No. 24-____

IN THE

Supreme Court of the United States

ANDREW HANSON, TYLER YZAGUIRRE, ERIC KLUN, AND NATHAN CHANEY,

Petitioners,

v.

DISTRICT OF COLUMBIA AND PAMELA A. SMITH, IN HER OFFICIAL CAPACITY AS CHIEF OF THE D.C. METROPOLITAN POLICE DEPARTMENT,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

GEORGE LESTER LYON, JR.
BERGSTROM ATTORNEYS
1929 Biltmore Street, NW
Washington, DC 20009
(202) 669-0442
gll@bergstromattorneys.com

MARK I. PINKERT
HOLTZMAN VOGEL
BARAN TORCHINSKY & JOSEFIAK, PLLC
119 S. Monroe Street
Suite 500
Tallahassee, FL 32301
(850) 270-5938
mpinkert@holtzmanvogel.com

EDWARD M. WENGER
Counsel of Record
SUSAN L. GREENE
DAVID J. BROWN
JARED S. BAUMAN
HOLTZMAN VOGEL
BARAN TORCHINSKY & JOSEFIAK, PLLC
2300 N Street NW
Suite 643
Washington, DC 20037
(202) 737-8808
emwenger@holtzmanvogel.com

CALEB ACKER
DANIEL A. BRUCE
HOLTZMAN VOGEL
BARAN TORCHINSKY & JOSEFIAK, PLLC
15405 John Marshall Highway
Haymarket, VA 20169
(540) 341-8808
cacker@holtzmanvogel.com

Counsel for Petitioners

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QUESTION PRESENTED

This Court in *District of Columbia v. Heller* "found it 'fairly supported by the historical tradition of prohibiting the carrying of "dangerous and unusual weapons"' that the Second Amendment protects the possession and use of weapons that are 'in common use at the time.'" *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 21 (2022) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 627 (2008)).

In this case, a divided D.C. Circuit panel held that magazines capable of holding more than ten rounds of ammunition are arms "in common use" for lawful purposes, but it nonetheless concluded that the District may categorically ban them because they are "particularly dangerous," analogous to Bowie knives and fully automatic machine guns.

Accordingly, the question presented is:

Whether the Second Amendment to the United States Constitution allows a categorical ban on arms that are indisputably common throughout the United States and overwhelming used for lawful purposes (generally) and self-defense (specifically).

PARTIES TO THE PROCEEDINGS

The Petitioners (plaintiffs-appellants below) are, Andrew Hanson, Tyler Yzaguirre, Eric Klun, and Nathan Chaney.

The Respondents (defendants-appellees below) are the District of Columbia and Pamela A. Smith, in her official capacity as Chief of the D.C. Metropolitan Police Department. Chief Smith succeeded Chief Asham M. Benedict and Chief Robert J. Contee III, both of whom resigned before the case proceeded to this stage.

CORPORATE DISCLOSURE STATEMENT

Petitioners Andrew Hanson, Tyler Yzaguirre, Eric Klun, and Nathan Chaney are individuals.

STATEMENT OF RELATED PROCEEDINGS

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PETITION FOR A WRIT OF CERTIORARI

This Court's decision in *Heller*—reaffirmed by *Bruen*—held that the Second Amendment protects arms "in common use" for lawful purposes. But in direct contravention of *Heller*, some circuits, including the court below, hold that arms in common use for lawful purposes may be categorically banned based on a court's subjective view of their "dangerousness." This issue, which affects millions of Americans' constitutional rights and a wide variety of arms, will continue to arise until this Court settles it.

It is undisputed that Americans possess hundreds of millions of magazines that can hold more than ten rounds of ammunition. Indeed, magazines that can hold more than ten rounds come standard with four of the five best selling self-defense pistols.[1] These "Standard Capacity Magazines" are the exact types of magazines that the District of Columbia categorically banned, on pain of a felony conviction. The D.C. Circuit acknowledged that these magazines are ubiquitous and overwhelmingly used for self-defense; yet it considered them so "particularly dangerous" that the Second Amendment allows the District to prevent *everyone* from possessing them *anywhere* (including in the home) and for *any reason* (including for self-defense). It reasoned that their "unprecedented lethality" likened them to machine guns and sawed-off shotguns.

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[1] *See* David Maccar, *Best Selling Guns of 2022 on Gun Broker: Numbers are in!*, FREE RANGE AM. (Feb. 23, 2023), https://freerangeamerican.us/best-selling-guns/ (last visited Feb. 26, 2025).

At bottom, the D.C. Circuit's opinion devolves into an interest-balancing exercise. In its view, Standard Capacity Magazines are too "particularly dangerous" to be trusted in the hands of Americans, so the District can ban them, even though they are undisputedly in common use for lawful purposes (and, indeed, it is estimated that there are enough in circulation to provide at least one to every man, woman, and child in America). Because this conclusion—adopted by other circuits—directly contradicts *Heller* and *Bruen*, this Court's intervention is necessary to protect the fundamental rights of millions of Americans.

OPINION BELOW

The opinion of the U.S. Court of Appeals for the District of Columbia Circuit (No. 23-7061) is reported at *Hanson v. Smith*, 120 F.4th 223 (D.C. Cir. 2024). This opinion is also reproduced at App. 1–47.

The memorandum opinion of the U.S. District Court for the District of Columbia (No. 1:22-cv-02256-RC) is reported at *Hanson* v. *District of Columbia*, 671 F. Supp. 3d 1 (D.D.C. 2023). This memorandum opinion is also reproduced at App. 100–45.

JURISDICTION

The district court issued its opinion on April 20, 2023. App. 100. Petitioners timely noticed their appeal on May 16, 2023.

The D.C. Circuit issued its decision on October 29, 2024. App. 1. On January 17, 2025, Petitioners submitted to Chief Justice Roberts an application to extend the time to file this Petition for Certiorari up

to February 26, 2025. The Chief Justice granted the requested extension.

Accordingly, this Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL & STATUTORY PROVISIONS AT ISSUE

The Second Amendment to the United States Constitution states: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

The District of Columbia ordinances at issue, D.C. Code § 7-2506.01(b)-(c), are included at App. 146–47.

STATEMENT OF THE CASE

A. For nearly fifty years, the District of Columbia has imposed some of the most extreme and (according to this Court and others) unconstitutional firearms restrictions.[2] In 1976, the District banned the possession of nearly all handguns by first making it a crime to possess a firearm without registering it and then prohibiting the registration of any handgun. *Wrenn v. District of Columbia*, 864 F.3d 650, 655 (D.C. Cir. 2017) (citing D.C. Code § 7-2502.01(a), 7-2502.02(a)(4)). This Court eventually struck down that categorical handgun ban in *Heller*, 554 U.S. at 636. Specifically, in *Heller*, the Court held that "[w]hatever the reason[] handguns are the most popular weapon chosen by Americans for self-defense in the home, . . . a complete prohibition of their use is invalid" under the Second Amendment. *Id*. at 629.

Having been rebuffed by this Court in *Heller*, the District got creative. It combined one restriction—that "no persons or organization in the District shall possess or control any firearm, unless the persons or organization holds a valid registration certificate for the firearm," D.C. Code § 7-2502.02(a)(4), with another that forbade handgun registration for use other than "self-defense within that person's home,"

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[2] *See Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1271 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) ("After *Heller*, . . . D.C. seemed not to heed the Supreme Court's message. Instead, D.C. appeared to push the envelope again[.] . . . D.C.'s public safety motivation in enacting these laws is worthy of great respect. But the means D.C. has chosen are again constitutionally problematic. The D.C. gun provisions at issue here, like the ban at issue in *Heller*, are outliers that are not traditional or common in the United States.").

id. § 7-2502.02(a)(4). In so doing, the District attempted to ban the carrying of *any* firearm outside the home. This provision, however, was rightly determined unconstitutional in *Palmer v. District of Columbia*, 59 F. Supp. 3d 173, 184 (D.D.C. 2014).

Undeterred, the District passed a regulation limiting the concealed carry of handguns outside the home to those who could convince the Metropolitan Police Chief that he or she had a "good reason to fear injury to [his or her] person or property" or "any other proper reason for carrying a pistol." D.C. Code § 22-4506(a)-(b). This "may issue" rule, predictably, resulted in the issuance of very few (only 123) concealed-carry licenses in the District. The D.C. Circuit rightly struck down that provision in *Wrenn*, 864 F.3d at 668, and this Court struck down a materially similar regulation in *Bruen*, 597 U.S. at 11.

Despite persistent repudiation by this Court and others, the District has not relented. After *Heller*, the District immediately enacted the Firearms Registration Amendment Act of 2008, D.C. Law, 17-372—the law at issue in this Petition. As amended, the law makes it a felony to possess an "ammunition feeding device"—more commonly known as a magazine—capable of holding more than ten rounds (the "Magazine Capacity Cap"), *see* D.C. Code § 7-2506.01(b)–(c),[3] even though four of the five most

[3] *See* D.C. Code § 7-2506.01(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."); *id.* § 7-2506.01(c) ("For the purposes of this section, the term 'large capacity ammunition feeding device' means a

popular self-defense pistols come off-the-shelf with magazines ranging from twelve to eighteen rounds.[4]

After this Court's decision in *Heller*, the same group of plaintiffs challenged the law, including the Magazine Capacity Cap. Over the dissent of then-Judge Brett Kavanaugh, the D.C. Circuit upheld the Magazine Capacity Cap under the now-defunct means-end scrutiny test, even after finding it "clear enough . . . that . . . magazines holding more than ten rounds are indeed in 'common use.'" *Heller II*, 670 F.3d at 1261. These Standard Capacity Magazines are even more common today. According to a 2021 research paper from the Georgetown McDonough School of Business, the law has rendered contraband the roughly *542 million* Standard Capacity Magazines currently in circulation throughout the Nation.[5]

B. After this Court reiterated that "the Second Amendment protects the possession and use of weapons that are 'in common use at the time,'" *Bruen*, 597 U.S. at 21 (quoting *Heller*, 554 U.S. at 627), the

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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.").

[4] *See* David Maccar, *Best Selling Guns of 2022 on Gun Broker: Numbers are in!*, FREE RANGE AM. (Feb. 23, 2023), https://freerangeamerican.us/best-selling-guns/ (last visited Feb. 26, 2025).

[5] William English, 2021 National Firearms Survey: Updated Analysis Including Types of Firearms Owned, Georgetown McDonough School of Business Research Paper No. 410949, at 2, 20, 24–25 (May 13, 2022).

Petitioners sued to enjoin the District's Magazine Capacity Cap. Each of the four Petitioners has a D.C. concealed-carry pistol license, and all regularly carry a pistol while in the District. They own (but keep outside the District) magazines capable of holding up to seventeen rounds, and one (Tyler Yzaguirre) tried to register a firearm with a twelve-round magazine. Shortly after filing their complaint, Petitioners moved for both a preliminary and a permanent injunction.

The district court declined to enjoin the Magazine Capacity Cap. In so doing, however, the district court correctly found that Standard Capacity Magazines are "arms" for purposes of the Second Amendment, App. 116, and then correctly observed that they are profoundly common, App. 116–17. It nonetheless concluded that Standard Capacity Magazines are not "typically possessed by law-abiding citizens for lawful purposes," App. 127, reasoning that because they are "most useful in military service," they are "not protected by the Second Amendment," App. 119. In the district court's view, because "civilians . . . simply d[o] not need" that much "ammunition . . . for self-defense," the Second Amendment did not prevent the District from banning Standard Capacity Magazines.

C. In a 2-1 per curiam opinion, the D.C. Circuit affirmed. App. 5. It interpreted *Bruen* as a two-step test: "First, we consider whether 'the Second Amendment's plain text covers' possession of" Standard Capacity Magazines. App. 8 (quoting *Bruen*, 597 U.S. at 17). "If it does, then we must determine whether the magazine cap is 'consistent with this Nation's historical tradition of firearm regulation' and therefore constitutional." App. 8 (quoting *Bruen*, 597 U.S. at 17).

After recognizing that the circuits had split over the correct inquiries under *Bruen* steps one and two,[6] the court construed step one as "encompass[ing] two more precise questions": Do Standard Capacity Magazines "constitute bearable arms," and, if so, are they "'in 'common use' for a lawful purpose, such as self-defense?" App. 9 (first quoting *Heller*, 554 U.S. at 582, then quoting *Bruen*, 597 U.S. at 47). Addressing step one, the D.C. Circuit held that "the answer to both questions is likely, as [Petitioners] maintain[], to be in the affirmative." App. 9. In so doing, it rejected the argument on which the district court relied—that Standard Capacity Magazines "are outside of the scope of the Second Amendment because they are most useful in military service." App. 11.

Despite Petitioners' argument and the dissent's conclusion that, under *Heller*, finding "an arm is in common use renders any restriction of that arm unconstitutional," App. 86–87, n.180, the D.C. Circuit instead examined whether "the District's magazine cap [is] 'relevantly similar' to a tradition of regulating firearms[.]" App. 6–7. Acknowledging the "considerable uncertainty as to the degree of generality at which a court might properly find a relevantly similar historical analogue," App. 14, the

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[6] *See* App. 9 n. 3 ("'There is no consensus on whether the common-use issue belongs at *Bruen* step one or *Bruen* step two.'" (quoting *Bevis v. City of Naperville, Ill.*, 85 F.4th 1175, 1198 (7th Cir. 2023) (assuming common use is part of step two); and citing *Teter v. Lopez*, 76 F.4th 938, 949–50 (9th Cir. 2023) (resolving common use at step two), *reh'g en banc granted, opinion vacated*, 93 F.4th 1150 (9th Cir. 2024); *United States v. Rahimi*, 61 F.4th 443, 454 (5th Cir. 2023) (resolving common use at step one), *rev'd*, 602 U.S. 680 (2024))).

court below found "the appropriate level of generalization" to be "one that aligns the regulation in question with the 'how' and 'why' of the historical analogue." App. 14 (quoting *Bruen*, 597 U.S. at 30, and citing *Rahimi*, 602 U.S. at 680).

Most of the analogues offered by the District did not pass the D.C. Circuit's smell test. In response to the District's gesture toward laws regulating the storage of gunpower, the court below found "[t]he suggestion that they limited the Second Amendment right to keep and bear arms" to be "silly." App. 16. It also found that "time, place, and manner restrictions," like laws prohibiting trap guns, banning carrying concealed, and outlawing firearm discharge within city limits, were not "relevantly similar" to the Magazine Capacity Cap. And it expressed discomfort with the fit between the Magazine Capacity Cap and prohibition-era regulations of machine guns, because "[m]any of those laws did not regulate magazine capacity itself; rather, they addressed the combination of" Standard Capacity Magazines "and automatic firing—effectively, and often explicitly, directed at machine guns." App. 18.

Despite its skepticism of the District's showing, the D.C. Circuit upheld the Magazine Capacity Cap as analogous to "historical restrictions on particularly dangerous weapons and on the related category of weapons particularly capable of unprecedented lethality." App. 19. The specific laws to which the court below pointed included restrictions on Bowie knives, sawed-off shotguns, and machine guns. App. 19, 23. Conceding that "these laws may target different crimes than does the magazine cap," the D.C. Circuit nonetheless concluded that "they share the

same basic purpose: To inhibit then unprecedentedly lethal criminal activity by restricting or banning weapons that are particularly susceptible to, and were widely used for, multiple homicides and mass injuries." App. 25.

Finally, and even though Petitioners maintained their request that the court below *permanently* enjoin the Magazine Capacity Cap, the D.C. Circuit considered the other *preliminary* injunction factors. In so doing, the court rejected the argument that the "deprivation of a constitutional right constitute[s] irreparable harm," and then held that Petitioners had not carried their burden on this prong. App. 33. After concluding that the balance of the equities favored the District, the D.C. Circuit affirmed. App. 41.

D. Judge Walker dissented. App. 48. In his view, the case began and ended as follows: "In *District of Columbia v. Heller*, the Supreme Court held that the government cannot categorically ban an arm in common use for lawful purposes. Magazines holding more than ten rounds of ammunition are arms in common use for lawful purposes. Therefore, the government cannot ban them." App. 48.

In addition to explaining *Heller*'s straightforward application to the District law at issue, Judge Walker provided a fifty-three-page explanation for why *Heller* represents the alpha and omega of this case. Before he did so, he clarified several threshold points.

First, he elucidated the contours of the unlawful prohibition: "D.C.'s ban on these plus-ten magazines is categorical; it extends to every purpose (even self-defense) and to every location (even inside the home)."

App. 49. Next, he drew a line between "a *complete* ban that covers everyone, everywhere" and "targeted 'prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms, . . . or prohibitions on carrying concealed weapons, . . . or the disarming of individuals who pose a credible threat to the physical safety of others." App. 48 n.3. Finally, he observed that Petitioners had requested primarily "a permanent injunction and a declaration that D.C.'s ban is unconstitutional," App. 50, and that "the district court's decision depended entirely on a legal conclusion—that the government can categorically ban an arm in common use for lawful purposes," App. 50–51.

After providing "a much-abbreviated version of the history that informs the Second Amendment," App. 51, Judge Walker correctly observed that the District had "offered no reason to doubt that throughout all of this history, no federal or state legislature enacted a blanket ban on a gun in common use for lawful purposes," App. 51. Next, he canvassed this Court's Second Amendment precedent. App. 57–79. Upon discussing *Heller*, Judge Walker noted that the Court's watershed Second Amendment opinion included "four increasingly specific holdings," each "dependent on the holding before it" and all four "binding on lower courts":

> 1) There is, in general, an individual right to keep and bear arms;
>
> 2) Exceptions to that right depend on the history and tradition of gun regulations;
>
> 3) There is no history and tradition of banning arms in common use for lawful purposes; and
>
> 4) Handguns cannot be categorically banned *precisely because* they are in common use for lawful purposes.

App. 65 (emphasis in original).

He then noted that, after *Heller*, "revanchist legislatures responded with 'defiance,'" and "D.C. led the way."[7] Observing that "D.C.'s unveiled contempt for *Heller* and *McDonald* was not unique," Judge Walker construed this Court's decision in *Caetano v. Massachusetts*, 577 U.S. 411 (2016), as "put[ting] lower courts on notice: Exceptions to gun rights under the Second Amendment depend on a historical tradition of analogous regulations, and there is no historical tradition of banning arms in common use for lawful purposes." App. 68.

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[7] *See* App. 67 ("After its ban on keeping handguns was held unconstitutional, it followed 'with a ban on carrying.' 'And when that was struck down,' D.C. confined 'carrying a handgun in public to those with a special need for self-defense." D.C. then lost in court *again*, this time after arguing that the Second Amendment's 'core does not cover public carrying at all.'" (emphasis in original)).

Arriving at *Bruen*, Judge Walker made a critical observation about how *Heller* and *Bruen* interact. Specifically, *Bruen*'s extended discussion of the history and tradition that informed the constitutionality of may-issue concealed-carry regimes was necessary "because . . . *Bruen* did not involve an arms ban." App. 75. For that reason, *Bruen* "'could not be resolved by applying *Heller*'s rule' that the government cannot ban arms in common use for lawful purposes." App. 75. Even so, *Bruen* took pains to underscore the rule from *Heller*: "the Second Amendment protects the possession and use of weapons that are 'in common use at the time.'" App. 75.

At bottom, Judge Walker concluded that the District's "ban on commonly used plus-ten magazines conflicts with *Heller*'s holding that the government cannot ban an arm in common use for lawful purposes." App. 82. In his view, "[t]hat alone decides this case." App. 82. But even assuming the majority was correct to reengage the historical analysis that *Heller* had already completed, Judge Walker still concluded that the Magazine Capacity Cap could not withstand Petitioners' Second Amendment challenge.

The most important problem with the majority opinion, according to Judge Walker, was that it invented out of whole cloth a new "regulatory category—'restrictions on . . . weapons particularly capable of unprecedented lethality.'" App. 88. "*Heller*," for instance, "never mentioned that category," App. 88, and in any event, this Court's "subsequent cases" confirmed that "'the relative dangerousness of a weapon is irrelevant when the weapon belongs to a class of arms commonly used for lawful purposes,'"

App. 89 (quoting *Caetano*, 577 U.S. at 418 (Alito, J., concurring in the judgment)). After pointing out that none of the Bowie knife regulations on which the majority relied were complete bans (i.e., "none of these laws banned Bowie knives from the home," App. 90), and that "Congress did not actually" "ban machine guns" when it passed the 1934 National Firearms Act," App. 95, Judge Walker concluded that the District had "failed to demonstrate that [its] regulation is consistent with this Nation's historical tradition of firearm regulation," App. 98.

Given his view that (1) this Court had "held that the government cannot categorically ban an arm in common use for lawful purposes," (2) "[m]agazines holding more than ten rounds of ammunition are arms in common use for lawful purposes," and, "[t]herefore," (3) "the government cannot ban them," Judge Walker would have "reverse[d] the district court's decision and directed it to enter a *permanent* injunction." App. 99 (emphasis added). Consistent with Petitioners' request (first to the district court, and then to the D.C. Circuit), that a permanent injunction should issue, Judge Walker saw the outcome of the legal question "inevitable," which justified "'dispos[ing]'" of this case "'as may be just under the circumstances,'" and in a way that would "'obviate further and entirely unnecessary proceedings below.'" App. 99 n.233 (quoting *Wrenn* 864 F.3d at 667).

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW DIRECTLY CONTRADICTS *HELLER*, *BRUEN*, AND *RAHIMI*.

Since *Heller*, this Court's decree has been unequivocal: The Second Amendment protects the possession and use of weapons that are "'in common use'"—full stop. *Bruen*, 597 U.S. at 47 (quoting *Heller*, 554 U.S. at 627). Judge Walker was right to acknowledge that this straightforward rule from *Heller*, alone, renders the District's Magazine Capacity Cap unconstitutional. App. 82.

According to both the majority and the dissent in the opinion below, Petitioners carried their burden of establishing that Standard Capacity Magazines "are 'Arms' within the meaning of the Second Amendment." App. 9. And according to the majority, the dissent, the D.C. Circuit's *Heller II* decision, and most other courts to have addressed the question, Standard Capacity Magazines are astoundingly common, and overwhelming used for lawful purposes, including self-defense. Under *Heller*, a "ban amount[ing] to a prohibition of an entire class of 'arms' that is overwhelmingly chosen by American society for [a] lawful purpose . . . fail[s] constitutional muster." *Heller*, 554 U.S. at 628–29. In other words, "[w]hatever the reason" an arm becomes a tremendously "popular weapon chosen by Americans," that choice renders "a complete prohibition of their use . . . invalid." *Id.* at 629. That principle should have ended this case.

Several members of this Court have recognized as much. Then-Judge Kavanaugh was correct when he observed in 2011 that arms enjoy constitutional protection if "they have not traditionally been banned and are in common use by law abiding citizens." *Heller II*, 670 F.3d at 1269 (Kavanaugh, J., dissenting).[8] Indeed, Justices Thomas and Scalia, the respective authors of *Bruen* and *Heller*, have clarified that "*Heller* asks," without more, "whether the law bans types of firearms commonly used for a lawful purpose." *Friedman v. City of Highland Park*, 577 U.S. 1039, 1042 (2015) (Thomas, J., joined by Scalia, J., dissenting from denial of certiorari). In that categorical arms-ban case (there, a ban on AR-15-style rifles), they set out the analysis that should govern here:

[8] *See also Heller II*, 670 F.3d at 1288 (Kavanaugh, J., dissenting) ("[T]he government may not generally ban semi-automatic guns" because "semi-automatic weapons 'traditionally have been widely accepted as lawful possessions.'" (quoting *Staples v. United States*, 511 U.S. 600, 612 (1994))).

