed more than 10 rounds into the firearm. The trial court, however, correctly held that operability is not an element of the offense of possession of an LCM.

1. The Plain Meaning of the LCM Statute Does Not Require Operability.

The LCM statute defines "large capacity ammunition feeding device." § 7-2506.01(b). As relevant here, that definition contains two requirements: (1) the device is "a magazine, belt, drum, feed strip, or

similar device" and (2) the device "has a capacity of . . . more than 10 rounds." *Id.* On its face, the statute does not require the device to feed ammunition.

Nor can operability be read into the plain meaning of the statute. Taking the second requirement first, the term "capacity" is undefined in the statute, but commonly refers to "the potential or suitability for holding, storing, or accommodating," *"Capacity,"* Merriam-Webster, https://www.merriam-webster.com/dictionary/magazine (last accessed Aug. 28, 2023), or "[t]he ability to receive, hold, or absorb," *American Heritage Dictionary of the English Language* 274 (Houghton Mifflin Harcourt 5th ed. 2016). Accordingly, the second statutory element requires only that the device has a *capacity* of more than 10 rounds but does not require that the device be capable of *feeding* those rounds into a firearm.

Turning to the first requirement, the terms "magazine," "belt," "drum," and "feed strip" are not defined in the statute, or in the D.C. Code more broadly.[3] Robertson himself suggests no definitions. The dictionary

[3] Nor are they defined in the federal statute on which the D.C. statute was modelled.

definitions of "magazine," however, contemplate that a magazine is designed or intended to hold and feed ammunition, but do not require operability. *See "Magazine,"* Merriam-Webster.com (last accessed Aug. 28, 2023) ("a holder in or on a gun for cartridges [ ] to be fed into the gun chamber"); *American Heritage Dictionary*, at 1053 ("A compartment in some types of firearms, often a small detachable box, in which cartridges are held to be fed into the firing chamber").

Usage of the term by courts discussing the LCM statute is in accord. "An ammunition feeding device, more commonly known as a magazine, 'is a vehicle for carrying ammunition. It can be either integral to the gun or detachable.'" *Hanson v. District of Columbia*, No. CV 22-2256 (RC), 2023 WL 3019777, at *1 (D.D.C. Apr. 20, 2023) (quoting *Ocean State Tactical, LLC v. Rhode Island*, No. 22-CV-246, 2022 WL 17721175, at *4 (D.R.I. Dec. 14, 2022)). "Magazines come in different sizes and have different capacities. Under D.C. law, a large-capacity magazine, or LCM, is simply a magazine that can hold more than ten bullets." *Id.* In short, common usage of the term "magazine" indicates a device capable of holding ammunition that is designed or intended to feed that

ammunition into the gun chamber; common usage, however, does not require operability.

This Court confronted a similar issue when it construed the definition of "firearm" in D.C. Code § 6-2302(9) (1981) [now D.C. Code § 7-2501.01(9)], which at the time was silent on operability, but defined a "firearm" as "any weapon which will, or is designed, made or remade, readily converted or restored, or intended to, expel a projectile or projectiles by the action of an explosive; . . .." *See Townsend v. United States*, 559 A.2d 1319, 1320 (D.C. 1989). In *Townsend*, the Court held "the statute clearly includes in its definition of a 'firearm' inoperable weapons that may be redesigned, remade, or readily converted or restored to operability." *Id*. Here, if the Court chooses to look to the common usage of the term "magazine" to determine the plain meaning of the statute, it should view the common usage of the word much as it viewed the statutory definition of "firearm," that is, to require design or intent to feed (or fire) but not current operability.

Robertson presents three arguments for discerning operability in the plain meaning of the statute. First, he claims (at 15), that the alternative definition of "large capacity ammunition feeding device" in

the statute—a device "that can be readily restored or converted to *accept*, more than 10 rounds of ammunition"—requires operability. § 7-2506.01(b) (emphasis added). His argument lacks merit. "Accept" is commonly understood to mean "to be able or designed to take or hold (something applied or added)," *"Accept,"* Merriam-Webster.com (last accessed Aug. 28, 2023), or "to be able to hold (something applied or inserted)," *American Heritage Dictionary*, at 9. Like the word "capacity," "accept" connotes holding, not feeding.[4]

Second, he claims (at 15) that the exclusion of tubular magazines "capable of operating only with, .22 caliber rimfire ammunition," § 7-2506.01(b), from the statutory definition of "large capacity ammunition feeding device" requires operability. Tubular magazines "are generally