- If "[r]oughly 5 million Americans own AR-style semiautomatic rifles";
- and the "overwhelming majority of citizens who own and use such rifles do so for lawful purposes, including self-defense and target shooting," then;
- "[u]nder our precedents, *that is all that is needed* for citizens to have a right under the Second Amendment to keep such weapons."

Id. (emphasis added).[9]

Although a plain application of *Heller* compels the conclusion that the District's Magazine Capacity Cap cannot withstand Second Amendment scrutiny, the court below, and others throughout the Nation, have wrestled with whether, and how, *Bruen* and *Rahimi* inform *Heller*'s application. According to *Bruen* and *Rahimi*, the answer is not much, if at all. The former held that the governing test was "set forth in *Heller* and appl[ied]" to the New York may-issue license regime at issue in that case without alteration. *Bruen*, 597 U.S. at 26. The latter did the same. *Rahimi*, 602 U.S. at 691. Still, judges throughout the federal-court

[9] *See also Friedman*, 577 U.S. at 1042 ("*Heller* draws a distinction between such firearms [in common use for a lawful purpose] and weapons specially adapted to unlawful uses and not in common use, such as sawed-off shotguns."); *id.* at 1040 (*Heller* and *McDonald* "excluded from [Second Amendment] protection only 'those weapons not typically possessed by law-abiding citizens for lawful purposes.'" (quoting *Heller*, 554 U.S. at 625)).

system have skipped past *Heller*'s command and (like the lower court did here) strain to find some "'relevantly similar'" historical firearms regulation that inevitably justifies the restriction. App. 13.

Judge Walker identified the correct rule, and it is one crying out for this Court to make explicit—*i.e.*, that the government cannot categorically ban arms that are in common use at the time. Neither *Bruen* nor *Rahimi* narrowed this rule in any way. That is because the law at issue in *Bruen* did not categorically ban an arm but instead regulated *where* a person has a right to carry a weapon. And because it fell short of a categorical ban on *everyone* from carrying an arm *everywhere*—like the law at issue here—the Court in *Bruen* needed to conduct a lengthy historical analysis to see whether New York's law tracked closely enough to the Nation's Founding Era time, place, and manner restrictions to survive a constitutional challenge (it did not). Before *Bruen*, this Court had not conducted that inquiry.

The same is true of *Rahimi*. In that case, the Court was similarly *not* asked to address a categorical ban on *everyone* from carrying a weapon *everywhere*. Instead, the inquiry centered on the circumstances under which a person could forfeit his fundamental Second Amendment right by engaging in the sort of behavior that justified disarming him. Again, the Court was forced to examine whether the Nation's Founding Era history of disarming violent individuals was analogous to the law forbidding individuals subject to a domestic violence restraining order from possessing a weapon (it was). And again, before *Rahimi*, this Court had not yet conducted that inquiry.

In contrast, *Heller* addressed a law that did indeed impose a categorical ban on the possession of a wildly common class of weapons. That categorical ban applied to *every person* in the District, and it forbade *any person* from possessing those wildly common weapons *anywhere*, including in their homes and including for self-defense. According to *Heller*, "[f]ew laws in the history of our Nation have come close to" a restriction that severe, and of those few, fewer still survived challenges in court. *Heller*, 554 U.S. at 629. In other words, categorical bans on entire classes of weapons were nonexistent throughout our Nation's history.

Understanding the distinction among the types of gun regulations at issue in *Heller*, *Bruen*, and *Rahimi* makes crystal clear why the District's categorical ban on Standard Capacity Magazines cannot survive Second Amendment scrutiny, and why the D.C. Circuit's contrary conclusion violates *Heller*. To reiterate Judge Walker's observation, all three cases have recognized that "[t]here is, in general, an individual right to keep and bear arms," and any "[e]xception[] to that right depend[s] on the history and tradition of gun regulations." App. 65. It just so happens that in *Heller*, this Court conducted the analysis necessary to determine whether there exists in this Nation a history and tradition of categorically banning *any* arms that are commonly used for lawful purposes. Because a class of arms would necessarily never become commonly possessed for lawful purposes if the Nation had a history and tradition of banning that class of arms, the Court correctly held that the Second Amendment does not allow

categorical bans of arms commonly possessed for lawful purposes. Full stop.

This problem extends far beyond the law at issue in the District of Columbia. In contravention of *Heller*, no fewer than three other circuits have engaged in analytic contortions in a collective effort to salvage categorical bans on arms that are indisputably in common use for lawful purposes.[10] This Court should grant certiorari to clarify how the rule from *Heller* applies in all categorical arms-ban cases.

II. THE DECISION BELOW DEEPENS NO FEWER THAN FOUR CIRCUIT SPLITS.

Assuming the court below did not err when it applied *Bruen*'s second step (and for all the reasons discussed above, it did indeed err), App. 25, this Court's attention is still critical. As of the date of this filing, most of the twelve circuit courts (and plenty more district courts) have grappled with the *Bruen* history-and-tradition inquiry. So far, no two have applied it consistently. Without this Court's attention, Second Amendment jurisprudence will fracture further into more, and deeper, circuit splits as time progresses.

A. The first divergence was explicitly recognized by the court below: Does the common-use inquiry belong at *Bruen* step one, or *Bruen* step two? App. 9 n.3. The D.C. Circuit applied "this issue" at "*Bruen*

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[10] *Bevis v. City of Naperville, Ill.*, 85 F.4th 1175, 1198 (7th Cir. 2023) (assuming common use is part of step two); *Bianchi v. Brown*, 111 F.4th 438, 441 (4th Cir. 2024); *Ocean State Tactical, LLC v. Rhode Island*, 95 F.4th 38, 43 (1st Cir. 2024).

step one because the *Bruen* Court determined that handguns are in common use before conducting its historical analysis," App. 9 n.3, which aligns with the Fifth Circuit's approach.[11] The Seventh Circuit,[12] however, as well as the Ninth Circuit,[13] have opted to apply it at step two, recognizing along the way that "[t]here is no consensus on" where "the common-use issue belongs," *Bevis*, 85 F.4th at 1198.

Resolving this question matters tremendously. At *Bruen* step one, the individuals or entities bringing a Second Amendment challenge bear the burden of showing that "the Second Amendment's plain text covers [their] conduct." *Bruen*, 597 U.S. at 24. At *Bruen* step two, "[t]he *government* must . . . justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Id.* (emphasis added). Although every court, and every litigant, seems to agree that Standard Capacity Magazines are staggeringly common, that consensus is unlikely to persist in future cases dealing with bans on other arms, which means that whether the government or the challenger bears the burden is likely to be outcome-dispositive.

B. Next, the D.C. Circuit recognized where this Court's guidance is likely needed most: clarifying the

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[11] *See United States v. Rahimi*, 61 F.4th 443, 454 (5th Cir. 2023) (resolving common use at step one), *rev'd*, 602 U.S. 680 (2024).

[12] *Bevis*, 85 F.4th at 1198 (assuming common use is part of step two).

[13] *Teter v. Lopez*, 76 F.4th 938, 949–50 (9th Cir. 2023) (resolving common use at step two), *reh'g en banc granted, opinion vacated*, 93 F.4th 1150 (9th Cir. 2024).

"considerable uncertainty as to the degree of generality at which a court might properly find a relevantly similar historical analogue." App. 14. According to the Court below, "[a]t the pinnacle of abstraction, an historical analogue could be representative of 'an unbroken tradition of regulating weapons to [protect communities].'" App. 14 (alteration in original) (quoting *Bevis*, 85 F.4th at 1200). "Conversely, one could read the history to find 'no American tradition of limiting ammunition capacity.'" App. 14 (quoting *Duncan v. Bonta*, 695 F. Supp. 3d 1206, 1214 (S.D. Cal. 2023)). In the D.C. Circuit's view, the Seventh Circuit's approach "exemplif[ies]" a "'regulatory blank check," while the Central District of California's approach "exemplif[ies]" a "'regulatory straightjacket," both of which *Bruen* cautioned against applying. App. 14.

So long as the circuits remain at sea regarding the degree of generality to apply when examining the Nation's history and tradition for relevant Second Amendment analogues, cases challenging identical (or nearly identical) firearms regulations will come out differently in different areas of the Country. And because there is no greater need for National uniformity than when applying the fundamental rights enshrined in our Constitution, this situation will remain untenable until this Court harmonizes it. The time for doing so is now.

C. Another issue splitting the circuits: What is an "Arm" for purposes of the Second Amendment inquiry? According to *Heller*, it is "any thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another." 554 U.S. at 581 (quoting 1 A New and Complete Law

Dictionary). Applying this definition, the D.C. Circuit held that Standard Capacity Magazines are indeed arms for purposes of the Second Amendment. App. 9.

Although the court below got this right, it nonetheless deepened a split when it did so. The Seventh Circuit, for example, has held that neither Standard Capacity Magazines nor some *rifles* are "arms" under this Court's Second Amendment jurisprudence. *Bevis*, 85 F.4th at 1198. Recently, the en banc Fourth Circuit also concluded that some rifles are not "arms" under this Court's caselaw. *Bianchi*, 111 F.4th at 441. The District of Rhode Island, in another magazine-capacity case, held that magazines are not arms, *Ocean State Tactical, LLC v. Rhode Island*, 646 F. Supp. 3d 368, 2022 U.S. Dist. LEXIS 227097, 2022 WL 17721175, at *4 (D.R.I. 2022), and on appeal, the First Circuit was only willing to assume without deciding that they are, *Ocean State Tactical, LLC*, 95 F.4th at 43.

Because "the Second Amendment extends, *prima facie*, to all instruments that constitute bearable arms," *Heller*, 554 U.S. at 582, clarifying what is and is not an "arm" is crucial if Second Amendment cases are to proceed with any semblance of order. Here, the D.C. Circuit got it right, the Seventh and Fourth Circuits got it profoundly wrong, and the First Circuit was unwilling to pick a side. Without this Court's attention, this problem is all but certain to metastasize as gun regulations proliferate and inevitable court challenges arise.

D. Finally: What to make of *Heller*'s stray comparison between weapons "in common use at the time" of the Founding with "dangerous and unusual

weapons," which might be "most useful in military service." *Heller*, 554 U.S. at 627. Below, the D.C. Circuit answered this question correctly, holding that "[t]he latter type of weapon 'may be banned' not because of its military use but because of the 'historical tradition of prohibiting the carrying of dangerous and unusual weapons.'" App. 11 (quoting *Heller*, 554 U.S. at 627).[14] In so doing, however, it had to find error in the district court's order, which reasoned that if a weapon "is *most* useful in military service, it is not protected by the Second Amendment," even if it "ha[s] *some* useful purposes in both civilian and military contexts." App. 119 (emphases in original).

The district court here was not an outlier. The Seventh Circuit upheld a ban on Standard Capacity Magazines and scores of so-called "assault weapons" because, in its view, those are "militaristic weapon[s]." *Bevis*, 85 F.4th at 1199. The First Circuit reasoned similarly. *Ocean State Tactical, LLC*, 95 F.4th at 41. So too, did the Fourth Circuit, which upheld a Maryland ban on assault weapons because "in essence, they are military-style weapons designed for sustained combat operations that are ill-suited and disproportionate to the need for self-defense." *Bianchi*, 111 F.4th at 441. Without this Court's intervention, this split will inevitably deepen.

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[14] *See also* App. 11 ("In other words, the Court was not saying there is no Second Amendment protection for weapons that are most useful in military service." (internal quotation marks omitted)).

The four splits are not the only points of confusion among the circuits. The courts below are still debating whether a weapon enjoys Second Amendment protection if it is in common use for any lawful purpose, or only if it is common use for self-defense. Whether a court must limit its inquiry to Founding Era history or may consult history contemporaneous with the Fourteenth Amendment's ratification, is a question that Justice Barrett has recognized remains open. *Bruen*, 597 U.S. at 81 (Barrett, J., concurring). Here the D.C. Circuit relied on early twentieth century machine gun laws, despite *Bruen*'s express rejection of twentieth century analogues. *See id*. at 66 n.28. Even the relevance of a specific historical analogue is triggering diametrically opposed conclusions. For instance, the D.C. Circuit found "silly" the suggestion that "laws regulating the storage of gunpower" had any relevance to the District's Magazine Capacity Cap. App. 16. The First Circuit, in stark contrast, concluded that the justification for Rhode Island's Magazine Capacity Cap included "a public safety concern comparable to the concerns justifying the historical regulation of gunpowder." *Ocean State Tactical*, LLC., 95 F.4th at 52.

For these reasons, the Court should grant certiorari.

III. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT, BECAUSE SURREPTITIOUS INTEREST BALANCING WILL CONTINUE TO SPREAD WITHOUT THIS COURT'S INTERVENTION.

In *Bruen*, the Court reaffirmed its holding that the Second Amendment "'surely elevates above all other

interests the right of law-abiding, responsible citizens to use arms' for self-defense.'" *Bruen*, 597 U.S. at 26 (quoting *Heller*, 554 U.S. at 635). In so doing, it spurned as "[il]legitimate" any tendency among judges to "'make difficult empirical judgments' about 'the costs and benefits of firearms restrictions,' especially given their 'lack [of] expertise' in the field." *Id.* at 25 (quoting *McDonald*, 561 U.S. at 790–91). For that reason, the Court rejected the use of any "judge-empowering 'interest-balancing inquiry' that 'asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests.'" *Id.* at 22 (quoting *Heller*, 554 U.S. at 634).

If "[t]he constitutional right to bear arms in public for self-defense is" truly "not 'a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees,'" *Bruen*, 597 U.S. at 70 (quoting *McDonald*, 561 U.S. at 780 (plurality opinion)), then the Court must step in, and it must do so now. Between *Bruen* and *Heller*, the prevailing two-step, means-end scrutiny approach provided courts with a way in which to justify upholding virtually any firearms restriction. And the courts did so enthusiastically; in the Ninth Circuit, the government at one point boasted an "'undefeated, 50–0 record'" against Second Amendment challenges. *Rahimi*, 602 U.S. at 712 (Gorsuch, J., concurring) (quoting *Duncan v. Bonta*, 19 F.4th 1087, 1167 n.8 (VanDyke, J., dissenting)); *see also Bruen*, 597 U.S. at 26.

When *Bruen* authorized a "nuanced approach" to "cases implicating unprecedented societal concerns or dramatic technological changes," it warned lower

courts that they were not to interject means-end scrutiny under the guise of that nuance. *Bruen*, 597 U.S. at 27. Rather than heed this warning, the lower courts have heartily used "nuance" "to decide on a case-by-case basis whether the right is *really* worth insisting upon." *Heller*, 554 U.S. at 634. "A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all," *Heller*, 554 U.S. at 634, but courts throughout the Nation have disregarded this admonition by taking back a prerogative that *Bruen* took from them.

Take this case. To justify a categorical ban on extremely common and pervasive Standard Capacity Magazines, the Court identified a history of "restrictions on particularly dangerous weapons and on the related category of weapons particularly capable of unprecedented lethality." App. 19. But an obvious point bears making explicit: Weapons, by definition, are dangerous, and guns, by definition, are lethal. This is true of the handguns people keep in their houses, and it is true of the handguns people carry concealed in public. Despite their danger and lethality, this Court held that the Second Amendment protects both the former (in *Heller*) and the latter (in *Bruen*).[15]

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[15] "Firearms are *supposed* to be effective—that is why civilians use them for self-defense. The very functions that make a weapon useful for military purposes—lethality, accuracy, durability, and maneuverability, to name a few—are functions that make a weapon useful for lawful self-defense, too. So in choosing a firearm for that purpose, civilians naturally gravitate

Therein lies the danger in the tradition identified by the D.C. Circuit. Accepting the premise that all guns are lethal, allowing a court to pin down whether any arm's lethality is so "*particularly* lethal" to warrant a categorical ban is just another way of saying that the court is allowed to "'make difficult empirical judgments' about 'the costs and benefits of'" the categorical ban. *Id.* (quoting *McDonald*, 561 U.S. at 790–91). And just like that, we're back to pre-*Bruen* interest balancing.

Other circuits have gotten it worse than the court below. The Fourth Circuit did not even bother to hide that it was conducting means-end scrutiny; it upheld Maryland's sweeping assault-weapons ban on grounds that "legislatures, since the time of our founding, have responded to the most urgent and visible threats posed by excessively harmful arms with responsive and *proportional* legislation." *Bianchi* 111 F.4th at 464 (emphasis added). And as the dissent correctly noted, "the entire concept of 'proportionality' is merely a license for unelected judges to usurp the public's role in determining whether a particular weapon is sufficiently *tailored* to the important *interest* of self-defense. Sound familiar?" *Id.* at 532 (Richardson, J., dissenting) (emphasis added).

The Seventh Circuit and the First Circuit both somehow adopted an approach even more brazenly at odds with *Bruen* and *Heller*. In upholding Rhode Island's ban on Standard Capacity Magazines, it reasoned that "*empirically*," having more than ten

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toward weapons that have already proved capable of repelling attackers." *Bianchi*, 111 F.4th at 527 (Richardson, J., dissenting).

rounds in a pistol "is not a useful feature for self-defense." *Ocean State Tactical, LLC*., 95 F.4th at 49. And in upholding Illinois's ban on so-called assault weapons and Standard Capacity Magazines, the Seventh Circuit *explicitly stated* that *Bruen* didn't mean what it said when it excised means-end scrutiny from the Second Amendment analysis: "For all its disclaiming of balancing approaches, *Bruen* appears to call for just that: a broader restriction burdens the Second Amendment right more, and thus requires a closer analogical fit between the modern regulation and traditional ones; a narrower restriction with less impact on the constitutional right might survive with a looser fit." *Bevis*, 85 F.4th at 1199.

This dilution of the fundamental right enshrined in the Second Amendment will not end unless this Court ends it. And the time to do so is now. As discussed below, deprivation of a constitutional right is correctly recognized by many courts as a per se irreparable injury, and states and municipalities across the Nation are inflicting this irreparable injury on their law-abiding citizens by negating their right to bear arms, all with the express imprimatur of the federal-court system.

IV. THERE EXIST NO PROCEDURAL IMPEDIMENTS TO THIS COURT'S REVIEW.

For the reasons above, the issues presented here warrant this Court's review. Nor is there any impediment to a grant of certiorari.

Throughout this litigation, Petitioners have requested a *permanent* injunction, and they consistently maintained that a correct application of

Heller, standing alone, would compel the conclusion that the District's Magazine Capacity Cap must be stricken. Judge Walker, for his part, recognized that "[t]hese gun owners" primarily "sought a permanent injunction and a declaration that D.C.'s ban is unconstitutional," while "simultaneously . . . request[ing] a preliminary injunction permitting them to keep their up-to-17-round magazines with their handguns in D.C. while this suit proceeded." App. 50. And in his view, the case should have resulted in a reversal with instruction to "enter a permanent injunction," premised on the notion that the District's Magazine Capacity Cap "'merits invalidation under *Heller*,' so it would 'wast[e] judicial resources' to remand[] the court to develop the record.'" App. 99, 99 n.233 (quoting *Wrenn*, 864 F.3d at 667).

Judge Walker was correct that, if his view prevailed, the only appropriate result would be entry of a permanent injunction. Petitioners agree and maintain that the entirety of this case turns on the following: In "*Heller*, [this] Court held that the government cannot categorically ban an arm in common use for lawful purposes. Magazines holding more than ten rounds of ammunition are arms in common use for lawful purposes. Therefore, the government cannot ban them." App. 48. Should this Court agree, then there would be neither any more work that a remand from the D.C. Circuit would accomplish, nor would there be any alterative grounds whatsoever for affirmance.

Even by the majority's lights, this case presents a clean vehicle for a grant of certiorari. This is true even though the D.C. Circuit held only that the district

court's order denying a preliminary injunction was (in its mistaken view) due to be affirmed. When the D.C. Circuit affirmed the denial of the motion for preliminary injunction, it did so chiefly by making broad pronouncements on the application of the Second Amendment to those, like Petitioners, who own arms in common use. Many were flat pronouncements of D.C. Circuit law that apply in any context, preliminary injunctive or otherwise. And where "there is some important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari, the case may be reviewed despite its interlocutory status." Stephen M. Shapiro et al., Supreme Court Practice § 4.18 (10th ed. 2013) (collecting cases).

One such conclusion is the primary one challenged in this Petition, that arms in common use for lawful purposes may still be categorically banned. That itself is a categorical rule that is not bound to the court's decision only to uphold the denial of a preliminary injunction. Similarly, its errant methodology for identifying and applying analogues is precedential in the D.C. Circuit. And again, the court's invocation and application of this Court's "nuanced approach" language was a legal conclusion not bound whatsoever to the posture of the case.

The Court would be doing nothing out of the ordinary if it granted certiorari in this case. It does so routinely when denials of preliminary injunctions raise questions regarding the appropriate constitutional standard. *Fulton v. Philadelphia*, 593 U.S. 522 (2021); *NIFLA v. Becerra*, 585 U.S. 755 (2018); *Obergefell v. Hodges*, 576 U.S. 644 (2015). It

also does so when a lower court has failed to ask the right question or apply the correct legal standard. *See Trump v. Mazars*, 591 U.S. 848, 871 (2020); *El Paso Nat. Gas Co. v. Neztsosie*, 526 U.S. 473, 488 (1999). And it has summarily vacated when a lower court "incorrectly read[s] a [section] in [this Court's] opinion" on its way to denying a preliminary injunction. *Wisc. Right to Life v. FEC*, 546 U.S. 410, 412 (2006) (per curiam).

Although the D.C. Circuit's opinion also affirmed on grounds that Petitioners had not established an irreparable injury, that similarly does not create a vehicle problem. This is true because this Court's precedent compels the conclusion that a Second Amendment violation inflicts a per se irreparable injury. For fifty years, this Court has held fast to the notion that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury," *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality op.), and it reaffirmed that principle twice over the last several years, *see Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 19 (2020) (per curiam) (citing *Elrod*, 427 U.S. at 373); *Tandon v. Newsom*, 593 U.S. 61, 64 (2021) (per curiam). Because the D.C. Circuit's contrary conclusion transgresses this Court's command that the Second Amendment may not be treated as "a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees," *Bruen*, 597 U.S. at 70 (quoting *McDonald*, 561 U.S. at 780), it is no impediment whatsoever.

In the end, however, a remand from the D.C. Circuit to the district court would accomplish absolutely nothing, which distinguishes this case from

Harrel v. Raoul, 144 S. Ct. 2491, 2493 (2024), where the Seventh Circuit had remanded for a determination whether banned semi-automatic rifles had a relevantly similar "firing rate," "kinetic energy," "muzzle velocity," and "effective range" to the a fully automatic M-16 rifle, *Bevis*, 85 F.4th at 1196. Throughout this litigation, Petitioners and the District have marshaled, produced, analyzed, and tarried over the relevant historical record. Both the district court and the D.C. Circuit fulsomely engaged with that record, which, incidentally, is the same as that mulled over by every other court to address categorical bans on arms (generally) and categorial bans on Standard Capacity Magazines (specifically). Declining to take this case now, on grounds that the parties should do more work at the district court level, would serve no purpose other than delaying resolution of these critically important, purely legal issues.

CONCLUSION

For the above reasons, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

EDWARD M. WENGER
Counsel of Record
SUSAN L. GREENE
DAVID J. BROWN
JARED S. BAUMAN
HOLTZMAN VOGEL BARAN TORCHINSKY & JOSEFIAK, PLLC
2300 N Street NW
Suite 643
Washington, DC 20037
(202) 737-8808
emwenger@holtzmanvogel.com

GEORGE LESTER LYON, JR.
BERGSTROM ATTORNEYS
1929 Biltmore Street, NW
Washington, DC 20009
(202) 669-0442
gll@bergstromattorneys.com

CALEB ACKER
DANIEL A. BRUCE
HOLTZMAN VOGEL BARAN TORCHINSKY & JOSEFIAK, PLLC
15405 John Marshall Highway
Haymarket, VA 20169
(540) 341-8808

MARK I. PINKERT
HOLTZMAN VOGEL BARAN TORCHINSKY & JOSEFIAK, PLLC
119 S. Monroe Street
Suite 500
Tallahassee, FL 32301
(850) 270-5938

Counsel for Petitioners

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23-7061

ANDREW HANSON, *et al.*,

Appellants

v.

DISTRICT OF COLUMBIA AND PAMELA A. SMITH,

Appellees

Appeal from the United States District Court
for the District of Columbia
(No. 1:22-cv-02256)

Argued February 13, 2024 Decided October 29, 2024

Edward M. Wenger argued the cause for appellants. With him on the briefs were *George L. Lyon, Jr.* and *Mateo Forero-Norena*.

Ashwin P. Phatak, Principal Deputy Solicitor General, Office of the Attorney General for the District of Columbia, argued the cause for appellees. With him on the brief were *Brian L. Schwalb*, Attorney General, *Caroline S. Van Zile*, Solicitor General, *Thais-Lyn Trayer*, Deputy Solicitor General, and *Sonya L. Lebsack*, Assistant Attorney General.

Mary B. McCord was on the brief for *amicus curiae* United States Conference of Mayors in support of appellees.

Matthew J. Platkin, Attorney General, Office of the Attorney General for the State of New Jersey, *Jeremy M. Feigenbaum*, Solicitor General, *Andrea Joy Campbell*, Attorney General, Office of the Attorney General for the Commonwealth of Massachusetts, *Robert Toone*, Chief, Government Bureau, *Rob Bonta*, Attorney General, Office of the Attorney General for the State of California, *Philip J. Weiser*, Attorney General, Office of the Attorney General for the State of Colorado, *William Tong*, Attorney General, Office of the Attorney General for the State of Connecticut, *Kathleen Jennings*, Attorney General, Office of the Attorney General for the State of Delaware, *Anne E. Lopez*, Attorney General, Office of the Attorney General for the State of Hawai'i, *Kwame Raoul*, Attorney General, Office of the Attorney General for the State of Illinois, *Aaron M. Frey*, Attorney General, Office of the Attorney General for the State of Maine, *Anthony G. Brown*, Attorney General, Office of the Attorney General for the State of Maryland, *Dana Nessel*, Attorney General, Office of the Attorney General for the State of Michigan, *Keith Ellison*, Attorney General, Office of the Attorney General for the State of Minnesota, *Aaron D. Ford*, Attorney General, Office of the Attorney General for the State of Nevada, *Letitia James*, Attorney General, Office of the Attorney General for the State of New York, *Ellen F. Rosenblum*, Attorney General, Office of the Attorney General for the State of Oregon, *Michelle A. Henry*, Attorney General, Office of the Attorney General for the Commonwealth of Pennsylvania, *Peter F. Neronha*, Attorney General, Office of the Attorney General for the State of Rhode Island, *Charity R. Clark*, Attorney

General, Office of the Attorney General for the State of Vermont, and *Robert W. Ferguson*, Attorney General, Office of the Attorney General for the State of Washington, were on the brief for *amici curiae* Massachusetts, et al. in support of appellees. *Turner H. Smith*, Assistant Attorney General, Office of the Attorney General for the Commonwealth of Massachusetts, entered an appearance.

Priyanka Gupta Sen was on the brief for *amicus curiae* Everytown for Gun Safety in support of appellees.

Douglas N. Letter, *Timothy C. Hester*, and *Ciara Wren Malone* were on the brief for *amici curiae* Brady Center to Prevent Gun Violence, et al. in support of appellees.

Before: MILLETT and WALKER, *Circuit Judges*, and GINSBURG, *Senior Circuit Judge*.

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PER CURIAM: After the Supreme Court's landmark ruling in *District of Columbia v. Heller*, 554 U.S. 570 (2008), the District of Columbia revised its firearms laws to cap the capacity of firearm magazines at "10 rounds of ammunition." D.C. Code § 7-2506.01(b). Over a decade ago, applying the then-prevailing intermediate scrutiny standard of review, we held the magazine cap did not violate the right to bear arms secured by the Second Amendment to the Constitution of the United States, which provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." *See Heller v. District of Columbia* (*Heller II*), 670 F.3d 1244, 1264 (D.C. Cir. 2011). Since then, the Supreme Court has rejected "means-end scrutiny in the Second Amendment context," in favor of asking whether a challenged restriction is consistent with "the Nation's historical tradition of firearm

regulation." *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 19, 24 (2022).

Seeing a new opening, the Appellants have charged once more unto the breach. They argue the District's magazine cap is unconstitutional under the test set forth in *Bruen* and moved the district court for a preliminary injunction to prohibit enforcement of the magazine cap. The district court denied the motion. Because the Appellants have failed to make the "clear showing" required for a preliminary injunction on this early and undeveloped record, *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 22 (2008), we affirm the denial of their motion.

I. Factual and Procedural History

After its "prohibition on the possession of usable handguns in the home" was held to violate the Second Amendment in *Heller*, 554 U.S. at 573, 635, the District of Columbia enacted the Firearms Registration Amendment Act of 2008, D.C. Law 17-372. The Act makes it a felony to possess a magazine capable of holding more than 10 rounds. Appellants wish to possess magazines containing up to 17 bullets, which for efficiency's sake we will refer to as an extra-large capacity magazine (ELCM) to distinguish it from a permitted large-capacity ten-round magazine.[1]

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[1] In full, D.C. Code § 7-2506.01(b)-(c), provides:

> 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

Each of the appellants, Andrew Hanson, Tyler Yzaguirre, Nathan Chaney, and Eric Klun, keeps one or more firearm magazines capable of holding more than ten rounds of ammunition outside the District of Columbia and each alleges he would use his magazines in the District for lawful purposes, including self-defense, were the magazine cap imposed by the Act not in effect. One appellant, Tyler Yzaguirre, attempted to register a firearm with a 12-round magazine in the District, but the Metropolitan Police Department denied his application because of the magazine cap.

On August 1, 2022 — a little more than a month after *Bruen* had been decided — the four appellants (hereinafter Hanson) sued the District and the Chief of the D.C. Metropolitan Police Department, seeking a declaratory judgment that the magazine cap violates the Second Amendment. Hanson also moved for preliminary and permanent injunctions preventing the District and the MPD from enforcing the magazine cap. The district court denied Hanson's motion for a preliminary injunction. *Hanson v. District of Columbia*, 671 F. Supp. 3d 1, 3 (D.D.C. 2023).

Because *Bruen* had "rejected how the Courts of Appeals interpreted and applied *Heller*," the district court undertook a "renewed analysis under the framework *Bruen* provides." *Id.* at 5. As applied to Hanson's suit, the court distilled the *Bruen* test into two questions: First, "whether the Second Amendment covers [ELCM] possession"; and second, if so, "whether

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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.

the District's [magazine cap] is relevantly similar to an historical analogue" in the regulation of firearms. *Id.* at 8. The court then subdivided the first question into two further questions: "Whether ELCMs are 'arms' within the meaning of the Second Amendment," and "whether ELCMs are typically possessed by law-abiding citizens for lawful purposes." *Id.* at 8–9 (cleaned up).

The district court held ELCMs are "arms" within the meaning of the Second Amendment and possession of an ELCM is not within the scope of the Second Amendment right. In the alternative, the court held the District's magazine cap would be "constitutional for the independent reason that the District has shown that it is consistent with this country's historical tradition of firearm regulation." *Id.* at 16. The court reasoned the District's justification for the magazine cap — "mitigating the carnage of mass shootings in this country" — matched that for Prohibition-era "laws restricting possession of high-capacity weapons" because both aimed to reduce violence, and each had a similarly modest burden on the Second Amendment right to bear arms. *Id.* at 22 (cleaned up). Accordingly, the court concluded Hanson had not shown a likelihood of success on the merits and the district court denied his motion for a preliminary injunction. Hanson timely appealed. We now affirm the order of the district court.

II. Standard of Review

A preliminary injunction is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter*, 555 U.S. at 22. To get a preliminary injunction the movant must show: (1) "he is likely to succeed on the merits," (2) "he is likely to suffer irreparable harm

in the absence of preliminary relief," (3) "the balance of equities tips in his favor," and (4) issuing "an injunction is in the public interest." *Id.* at 20. We review the district court's decision whether "to grant the Plaintiffs' request for a preliminary injunction for abuse of discretion, its legal conclusions de novo, and its findings of fact for clear error." *HuishaHuisha v. Mayorkas*, 27 F.4th 718, 726 (D.C. Cir. 2022).

III. Likelihood of Success on the Merits

To assess the merits of Hanson's request for a preliminary injunction,[2] we must determine whether the District's magazine cap allowing ten but not seventeen rounds likely violates Hanson's Second Amendment rights. *Bruen* established a two-step test for making that determination. First, we consider whether "the Second Amendment's plain text covers" possession of an ELCM. *Bruen*, 597 U.S. at 17. If it does, then we must determine whether the magazine cap is "consistent with this Nation's historical tradition of firearm regulation" and therefore constitutional. *Id.* The plaintiff bears the burden of proof at the first step, whereas the Government bears the burden of proof at the second step. *See id.* at 24; *see also Bianchi v. Brown*, No. 21-1255, 111 F.4th 438, 445–46 (4th Cir. 2024).

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[2] Because the appellants conceded at oral argument that they had not made the requisite showing for a facial challenge to the District's magazine cap, *see* Oral Arg. Tr. at 9–14, we address their challenge only as-applied and only to the type of weapons equipped with an ELCM that appellants actually own and want to register in the District, namely, handgun magazines holding between 12 and 17 rounds. *See id.* at 11:20–12:22 (counsel for Hanson explaining that the largest magazine that Hanson "possess[es]" and "want[s] to carry in the District" holds 17 bullets).

A. Plain Text of the Second Amendment

Under governing precedent, *Bruen* step one encompasses two more precise questions: Do ELCMs "constitute bearable arms," *Heller*, 554 U.S. at 582, and, if so, are ELCMs "in 'common use'" for a lawful purpose, such as self-defense?[3] *Bruen*, 597 U.S. at 47 (quoting *Heller*, 554 U.S. at 627). On the current record, we think the answer to both questions is likely, as Hanson maintains, to be in the affirmative.

As to the first question, Hanson is likely to succeed in showing that ELCMs are "Arms" within the meaning of the Second Amendment. "Constitutional rights . . . implicitly protect those closely related acts necessary to their exercise." *Luis v. United States*, 578 U.S. 5, 26 (2016) (Thomas, J., concuring). A magazine is necessary to make meaningful an individual's right to carry a handgun for self-defense. To hold otherwise

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[3] "There is no consensus on whether the common-use issue belongs at *Bruen* step one or *Bruen* step two." *Bevis v. City of Naperville, Ill.*, 85 F.4th 1175, 1198 (7th Cir. 2023) (assuming common use is part of step two); *see Teter v. Lopez*, 76 F.4th 938, 949–50 (9th Cir. 2023) (resolving common use at step two), *reh'g en banc granted, opinion vacated*, 93 F.4th 1150 (9th Cir. 2024); *United States v. Rahimi*, 61 F.4th 443, 454 (5th Cir. 2023) (resolving common use at step one), *rev'd*, 602 U.S. ---, 144 S. Ct. 1889 (2024). We assume, without deciding, this issue falls under *Bruen* step one because the *Bruen* Court determined that handguns are in common use before conducting its historical analysis. *See* 597 U.S. at 32 ("Nor does any party dispute that handguns are weapons in common use today for self-defense. We therefore turn to whether the plain text of the Second Amendment protects [the petitioners'] proposed course of conduct — carrying handguns publicly for self-defense." (cleaned up)); *see also Heller II,* 670 F.3d at 1296 n.20 (Kavanaugh, J., dissenting) ("In order to apply *Heller*'s test to this prohibition, we must know whether magazines with more than 10 rounds have traditionally been banned and are not in common use").

would allow the government to sidestep the Second Amendment with a regulation prohibiting possession at the component level, "such as a firing pin." *Kolbe v. Hogan*, 813 F.3d 160, 175 (4th Cir. 2016), *rev'd en banc*, 849 F.3d 114 (2017). We therefore agree with Hanson and the district court that ELCMs very likely are "Arms" within the meaning of the plain text of the Second Amendment.

Next, Hanson is likely to succeed in showing that ELCMs are "in common use" for self-defense, *see Heller*, 554 U.S. at 627, a deceptively simple question. To start, it demands we answer the antecedent question: What is the relevant geographic area, the District of Columbia, the District-Maryland-Virginia Region, or the entire United States? We think the relevant area is the United States because the source of the right is the Constitution of the United States. It would be anomalous for the protection offered by the Second Amendment to vary from one state or place to another based upon the local popularity of a particular firearm.

What, then, does "common use" mean? We agree with the District that the answer is not to be found solely by looking to the number of a certain weapon in private hands. *Accord Bianchi*, 111 F.4th at 460 ("the Court's choice of the phrase common *use* instead of common *possession* suggests that only instances of 'active employment' of the weapon should count"). After all, there are more than 700,000 machine guns registered with the federal government, Bureau of Alcohol, Tobacco, Firearms, and Explosives, *Firearms Commerce in the United States: Annual Statistical Update 2021*, at 16 (2021), and only "approximately 200,000" stun guns owned by civilians. *Caetano v. Massachusetts*, 577 U.S. 411, 420 (2016) (Alito, J.,

concurring in the judgment) (cleaned up). Yet possession of a stun gun is protected by the Second Amendment, *id.* at 412, whereas possession of a machine gun has generally been banned, *see* 18 U.S.C. § 922(o).

The district court erred, however, in reasoning (as the District now argues) that ELCMs are outside the scope of the Second Amendment because they are most useful in military service. *Heller* contrasted weapons "in common use at the time" of the Founding with "dangerous and unusual weapons," which are "most useful in military service." 554 U.S. at 627 (cleaned up). The latter type of weapon "may be banned" not because of its military use but because of the "historical tradition of prohibiting the carrying of dangerous and unusual weapons." *Id.*

The Supreme Court in *Heller* did not hold, however, that Second Amendment protection does not extend to weapons that are "most useful" in the military context. Rather, the Court acknowledged that the Second Amendment protects those weapons that are "in common use at the time," but not "dangerous and unusual weapons." That means that some "weapons that are most useful in military service" do not receive Second Amendment protection. *Heller*, 554 U.S. at 627. The Court conceded this differential treatment may mean that "modern developments have limited the degree of fit between the [Second Amendment's] prefatory clause and the protected right," but was untroubled by that outcome, reasoning that diminished fit could not "change [its] interpretation of the right." *Id.* at 627–28. In other words, the Court was not saying "there is no Second Amendment protection for weapons that are 'most useful in military service.'" Br. of Appellee 23. It was explaining that some

"sophisticated" and "highly unusual" military weapons, *Heller*, 554 U.S. at 627, may not receive protection notwithstanding the Second Amendment predicate regarding the necessity of a "well-regulated Militia," U.S. Const. amend. II.

The District argues ELCMs are not in common use for self-defense because they are rarely used to fire more than a couple rounds in self-defense. Hanson replies that one need not fire every bullet in an ELCM in order to use it. Because ELCMs are in sufficiently wide circulation and given the disputed facts in the record about the role of ELCMs for self-defense, we will presume for present purposes that ELCMs can be used for self-defense. Accordingly, because Hanson has shown it is likely that ELCMs are "arms" and are in common use for self-defense today, it appears on this record that "the Second Amendment's plain text covers" and therefore presumptively protects the possession of ELCMs. *See Bruen*, 597 U.S. at 17.

Hanson would have us stop here, as would our dissenting colleague, arguing that, under *Bruen*, to find an arm is in common use renders any restriction of that arm unconstitutional. As the District points out, however, *Bruen* itself precludes this argument. Although no party there disputed that "handguns are weapons in common use today for self-defense," *id.* at 32 (cleaned up), the bulk of what follows in the Court's opinion is an extended analysis of the Government's proposed historical analogues, hardly an *obiter dictum*, *see id.* part III, at 31–70.[4] We therefore

[4] Indeed, *Bruen* itself explains that, even where an individual's conduct is "presumptively protec[ed]" because the "Second Amendment's plain text covers" it, the government can "justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Id.* at 24. Our

conclude that, if an arm is "in common use for self-defense," then it falls to the Government, at the second step of the *Bruen* analysis, to show its restriction on the right to keep and bear arms is "consistent with this Nation's historical tradition of firearm regulation." *Bruen*, 597 U.S. at 17.

B. Historical Tradition of Firearm Regulation

Is the District's magazine cap "relevantly similar" to a tradition of regulating firearms? *Id.* at 29 (quoting C. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 773 (1993)). Although the Supreme Court has not "provided an exhaustive survey of the features that render regulations relevantly similar under the Second Amendment, . . . *Heller* and *McDonald* point toward at least two metrics: *how* and *why* the regulations burden a law-abiding citizen's right to armed self-defense." *Id.* (emphases added) (cleaned up). As the Court has explained,

> analogical reasoning under the Second Amendment is neither a regulatory straight-jacket nor a regulatory blank check. On the one hand, courts should not uphold every modern law that remotely resembles an historical analogue, because doing so risks endorsing outliers that our ancestors would never have accepted. On the other hand, analogical reasoning requires only that the government identify a well-established and representative historical *analogue*, not a

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dissenting colleague says *Bruen*'s historical analysis is *dicta*; it is not, but even if it were, under this court's practice, "carefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative." *See United States v. Dorcely*, 454 F.3d 366, 375 (D.C. Cir. 2006).

> historical *twin*. So even if a modern-day regulation is not a dead ringer for historical precursors, it still may be analogous enough to pass constitutional muster.

Bruen, 597 U.S. at 30 (cleaned up); *see also Rahimi*, 144 S. Ct. at 1903 (emphasizing the error of requiring a "twin" instead of an "analogue").

Even with this guidance from *Bruen*, there is considerable uncertainty as to the degree of generality at which a court might properly find a relevantly similar historical analogue. At the pinnacle of abstraction, an historical analogue could be representative of "an unbroken tradition of regulating weapons to [protect communities]." *Bevis*, 85 F.4th at 1200. Conversely, one could read the history to find "no American tradition of limiting ammunition capacity." *Duncan v. Bonta*, 695 F. Supp. 3d 1206, 1214 (S.D. Cal. 2023). We think these levels of generality and specificity exemplify, respectively, just the "regulatory blank check" and the "regulatory straightjacket" against which *Bruen* warns. 597 U.S. at 30; *see id.* (at a high enough level of generality, "everything is similar in infinite ways to everything else" (cleaned up)). We think the appropriate level of generalization is one that aligns the regulation in question with the "how" and "why" of the historical analogue. *Id.*; *see also Rahimi*, 144 S. Ct. at 1898 ("As we explained in *Bruen*, the appropriate analysis involves considering whether the challenged regulation is consistent with the principles that underpin our regulatory tradition").

1. Historical Analogues to the Magazine Cap

With this understanding in mind, we turn now to whether, on this preliminary record, the District has

identified a "relevantly similar" historical analogue for its magazine cap. *Bruen*, 597 U.S. at 8. To do so, the District must identify an historical tradition of regulation that burdens the right to armed self-defense in a manner similar to the burden imposed by the magazine cap (the "how") and does so for a similar reason (the "why"). As explained in greater detail below, we apply the "nuanced approach" under *Bruen* to this inquiry.

Here, our inquiry turns upon whether the District can identify an historical regulation that restricts possession of an arm based on a justification similar to that for the magazine cap, namely, to respond to "the growing use of [ELCMs] to facilitate crime and, specifically, to perpetrate mass shootings." Br. of Appellee 46.

The District and the *amici* States proffer several candidates for historical analogues of the magazine cap: laws regulating the storage of gunpowder and ammunition; time, place, and manner restrictions on when arms may be carried or firearms discharged; Prohibition-era regulations of removable magazines and their capacity; and restrictions on dangerous and un- usual weapons, including weapons considered particularly dangerous or susceptible to unprecedented lethality.

a. Storage of Gunpowder

The District and the *amici* States advance various restrictions on the storage of gunpowder in the Founding era as a purportedly relevant historical tradition. A modern detachable magazine is similar to a colonial or Founding-era cache of gunpowder only insofar as it acts as a limit on the firepower available to a single household. Those regulations are not "relevantly similar" because they were purely fire

prevention measures that affected firearm capacity only incidentally, if at all.[5] The suggestion that they limited the Second Amendment right to keep and bear arms is silly.

b. Time, Place, and Manner Restrictions

We also agree with Hanson that the various time, place, and manner restrictions identified by the District and the *amici* States fail to identify a "relevantly similar" analogue. They entail neither a justification nor a burden commensurate with those of the magazine cap.

Take trap or spring guns: The District argues the tradition of banning the setting of guns as a trap indicates a tradition of regulating "unacceptable levels [ofJ risk of harm to innocent bystanders." This analogy is too generalized and "comes too close to the means/end scrutiny that *Bruen* rejected." *Bevis*, 85 F.4th at 1200. In any event, the burden imposed by

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[5] "As Massachusetts's 1780 gunpowder statute put it, its goal was to 'deter[] the Inhabitants thereof from keeping certain Quantities of Powder in Houses and Ware-Houses, &c. to the great Inconvenience, Discouragement and Danger of Persons assisting in Time of Fire.'" Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 FORDHAM L. REV. 487, 512 (2004) (quoting ch. V, 1780 Mass. Acts 326); *see also, e.g.*, Act of June 26, 1792, ch. X, 1792 Mass. Acts 208 (requiring gunpowder in excess of the legal limit to be transported "in a waggon [sic] or carriage, closely covered with leather or canvas, and without iron on any part thereof, to be first approbated by the Firewards of said town"); Act of Apr. 13, 1784, ch. 28, 1784 N.Y. Laws 627 (gunpowder in a home must be stored "into four stone jugs or tin cannisters, which shall not contain more than seven pounds each"); § XLII, 1781-1782 Pa. Laws 41 (gunpowder "in any house, shop, cellar, store or other place within the said borough" must be kept "in the highest story of the house . . . unless it be at least fifty yards from any dwelling house").

trap guns does not align with the burden imposed by the District's magazine cap. "The liability for spring guns and mantraps arises from the fact that the defendant . . . expected the trespasser and prepared an injury that is no more justified than if he had held the gun and fired it." *United Zinc & Chem. Co. v. Britt*, 258 U.S. 268, 275 (1922). In other words, restrictions on setting trap guns are justified because they target tortious activity that lies outside the realm of lawful self-defense.

Nor do prohibitions on concealed carry constitute a "relevantly similar" tradition; they lack a justification like the one animating the District's magazine cap. A prohibition on carrying a concealed weapon does nothing to limit the lethality of the weapon.

Laws that prohibit discharging a firearm within a city or after dark fare no better. *See, e.g.*, Ga. Code § 16-11-103 (2022) (prohibiting the discharge of firearms within 50 yards of a public highway). Unlike the burden the magazine cap imposes upon the right to bear arms, modest though it is, we doubt city and nighttime prohibitions burden the right to armed self-defense at all; self-defense surely would be a complete defense to a charge under those statutes. Indeed, the purpose of these laws is akin to a prohibition on breach of the peace. *See, e.g.*, *Commonwealth v. Wing*, 26 Mass. 1, 3–4 (1829) (noting "the discharging of guns unnecessarily . . . is an offense against the public peace and security" (cleaned up)). Delaware's colonial-era prohibition on firing guns in urban areas, for example, had an exception for "days of public rejoicing." Robert H. Churchill, *Gun Regulation, the Police Power, and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment*, 25 LAW & HIST. REV. 139, 163 (2007).