[4] Indeed, as Robertson argued to the trial court (see R.21:2-3), this part of the statute pertains to the capacity of the magazine, not whether it feeds. Before the trial court, Robertson claimed that the statute "allows gun owners to modify ordinary magazines that are legal in other jurisdictions so that they are legal here as well" (*id*. at 2). Robertson explained that the provision resulted in the commercial sale of devices, called Magblocks, that "reduce the number of rounds a magazine will accept to 10 to bring them into compliance without causing malfunctions" (*id*.; *see id*. at 2 n.1 (citing www.magazineblocks.com/magento, "Block Your Mags and Keep Them Legal")). Robertson cannot take a contradictory position on appeal. *(Thomas) Brown v. United States*, 627 A.2d 499, 508 (D.C. 1993).

fixed magazines that run horizontally along the length of the barrel and are fed with cartridges end to end and are typically only for lever action rifles, rimfire rifles and shotguns." *National Ass'n for Gun Rts. v. Lamont*, No. CV 3:22-1118 (JBA), 2023 WL 4975979, at *5 (D. Conn. Aug. 3, 2023). Twenty-two caliber rimfire ammunition is used by the Boy Scouts of America for the rifle shooting merit badge. Boy Scouts of America, *National Shooting Sports Manual*, at 18, 161, 227-28, 234 (2022). It does not follow from the statute's wording that the separate definition for "large capacity ammunition feeding device" requires operability, and Robertson does not explain why that is so. In any event, it makes sense that the drafters would not wish to exclude from the statute's scope tubular magazines that were intended or designed for .22 caliber rimfire ammunition, but capable of feeding more powerful ammunition.[5]

Third, Robertson urges (at 12-13, 15-16) that the Court should read an operability requirement into the plain meaning of the term, "large capacity ammunition feeding device," much as the Court previously read an operability requirement into the term "firearm" as that word was used

[5] We are unaware of any explanation in the legislative history of the D.C. or federal provision that explains the genesis of this language.

in title 22 of the D.C. Code. *See Lee v. United States*, 402 A.2d 840, 840-41 (D.C. 1979) (holding, for the purposes of D.C. Code § 22-3204 (1973) [now D.C. Code § 22-4504(a)] that "[a] firearm is by common usage a device capable of propelling a projectile by explosive force"). In *Lee*, however, the Court resorted to common usage only because title 22 at the time, unlike title 6 [now title 7], did not define "firearm." *Townsend*, 559 A.2d at 1320 ("It is true that we have construed [ ] the statute that prohibits the carrying of a 'pistol' without a license, to require a showing of operability . . . But that statute, unlike § 6-2311(a), is not accompanied by a definitional section that unmistakably dispenses with the need for such a showing.") (citations omitted).

Here, by contrast, the D.C. Council has defined "large capacity ammunition feeding device" in the statute itself; therefore, there is no need for the Court to define the term. *See Townsend*, 559 A.2d at 1320; *see also Washington v. United States*, 498 A.2d 247, 250 (D.C. 1985) (Terry, J., concurring) ("[T]he problem presented by this case can be

readily solved by legislation. It would be a simple matter to amend [title 22] so as to deal with the question of operability.").[6]

In sum, because the plain meaning of the LCM statute is unambiguous and does not require operability, the judicial inquiry should go no further. *Gallagher*, 734 A.2d at 1091. "This [C]ourt will not read into an unambiguous statute language that is clearly not there." *Carter v. State Farm Mut. Auto. Ins. Co.*, 808 A.2d 466, 472 (D.C. 2002). Indeed, adding an operability requirement despite the Council's evident intent not to include one would "'transcend[] the judicial function.'" *Id.* (quoting *Iselin v. United States*, 270 U.S. 245, 251 (1926)).

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[6] In the other cases relied upon by Robertson (at 13, 16), the Court similarly found operability in the absence of a statutory definition of firearm. *See Moore v. United States*, 927 A.2d 1040, 1054-55 (D.C. 2007) (possession of a machine gun, a kind of "firearm," pursuant to D.C. Code § 22-3214(a) (2001) [now D.C. Code § 22-4514(a) (2001)] requires proof of operability); *see also Washington*, 498 A.2d at 248-49 (possession of "shotgun" within meaning of D.C. Code § 22-3214(a) requires operability, relying on dictionary definitions in the absence of statutory definition). *Strong v. United States*, 581 A.2d 383, 385-87 (D.C. 1990) turned upon the meaning of "dangerous weapon" within the meaning of D.C. Code § 22-3204 (1989). *See* 581 A.2d at 385 (inoperable weapon is not a "dangerous weapon").