For these reasons, on the abbreviated record before us, we cannot say the District has carried its burden of demonstrating that time, place, and manner restrictions on the use of firearms are "relevantly similar" historical analogues to the District's magazine cap.

c. Prohibition-Era Regulations

The district court held the magazine cap was consistent with an historical tradition of regulating magazine capacity based upon Prohibition-era bans and regulations. 671 F. Supp. 3d at 21-25. The comparison is somewhat helpful in documenting a history of limiting magazine capacity, at least when combined with rapid-firing capabilities. The district court identified bans "adopted by nearly half of all states." *Id.* at 21. Some of those states also limited magazine capacity to even fewer than 10 rounds — including two that limited capacity to a single round. *See, e.g.*, 1927 Mass. Acts 413, 413–14. But, keeping in mind the preliminary nature of this decision, those regulations alone may not suffice as a relevant analogue. Many of those laws did not regulate magazine capacity itself; rather, they addressed the combination of ELCMs and automatic firing — effectively, and often explicitly, directed at machine guns.[6]

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[6] *See, e.g.*, 1933 Cal. Stat. 1169 §§ 2–3 ("[E]very person . . . who within the State of California sells, offers for sale, possesses or knowingly transports any . . . machine gun . . . is guilty of a public offense," defining machine gun as "all firearms known as machine rifles, machine guns, or submachine guns *capable of discharging automatically and continuously loaded ammunition* . . . automatically fed after each discharge from or by means of clips, discs, drums, belts or other separable mechanical device *having a capacity greater than ten cartridges*" (emphases added)); 1932 La. Acts 337 38 § 1 (defining machine gun in part as being "capable

This is to be expected, as those laws were enacted largely in response to the then-novel Thompson submachine gun invented in 1918. The regulation of machine guns through restrictions on capacity and automatic firing together targets a combination that renders a weapon significantly more lethal than a weapon equipped with an ELCM alone.

d. Restrictions on Weapons Particularly Capable of Unprecedented Lethality

Finally, the District and its *amici* argue that historical restrictions on particularly dangerous weapons and on the related category of weapons particularly capable of unprecedented lethality constitute a relevantly similar tradition. Those laws are commensurate with the District's justification of its magazine cap to counter "the growing use of [ELCMs] to facilitate crime and, specifically, to perpetrate mass shootings." Therefore, on the limited record before us, we agree with the District that it has identified a relevant historical analogue and Hanson is not likely to succeed on the merits of his claim.

The District advances as an example the history of restrictions on Bowie knives or similar blades, and to a lesser extent pocket pistols. Together with the *amici* States, the District recounts that, in response to rising murder rates and an outpouring of public concern, "nearly every state in the Union restricted Bowie (or similar long-bladed) knives in some manner, whether by outlawing their possession, carry, sale, enhancing criminal penalties, or taxing their ownership." Br. of Appellee 38.

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of automatically discharging more than eight cartridges successively without reloading"); 1934 S.C. Acts 1288 § 1 (same).

Most of those laws merely list Bowie knives by name in the course of prohibiting the concealed carrying of dangerous weapons generally, and therefore are not indicative of a "relevantly similar" tradition. *See, e.g.*, Acts of the General Assembly of Virginia, Passed at the Session of 1838, ch. 101, at 76 ("It is against the law to habitually or generally keep or carry about his person any pistol, dirk, bowie knife, or any other weapon of the like kind . . . hidden or concealed from common observation"). A handful, however, did ban the carrying, rather than only the concealment, of Bowie knives with no or narrow exceptions. *See* 1881 Ark. Acts 191, An Act to Preserve the Public Peace and Prevent Crime, ch. xcvi, § 1 ("That any person who shall wear or carry, in any manner whatever, as a weapon, any dirk or bowie knife, or a sword, or a spear in a cane, brass or metal knucks, razor, or any pistol of any kind whatever, except such pistols as are used in the army or navy of the United States, shall be guilty of a misdemeanor"); 1871 Tex. Laws 25 § 1("[A]ny person carrying on or about his person, saddle, or in his saddle bags, any . . . bowie-knife . . . unless he had reasonable grounds for fearing an unlawful attack on his person, and that such ground of attack shall be immediate and pressing . . . misdemeanor"); 1889 Ariz. Sess. Laws 16, An Act Defining And Punishing Certain Offenses Against The Public Peace, §§ 1–2 ("If any person . . . shall carry on or about his person . . . any bowie knife . . . he shall . . . forfeit to the County in which his is convicted, the weapon or weapons so carried," but providing a limited exception for self-defense from an "imminent and threatening" danger).

Contemporaneous court decisions also upheld laws targeting Bowie knives against challenges based upon the Second Amendment or a state equivalent. In

Aymette v. State, 21 Tenn. 154, 158 (1840), for example, the Supreme Court of Tennessee concluded:

> They need not, for such a purpose, the use of those weapons which are usually employed in private broils, and which are efficient only in the hands of the robber and the assassin. These weapons . . . could not be employed advantageously in the common defence of the citizens. The right to keep and bear them is not, therefore, secured by the constitution.

As the Supreme Court of Texas put it in *Cockrum v. State*, 24 Tex. 394, 402–03 (1859):

> The bowie-knife differs from [guns or swords] in its device and design; it is the instrument of almost certain death. He who carries such a weapon, for lawful defense, as he may, makes himself more dangerous to the rights of others, considering the frailties of human nature, than if he carried a less dangerous weapon. Now, is the legislature powerless to protect the rights of others thus the more endangered, by superinducing caution against yielding to such frailties? May the state not say, through its law, to the citizen, "this right which you exercise, is very liable to be dangerous to the rights of others, you must school your mind to forbear the abuse of your right, by yielding to sudden passion; to secure this necessary schooling of your mind, an increased penalty must be affixed to the abuse of this right, so dangerous to others.

We emphasize that our identification of a relevant historical tradition is based upon the regulation of weapons that are particularly capable of unprecedented

lethality and not, as the dissent would have it, upon the regulation of Bowie knives specifically. Nor is our conclusion based upon statutes the dissent characterizes as "not only too little [but also] too late." Dissent at 46.[7]

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[7] The dissent states that "the original meaning that controls [the District's magazine cap] is undoubtedly the original meaning [of the Second Amendment] in 1791," rather than its meaning in 1868, taking no position on whether the same is true for state laws. Dissent at 46 n.203. We see three reasons, however, to believe analogues after 1791 are still relevant. First, the limitations on the Second Amendment listed in *Heller* (involving a D.C. regulation) were based on examples that occurred throughout the 19th century. *See Heller*, 554 U.S. at 626–27. Second, the Supreme Court has relied on early 19th-century (and still earlier) history to overturn state laws that implicate the Second Amendment even though the Second Amendment had not yet been incorporated through the Due Process Clause, noting that "individual rights enumerated in the Bill of Rights and made applicable against the States through the Fourteenth Amendment have the same scope as against the Federal Government." *Bruen,* 597 U.S. at 38; *see also, e.g.*, *Rahimi*, 144 S. Ct. at 1899–902; *Bruen*, 597 U.S. at 33–59; *id.* at 38. Third, the Supreme Court has similarly emphasized that our inquiry is "not meant to suggest a law trapped in amber" and that "the Second Amendment permits more than just those regulations identical to the ones that could be found in 1791." *Rahimi*, 144 S. Ct. at 1897–98. On the limited record before us, we believe that this evidence demonstrates a relevant historical tradition, as required by *Bruen* and *Rahimi*.

Finally, the dissent states that "the Supreme Court's subsequent cases "confirm that 'the relative dangerousness of a weapon is *irrelevant* when the weapon belongs to a class of arms commonly used for lawful purposes.'" Dissent at 43 (quoting *Caetano*, 577 U.S. at 418 (Alito, J., concurring) (emphasis added)). This statement of a single justice is obviously not controlling. We also think there is merit in the District's argument that *Heller*'s reference to "dangerous and unusual weapons," 554 U.S. at 627 means "uncommonly dangerous" weapons. All arms are self-evidently "dangerous"; in this context, therefore, "dangerous" must mean something other than its standard definition or the

The broader regulation of weapons that are particularly capable of unprecedented lethality includes other prominent examples, such as the ban on sawed-off shotguns held constitutional by the Supreme Court in *Miller* and implicitly approved in *Heller*. *See* 554 U.S. at 627; *see also Ocean State Tactical v. Rhode Island*, 95 F.4th 38, 47 (1st Cir. 2024) (The "Congress began regulating sawed-off shotguns in 1934, after they became popular with the mass shooters of their day — notorious Prohibition-era gangsters like Bonnie Parker and Clyde Barrow." (quotations omitted)). The examples above regarding Prohibition-era bans on machine guns, although insufficient to support a tradition of regulating magazines in and of themselves, fit nicely into the tradition of regulating weapons particularly capable of unprecedented lethality, as then-Attorney General Homer Cummings testified in 1934 during hearings regarding the bill that became the National Firearms Act:

> There are more people in the underworld today armed with deadly weapons, in fact, twice as many, as there are in the Army and the Navy of the United States combined. In other words, roughly speaking, there are at least 500,000 of these people who are warring against society and who are carrying about

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word would do no work delineating the category. From the canonical example in the case law — the sawed-off shotguns at issue in *United States v. Miller*, 307 U.S. 174 (1939) — we can infer that dangerous in the phrase "dangerous and unusual" means "uncommonly dangerous." *See* Samuel L. Bray, *"Necessary and Proper" and "Cruel and Unusual": Hendiadys in the Constitution*, 102 Va. L. Rev. 687, 695 (2016) (explaining a "hendiadys," a figure of speech involving "two terms, separated by a conjunction, [that] are melded together to form a single complex expression").

> with them or have available at hand, weapons of the most deadly character.

National Firearms Act: Hearing(s) on H.R. 9066 Before the Comm. on Ways and Means, 73rd Cong. 45 (1934) (cleaned up); *accord Andrews v. State*, 50 Tenn. 165, 189 (1871) ("The law allows ample means of self-defense, without the use of the weapons which we have held may be rightfully proscribed by this statute. The object being to banish these weapons from the community by an absolute prohibition for the prevention of crime, no man's particular safety, if such case could exist, ought to be allowed to defeat this end."); *State v. Reid*, 1 Ala. 612, 617 (1840) ("[A] law which is intended merely to promote personal security, and to put down lawless aggression and violence, and to that end inhibits the wearing of certain weapons, in such a manner as is calculated to exert an unhappy influence upon the moral feelings of the wearer, by making him less regardful of the personal security of others, does not come in collision with the Constitution."); *see also Staples v. United States*, 511 U.S. 600, 611–12 (1994) ("[W]e might surely classify certain categories of guns — no doubt including the machineguns, sawed-off shotguns, and artillery pieces that Congress has subjected to regulation — as items the ownership of which would have the same quasi-suspect character we attributed to owning hand grenades."); *Ocean State Tactical*, 95 F.4th at 49 ("[O]ur nation's historical tradition recognizes the need to protect against the greater dangers posed by some weapons (as compared to, for example, handguns) as a sufficient justification for firearm regulation").

Although these laws may target different crimes than does the magazine cap, they share the same basic purpose: To inhibit then unprecedentedly lethal

criminal activity by restricting or banning weapons that are particularly susceptible to, and were widely used for, multiple homicides and mass injuries. Because many of the preceding examples are also outright bans on an entire class of weapons, they impose a burden on the right to armed self-defense comparable to (if nor greater than) the burden imposed by the District's magazine cap.[8]

To summarize, we hold that, at this interlocutory juncture, the District has met its burden to show its magazine cap is "consistent with the Nation's historical tradition of firearm regulation," *Bruen*, 597 U.S. at 24. Again, "the [magazine cap] must comport with the principles underlying the Second Amendment, but it need not be a dead ringer or a historical twin." *Rahimi*, 144 S. Ct. at 1898 (cleaned up). On a more developed record, evidence disputing the linkage between ELCMs and mass shootings may render inapposite the tradition of banning weapons capable of unprecedented lethality. On the present record, however, we think the District's magazine cap

[8] The dissent argues that the District's law is different from permissible regulations because it is a "ban." Dissent at, *e.g.*, 1 n.4, 31, 36-37, 45. But the dissent acknowledges that the only merits question on this preliminary motion is whether the District erred in capping magazine capacity at 10 rounds rather than 17. Dissent at 36 n.169. Treating every line-drawing regulation, including in areas where appellants do not even dispute that a line can constitutionally be drawn at some point, gilds the lily, rather than undertakes a nuanced analysis. In any event, we view the dissent's distinction between an "outright ban" and a "regulation" of arms to be of dubious utility. One could, for example, easily reframe the law at issue in *Rahimi* — which "prohibit[ed]" individuals shown to be a credible threat to the physical safety of an intimate partner from possessing a firearm, *Rahimi*, 144 S. Ct. at 1894 — as an outright ban on the possession of firearms by this class of individuals.

sufficiently parallels a relevantly similar historical analogue to foreclose a finding that appellants are likely to succeed on the merits.

2. The Nuanced Approach to History Under *Bruen*

Nevertheless, Hanson claims no historical tradition, including this one, can be relevant because weapons capable of holding or shooting more than ten rounds without reloading have existed since the Founding (true) and there is no historical tradition either of prohibiting them or of regulating the number of rounds a gun could hold (true). Therefore, he argues, the District's magazine cap is unconstitutional. We agree there is no narrowly described tradition of banning weapons capable of holding or shooting more than ten rounds without reloading or, more generally, of regulating the number of rounds a gun may hold. The lack of such a tradition is to be expected, however, because firearms did not have the capacity to occasion a societal concern with mass shootings or other widespread homicidal criminality until dramatic technological changes vastly increased their capacity and the rapidity of firing; there simply is no relevantly similar historical analogue to a modern, semiautomatic handgun equipped with an ELCM. *Accord Friedman v. City of Highland Park, Ill.*, 784 F.3d 406, 410 (7th Cir. 2015) ("Most guns available [in 1791] could not fire more than one shot without being reloaded; revolvers with rotating cylinders weren't widely available until the early 19th century. Semiautomatic guns and large-capacity magazines are more recent developments").

Again, *Rahimi* makes clear that "the Second Amendment permits more than just those regulations identical to ones that could be found in 1791." 144 S. Ct. at 1897–98; *see also id.* at *30 (Barrett, J.,

concurring) (cautioning against "assum[ing] that founding-era legislatures maximally exercised their power to regulate"). Moreover, as *Bruen* explained, "cases implicating unprecedented societal concerns or dramatic technological changes may require a more nuanced approach." 597 U.S. at 27. Because these criteria are in the disjunctive, the government may demonstrate a constitutionally adequate historical analogue for a regulation or ban of an arm implicating either criterion. We agree with the District that ELCMs implicate both.

a. Unprecedented Societal Concern

Large capacity magazines have given rise to an unprecedented societal concern: mass shootings. As the First Circuit has observed, there is "no direct precedent for the contemporary and growing societal concern that [ELCMs] have become the preferred tool for murderous individuals intent on killing as many people as possible, as quickly as possible." *Ocean State Tactical* 95 F.4th at 44. This comes as no surprise, because mass shootings themselves are a relatively recent phenomenon: "The first known mass shooting resulting in ten or more deaths did not occur in this country until 1949." *Id.* (cleaned up).

Mass shootings have become ever more common since then.[9] A Congressional Research Service report

[9] "The definition of mass shooting varies by source." Office of the U.S. Surgeon General, The U.S. Surgeon General's Advisory on Firearm Violence: A Public Health Crisis in America 11 (2024). The Surgeon General's Advisory defines a mass shooting as "four or more shot or killed, not including the shooter," which it borrows from the Gun Violence Archive. *Id.* The Congressional Research Service defines it as "a multiple homicide incident in which four or more victims are murdered with firearms — not including the offender(s) — within one event, and in one or more locations

notes the steady increase in the frequency of mass shootings, from an average of 1.1 per year during the 1970s, to an average of 4.5 per year from 2010 through 2013, Krouse & Richardson, above, at 14, and "more than 600 . . . each year between 2020 and 2023," according to data published by Gun Violence Archive and cited in the Surgeon General's Advisory, above, at 11. "Despite accounting for a relatively small number of firearm deaths, mass shooting incidents cause outsized collective trauma on society and have a strong negative effect on the public's perception of safety." *Id.* "Mass shootings that involve a firearm with a large-capacity magazine result in significantly more injuries and deaths than shootings that do not involve such magazines." *Id.* at 30 (citing Koper, 19 Crim. & Pub. Pol'y at 152–53). There can be little doubt that mass shootings are an unprecedented societal concern.

b. Dramatic Technological Change

A nuanced approach is also appropriate for the analysis of historical analogues to the District's magazine cap because large-capacity, detachable magazines for semiautomatic handguns are a relatively modern invention. They are different in form and in kind from

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relatively near one another." William J. Krouse & Daniel J. Richardson, Congressional Research Service, Mass Murder with Firearms: Incidents and Victims, 1999–2013, at 2 (2015). Another study similarly defines mass shootings as "incidents in which at least four persons were killed, not including the shooter if applicable and irrespective of the number of additional victims shot but not killed." Christopher S. Koper, *Assessing the potential to reduce deaths and injuries from mass shootings through restrictions on assault weapons and other high-capacity semiautomatic firearms*, 19 Crim. & Pub. Pol'y 147, 150 (2020). The Congress, meanwhile, has defined "mass killing" to mean "3 or more killings in a single incident." 28 U.S.C. § 530C(b)(1)(M)(i)(I).

arms in common use during the Founding and Reconstruction eras, the relevant periods for assessing the original understanding of the Second and the Fourteenth Amendments, respectively.[10]

Compared to the historical analogues Hanson offers, modern firearms equipped with ELCMs do not have the propensity to jam or misfire that plagued many historical weapons. ELCMs also have significantly larger capacities and can fire multiple rounds in a shorter time. Indeed, a handgun with an ELCM can fire more than 10 rounds in a few seconds. The Glock 17 handgun, for example, can fire 30 rounds in five seconds. Add to that the ease with which one detachable magazine can be swapped for another, and a handgun with an ELCM can fire scores of shots in a matter of seconds.

There were no remotely comparable arms in common use even when the Fourteenth Amendment was ratified. As a result, modern firearms equipped with ELCMs have enabled mass shootings to a degree impossible with Founding or Reconstruction era weapons.

To bolster his argument to the contrary, Hanson offers several pre-Fourteenth Amendment examples of weapons capable of holding or shooting more than ten rounds without reloading, s*ee* Appendix: Historical

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[10] *See Bruen*, 597 U.S. at 82 (Barrett, J., concurring) (there is an "ongoing scholarly debate on whether courts should primarily rely on the prevailing understanding of an individual right when the Fourteenth Amendment was ratified in 1868 or when the Bill of Rights was ratified in 1791" (cleaned up)). Because the choice would not alter our conclusion, we take no position regarding whether the relevant period for analysis is 1791 or 1868. *See, e.g.*, *Rahimi*, 144 S. Ct. at 1898 n.1 ("under the circumstances, resolving the dispute [is] unnecessary to decide the case").

Firearms, some of which are irrelevant and none of which is persuasive. Most of his examples were never in common use — indeed, some were no more than one-offs or prototypes — and therefore have no bearing on the scope of the Second Amendment, which "protects only the carrying of weapons that are those in common use at the time." *Bruen*, 597 U.S. at 47 (cleaned up). Of the four that are arguably relevant (the Jennings, Pepperbox, Colt, and Winchester), there is no evidence any could be fired as rapidly as a modern handgun. All but the Jennings were also prone to jamming or to misfiring. As a result, none had nearly the same potential for mass shootings as does an ELCM.

Contrary to Hanson's assertions, none of his examples is a functional analogue to a modern gun with a detachable ELCM. We do not expect to find an historical tradition of regulating handguns with detachable magazines before ratification of the Fourteenth Amendment, much less ratification of the Second Amendment, because there was then no "relevantly similar" weapon "in common use," until the late 19th or early 20th century, when the Mauser C96 semi-automatic pistol entered circulation.[11]

* * *

Because ELCMs implicate unprecedented societal concerns and dramatic technological changes, the lack of a "precise match" does not preclude finding at this preliminary juncture an historical tradition "analogous enough to pass constitutional muster." Therefore, we

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[11] Although the Mauser C96 semi-automatic pistol is relevantly similar to a modern handgun with an ELCM, it and similar weapons that postdate the ratification of the Fourteenth Amendment represent dramatic technological advances over Founding- and Reconstruction-era firearms.

hold Hanson is not sufficiently likely to succeed on the merits of his claim to warrant the entry of a preliminary injunction against enforcement of the magazine cap.

IV. Other Preliminary Injunction Factors

In addition to establishing a likelihood of success on the merits, a party seeking a preliminary injunction must make a "clear showing" that "it will likely suffer irreparable harm before the district court can resolve the merits of the case," that "the balance of equities favors preliminary relief," and that "an injunction is in the public interest." *Singh v. Berger*, 56 F.4th 88, 95 (D.C. Cir. 2022); *see also Winter*, 555 U.S. 7, 32 ("An injunction is a matter of equitable discretion; it does not follow from success on the merits as a matter of course." (citing *Weinberger v. Romero–Barcelo*, 456 U.S. 305, 313 (1982))). Those factors enforce a vital, structural limitation on the role of courts. Unlike the Political Branches, courts are institutionally reactive. Our authority to alter legal rights and obligations generally derives from — rather than precedes — our determination of the merits. Said another way, "[t]he judicial power is inseparably connected with the judicial duty to decide cases and controversies by determining the parties' legal rights and obligations," and a "preliminary injunction is remarkable because it imposes a constraint on the enjoined party's actions in advance of any such determination." *O Centro Espirita Beneficente Uniao do Vegetal v. Ashcroft*, 389 F.3d 973, 1014 (10th Cir. 2004) (McConnell, J., concurring); *see Delaware State Sportsmen's Ass'n, Inc. v. Delaware Dep't of Safety & Homeland Sec.*, 108 F.4th 194, 199 (3d Cir. 2024) ("Because injunctions can irreparably injure parties, courts must use great caution, granting them

only in cases where they are clearly indispensable to the ends of justice") (cleaned up).

On the record before us, Hanson has failed to show that the preliminary injunction factors warrant the "extraordinary remedy" of a preliminary injunction that would alter a 15-year status quo and effectively grant him the same relief he would obtain at the end of trial before that trial even starts.

The dissent analyzes none of the normal preliminary injunction factors, instead invoking the narrow exception for when "the merits of the plaintiffs' challenge are certain and don't turn on disputed facts." Dissent at 53 n.234 (citing *Wrenn v. D.C.*, 864 F.3d 650, 667 (D.C. Cir. 2017)). But that exception does not apply here, even if the dissent is right and we are wrong about the merits. No precedent dictates with certainty that, in confronting the unprecedented criminal and lethal misuse ELCMs have allowed, the District erred in capping magazine capacity at 10 rather than 17. Appellants, after all, do not argue in this motion that the Second Amendment prohibits any cap on magazine capacity for semiautomatic weapons. Nor does the dissent.

Instead, we assess all the preliminary injunction factors to determine whether we should act *despite* our uncertainty on an undeveloped record and amid factual disputes, rather than deciding before trial simply because we believe we must be right. After all, a preliminary injunction "is not a shortcut to the merits." *Delaware State Sportsmen's Assn*, 108 F.4th at 197.

A. Irreparable Harm

To begin, we note that irreparable harm, even when demonstrated, may be insufficient on its own to warrant a preliminary injunction. "The award of an

interlocutory injunction by courts of equity has never been regarded as strictly a matter of right, even though irreparable injury may otherwise result to the plaintiff." *Yakus v. United States*, 321 U.S. 414, 440 (1944). The purpose of a preliminary injunction is not to prevent all harm but "merely to preserve the relative positions of the parties until a trial on the merits can be held." *Starbucks Corp. v. McKinney*, 602 U.S. ---, 144 S. Ct. 1570, 1576, (2024).

Nor does the alleged deprivation of a constitutional right constitute irreparable harm. Even in the sensitive areas of freedom of speech and religion, where the risk of chilling protected conduct is especially high, we do not "axiomatically" find that a plaintiff will suffer irreparable harm simply because it alleges a violation of its rights. *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 302 (D.C. Cir. 2006). Rather, a plaintiff must show why the court will be unable to grant meaningful relief following trial. Thus, far from treating the Second Amendment as a "second-class right," *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 780 (2010), we assess Hanson's claim of irreparable harm using the same standard we apply to all fundamental rights.

Hanson has not come forward with a factual record showing that he will be *irreparably* harmed if he is required to wait until the court hears his case before obtaining larger-capacity magazines for his firearms. "Irreparable harm," in this context, refers to harm within a specific timeframe. That is, Hanson must demonstrate injury that is sufficiently certain, persuasively demonstrated, and so clearly irremediable that it warrants a court reaching out to alter the status quo before the merits are resolved. *See O Centro Espirita*, 389 F.3d at 1013 ("[T]here are cases in which

preservation of the status quo may so clearly inflict irreparable harm on the movant, with so little probability of being upheld on the merits, that a preliminary injunction may be appropriate even though it requires a departure from the status quo").

Hanson rests his entire irreparable harm showing on the argument that the District's magazine cap burdens his Second Amendment right to use magazines of between 11 and 17 rounds for self-defense. *See* Oral Arg. Tr. 11:20–12:22 (counsel for Hanson explaining that the largest magazine that Hanson "possess[es]" and "want[s] to carry in the District" holds 17 bullets); Oral Arg. Tr. 14:17–25 (similar); *see also id.* at 9:20–13:13 (counsel for Hanson acknowledging that the requested preliminary injunction is limited to Hanson's as-applied challenge); *id.* at 77:20–23 ("[T]he imposition, the actual threat to the right here is the ability for my clients to bear an arm that they've decided is necessary for their self-defense purposes."); *id.* at 20:9–21:3 (counsel for Hanson acknowledging that self-defense is the operative Second Amendment interest for their preliminary-injunction request). But Hanson does not offer any factual showing of irreparable harm to his self-defense interest.

First, Hanson has not provided any specific explanation of the irreparable harm he faces from having the ability to fire 11, but not 18, rounds without pausing during the pendency of this litigation.[12] In fact, each of the appellants owns at least one handgun

[12] The District's magazine cap permits Hanson to fire 11 rounds without pausing — 10 rounds in the magazine, plus one round in the chamber. Hanson seeks to use 17-round magazines that would enable him to fire 18 rounds without pausing — 17 rounds in the magazine, plus one round in the chamber.

for which the standard-issue magazine contains 10 or fewer rounds. *See* J.A. 181–185. And the standard-issue magazine for six of the 13 firearms at issue in this as-applied challenge likewise contains no more than 10 rounds. *See* J.A. 181– 185. Hanson, having limited his injunctive request to his as-applied challenge, does not allege that he faces difficulty obtaining such standard-issue magazines, and he does not identify any irreparable harm to his self-defense that will arise if he is limited to using the magazines that he already owns while the merits of his constitutional challenge to the District's magazine cap are resolved.

Hanson protests that he faces irreparable harm from the District's magazine cap because it prevents him from "be[ing] prepared for th[e] unthinkable circumstance where [he] might need to use more than [10] rounds." Oral Arg. Tr. 75:22–23; *see id.* at 75:22–76:6; *see also id.* at 72:23–78:1. But Hanson concedes that such circumstances are, at most, "rare" and "unusual." *Id.* at. 74:25, 75:6; *see id.* at 76:17–24. The Supreme Court has held that "simply showing some *possibility* of irreparable injury" is not sufficient to make the irreparable harm showing needed to obtain preliminary relief. *Nken v. Holder*, 556 U.S. 418, 434 (2009) (emphasis added; quotations omitted). Yet in Hanson's own words, he has raised only remote conjecture. *See* Oral Arg. Tr. 75:22–23, 74:25, 75:6.

Highlighting that point, Hanson himself has explained that, "[i]n most self-defense circumstances, pulling out a weapon and brandishing it will scare off somebody else." Oral Arg. Tr. 75:9–10. In addition, Hanson's own evidence in support of a preliminary injunction shows that "the average amount of rounds fired in self-defense is usually less than 10" and

"generally only two or three." J.A. 721 (Decl. of John Murphy); *see id.* at 1039–1040 (district court noting that a prior study conducted by one of Hanson's experts "concluded that the average number of shots a civilian fired in a self-defense incident [between 1997 and 2001] was 2.2"). Hanson, in short, has not shown that there will be any "time-sensitive" actual effect on his ability to engage in self-defense while this litigation proceeds. *See Del. State Sportsmen's Ass'n.*, 108 F.4th at 205 (declining preliminarily to enjoin a similar magazine-size cap when there was "scant evidence" of any "time-sensitive need" for larger magazines than the law allowed).

Second, Hanson himself does not argue that *any* restriction on magazine capacity would inflict irreparable harm on his Second Amendment rights. He, in fact, agrees with the District that the Second Amendment does not protect magazines of all sizes, and he concedes that there is a magazine capacity that the District can constitutionally limit. *See* Oral Arg. Tr. 7:23– 10:24 (counsel for Hanson conceding that the District could ban magazines not in common use for self-defense). He simply disagrees with where the District has drawn that line. But that type of close line-drawing regarding how many bullets to permit in a magazine while litigation is pending does not, without something more concrete than fear of the "unthinkable," bespeak irreparable harm. *Cf. Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 330 (2006) ("Making distinctions . . . where line-drawing is inherently complex, may call for a far more serious invasion of the legislative domain than we ought to undertake.") (cleaned up).

Third, Hanson has evidenced no urgency in obtaining relief in this litigation. He consented to a

stay of district court proceedings pending resolution of this appeal while at the same time failing to seek expedited review from this court. "[A] party requesting a preliminary injunction must generally show reasonable diligence." *Benisek v. Lamone*, 585 U.S. 155, 159 (2018). Although consenting to a stay or declining to seek expedited review on appeal will not always establish lack of diligence on the part of the party seeking injunctive relief, such action, when unexplained, undercuts claims of irreparable harm. Hanson's unhurried litigation tactics counsel against a finding of irreparable harm here.

B. Balance of the Equities

Finally, the balance of equities also weighs against granting a preliminary injunction at this time. A party seeking a preliminary injunction must show that "the balance of equities favors preliminary relief" and that "an injunction is in the public interest." *Singh*, 56 F.4th at 95. In analyzing this record, we must carefully balance the equities by weighing the harm to the moving party and the public if there is no injunction against the harm to the government and the public if there is. *See League of Women Voters of the U.S. v. Newby*, 838 F.3d 1, 12–14 (D.C. Cir. 2016).

On the District's side of the balance is the governmental interest in enforcing its duly enacted law, and the likelihood of "concrete harm to [the District's] law enforcement and public safety interests" were we to grant a preliminary injunction. *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers). The District has demonstrated that it will likely suffer irreparable harm if an injunction issues. Even at this preliminary stage, the record contains evidence that the District would experience an influx of ELCMs if this court were to preliminarily enjoin the

District's magazine cap. *See* J.A. 119. The District notes that over one million ELCMs "flooded into California in the brief [one-week] period *after* [California's ELCM cap] was enjoined but *before* the ruling was stayed by the district court." District Br. 51 (citing Matthew Green, *Gun Groups: More Than a Million High-Capacity Magazines Flooded California During Weeklong Ban Suspension*, KQED (Apr. 12, 2019), https://perma.cc/65NQ-Z6D6). Hanson has not offered any evidence that rebuts this claim or that shows the District would not face similar harm were an injunction to issue here.

The District's harm, moreover, encompasses not only the likely proliferation of ELCMs, but also the uses to which those magazines can be put. The District submitted expert testimony that ELCMs are "extraordinarily lethal" when used in combination with semiautomatic firearms, increasing the number of individuals killed in mass shootings and other criminal activity. J.A. 477; *see id.* ("Without extended magazines, semiautomatic rifles cause an average of 40 percent more deaths and injuries in mass shootings than regular firearms, and semiautomatic handguns [cause] 11 percent more than regular firearms. But with extended magazines, semiautomatic rifles cause an average of 299 percent more deaths and injuries than regular firearms, and semiautomatic handguns [cause] 184 percent more than regular firearms."). The District has a particular and unique interest in reducing that lethality "given homeland security issues in the District" as the seat of the federal government and the location of countless sensitive governmental institutions and protected personnel. Br. of Appellee 4 (quoting Committee on Pub. Safety and the Judiciary, D.C. Council, Report on Bill 17-843, at 9 (2008)).

Hanson, for his part, asserts the public's interest in exercising the Second Amendment right to bear constitutionally protected arms. *Cf. Singh*, 56 F.4th at 107 ("On the Plaintiffs' side of the balance is the weighty public interest in the free exercise of religion that RFRA protects").

Yet the mere fact that Hanson seeks to enjoin the District's magazine cap on constitutional grounds does not decide our balance-of-the-equities inquiry. To the contrary, this court must balance the equities of the parties and the public even when a party seeks to restrain the enforcement of an allegedly unconstitutional law. *See Singh*, 56 F.4th at 107–109; *Archdiocese of Wash. v. Washington Metro. Area Transit Auth.*, 897 F.3d 314, 334–335 (D.C. Cir. 2018). Furthermore, we have stated that the public interest in such cases "rises and falls with the strength of [the moving party's] showing" on the merits. *Archdiocese of Wash.*, 897 F.3d at 335. While "[t]he public interest favors the protection of constitutional rights," Hanson would need to establish a likely violation of his constitutional rights to establish that the public interest outweighs the District's unrebutted showing of substantial harm, a showing he has not made. *Id.* (explaining the parties' relative equities might balance differently if the plaintiffs had established a likelihood of success on the merits of their constitutional claim and, in turn, that the public interest favored an injunction).

In addition, Hanson is seeking at this preliminary stage a longstanding-status-quo-altering injunction that effectively gives him the full relief he would receive if he won on the merits. Preliminary injunctions, though, "are generally a 'stopgap measure' meant only to 'preserve the relative positions of the parties' until trial." *Singh*, 56 F.4th at 95 (quoting

Sherley v. Sebelius, 689 F.3d 776, 781–782 (D.C. Cir. 2012)). "After all, 'deciding whether to grant a preliminary injunction is normally to make a choice under conditions of grave uncertainty.'" *Id.* (quoting *O Centro Espirita*, 389 F.3d at 1015). Because "a grant of preliminary relief could prove to be mistaken once the merits are finally decided," courts must be "institutionally wary of granting relief that disrupts, rather than preserves, the status quo, especially when that relief cannot be undone if the nonmovant ultimately wins on the merits." *Id.* (quotations omitted). At bottom, that "reluctance to disturb the status quo prior to trial on the merits is an expression of judicial humility." *O Centro Espirita*, 389 F.3d at 1015.

Concern about so materially altering the status quo has particular purchase on the record of this case. For 15 years, District law enforcement has operated and been resourced with the magazine cap in place. The District has also shown that an erroneously issued preliminary injunction suspending its law could drastically compromise the District's ability to enforce its magazine cap far into the future — long beyond the term of the preliminary injunction itself — because of the likelihood that ELCMs will flood into the District during any such injunctive relief. Hanson, in contrast, would suffer from an erroneous preliminary analysis of his claim for a far shorter time while the merits of this case are resolved. Those unequal consequences carry material weight in the equitable preliminary-injunction calculus. *Cf. Singh*, 56 F.4th at 97 ("The public consequences of employing the extraordinary remedy of injunction necessarily include the risk that the relief requested will cause unusual disruption if granted in error, for example by disturbing the status quo in a way that cannot readily be undone.") (cleaned up).

Finally, we cannot simply rebalance the equities by limiting injunctive relief to the four appellants in this case. Were this court to direct the issuance of such a preliminary injunction, a follow-on class-action suit seeking the same relief would inevitably follow and almost inevitably have to be granted. Allowing preliminary injunctive relief in such a case would ultimately result in the very harms to the public interest detailed above. As a result, the balance of the equities in this case does not favor a preliminary injunction, no matter the injunction's scope.

In sum, the ancient principle *primum non nocere* — first, do no harm — "counsels against forcing changes before there has been a determination of the parties' legal rights" and in favor of maintaining the status quo. *O Centro Espirita*, 389 F.3d at 1012. Hanson has not, on the record before us, shown the type of irreparable harm and favorable balancing of equities and interests that can warrant the exceptional relief of a statusquo-altering injunction handing him the same relief he would ordinarily obtain only after prevailing on the merits.

V. Summary and Conclusion

Because Hanson has failed to demonstrate a likelihood of success on the merits or that he has suffered irreparable harm, and because the balance of equities does not weigh in his favor, the order of the district court is

Affirmed.

Appendix: Historical Firearms

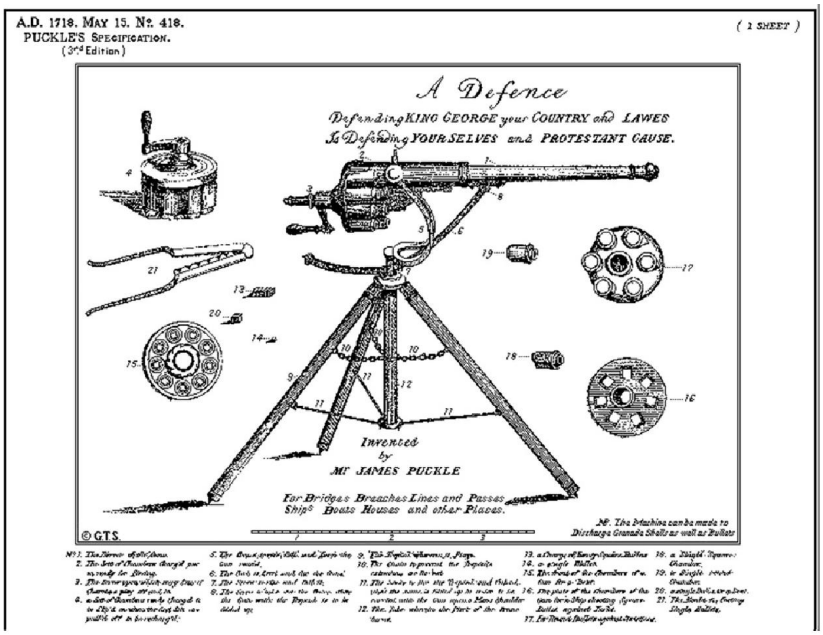
Hanson offers a plethora of historical examples to argue that extra-large capacity magazines (ELCMs)

are nothing new. For the reasons given below, each of his examples misses the mark.

His first example is a 16-shot wheellock created around 1580. *See* David B. Kopel, *The History of Firearm Magazines and Magazine Prohibitions*, 78 ALB. L. REV. 849, 852 & n.21 (2015) (citing Lewis Winant, *Firearms Curiosa* 168–70 (Ishi Press Int'l 2009) (1954)). The wheellock lacks both the rapid-reloading capability and the trigger control of a modern semiautomatic handgun with a detachable magazine, which limited its potential lethality. One wheel lock would ignite a fuse and fire the ten upper charges without stopping and another wheel lock would fire the remaining six lower charges. This gun was "very rare," however; indeed, it may have been a one-off, artisanal curiosity. Winant, above, at 168–70; *see A 16-Shot Wheel Lock*, America's 1st Freedom (June 2014), https://web.archive.org/web/20140702092902/https:/www.nrapublications.org/index.php/17739/a-16-shot-wheel-lock/ (noting the "highly decorated" and "unique rifle" had "achieved a multi-shot capability that would not be reached again until the American Civil War").

Hanson also directs us to the "Puckle Gun," patented in 1718, which he describes as one of "the more successful of the early designs" of multi-shot firearms. But the Puckle Gun never entered commercial production; only two prototypes were made; and they suffered from mechanical problems. Br. of Amici Curiae Brady Center to Prevent Gun Violence et al. (Brady Br.) at 10–11. Even if it had entered commercial production, however, the Puckle Gun still would not be a "relevantly similar" analogue: It was mounted on a tripod and operated by hand crank,

making it more akin to a Gatling gun than to a semiautomatic handgun with an ELCM.



U.K. Patent No. 418 (issued May 15, 1718).

Hanson next proffers the Girandoni air rifle, invented in 1779. The Girandoni rifle was never in common use: Only around 1,500 were produced and even fewer made their way to America. Robert J. Spitzer, *Understanding Gun Law History after Bruen: Moving Forward by Looking Back*, 51 FORDHAM URB. L.J. 57, 76–77 (2023); *see also* John Plaster, *The History of Sniping & Sharpshooting* 70 (2008). It remained such a curiosity that, in 1792, one museum proprietor in New York charged visitors six pence to see it discharge a shot. Gardiner Baker, *To the Curious*, The Weekly Museum (New York, NY), Feb. 11, 1792.

Hanson's next example, the Jennings multi-shot flintlock rifle, was beset by "technical challenges."

Ass'n of N.J. Rifle & Pistol Clubs v. Att'y Gen. N.J., 974 F.3d 237, 255 (3d Cir. 2020) (Matey, J., dissenting) (cleaned up), *cert. granted, judgment vacated sub nom. Ass'n of N.J. Rifle & Pistol Clubs v. Bruck*, 142 S. Ct. 2894 (2022). The rifle has a "complicated mechanism" with a moving hopper and swivel covers that required a hammer to be pulled back for each shot. Corey R. Wardrop, *A Close-up Look at the Ellis-Jennings Repeating Flintlock Rifle*, THE FIREARM BLOG (July 27, 2017), https://web.archive.org/web/20220402053233/https://www.thefirearmblog.com/blog/2017/07/27/close-look-ellis-jennings-repeating-flintlock-rifle/. Moreover, most of these rifles had a capacity of only four shots, and only 521 were ever made. *Id.*

Hanson also points to "Pepperbox" pistols, which were capable of firing only "five or six rounds without reloading," and therefore are not comparable in lethality to a modern ELCM. Brady Br. at 13 (citing *Wheelgun Wednesday: A Closer Look at Pepperbox Pistols*, THE FIREARM BLOG (Dec. 8, 2021), https://perma.cc/2Z2U-RJ62)) (cleaned up). Pepperbox pistols were also prone to "chain-firing," that is, all barrels firing at once. *Id.*

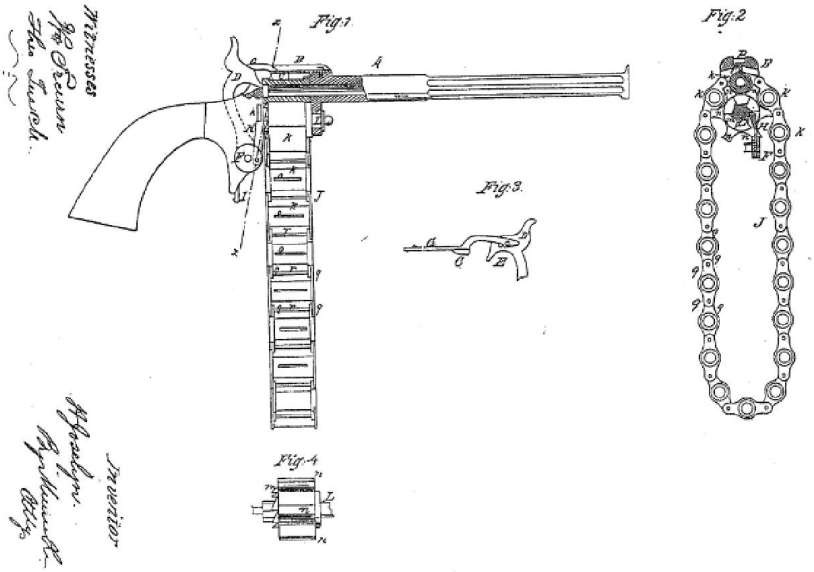
Next is the Colt revolver, introduced in 1836. *See* Improvement in Fire-Arms, U.S. Patent No. 9430X (issued Feb. 25, 1836). The Colt revolver "was the first widely used multishot weapon," Jim Rasenberger, Revolver: Sam Colt and the Six-Shooter that Changed America 401 (2020), but the shooter was required to cock the hammer before firing each round; the gun was limited to six shots; it was prone to jamming; and, unlike a handgun with an ELCM, it could not be rapidly reloaded. The six-shooter is not a relevant comparator because the District *allows* six-shooters. Its magazine cap is set at 10 (plus one in the chamber).

Hanson next points to the Bennet & Haviland Revolving Rifle, which began circulating in 1838, as well as the similar Porter and Hall rifles of the 1850s. There is no evidence that any of these rifles were in common use. John Paul Jarvis, *Bennet & Havilland Revolving Rifle: A Link in the Repeating Rifle Chain*, GUNS.COM (Apr. 3, 2012 5:44 PM), https://perma.cc/6FLX-AE5G ("experts believe that Bennett & Havilland made fewer than 10 full-scale" rifles); *Ian* McCollum, *RIA: Porter Turret Rifle*, FORGOTTEN WEAPONS BLOG (Feb. 7, 2016), https://perma.cc/N5J5-R93H (only "several thousand examples" of the Porter rifle were made); Norm Flayderman, *Flayderman's Guide to Antique American Firearms and their Values* 713 (9th ed. 2007) (noting an unknown quantity were made and the rifle is "[v]ery rare").

The other antebellum firearms Hanson identifies — the Enouy Ferris wheel revolver, the Jarre harmonica pistol, and pin-fire revolvers — all have similar limitations. None was ever in common use — indeed, the Enouy Ferris wheel revolver may have been a one-off curiosity. Dan Zimmerman, *Is the 48-Shot Enouy the Most Unusual Revolver in History?*, THE TRUTH ABOUT GUNS (Oct. 18, 2015), https://perma.cc/6FW9-J27J (noting "[t]here are no records of it ever being manufactured or sold commercially"). Those that were capable of firing more than six shots tended to be cumbersome and unwieldy, limiting their potential lethality.

Lewis Winant, *Firearms Curiosa* 207 (Greenberg 1955) (1954) (depicting the Ferris wheel revolver). Although one version of the Jarre harmonica pistol did have a detachable magazine, it still required the hammer to be cocked before firing each round, *id.* at 244–45, and "[t]he particularly awkward design of the pinfire cartridge made it difficult to deploy in a repeating pistol." *Unique Handgun Detail*, THE HANDGUN INFORMATION RESOURCE (2024), https://perma.cc/6PVH-LWDD.

Hanson's next example, the Josselyn belt-fed chain pistol (patented in 1866), was likewise unwieldy and was likely never in common use. As with the Colt revolver, the need to cock the hammer before firing each round limited the rate of fire and therefore the potential lethality of the weapon. *Chain Guns I,* FIREARMS HISTORY, TECHNOLOGY & DEVELOPMENT BLOG (July 23, 2014 1:35 AM), https://perma.cc/MT7P-JP5L.



Improvement in Revolving Fire-Arms, U.S. Patent No. 52,248 (issued Jan. 24, 1866).

Hanson also argues the Winchester Repeater rifle of 1866 is analogous to an ELCM. Although it had a magazine capable of firing more than ten rounds without reloading, it required manual manipulation of a lever in between each shot. Ryan Hodges, *The 1866 Rifle*, TAYLOR'S & COMPANY (Aug. 26, 2020), https://perma.cc/ 7STW-8WMS. The magazine was also exposed, which made it susceptible to jamming. *Id.* For this reason, the rifle lacks the potential lethality of a modern weapon equipped with an ELCM.