2. Contrary to Robertson's Claim, the Statutory Scheme and Legislative History Do Not Justify Reading an Operability Requirement into the LCM Statute.

Robertson further urges (at 16) that the statutory scheme, particularly the D.C. Council's 2009 amendments to title 22 and title 7, and the legislative history, require the Court to read an operability requirement into § 7-2506.01(b). Even if the statute were ambiguous, his argument lacks merit.

As relevant here, the Firearms Registration Amendment Act of 2008 made three amendments to title 7 of the D.C. Code: (1) it changed the definition of "machine gun," § 7-2501.01(10), to mean a firearm which "shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot"; (2) it adopted the new prohibition on possession of large capacity ammunition feeding devices, § 7-2506.01(b); and (3) it inserted language into the definition of "firearm" in § 7-2501 specifying that the definition applied to any weapon, "regardless of operability." Firearms Registration Amendment Act of 2008, §§ 3(a)(3), 3(a)(5), 3(n).

The Council explained that it modified the definition of "machine gun" to refer to action (semiautomatic vs. automatic), instead of capacity (over 12 rounds), because almost all semi-automatic weapons are capable of holding over 12 rounds. 2008 Firearms Registration Amendment Act Report, at 9 (App.72). Consequently, "[*t*]*o deal with the capacity issue*, the bill prohibits large capacity magazines." *Id*. (emphasis added). Finally, the Council explained that it was amending the title 7 definition of "firearm" to conform to the new definition of firearm being added to title 22 in accompanying legislation. *Id*. at 14; *see also* D.C. Council Comm. on Public Safety and the Judiciary, Rep. on Bill 17-593, the "Inoperable Pistol Amendment Act of 2008," at 2 (Nov. 25, 2008) ("2008 Inoperable Pistol Amendment Act Report") (App.23).

In 2009, the Council also adopted legislation to amend title 22 of the D.C. Code. *See* Inoperable Pistol Amendment Act of 2008, D.C. Law 17-388, § 2, 56 D.C. Reg. 1162 (eff. May 20, 2009). In relevant part, that Act adopted a new definition of "firearm" in title 22 that conformed with the revised definition in title 7 and stated expressly that a "firearm" "means any weapon, regardless of operability." *Id*. The Council explained that it did so to remedy a "problem in the prosecution" of CPWL: "For

years the courts have required proof that a firearm is operable as a matter of law even though the statute is silent as to operability and for many decades operability had not been required as an element of the offense." 2008 Inoperable Pistol Amendment Act Report, at 1 (App.22).

Against this backdrop, Robertson claims (at 16) that the Council's decision to specify that firearms need not be operable, at the same time that it created a new large capacity magazine prohibition that was silent on operability, suggests that the Council intended the latter provision to included only operable magazines. This claim lacks merit. The operability problem the Council sought to fix involved firearms, not magazines, and it was confined to title 22, which had no definition of "firearm," not title 7, whose definition of "firearm" had always included inoperable weapons. 2008 Inoperable Pistol Amendment Act Report, at 1 (App.22); *Townsend*, 559 A.2d at 1320. Quite simply, operability was never a problem in the title 7 definition of "firearm," and there was no need to "fix" that problem. Moreover, it would make little sense to require

a prohibited magazine to be operable under title 7, when the gun in which it was likely found need not be operable under title 7 or title 22.[7]

This Court rejected a similar argument about operability in *In re D.F.*, 70 A.3d 240, 244-45 (D.C. 2013). There, D.F. urged that the Council's failure in 2009 to amend the prohibition on possession of a B-B gun in 24 D.C.M.R. § 2301.3 "should be taken to signify that § 2301.3 is properly interpreted to require operability." *Id.* at 244. The Court noted that in amending the firearms laws in 2009, the Council "has rejected the approach of our case law implying 'operability' as a requirement for conviction." *Id.* at 245. As in *D.F.*, the Court should heed the Council's intent in the 2009 amendments and decline Robertson's invitation to read an operability requirement into a criminal weapons statute that is otherwise silent on that point.