WALKER, *Circuit Judge*, dissenting:

In *District of Columbia v. Heller*, the Supreme Court held that the government cannot categorically ban an arm in common use for lawful purposes. Magazines holding more than ten rounds of ammunition are arms in common use for lawful purposes. Therefore, the government cannot ban them.

I. Background

In 2003, Dick Heller and five other plaintiffs alleged that the District of Columbia's ban on handguns violated their Second Amendment right to "keep and bear Arms."[1] Five years later, the Supreme Court agreed.[2] It held D.C.'s law unconstitutional because the law banned an arm "in common use" for lawful purposes.[3]

A month after Heller's victory, he returned to federal court.[4] This time, in *Heller II*, he challenged D.C.'s felony prohibition on possessing what D.C. calls a

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[1] U.S. Const. amend. II.

[2] *District of Columbia v. Heller*, 554 U.S. 570, 635-36 (2008).

[3] *Id.* at 624, 627 (cleaned up); *see also id.* at 629.

When I refer to a ban on arms in common use for lawful purposes, I mean a *complete* ban that covers everyone, everywhere — not, for example, targeted "prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms," *id.* at 626-27, or "prohibitions on carrying concealed weapons," *id.* at 626, or the disarming of individuals who pose "a credible threat to the physical safety of others," *United States v. Rahimi*, No. 22-915, 602 U.S. ___, slip op. at 15 (June 21, 2024).

[4] *Heller v. District of Columbia*, 670 F.3d 1244 (D.C. Cir. 2011) (*Heller II*).

"large capacity ammunition feeding device" — defined as "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."[5] D.C.'s ban on these plus-ten magazines is categorical; it extends to every purpose (even self-defense) and to every location (even inside the home).[6]

Heller lost his second suit before a divided panel of this court. It upheld D.C.'s ban on plus-ten magazines because the ban was substantially related to an important government interest.[7] But this court's decision in *Heller II* was effectively overruled in *New York State Rifle & Pistol Association, Inc. v. Bruen*.[8] There, the Supreme Court reaffirmed its holding in

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[5] D.C. Code § 7-2506.01(b) (2009); *see Heller II*, 670 F.3d at 1249.

Heller II also included challenges to D.C.'s ban on semi-automatic rifles and its gun registration and licensing requirements. 670 F.3d at 1248-49.

[6] The prohibited magazines are neither unusually "large," D.C. Code § 7-2506.01(b) (2013), nor "extra-large," Majority Op. at 5. *See infra* Part III.A. So I will simply call them "plus-ten magazines." *Cf. Duncan v. Bonta*, 19 F.4th 1087, 1140 n.1 (9th Cir. 2021) (*Duncan II*) (en banc) (Bumatay, J., dissenting) ("we would be more correct to refer to" plus-ten magazines as "standard-capacity magazines," rather than "large-capacity magazine[s]" (cleaned up)), *cert. granted, judgment vacated, and remanded*, 142 S. Ct. 2895 (2022), *and vacated and remanded by Duncan v. Bonta*, 49 F.4th 1228 (9th Cir. 2022).

[7] *Heller II*, 670 F.3d at 1263-64; *cf. Heller v. District of Columbia*, 801 F.3d 264, 274-80 (D.C. Cir. 2015) (*Heller III*) (applying means-end scrutiny to D.C.'s gun registration regime).

[8] 142 S. Ct. 2111 (2022).

Heller I and repudiated "means-end scrutiny in the Second Amendment context."[9]

After *Bruen*, Andrew Hanson and three other D.C. residents filed this suit. They own handguns, as well as magazines that hold up to 17 rounds of ammunition. Because of D.C.'s ban on plus-ten magazines, they must store those magazines outside of D.C., away from their homes.

These gun owners sought a permanent injunction and a declaration that D.C.'s ban is unconstitutional. Simultaneously, they requested a preliminary injunction permitting them to keep their up-to-17-round magazines with their handguns in D.C. while this suit proceeded.

The district court found that the gun owners were not likely to succeed on the merits.[10] So it denied the preliminary injunction without assessing any other equitable factors.[11] The gun owners appealed, requesting a preliminary or permanent injunction.

Because the district court's decision depended entirely on a legal conclusion — that the government

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[9] *Id.* at 2127; *see id.* at 2125-27.

[10] *Hanson v. District of Columbia*, 671 F. Supp. 3d 1, 3 (D.D.C. 2023).

[11] *Id.*; *see Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008) (a party seeking a preliminary injunction must show that (1) "he is likely to succeed on the merits," (2) "he is likely to suffer irreparable harm in the absence of preliminary relief," (3) "the balance of equities tips in his favor," and (4) "an injunction is in the public interest").

can categorically ban an arm in common use for lawful purposes — review is de novo.[12]

II. The Government Cannot Ban Arms in Common Use for Lawful Purposes

The Second Amendment guarantees law-abiding citizens a right against categorical bans of an arm in common use for lawful purposes. What follows is the story of how the Supreme Court came to affirm that right — and then reaffirm it over and over and over again.

A. Text and History

I begin with a much-abbreviated version of the history that informs the Second Amendment.[13] My hope here is to provide any readers new to this topic with a prologue to the Supreme Court's Second Amendment jurisprudence. Later, I'll explain why that jurisprudence holds that the government cannot ban an arm in common use for lawful purposes.

1. The English Bill of Rights and Colonial History (1689-1775)

In the 1660s, Britain's Stuart king began to disarm Protestants and other politically disfavored subjects.[14] After the Stuarts' ouster and exile in 1688, King William and Queen Mary assented to a parliamentary

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[12] *Huisha-Huisha v. Mayorkas*, 27 F.4th 718, 726 (D.C. Cir. 2022).

[13] Some of the finest judges in the country have written detailed accounts of that history, which I commend to the interested reader. The most recent example is Judge Richardson's excellent dissent in *Bianchi v. Brown*, No. 21-1255, 111 F.4th __, slip op. at 85-183 (4th Cir. Aug. 6, 2024) (en banc). Others are cited throughout this opinion.

[14] *Heller*, 554 U.S. at 592-93.

declaration that became the 1689 English Bill of Rights.[15] It "explicitly protected a right to keep arms for self-defense."[16]

"As English subjects," American "colonists considered themselves to be vested with the same fundamental rights as other Englishmen."[17] That included the "right of self-preservation" to "repel force by force."[18] So when King George III tried "to disarm the colonists just as the Stuarts attempted to disarm Protestants," his attempts "provoked polemical reactions by Americans invoking their rights as Englishmen to keep arms."[19]

Then, in 1775, the "spark that ignited the American Revolution was struck at Lexington and Concord,

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[15] *Id.* at 593; *Duncan v. Becerra*, 970 F.3d 1133, 1144 (9th Cir. 2020) (*Duncan I*) (panel), *reh'g en banc granted, opinion vacated*, 988 F.3d 1209 (9th Cir. 2021), *and on reh'g en banc sub nom. Duncan II*, 19 F.4th 1087.

[16] *McDonald v. City of Chicago*, 561 U.S. 742, 768 (2010); *see also* 1 W. & M., ch. 2 (1689) ("That the Subjects which are Protestants, may have Arms for their Defence suitable to their Conditions, and as allowed by Law."), *in* 6 Statutes of the Realm at 143.

In a reversal of the Stuart Era, the English Bill of Rights extended gun rights only to Protestants. But by 1765, though anti-Catholic politics and prejudice persisted, "the right to keep and bear arms was one of the fundamental rights of Englishmen." *McDonald*, 561 U.S. at 768 (cleaned up) (noting that Blackstone recognized this fundamental right in 1765).

[17] *McDonald*, 561 U.S. at 816 (Thomas, J., concurring in part and concurring in the judgment).

[18] *Heller*, 554 U.S. at 595 (cleaned up) (citing 1 William Blackstone, *Commentaries* at *145 n.42 (1803) (notes of St. George Tucker)).

[19] First quoting *Duncan I*, 970 F.3d at 1153; then quoting *McDonald*, 561 U.S. at 768 (cleaned up).

when the British governor dispatched soldiers to seize the local farmers' arms and powder stores."[20]

2. The Second Amendment, State-Constitution Analogues, and the "Palladium of the Liberties of a Republic" (1775-1833)

The American Revolution led to Western Civilization's "seminal era of constitution writing."[21] The thirteen states "created the first thirteen constitutions in this country, indeed many of the first constitutions in the world."[22] Almost immediately, four of them guaranteed gun rights.[23]

By 1787, the nation was debating whether to ratify the United States Constitution, proposed by that summer's Philadelphia Convention.[24] In that debate, "the fear that the Federal Government would disarm the people in order to impose rule through a standing army or select militia was pervasive in Antifederalist rhetoric."[25] "In response, the Federalists agreed to include a Bill of Rights, which, of course, featured the right to bear arms."[26] Its Second Amendment provides:

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[20] *Rahimi*, slip op. at 5; *Duncan I*, 970 F.3d at 1153.

[21] Jeffrey S. Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law* 11 (2018).

[22] *Id.* at 10.

[23] *Heller*, 554 U.S. at 600-02; *see also McDonald*, 561 U.S. at 769.

[24] *Heller*, 554 U.S. at 598-99 (discussing ratification debates).

[25] *Id.* (citing Letters from The Federal Farmer III (Oct. 10, 1787), *in* 2 The Complete Anti-Federalist 234, 242 (H. Storing ed. 1981), and 2 Documentary History of the Ratification of the Constitution 508 09 (M. Jensen ed. 1976) (comments of John Smilie at the Pennsylvania ratifying convention)).

[26] *Duncan I*, 970 F.3d at 1144.

> A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.[27]

In the three decades that followed ratification of the Bill of Rights, nine more states guaranteed gun rights in their constitutions.[28] After that, as new states joined the Union, many of their constitutions made similar guarantees.[29] They reflected what Joseph Story observed in 1833: "The right of the citizens to keep and bear arms has justly been considered, as the palladium of the liberties of a republic . . . ."[30]

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[27] U.S. Const. amend. II.

[28] *See McDonald*, 561 U.S. at 769.

[29] *See, e.g.*, An Act to Provide for the Due Execution of the Laws of the United States Within the State of Michigan, ch. 239, sec. 1, 5 Stat 61, 61 (1836) (applying United States law to Michigan); An Act to Admit the State of Michigan into the Union, upon an Equal Footing with the Original States, ch. 6, sec. 1, 5 Stat. 144, 144 (1837) (formally admitting Michigan as a state); Mich. Const. of 1835, art. I, § 13 ("right to bear arms"); An Act for the Admission of the State of Arkansas into the Union, and to Provide for the Due Execution of the Laws of the United States, Within the Same, and for Other Purposes, ch. 100, secs. 1 & 3, 5 Stat. 50, 50-51 (1836) (admitting Arkansas); Ark. Const. of 1836, art. II, § 21 ("right to keep and to bear arms"); An Act to Extend the Laws of the United States over the State of Texas, and for Other Purposes, ch. 1, sec. 1, 6 Stat. 1, 1 (1845) (annexing Texas); Tex. Const. of 1845, art. I, § 13 ("right to keep and bear arms"); An Act for the Admission of Iowa and Florida into the Union, ch. 48, sec. 1, 6 Stat. 742, 742 (1845) (admitting Florida); An Act Supplemental to the Act for the Admission of Florida and Iowa into the Union, and for Other Purposes, ch. 75, sec. 2, 6 Stat. 788, 788 (1845) (formally applying United States law to Florida); Fla. Const. of 1838, art. I, § 21 ("right to keep and to bear arms").

[30] 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1890, at 746 (1833); *see also McDonald*, 561 U.S.

3. The Fourteenth Amendment (1868)

Just as guns were often the difference between life and death for "the remote settler" who needed "to defend himself and his family against hostile Indian tribes and outlaws, wolves and bears,"[31] guns were often the only defense for African-Americans against night riders and lynch mobs after the Civil War.[32] So when states "of the old Confederacy" engaged in "systematic efforts . . . to disarm" recently freed slaves and "many of the over 180,000 African-Americans who served in the Union Army," Congress passed the Freedmen's Bureau Act of 1866.[33] It guaranteed "the constitutional right to bear arms" to all citizens "without respect to race or color."[34]

That same year, Congress enacted the Civil Rights Act.[35] Its "principal proponents . . . meant to end the

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at 769 70 (citing "Founding-era legal commentators" including Joseph Story, St. George Tucker, and William Rawle).

[31] Oral Arg. Tr. at 8 (comment of Kennedy, J.), *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290), 2008 WL 731297.

[32] *McDonald*, 561 U.S. at 855-58 (Thomas, J., concurring in part and concurring in the judgment); *see also Duncan I*, 970 F.3d at 1154 (The NAACP's co-founder once wrote of a year plagued by racial lynchings in the late nineteenth century, "the only case where the proposed lynching did *not* occur, was where the men armed themselves . . . and prevented it. The only times an Afro-American who was assaulted [and] got away has been when he had a gun and used it in self-defense." (quoting Ida B. Wells, *Southern Horrors and Other Writings: The Anti-Lynching Campaign of Ida B. Wells, 1892 1900*, at 70 (Jacqueline Jones Royster ed., 1997))).

[33] *McDonald*, 561 U.S. at 771.

[34] Ch. 200, § 14, 14 Stat. 173, 176-177 (1866).

[35] Ch. 31, 14 Stat. 27 (1866).

disarmament of African-Americans in the South."[36] Then, "to provide a constitutional basis for protecting the rights set out in the Civil Rights Act of 1866," Congress passed and the states ratified the Fourteenth Amendment.[37] Its first section provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[38]

4. Takeaways from the Second Amendment's Text and History

D.C. has offered no reason to doubt that throughout all of this history, no federal or state legislature enacted a blanket ban on a gun in common use for lawful purposes. Yes, there could be limits on *who* possesses a gun.[39] Yes, there could be limits on *where* and *how* you carry a gun.[40] And yes, there could be

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[36] *McDonald*, 561 U.S. at 774 n.23.

[37] *Id.* at 775.

[38] U.S. Const. amend. 14 § 1; *see also id.* § 5 (granting Congress enforcement power).

[39] *Rahimi*, slip op. at 10-13 (citing Founding-era "regulations targeting individuals who physically threatened others").

[40] *Bruen*, 142 S. Ct. at 2133 (citing examples of "sensitive places" where weapons were historically prohibited).

limits on owning and carrying *unusual* guns.[41] But D.C. has failed to identify any categorical ban on a gun in common use for lawful purposes in the first century of our nation's history.[42]

B. Supreme Court Precedents

The Supreme Court's first notable application of the Second Amendment did not occur until 1939 — when it distinguished unusual weapons from those in common use.[43] And its first extensive consideration of the Amendment's meaning did not come until 2008 — when it relied on this distinction to hold that the government cannot completely ban an arm in common use for lawful purposes. In the 16 years since then, the Court has invariably reaffirmed that principle.

1. *United States v. Miller* (1939)

In 1934, Congress enacted the National Firearms Act — the first significant federal gun law.[44] It regulated a special class of unusual firearms.[45] This

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[41] *Heller*, 554 U.S. at 627 (explaining that there is an "historical tradition of prohibiting the carrying of dangerous and unusual weapons" (cleaned up)).

[42] *See Bruen*, 142 S. Ct. at 2126 (it is the government's burden to "demonstrate that [its] regulation is consistent with this Nation's historical tradition of firearm regulation").

[43] "For most of our history, the Bill of Rights was not thought applicable to the States, and the Federal Government did not significantly regulate the possession of firearms by law-abiding citizens." *Heller*, 554 U.S. at 625.

[44] National Firearms Act, Pub. L. No. 73-474, 48 Stat. 1236 (1934).

[45] *Id.* § 1(a), 48 Stat. at 1236.

class included fully automatic machine guns, sawed-off shotguns, and short-barreled rifles.[46]

The National Firearms Act required pre-existing owners to register those firearms.[47] It also compelled sellers and transferors to pay special taxes.[48] So obtaining a covered arm became expensive, but not illegal.

The Supreme Court upheld the National Firearms Act in *United States v. Miller*.[49] There, "two washed-up Oklahoma bank robbers" had been charged with transporting an unregistered sawed-off shotgun in interstate commerce.[50] The Court held that the Second Amendment does not protect "the right to keep and bear such an instrument."[51]

In explaining why, *Miller* referred to Founding-Era history. It observed that men called to serve in the militia "were expected to appear bearing arms supplied by themselves and of the kind *in common use*

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[46] *Id.*

Machine guns are automatic weapons. *Id.* § 1(b), 48 Stat. at 1236 (defining "machine gun"). They fire "repeatedly with a single pull of the trigger. That is, once its trigger is depressed, the weapon will automatically continue to fire until its trigger is released or the ammunition is exhausted." *Staples v. United States*, 511 U.S. 600, 602 n.1 (1994).

[47] National Firearms Act, § 5(a), 48 Stat. at 1238.

[48] *Id.* §§ 2(a), 3(b), 48 Stat. at 1237.

[49] 307 U.S. 174, 183 (1939).

[50] Brian L. Frye, *The Peculiar Story of* United States v. Miller, 3 N.Y.U. J.L. & Liberty 48, 48 (2008); *see id.* at 50 (describing how *Miller* was a "test case arranged by the government and designed to support the constitutionality of federal gun control").

[51] *Miller*, 307 U.S. at 178.

at the time."[52] Therefore, in the Court's view, the Second Amendment did not protect the weapon at issue in *Miller*, which was unusual at the time of the bank robbers' arrest.[53]

The Supreme Court has since "read *Miller* to say only that the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes,"[54] explaining (this time without the multiple negatives) that "*Miller* said . . . the sorts of weapons protected were those in common use at the time."[55]

2. *Staples v. United States* (1994)

Five and a half decades after *Miller*, the Supreme Court considered another case about the National Firearms Act — *Staples v. United States*.[56]

Staples reversed a conviction under the National Firearms Act for possession of an unregistered fully automatic machine gun.[57] The Court held that the government must (and did not) prove the defendant knew his AR-15 rifle had been converted to enable automatic fire.[58] That's because most modern guns are "so commonplace and generally available" that a

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[52] *Id.* at 179 (emphasis added); *see id.* at 179-82 (citing state laws *requiring* men to keep and bear commonly used firearms for militia service).

[53] *Id.* at 178.

[54] *Heller*, 554 U.S. at 625; *see also id.* at 623 (*Miller* recognizes that "the Second Amendment right, whatever its nature, extends only to certain types of weapons").

[55] *Id.* at 627 (cleaned up).

[56] 511 U.S. 600 (1994).

[57] *Id.* at 602.

[58] *Id.* at 603, 619.

defendant cannot be considered "on notice" of likely regulation just because a gun is dangerous.[59]

Consistent with *Miller*, *Staples* contrasted guns like a semiautomatic AR-15 rifle that "traditionally have been widely accepted as lawful possessions" with "certain categories" of unusual guns like fully automatic "machineguns, sawed-off shotguns, and artillery pieces."[60] So even though *Staples* was not a constitutional decision, it confirmed a principle that would matter in future cases about the Second Amendment: Arms in common use for lawful purposes are legally distinct from unusual, "quasi-suspect" arms.[61]

3. *District of Columbia v. Heller* (2008)

D.C. has long been an anti-gun outlier in a nation where, as *Staples* said, guns are "widely accepted as lawful possessions."[62] By 1976, D.C. had "banned all handgun possession."[63] That ban was challenged by Dick Heller in a suit decided by the Supreme Court in 2008.[64]

During the litigation in *Heller*, D.C. made a series of arguments designed to render the Second Amendment a dead letter. For starters, D.C. argued that the Second Amendment does not "entitle[] individuals to have

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[59] *Id.* at 611.

[60] *Id.* at 611-12.

[61] *See Heller II*, 670 F.3d at 1288 (Kavanaugh, J., dissenting) (cleaned up).

[62] *Staples*, 511 U.S. at 612; *see id.* at 611-12.

[63] *Wrenn v. District of Columbia*, 864 F.3d 650, 655 (D.C. Cir. 2017) (citing D.C. Code § 7-2502.01(a), 7-2502.02(a)(4)).

[64] *Heller*, 554 U.S. at 574-76.

guns for their own private purposes."[65] Next, D.C. argued that there's no right to handguns when "the District allows residents to keep rifles and shotguns."[66] Finally, D.C. argued that its "predictive judgment about how best to reduce gun violence was reasonable" and "entitled to substantial deference."[67]

In *District of Columbia v. Heller*, the Supreme Court rejected every one of D.C.'s arguments.[68] In so doing, it made four increasingly specific holdings. Each was dependent on the holding before it.

Heller's first holding was its broadest: As a general matter, the Second Amendment guarantees an "individual right" to possess and carry "arms," though that right is "not unlimited."[69]

Heller's second holding concerned how to discover the Second Amendment's limits: Courts must rely "on the historical understanding of the Amendment to demark the limits on the exercise of that right."[70] This historical approach led *Heller* to distinguish D.C.'s law from "longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the

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[65] Petitioner Br. at 8, *Heller*, 554 U.S. at 570 (No. 07-290), 2008 WL 102223.

[66] *Id.* at 10; *see id.* at 48, 54-55.

[67] *Id.* at 11.

[68] *See* 554 U.S. 570, 628-29, 629, 634-36 (2008).

[69] *Id.* at 579-81, 581-92, 626-28.

[70] *Bruen*, 142 S. Ct. at 2128 (describing *Heller*).

commercial sale of arms."[71] *Heller* thus "exemplifies" a "straightforward historical inquiry."[72]

In adopting this historical approach, "*Heller* decline[d] to engage in means-end scrutiny generally" and "specifically ruled out the intermediate-scrutiny test."[73] The Court explained:

> We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding "interest-balancing" approach. The very enumeration of the right takes out of the hands of government — even the Third Branch of Government — the power to decide on a case-by-case basis whether the right is *really worth* insisting upon.[74]

Heller then applied that "straightforward historical inquiry"[75] to reach its third holding: Whereas the United States has a "historical tradition of prohibiting the carrying of 'dangerous and unusual weapons,' there is no historical tradition of banning arms 'in common use.'"[76] So arms "in common use" are

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[71] *Heller*, 554 U.S. at 626-27.

[72] *Bruen*, 142 S. Ct. at 2131.

[73] *Id.* at 2129.

[74] *Heller*, 554 U.S. at 634; *see also id.* ("A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all."); *id.* at 635 ("Like the First, [the Second Amendment] is the very *product* of an interest balancing by the people . . . .").

[75] *Bruen*, 142 S. Ct. at 2131 (describing *Heller*).

[76] *Heller*, 554 U.S. at 627 (quoting *Miller*, 307 U.S. at 179) (cleaned up).

"protected," and "a complete prohibition of their use is invalid."[77]

Heller's third holding confirmed the same critical distinction on which *Miller* had relied in 1939 — the distinction between "unusual" weapons versus weapons "in common use" for lawful purposes.[78] That distinction "dovetailed with the historical practice of the militia bringing 'the sorts of lawful weapons that they possessed at home to militia duty'; *i.e.*, weapons that were 'in common use at the time.'"[79]

From there, *Heller* reached its fourth and final holding: Because handguns are in common use today, law-abiding citizens have a Second Amendment right to keep them in their homes for self-defense.[80] It didn't

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[77] *Id.* at 624, 627, 629; *see also Heller II*, 670 F.3d at 1269 (Kavanaugh, J., dissenting) (*Heller* held that the government cannot ban arms when "they have not traditionally been banned and are in common use by law-abiding citizens."); *id.* at 1271-72 (Kavanaugh, J., dissenting) ("As to bans on categories of guns, the *Heller* Court stated that the government may ban classes of guns that have been banned in our 'historical tradition' — namely, guns that are 'dangerous and unusual' and thus are not the sorts of lawful weapons that citizens typically possess at home." (cleaned up)); *id.* at 1272 (Kavanaugh, J., dissenting) ("The [*Heller*] Court said that 'dangerous and unusual weapons' are equivalent to those weapons not 'in common use,' as the latter phrase was used in *United States v. Miller*.").

[78] *Heller*, 554 U.S. at 623-25; *supra* Part II.B.1 (discussing *Miller*).

[79] Mark W. Smith, *What Part of "In Common Use" Don't You Understand?: How Courts Have Defied* Heller *in Arms-Ban Cases — Again*, Harv. J.L. & Pub. Pol'y Per Curiam, No. 41, at 4 (2023) ("Smith, *How Courts Have Defied* Heller") (quoting *Heller*, 554 U.S. at 627).

[80] *Heller*, 554 U.S. at 628-29; *see also Bruen*, 142 S. Ct. at 2143 (discussing *Heller*).

matter whether D.C. residents could already keep other guns — it only mattered that handguns are in common use.[81] Nor did it matter whether handguns were once unusual — it only mattered that they are common now.[82]

Heller explained time and again that this fourth holding (a right to handguns) depended on its third holding (a right to possess arms "in common use" for lawful purposes):

- "It is enough to note, as we have observed, that the American people have considered the handgun to be the quintessential self-defense weapon."[83]
- "The handgun ban amounts to a prohibition of an entire class of 'arms' that is overwhelmingly chosen by American society for that lawful purpose."[84]
- "Whatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid."[85]
- "Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home the most preferred firearm in the nation to keep and use

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[81] *Heller*, 554 U.S. at 629.

[82] *See id.* at 582 ("the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding").

[83] *Id.* at 629.

[84] *Id.* at 628.

[85] *Id.* at 629.

> for protection of one's home and family would fail constitutional muster."[86]

In other words, *Heller* did not simply hold that the Second Amendment is an individual right, then add a lot of dicta, and then finally hold that D.C. cannot ban handguns. What came between *Heller*'s first and last holdings is binding on lower courts, because each of *Heller*'s four increasingly specific holdings is dependent on the holding before it:

1) There is, in general, an individual right to keep and bear arms;
2) Exceptions to that right depend on the history and tradition of gun regulations;
3) There is no history and tradition of banning arms in common use for lawful purposes; and
4) Handguns cannot be categorically banned *precisely because* they are in common use for lawful purposes.

Of course, *Heller* did not ignore "the problem of handgun violence in this country."[87] It took "seriously the concerns" of those "who believe that prohibition of handgun ownership is a solution."[88] But the Court was bound by the Second Amendment's command that the government may not ban arms in common use for lawful purposes — whether good policy or not. As this court later recognized: "*Heller I* closed off the possibility" that we could "find some benefits weighty

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[86] *Id.* at 628-29 (cleaned up).

[87] *Id.* at 636.

[88] *Id.*

enough to justify other effective bans on the right to keep common arms."[89]

4. *McDonald v. City of Chicago* (2010)

Two years after *Heller*, in *McDonald v. City of Chicago*, the Supreme Court confirmed that because of the Fourteenth Amendment, "the Second Amendment right is fully applicable to the States."[90] *McDonald* explained that "the right to keep and bear arms is fundamental to our scheme of ordered liberty."[91] It is "'deeply rooted in this Nation's history and tradition.'"[92]

At the same time, "*McDonald* underscore[d] that text, history, and tradition guide analysis of gun laws and regulations."[93] It confirmed that exceptions to the general right to keep and bear arms depend on "longstanding regulatory measures," not "judicial interest balancing," which *Heller* had "expressly rejected."[94] And like *Heller*, it held that "citizens must

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[89] *Wrenn*, 864 F.3d at 665. *But see Bianchi*, slip op. at 64 ("Imagine, then, *living* through these recent tragedies. Imagine the sense of loss that afflicts not only the moment, but the lifetimes of those families and friends affected. And then imagine that you mobilize and lobby your representatives to pass preventative legislation, only to be told by a court that your Constitution renders you powerless to save others from your family's fate." (emphasis omitted)).

[90] 561 U.S. 742, 750 (2010).

[91] *Id.* at 767 (emphasis omitted).

[92] *Id.* at 768 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

[93] *Heller II*, 670 F.3d at 1278 (Kavanaugh, J., dissenting).

[94] *McDonald*, 561 U.S. at 785-86 (plurality); *see also id.* at 803 (Scalia, J., concurring) ("traditional, historically focused method").

be permitted to use handguns for the core lawful purpose of self-defense" *because* handguns "are the most preferred firearm in the nation to keep and use for protection of one's home and family."[95]

In *McDonald*, the Supreme Court had a chance to back away from *Heller*'s holdings. Instead, it doubled down.

5. "Defiance" of *Heller* (2010-2022)

With *Heller* and *McDonald*, the Supreme Court left little doubt about the validity of severe gun-control regimes. But revanchist legislatures responded with "defiance."[96]

D.C. led the way. After its ban on keeping handguns was held unconstitutional, it followed "with a ban on carrying."[97] "And when *that* was struck down," D.C. confined "carrying a handgun in public to those with a special need for selfdefense."[98] D.C. then lost in court *again*, this time after arguing that the Second Amendment's "core does not cover public carrying at all."[99]

D.C.'s unveiled contempt for *Heller* and *McDonald* was not unique. For example, the Massachusetts Supreme Judicial Court held that the Second

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[95] *Id.* at 767-68 (cleaned up).

[96] *Silvester v. Becerra*, 138 S. Ct. 945, 951 (2018) (Thomas, J., dissenting from denial of certiorari); *cf. Cooper v. Aaron*, 358 U.S. 1, 17 (1958) ("we should answer the premise of the actions of the Governor and Legislature that they are not bound by our holding in the *Brown* case").

[97] *Wrenn*, 864 F.3d at 655 (citing D.C. Code § 22-4504).

[98] *Id.* (citing *Palmer v. District of Columbia*, 59 F. Supp. 3d 173 (D.D.C. 2014) and D.C. Code § 22-4506(a)-(b)).

[99] *Id.* at 657.

Amendment does not protect stun guns[100] — a decision that the unanimous Supreme Court summarily reversed in *Caetano v. Massachusetts*.[101] With a terse, two-page opinion, the Court dispensed with the state court's thin reasoning as patently "inconsistent" with the "clear" holdings of *Heller* and *McDonald*.[102]

Caetano put lower courts on notice: Exceptions to gun rights under the Second Amendment depend on a historical tradition of analogous regulations, and there is no historical tradition of banning arms in common use for lawful purposes.

Many state courts did not get the memo. Nor did some federal circuit courts.

In particular, several federal circuits devised "a 'two-step' framework for analyzing Second Amendment challenges that combines history with means-end scrutiny."[103] That approach was "policy by another name," and it "eviscerate[d] many of the protections recognized in *Heller* and *McDonald*."[104] In the Ninth

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[100] *Commonwealth v. Caetano*, 26 N.E.3d 688, 692-94 (Mass. 2015).

[101] 577 U.S. 411, 412 (2016).

[102] *Id.* at 412; *see id.* at 411-12 (swiftly rejecting each of the state court's three rationales for its holding, which were that (1) stun guns "were not in common use at the time of the Second Amendment's enactment," (2) stun guns are "unusual" because they are "a thoroughly modern invention," and (3) stun guns are not "readily adaptable to use in the military" (cleaned up)).

[103] *Bruen*, 142 S. Ct. at 2125; *see id.* at 2125-27 & n.4 (citing cases).

[104] First quoting *Rahimi*, slip op. at 18 (Kavanaugh, J., concurring); then quoting *Friedman v. City of Highland Park*, 577 U.S. 1039, 1041 (2015) (*Friedman II*) (Thomas, J., dissenting from denial of certiorari). Because I later refer to the Seventh Circuit opinion with the same caption, I will cite this one as *Friedman II*.

Circuit, for example, the government at one point enjoyed an "'undefeated, 50–0 record'" against Second Amendment challenges.[105]

Meanwhile, a number of Supreme Court justices raised the alarm:

- Justice Thomas (joined by Justice Scalia) lamented that "[d]espite the clarity with which we described the Second Amendment's core protection for the right of self-defense, lower courts . . . have failed to protect it."[106]
- Justice Thomas (again joined by Justice Scalia) criticized lower courts' "crabbed reading of *Heller*" and "noncompliance with our Second Amendment precedents."[107]
- Justice Thomas said that "lower courts are resisting this Court's decisions in *Heller* and *McDonald* and are failing to protect the Second Amendment to the same extent that they protect other constitutional rights."[108]

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[105] *Rahimi*, slip op. at 5 (Gorsuch, J., concurring) (quoting *Duncan II*, 19 F.4th at 1167 n.8 (VanDyke, J., dissenting)); *see also Bruen*, 142 S. Ct. at 2131 ("If the last decade of Second Amendment litigation has taught this Court anything, it is that federal courts tasked with making such difficult empirical judgments regarding firearm regulations under the banner of 'intermediate scrutiny' often defer to the determinations of legislatures.").

[106] *Jackson v. City and County of San Francisco*, 135 S. Ct. 2799, 2799 (2015) (Thomas, J., dissenting from denial of certiorari).

[107] *Friedman II*, 577 U.S. at 1039, 1041 (Thomas, J., dissenting from denial of certiorari).

[108] *Silvester*, 138 S. Ct. at 950 (Thomas, J., dissenting from denial of certiorari).

- Justice Alito (joined by Justice Thomas) criticized lower-court "reasoning" that "defies our decision in *Heller*."[109]
- Justice Alito (joined by Justice Gorsuch) expressed "concern" about "the way *Heller* has been treated in the lower courts."[110]
- Justice Kavanaugh shared a similar "concern that some federal and state courts may not be properly applying *Heller* and *McDonald*."[111]
- Justice Thomas (joined by Justice Kavanaugh) again accused the lower courts of "blatant defiance," explaining that means-end scrutiny was "entirely inconsistent with *Heller*" and "appear[ed] to be entirely made up."[112]

These five justices did not chastise lower courts only for ignoring *Heller*'s holding that history and tradition alone determine exceptions to the Second Amendment's textual baseline. They also chided lower courts for ignoring *Heller*'s more specific holding — that there is no historical tradition of categorical bans on arms "in common use" for lawful purposes.[113]

Consider, for example, *Friedman v. City of Highland Park*.[114] The Court declined to take up a challenge to a

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[109] *Caetano*, 577 U.S. at 414 (Alito, J., concurring in the judgment).

[110] *New York State Rifle & Pistol Association v. City of New York*, 140 S. Ct. 1525, 1544 (2020) (Alito, J., dissenting).

[111] *Id.* at 1527 (Kavanaugh, J., concurring).

[112] *Rogers v. Grewal*, 140 S. Ct. 1865, 1867 (2020) (Thomas, J., dissenting from denial of certiorari).

[113] *Heller*, 554 U.S. at 627.

[114] 577 U.S. 1039, 1039 (2015) (Thomas, J., dissenting from denial of certiorari).

city ban on "many of the most commonly owned" semiautomatic rifles and the plus-ten magazines commonly used with them.[115] Justice Thomas dissented from the denial of certiorari, joined by Justice Scalia. He explained that *Heller* and *McDonald* do not allow "categorical bans on firearms that millions of Americans commonly own for lawful purposes,"[116] repeatedly underscoring *Heller*'s third holding about arms in common use:

- "*Heller* asks whether the law bans types of firearms commonly used for a lawful purpose — regardless of whether alternatives exist."[117]
- "*Heller* draws a distinction between such firearms [in common use for a lawful purpose] and weapons specially adapted to unlawful uses and not in common use, such as sawed-off shotguns."[118]
- *Heller* and *McDonald* "excluded from [Second Amendment] protection only those weapons not typically possessed by law-abiding citizens for lawful purposes."[119]
- "Roughly 5 million Americans own AR-style semiautomatic rifles. The overwhelming majority of citizens who own and use such rifles do so for lawful purposes, including self-defense and target shooting. Under our precedents, *that is all that is needed* for citizens to have a right

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[115] *Id.* at 1039 (Thomas, J., dissenting from denial of certiorari).

[116] *Id.* (Thomas, J., dissenting from denial of certiorari).

[117] *Id.* at 1042 (Thomas, J., dissenting from denial of certiorari).

[118] *Id.* (Thomas, J., dissenting from denial of certiorari).

[119] *Id.* at 1040 (Thomas, J., dissenting from denial of certiorari) (cleaned up).

under the Second Amendment to keep such weapons."[120]

Consider also *Caetano*, the stun-gun case in which the unanimous Supreme Court summarily reversed the Massachusetts Supreme Judicial Court. There, Justice Alito (joined by Justice Thomas) wrote separately to emphasize *Heller*'s third holding about arms in common use:

- "[T]he pertinent Second Amendment inquiry is whether [the arms] are commonly possessed by law-abiding citizens for lawful purposes today."[121]
- "A weapon may not be banned unless it is *both* dangerous *and* unusual."[122]
- "[T]he relative dangerousness of a weapon is *irrelevant* when the weapon belongs to a class of arms commonly used for lawful purposes."[123]
- "While less popular than handguns, stun guns are widely owned and accepted as a legitimate means of self-defense across the country. Massachusetts' categorical ban of such weapons *therefore* violates the Second Amendment."[124]

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[120] *Id.* at 1042 (Thomas, J., dissenting from denial of certiorari) (emphasis added).

[121] *Caetano*, 577 U.S. at 420 (Alito, J., concurring in the judgment) (emphasis omitted).

[122] *Id.* at 417 (Alito, J., concurring in the judgment).

[123] *Id.* at 418 (Alito, J., concurring in the judgment) (emphasis added).

[124] *Id.* at 420 (Alito, J., concurring in the judgment) (emphasis added); *see id.* (Alito, J., concurring in the judgment) (noting "that hundreds of thousands of Tasers and stun guns have been sold to

Supreme Court justices were not alone in objecting to lower courts' "eviscerat[ion]" of *Heller* and *McDonald*.[125] "A chorus" of district judges and dissenting circuit judges echoed them.[126] One was then-Judge Kavanaugh.

Dissenting in *Heller II*, Judge Kavanaugh urged this court to apply *Heller I*'s second and third holdings. He said, "*Heller* and *McDonald* leave little doubt that courts are to assess gun bans and regulations based on text, history, and tradition, not by a balancing test such as strict or intermediate scrutiny."[127] And he added, "In *Heller*, the Supreme Court held that handguns . . . are constitutionally protected *because* they have not tradi-

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private citizens, who it appears may lawfully possess them in 45 States" (cleaned up)).

[125] *Friedman II*, 577 U.S. at 1041 (Thomas, J., dissenting from denial of certiorari).

[126] *Duncan II*, 19 F.4th at 1147 (Bumatay, J., dissenting, joined by Ikuta and Nelson, JJ.) (citing *Mai v. United States*, 974 F.3d 1082, 1083 (9th Cir. 2020) (Collins, J., dissenting from the denial of reh'g en banc)); *id.* at 1097 (VanDyke, J., dissenting from the denial of reh'g en banc); *Association of New Jersey Rifle & Pistol Clubs, Inc. v. Attorney General of New Jersey*, 910 F.3d 106, 126 (3d Cir. 2018) (Bibas, J. dissenting); *Mance v. Sessions*, 896 F.3d 390, 394 (5th Cir. 2018) (Elrod, J., joined by Jones, Smith, Willett, Ho, Duncan, and Engelhardt, JJ., dissenting from the denial of reh'g en banc); *Tyler v. Hillsdale Cnty. Sheriff's Department*, 837 F.3d 678, 702 (6th Cir. 2016) (Batchelder, J., concurring in most of the judgment); *id.* at 710 (Sutton, J., concurring in most of the judgment)).

[127] *Heller II*, 670 F.3d at 1271 (Kavanaugh, J., dissenting); *see also id.* at 1272 (Kavanaugh, J., dissenting) ("The scope of the right is thus determined by 'historical justifications.'" (quoting *Heller,* 554 U.S. at 635)).

tionally been banned and are in common use by law-abiding citizens."[128]

6. *New York State Rifle & Pistol Association, Inc. v. Bruen* (2022)

In *New York State Rifle & Pistol Association, Inc. v. Bruen*, the Supreme Court vindicated the chorus of circuit-court dissenters, repudiated "means-end" scrutiny (again), and (again) reaffirmed *Heller*'s second holding that "when the Second Amendment's plain text covers an individual's conduct," exceptions to that right must be "consistent with this Nation's historical tradition of firearm regulation."[129]

At the same time, *Bruen* gave lower courts additional guidance about how to apply *Heller*'s history-and-tradition test. As in other constitutional contexts, the burden is on the government to justify regulations that are "presumptively protect[ed]."[130] And the government satisfies that burden only if it can "identify a well-established and representative historical analogue" within our country's historical tradition.[131]

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[128] *Id.* at 1269 (Kavanaugh, J., dissenting) (emphasis added); *see also id.* at 1288 (Kavanaugh, J., dissenting) ("the government may not generally ban semi-automatic guns" because "semi-automatic weapons 'traditionally have been widely accepted as lawful possessions'" (quoting *Staples*, 511 U.S. at 612)).

[129] 142 S. Ct. 2111, 2126-27 (2022); *see also id.* at 2131 ("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."); *id.* at 2128 (*Heller* "assessed the lawfulness of that handgun ban by scrutinizing whether it comported with history and tradition").

[130] *Id.* at 2129-30.

[131] *Id.* at 2133 (emphasis omitted).

Bruen applied that history-and-tradition test to a New York law that conditioned licenses to carry handguns "on a citizen's showing of" a "special need for self-defense."[132] *Bruen* needed to conduct its own historical inquiry "because . . . *Bruen* did not involve an arms ban" and so "could not be resolved by applying *Heller*'s rule" that the government cannot ban arms in common use for lawful purposes.[133] The Court considered the history and held that New York's law was not "consistent with the Second Amendment's text and historical understanding."[134]

In addition, *Bruen* reaffirmed *Heller*'s third holding — that, in view of our nation's history and tradition, the government cannot categorically ban a class of arms in common use for lawful purposes: "[*Heller*] found it 'fairly supported by the historical tradition of prohibiting the carrying of dangerous and unusual weapons' that the Second Amendment protects the possession and use of weapons that are 'in common use at the time.'"[135] *Heller*'s "historical analysis sufficed to show that the Second Amendment did not countenance a complete prohibition on the use of the most popular weapon chosen by Americans for self-defense in the home."[136]

So in summary, *Bruen*:

- Confirmed *Heller*'s second holding, which established the history-and-tradition test;

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[132] *Id.* at 2122.

[133] Smith, *How Courts Have Defied* Heller, at 11 (emphasis omitted).

[134] *Bruen*, 142 S. Ct. at 2131.

[135] *Id.* at 2128 (quoting *Heller*, 554 U.S. at 627 (cleaned up)).

[136] *Id.* (cleaned up).

- Described how to apply *Heller*'s history-and-tradition test to types of gun regulations that the Supreme Court has not *already* considered;
- Held that there is no historical tradition analogous to New York's public-carry regulation — which was a time-place-manner regulation, not a categorical ban controlled by *Heller*'s third holding that the government cannot ban arms "in common use" for lawful purposes; and
- Reaffirmed that third holding of *Heller*.

7. *United States v. Rahimi* (2024)

Just two years after *Bruen*, the Supreme Court returned to the Second Amendment in *United States v. Rahimi*.[137] It reviewed a federal statute that "prohibits an individual subject to a domestic violence restraining order from possessing a firearm if that order includes a finding that he 'represents a credible threat to the physical safety of an intimate partner,' or a child of the partner or individual."[138]

In *Rahimi*, the government proposed two traditional types of laws to show that "the new law is relevantly similar to laws that our tradition is understood to permit."[139] Because those old laws (1) imposed burdens like the new law's burdens for reasons like the new law's reasons, (2) were widespread, and (3) were old enough to help illuminate the Second Amendment's original meaning, the Court upheld the new law. It held that the nation's "tradition of firearm regulation allows the Government to disarm individuals who

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[137] No. 22-915, 602 U.S. ___, slip op. (June 21, 2024).

[138] *Id.* at 1 (quoting 18 U.S.C. § 922(g)(8) (cleaned up)).

[139] *Id.* at 23 (Kavanaugh, J., concurring) (cleaned up).

present a credible threat to the physical safety of others."[140]

In so doing, *Rahimi* "carefully buil[t] on *Heller*, *McDonald*, and *Bruen*."[141] It reiterated the history-andtradition test already well established under *Heller*, *McDonald*, and *Bruen*, while also reaffirming their distinction between arms in common use versus "'dangerous and unusual weapons.'"[142] In addition, its multiple opinions elaborated on the standard for using analogical reasoning to determine whether a modern law falls within a historical tradition.

8. Takeaways from the Supreme Court's Precedents

Where do all these cases leave us? For starters, *Heller*'s four holdings remain undisturbed: There is an individual (though not unlimited) right to possess and carry arms.

Exceptions to that right depend on history and tradition. There is no history and tradition of banning arms in common use for lawful purposes. D.C. cannot categorically ban handguns because they are in common use.

To *Heller*'s final and most specific holding, we can add the most specific holdings of *McDonald*, *Bruen*, and *Rahimi*. Like the federal government and federal enclaves, states too cannot categorically ban handguns because they are in common use for lawful purposes — *McDonald*.[143] The government also cannot impose an

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[140] *Id.* at 16 (majority).

[141] *Id.* at 23 (Kavanaugh, J., concurring).

[142] *Id.* at 6 (majority) (quoting *Heller*, 554 U.S. at 627).

[143] *McDonald*, 561 U.S. at 749-50.

unusually restrictive licensing regime like New York's because it is inconsistent with the nation's historical tradition — *Bruen*.[144] In contrast, the government can temporarily disarm people who present a credible threat of violence because that type of law is consistent with the nation's historical tradition — *Rahimi*.[145]

None of those holdings should cause unusual "difficulty" for "judges on the ground."[146] For example, in cases about banning arms in common use, *Heller* and its progeny require no "mad scramble for historical records"[147] because they have "already done the work and provided the test that [we] must apply."[148] And when we fail to apply their rule, "the blame" lies "with us, not with them."[149]

As for gun laws *other than* complete bans on arms in common use for lawful purposes (*Heller*), unusually restrictive licensing regimes (*Bruen*), and temporary disarmaments of specific people who credibly threaten violence (*Rahimi*), the government can defend laws regulating conduct covered by the Second Amendment's plain text only by identifying an appropriate analogue from our nation's historical

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[144] *Bruen*, 142 S. Ct. at 2156.

[145] *Rahimi*, slip op. at 5.

[146] *Id.* at 1 (Jackson, J., concurring); *see also id.* at 2 (Jackson, J., concurring) ("The message that lower courts are sending now in Second Amendment cases could not be clearer. They say there is little method to *Bruen*'s madness."); *id.* (citing many lower-court judges' complaints about the Supreme Court's jurisprudence).

[147] *Id.* at 5 n.3 (Jackson, J., concurring).

[148] Smith, *How Courts Have Defied* Heller, at 10.

[149] *Rahimi*, slip op. at 1 (Jackson, J., concurring).

tradition.[150] Three considerations must inform that "analogical reasoning under the Second Amendment."[151]

First, "[w]hy and how the regulation burdens the right are central to this inquiry."[152] The government must identify traditional laws that had a similar justification *and* imposed a similar burden when compared to the challenged modern law. "[I]f earlier generations addressed the [same] societal problem, but did so through materially different means, that . . . could be evidence that a modern regulation is unconstitutional."[153] (Spoiler alert: This is a problem for the majority's two analogues.)

Second, to establish a historical tradition, the government needs analogues that represent the "collective understanding of Americans."[154] So outliers don't count. That's why *Bruen* dismissed "three colonial regulations" and "a few late-19thcentury outlier jurisdictions."[155] And it's why *Heller* "would not stake" its "interpretation of the Second Amendment upon a single law, in effect in a single city, that contradicts the overwhelming weight of other

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[150] *See Bruen*, 142 S. Ct. at 2133.