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[7] In addition, the Council placed the LCM provision in § 7-2506.01, entitled "Persons permitted to possess ammunition," whose only other provision is a prohibition against possession of ammunition. That provision, like LCM, also contains no express operability requirement. *See* § 7-2506.01(a); *see also* § 7-2501.01(2) ("'Ammunition' means cartridge cases, shells, projectiles (including shot), primers, bullets (including restricted pistol bullets), propellant powder, or other devices or materials *designed, redesigned, or intended for use in a firearm* or destructive device.") (emphasis added).

Robertson's argument is also at odds with this Court's construction of "the comprehensive statutory scheme" of title 7 and title 22: "[t]he provisions of the Firearms Control Regulations Act [then title 6, now title 7] were intended primarily as regulatory measures adopted pursuant to the District's local 'police power' . . . . Further, the Act was intended to broaden and increase the limitations on firearms within the District above and beyond the existing criminal code provisions contained in Title 22." *Townsend*, 559 A.2d at 1321; *see* 2008 Inoperable Pistol Amendment Act Report, at 2 (acknowledging the "distinction between the two organic statutes: The 1932 Congressional Act dealing with the carrying of weapons and criminal behavior [now title 22] and the 1975 Council act establishing registration requirements [in title 7]"). The restrictive construction of the LCM statute urged by Robertson would be in tension with the Council's expressed desire in title 7 to broaden regulation of firearms beyond the criminal code provisions in title 22, especially since, after 2009, title 22 no longer required "firearms" to be operable.

Robertson further asserts (at 16-19) that the legislative history of the two statutes reveals a legislative intent to prohibit only operable magazines. It is true, as Robertson notes (at 17), that the Council wished

to eliminate the Court-made operability requirement for firearms in title 22: "What is the good in allowing someone to carry [an inoperable revolver]? To everyone else who might see it, the gun still appears completely dangerous." 2008 Inoperable Pistol Amendment Act Report, at 3 (App.24). It is not true, however, that the Council's concern about large-capacity magazines was limited to operable magazines. Neither committee report states such a limitation.[8] To the contrary, the Council expressly stated that it was adopting the LCM statute to address a gap created by its change in the definition of machine gun from capacity to function. 2008 Firearms Registration Amendment Act Report, at 9 (App.72). Again, when the prohibited machine gun was not required to

[8] In fact, the Council endorsed multiple arguments for not requiring operability in a weapons statute in addition to concerns about how the weapon might be used to intimidate citizens on the street. 2008 Inoperable Pistol Amendment Act Report, at 2-3. These included (1) limiting the police officer time and expertise required to prove operability at presentment and trial; (2) eliminating the "loophole that forces the government to dismiss cases against defendants who carry real guns that, for some reason, fail to testfire"; and (3) eliminating the risk that an operable weapon would be rendered inoperable by a defendant "who tosses his gun while fleeing coincidentally rendering the weapon inoperable." *Id*. Those concerns apply to magazines as well as to firearms.

be operable, *see* D.C. Code §§ 7-2501.01(9), (10), there was no reason to require that the prohibited magazine be operable.

Finally, we are unaware of any authority for the proposition that either the "large capacity ammunition feeding device" provision in the D.C. statute, or the federal assault weapons ban or the California statute on which the D.C. statute was modelled, have been construed to require proof of operability.[9] For this reason as well, the Court should decline to read such a provision into the statute.[10]

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[9] Contrary to Robertson's claim (at 18-19), the expired federal provision does not aid him. The statute, formerly codified at 18 U.S.C. § 922(w), added "large capacity ammunition feeding device" to the definition of "firearm" in 18 U.S.C. § 921(3), a definition that includes inoperable weapons. *See* H.R. Rep. No. 103-489, at 24-25 (1994) (App.175-76); *see also United States v. Gwyn*, 481 F.3d 849, 855 (D.C. Cir. 2007); *see also Moore v. State*, 34 A.3d 513, 523–24 (Md. App. Ct. 2011) (collecting cases).

[10] Robertson's reliance (at 19-20) on the rule of lenity is unavailing. That rule only applies when "a penal statute's language, structure, purpose and legislative history leaves its meaning genuinely in doubt." *United States Parole Comm'n v. Noble*, 693 A.2d 1084, 1103-04 (D.C. 1997) (internal citations omitted). For the reasons set out in the text, there is no such lingering ambiguity here.

CONCLUSION

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

Respectfully submitted,

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

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

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23-CF-175
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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, Peter H. Meyers, Esq., PMeyers@law.gwu.edu,, on this 8th day of September, 2023.

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