[151] *Id.*; *see also Rahimi*, slip op. at 7-8.

[152] *Rahimi*, slip op. at 7; *see also Bruen*, 142 S. Ct. at 2132-33.

[153] *Bruen*, 142 S. Ct. at 2131.

[154] *Rahimi*, slip op. at 11 (Kavanaugh, J., concurring).

[155] *Bruen*, 142 S. Ct. at 2142 (emphasis omitted); *id.* at 2156; *see also id.* at 2153 ("while we recognize the support that postbellum Texas provides for [the government's] view, we will not give disproportionate weight to a single state statute and a pair of state-court decisions"); *Bevis v. City of Naperville, Illinois*, 85 F.4th 1175, 1218 (7th Cir. 2023) (Brennan, J., dissenting) ("three analogues were not enough in *Bruen*").

evidence."[156] (Spoiler alert: This is a problem for the majority's state-law analogue.)

Third, "when it comes to interpreting the Constitution, not all history is created equal."[157] The "Second Amendment 'codified a *pre-existing* right' belonging to the American people, one that carries the same 'scope' today that it was 'understood to have when the people adopted' it."[158] So its scope "is pegged to the public understanding of the right when the Bill of Rights was adopted in 1791."[159]

That means "the history that matters most is the history surrounding the ratification of the text."[160] For the Second Amendment, the Founding Era matters more than the half-century that followed it, which matters more than the late-nineteenth and early-twentieth centuries, which matter more than the late-twentieth and twenty-first centuries, which do not matter much at all. (Spoiler alert: This too is a problem for the majority.)

To be sure, "post-ratification history" can "be important," especially when it's close in time to the Founding, the constitutional text is vague, the Founding-Era history is inconclusive, the post-Founding tradition is well-established, and judicial precedents give no guidance.[161] Put differently, post-ratification history matters when the only alternative

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[156] *Heller*, 554 U.S. at 632.

[157] *Bruen*, 142 S. Ct. at 2136.

[158] *Rahimi*, slip op. at 2 (Gorsuch, J., concurring) (quoting *Heller*, 554 U.S. at 592).

[159] *Bruen*, 142 S. Ct. at 2137.

[160] *Rahimi*, slip op. at 2 (Barrett, J., concurring).

[161] *Id.* at 10-11 (Kavanaugh, J., concurring).

is policymaking from the bench.[162] But "evidence of tradition unmoored from original meaning is not binding law. And scattered cases or regulations pulled from history may have little bearing on the meaning of the text."[163]

Heller is, as ever, instructive. There, the Founding-Era history mattered the most. The Court said that if discussions "took place 75 years after the ratification of the Second Amendment, they do not provide as much insight into its original meaning as earlier sources."[164] That's why "*Heller*'s interest in mid- to late-19th-century commentary was secondary."[165] *Heller*'s "19th-century evidence was treated as mere confirmation of what the Court thought had already been established,"[166] and it refused to give that "postenactment history more weight than it can rightly bear."[167]

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[162] *See id.* at 10 (Kavanaugh, J., concurring) ("there can be little else to guide a judge deciding a constitutional case in that situation, unless the judge simply defaults to his or her own policy preferences").

[163] *Id.* at 2-3 (Barrett, J., concurring) (cleaned up); *see also Bruen*, 142 S. Ct. at 2137 ("to the extent later history contradicts what the text says, the text controls"); *id.* ("'post-ratification adoption or acceptance of laws that are *inconsistent* with the original meaning of the constitutional text obviously cannot overcome or alter that text'" (quoting *Heller II*, 670 F.3d at 1274 n.6 (Kavanaugh, J., dissenting))).

[164] *Heller,* 554 U.S. at 614.

[165] *Bruen*, 142 S. Ct. at 2137.

[166] *Id.* (cleaned up).

[167] *Id.* at 2136; *see also id.* at 2131 ("after considering '*founding-era* historical precedent,' including 'various restrictive laws in the colonial period,' and finding that none was analogous to the District's ban, *Heller* concluded that the handgun ban was

So to sum up the history-and-tradition test, a historical analogue need not be a "dead ringer" or "historical twin."[168] But analogues are strongest when (1) they burden gun rights for a similar reason *and* in a similar way as the challenged modern law; *and* (2) they represent the nation's collective understanding; *and* (3) they were enacted in an instructive historical period, preferably around the Second Amendment's ratification in 1791. In *Rahimi*, the government won when it hit that trifecta. In *Heller*, *McDonald*, and *Bruen*, the government lost when it could not.

III. D.C.'s Ban on Plus-Ten Magazines Is Unconstitutional

D.C.'s ban on commonly used plus-ten magazines conflicts with *Heller*'s holding that the government cannot ban an arm in common use for lawful purposes. That alone decides this case.

In addition, D.C. has failed to show that its ban is consistent with the nation's historical tradition — even assuming *Heller* left it an open question. That too is a sufficient reason to hold that D.C.'s ban is unconstitutional.[169]

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unconstitutional" (emphasis added) (quoting *Heller,* 554 U.S. at 631)); *Duncan II*, 19 F.4th at 1158 (Bumatay, J., dissenting) ("Prohibition-era laws of Michigan, Rhode Island, and Ohio . . . aren't nearly old enough to be longstanding").

[168] *Bruen*, 142 S. Ct. at 2133 (emphasis omitted).

[169] When I say D.C.'s ban is unconstitutional, I mean it is unconstitutional as applied to magazines that hold up to 17 rounds. Those are the only magazines at issue in this appeal, which concerns the plaintiffs' as-applied challenge. *See* Majority Op. at 7 n.2. We are not asked to decide whether there is a right to magazines that hold more than 17 rounds. *Cf. Heller II*, 670 F.3d at 1261 ("There may well be some capacity above which magazines are not in common use but, if so, the record is devoid

A. Applying *Heller*'s Common-Use Test to D.C.'s Ban on Plus-Ten Magazines

The majority presumes that plus-ten magazines are arms in common use by law-abiding citizens for the lawful purpose of self-defense.[170] On that, we agree.[171]

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of evidence as to what that capacity is; in any event, that capacity surely is not ten.").

[170] Majority Op. at 11.

[171] The majority uses the formulation "in common use *for self-defense*," *see, e.g.*, *id.* (emphasis added), whereas I use the formulation "in common use for lawful purposes," *cf. Bianchi*, slip op. at 87-88 (Richardson, J., dissenting) ("the tradition of prohibiting dangerous and unusual weapons . . . does not support a complete ban on the possession of weapons that are commonly used for *lawful purposes*" (emphasis added)); *Friedman v. City of Highland Park, Illinois*, 784 F.3d 406, 415 (7th Cir. 2015) (*Friedman I*) (Manion, J., dissenting) ("The 'common use' test . . . asks whether a particular weapon is commonly used by law-abiding citizens *for lawful purposes*." (emphasis added)). For today's case, the difference doesn't matter because the majority presumes that plus-ten magazines are in common use by law-abiding citizens for "self-defense," which is a "lawful purpose."

Because the distinction may matter in future cases, I offer a quick note on why it seems to me that the "lawful purposes" formulation is more faithful to the Supreme Court's precedents.

The Supreme Court has often noted other lawful purposes for keeping and bearing arms, in addition to self-defense. *Heller,* 554 U.S. at 599 ("preserving the militia was [not] the only reason Americans valued the ancient right; most undoubtedly thought it even more important for self-defense *and hunting*" (emphasis added)); *id.* at 636-37 (Stevens, J., dissenting) (framing the question in *Heller* as "[w]hether [the Second Amendment] . . . protects the right to possess and use guns for [lawful] nonmilitary purposes like hunting and personal self-defense"); *see also id.* at 620 (majority) (noting that the Court had previously "described the right protected by the Second Amendment as bearing arms for a lawful purpose" (cleaned up)). Though the Court has also often mentioned self-defense, that's because self-defense is the

That should not be a close question. Americans have in their hands and homes an estimated 100 million plus-ten magazines.[172] They likely account for about half of all magazines in circulation,[173] and nearly half of gun owners have owned them.[174] These magazines "come standard" with many of the nation's most popular firearms, including "[m]illions of semiautomatic pistols, the 'quintessential self-defense weapon' for the American people."[175]

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primary "lawful purpose" for which Americans keep and bear arms. *See id.* at 630 (self-defense is handguns' "core lawful purpose"); *id.* at 624 (using the phrase "for lawful purposes *like* self-defense" (emphasis added)); *McDonald*, 561 U.S. at 780 (plurality) (stating that the "central holding in *Heller*" was "that the Second Amendment protects a personal right to keep and bear arms *for lawful purposes, most notably for self-defense within the home*" (emphasis added)); *cf. Bianchi*, slip op. at 175-76 (Richardson, J., dissenting) (cautioning against a framework that "allows judges to decide just how important they think certain firearms are for self-defense and then to weigh th[at] finding against the threat they believe those arms pose to the public at large").

[172] *See Duncan II*, 19 F.4th at 1155 (Bumatay, J., dissenting); *see also* William English, 2021 National Firearms Survey: Updated Analysis Including Types of Firearms Owned, SSRN, at 20, 24 (May 13, 2022), https://perma.cc/PXN2-T3XG ("English Report") (estimating that Americans have, over time, owned more than *500 million* plus-ten magazines, including 269 million for handguns).

[173] *See Duncan II*, 19 F.4th at 1155 (Bumatay, J., dissenting); *id.* at 1097 (majority) ("experts estimate that approximately half of all privately owned magazines in the United States have a capacity greater than ten rounds").

[174] *See* English Report at 1-2, 20.

[175] *Duncan II*, 19 F.4th at 1155 (Bumatay, J., dissenting) (quoting *Heller,* 554 U.S. at 629); *see also Duncan I*, 970 F.3d at 1142 ("several variants of the Glock pistol — dubbed 'America's gun' due to its popularity — come standard with a seventeen-

I could say more.[176] But if plus-ten magazines are (1) half of America's magazines, (2) owned by half of America's gun owners, and (3) often standard on Americans' preferred weapon for self-defense, what else needs to be said? That is (more than) enough to show common use for lawful purposes.

In the context of a complete ban on a category of arms, "that is *all that is needed* for citizens to have a right under the Second Amendment to keep such weapons."[177] *Heller* held that because handguns are "in common use," D.C.'s "complete prohibition of their use is invalid."[178] For the same reason, D.C.'s ban on plus-ten magazines is unconstitutional.[179]

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round magazine"); *Kolbe v. Hogan*, 849 F.3d 114, 129 (4th Cir. 2017) ("Most pistols are manufactured with magazines holding ten to seventeen rounds . . . ."), *abrogated by Bruen*, 142 S. Ct. 2111, 2125 27 (2022); David B. Kopel, *The History of Firearm Magazines and Magazine Prohibitions*, 78 Alb. L. Rev. 849, 874 (2015) ("It is indisputable in the modern United States that magazines of up to thirty rounds for rifles and up to twenty rounds for handguns are standard equipment for many popular firearms.").

[176] Plus-ten magazines also have "a long historical lineage." *Duncan II*, 19 F.4th at 1140 (Bumatay, J., dissenting). "They enjoyed widespread use throughout the nineteenth and twentieth centuries," with "no longstanding prohibitions against them." *Id.* (Bumatay, J., dissenting).

[177] *Friedman II*, 577 U.S. at 1042 (Thomas, J., dissenting from denial of certiorari) (emphasis added).

[178] *Heller,* 554 U.S. at 624, 629; *see also supra* Part II.B.3.

[179] *See, e.g.*, *Duncan II*, 19 F.4th at 1140 (Bumatay, J., dissenting) ("The state bans . . . [plus-ten] magazines [that] are lawfully owned by millions of people nationwide and come standard on the most popular firearms sold today. . . . But the Constitution protects the right of law-abiding citizens to keep and bear arms typically possessed for lawful purposes."); *Duncan I*,

In other words:

Major Premise (explained at length above):

Heller held that the government cannot ban arms in common use for lawful purposes.

Minor Premise (undisputed by the majority):

Plus-ten magazines are arms in common use for lawful purposes.

Conclusion:

The government cannot ban plus-ten magazines.[180]

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970 F.3d at 1169 ("California's near-categorical ban of [plus-ten magazines] . . . criminalizes the possession of half of all magazines in America today. It makes unlawful magazines that are commonly used in handguns by law-abiding citizens for self-defense. And it substantially burdens the core right of self-defense guaranteed to the people under the Second Amendment."); *New Jersey Rifle & Pistol Clubs*, 910 F.3d at 126-27, 130 (Bibas, J., dissenting) ("I would enjoin this Act until New Jersey provides real evidence to satisfy its burden of proving the Act constitutional. . . . People commonly possess large magazines to defend themselves and their families in their homes. That is *exactly why* banning them burdens the core Second Amendment right."); *cf. Bianchi*, slip op. at 152-53 (Richardson, J., dissenting) (The "evidence shows that millions of Americans have chosen to equip themselves with semiautomatic rifles, like the AR-15, for various lawful purposes. So Appellees have failed to prove that these weapons are 'unusual' such that they can be constitutionally outlawed. Maryland's ban therefore violates the Second Amendment.").

[180] Before discussing in the next section my disagreement with the majority, I digress here to note two areas where the majority and I share common ground.

First, I agree with the majority's decision to presume that it doesn't matter whether plus-ten magazines "are rarely used to fire more than a couple rounds in self-defense." Majority Op. at 11. A handgun may be "used" without firing it, and a magazine

B. Regarding the Majority

To repeat, I read *Heller* and its progeny to have *already* held that the government cannot ban an arm in common use for lawful purposes. But I also respect the good faith with which my fellow panel members

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may be "used" without dispensing a single round (let alone depleting its capacity). *See Heller,* 554 U.S. at 629, 636 (recognizing that handguns are commonly "*used* for self-defense" (emphasis added)); English Report at 14 (noting that "in the vast majority of defensive gun uses (81.9%), the gun was not fired"). What matters, again, is that millions of law-abiding Americans have chosen to arm themselves with plus-ten magazines to use for a lawful purpose. *Id.* at 26-33 (survey responses commenting on the utility of plus-ten magazines in self-defense situations); *id.* at 23 (62.4% of 39 million plus-ten magazine owners — about 24 million — own them for home defense). In any event, Americans *do* often fire more than ten rounds at the shooting range, and target practice is a perfectly lawful, common use. *See id.*

Second, though the majority says I argue that "any restriction" of arms in common use is unconstitutional, that is not my position. *See* Majority Op. at 12 ("Hanson would have us stop here, as would our dissenting colleague, arguing that, under *Bruen*, to find an arm is in common use renders any restriction of that arm unconstitutional."). I agree with the majority that some regulations of arms in common use are constitutional — including some regulations of plus-ten magazines. But that's because some regulations are not outright bans. Regulations of arms in common use — other than outright bans — are constitutional if they are "consistent with this Nation's historical tradition of firearm regulation." *Bruen*, 142 S. Ct. at 2126. *Heller* lists some regulations — other than outright bans — that are likely consistent with our nation's history and tradition of firearms regulation: "prohibitions on carrying concealed" arms in common use; prohibitions on the possession of arms in common use "by felons and the mentally ill"; "forbidding the carrying of" arms in common use "in sensitive places such as schools and government buildings"; and "laws imposing conditions and qualifications on the commercial sale of arms" in common use. *Heller,* 554 U.S. at 626 27 & n.26.

have concluded otherwise. In their view, the validity of every ban on arms in common use is its own open question, so D.C. deserves the chance to show its ban "is consistent with this Nation's historical tradition of firearm regulation."[181]

Even if that is in fact an open question, D.C. has identified no "historical tradition" of *any* ban on an arm in common use for lawful purposes. Neither has the majority. Instead, the majority invents a regulatory category — "restrictions on . . . weapons particularly capable of unprecedented lethality."[182] Then it says such restrictions are consistent with two historical analogues.[183]

I agree with the majority that the history-and-tradition test allows for historical analogues less specific than, say, bans on plus-ten magazines. After all, "the Second Amendment permits more than just those regulations identical to ones that could be found in 1791."[184] But the history-and-tradition test demands a level of generality more specific than the majority's preferred category of "restrictions on weapons particularly capable of unprecedented lethality."[185]

Heller never mentioned that category — even though the Court was told that the handguns at issue there "are used in an extraordinary percentage of this

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[181] *Bruen*, 142 S. Ct. at 2126.

[182] Majority Op. at 18.

[183] *See id.* at 18-25.

[184] *See Rahimi*, slip op. at 7.

[185] *See* Majority Op. at 18; *see also id.* at 13 (considering "an unbroken tradition of regulating weapons to protect communities" (cleaned up) to be "the pinnacle of abstraction" and representative of a "regulatory blank check").

country's well-publicized shootings, including the large majority of mass shootings."[186] Instead, *Heller* set the level of generality for bannable arms at "dangerous *and* unusual" arms — i.e., arms not "in common use" for lawful purposes.[187] So did the Supreme Court's subsequent cases.[188] They confirm that "the relative dangerousness of a weapon is *irrelevant* when the weapon belongs to a class of arms commonly used for lawful purposes."[189]

As for the two historical analogues proposed by the majority, they do not show a historical tradition of laws like D.C.'s ban of plus-ten magazines. The majority first points to a "handful" of outlier state and territorial laws from the second half of the nineteenth century that restricted the open carry of Bowie knives.[190] The majority's second analogue — the National Firearms Act of 1934 — regulated only "unusual" weapons like fully automatic machine guns, not arms "in common use" like the plus-ten magazines that D.C. has banned.[191]

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[186] *See* Br. of Violence Policy Center et al. as Amici Curiae Supporting Petitioners at 24, *Heller,* 554 U.S. 570 (No. 07-290), 2008 WL 136348; *see also* Smith, *How Courts Have Defied* Heller, at 7-8.

[187] *Heller,* 554 U.S. at 627 (emphasis added) (cleaned up).

[188] *See supra* Part II.B.4, 6-7.

[189] *Caetano*, 577 U.S. at 418 (Alito, J., concurring in the judgment) (emphasis added).

[190] *See* Majority Op. at 19-20.

[191] *See id.* at 22-24.

1. Outlier State and Territory Bowie-Knife Regulation (1871-1889)

In the 1870s and '80s, two states (Texas and Arkansas) and a federal territory (Arizona) prohibited the open carry of Bowie knives.[192] For the sake of argument, let's suppose that Bowie knives were arms in common use for lawful purposes.[193]

Even then, these three laws did not impose the "burden" on arms that D.C.'s total ban imposes because none of these laws banned Bowie knives from the home.[194] Plus, two expressly permitted keeping Bowie knives at one's "place of business," and all of these laws allowed travelers to carry Bowie knives.[195]

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[192] An Act to Regulate the Keeping and Bearing of Deadly Weapons, 1871 Tex. Gen. Laws 25, ch. 34, § 1 (prohibiting "any person" from "carrying [a Bowie knife] on or about his person, saddle, or in his saddle bags"); An Act to Preserve the Public Peace and Prevent Crime, 1881 Ark. Acts 191, no. 96, § 1 (crime to "wear or carry" Bowie knives "in any manner"); An Act Defining and Punishing Certain Offenses Against the Public Peace, 1889 Ariz. Sess. Laws 30, no. 13, § 1 (no person may "carry [a Bowie knife] on or about his person, saddle, or in his saddle bags"); *see* Majority Op. at 19-20 (citing these three laws as "ban[ning] the carrying, rather than only the concealment, of Bowie knives"); An Act to Provide a Temporary Government for the Territory of Arizona, Pub. L. No. 37-56, ch. 56, § 1, 12 Stat. 664, 665 (1863) (creating the "temporary" Arizona territory government that enacted the Bowie-knife law).

[193] *But see* Majority Op. at 20 ("those weapons . . . are usually employed in private broils, and . . . are efficient only in the hands of the robber and the assassin" (quoting *Aymette v. State*, 21 Tenn. 154, 158 (1840))).

[194] *Bruen*, 142 S. Ct. at 2133.

[195] *See* 1871 Tex. Gen. Laws 25, § 1 ("*provided*, that this section shall not be so construed as to prohibit any person from keeping or bearing arms *on his or her own premises, or at his or her own place of business*, . . . nor to prohibit persons *traveling* in the State

In contrast, D.C.'s plus-ten magazine ban applies in the home and everywhere else. For that reason alone, the three laws are not analogous to D.C.'s.

In addition, three laws passed nearly a century after the Second Amendment's ratification (plus a couple of state court decisions)[196] hardly constitute a "representative historical analogue"[197] that reflects the "collective understanding of Americans."[198] *Heller* refused to "stake" its "interpretation of the Second Amendment upon a single law, in effect in a single city."[199] *Bruen* refused to "give disproportionate weight to a single state statute" — or even to "three."[200]

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from keeping or carrying arms with their baggage" (second and third emphasis added)); 1881 Ark. Acts 191, § 1 ("*Provided, further*, That nothing in this act be so construed as to prohibit any person from carrying any weapon *when upon a journey, or upon his own premises*." (second emphasis added)); 1889 Ariz. Sess. Laws 30, Act No. 13, § 2 ("The preceding article shall not apply to . . . the carrying of arms *on ones* [sic] *own premises or place of business*, nor to persons *traveling* . . . ." (emphases added)).

[196] *See* Majority Op. at 19-21.

[197] *Bruen*, 142 S. Ct. at 2133 (emphasis omitted).

[198] *Rahimi*, slip op. at 11 (Kavanaugh, J., concurring).

[199] *Heller,* 554 U.S. at 632.

[200] *Bruen*, 142 S. Ct. at 2153, 2156.

By the way, neither of the state court decisions quoted by the majority addressed *bans* on Bowie knives. *See Cockrum v. State*, 24 Tex. 394, 401 (1859) (law enhancing the penalty for manslaughter committed with Bowie knife); *Aymette*, 21 Tenn. at 156 (law prohibiting concealed carry of Bowie knives). And in fact, both courts conspicuously affirmed the right to possess Bowie knives. *See Cockrum*, 24 Tex. at 403 ("The right to carry a bowie-knife for lawful defense is secured, and must be admitted."); *Aymette*, 21 Tenn. at 160 (noting that "citizens have the unqualified right to *keep* the weapon," while explaining that "the right to *bear arms* is not of that unqualified character" (emphases

Three statutes from the late 1800s are not only too little — they're also too late. Recall that "*Heller*'s interest in mid- to late-19th-century commentary was secondary."[201] Likewise, in *Bruen*, "post-Civil War discussions of the right" did "not provide as much insight into its original meaning as earlier sources" in part because they occurred "75 years after the ratification of the Second Amendment."[202] So even if the majority's "handful" of states had gone *further* and completely banned Bowie knives in the late 1800s, "scattered cases or regulations pulled from history may have little bearing on the meaning of the text" of the Second Amendment.[203]

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original)); *see also Bianchi*, slip op. at 140-41 (Richardson, J., dissenting) (*Aymette* and similar state cases "determined whether the regulated weapon was in common use for lawful purposes. If it was, then they held that the government could regulate the possession or carry of that weapon, but that it could not completely ban it. Yet if that weapon was not in common use for lawful purposes, and if the weapon was particularly useful for criminal activity, then the government could outlaw it.").

[201] *Bruen*, 142 S. Ct. at 2137.

[202] *Id.* (cleaned up).

[203] *Rahimi*, slip op. at 2-3 (Barrett, J., concurring).

Bruen left open the question of whether the right to keep and bear arms, as applied against the states through the Fourteenth Amendment, should be interpreted as it was understood in 1791, when the Second Amendment was ratified, or in 1868, when the Fourteenth Amendment was ratified. *See* 142 S. Ct. at 2138. I take no position on that debate, or on mid- to late-19th-century regulations' relevance to analysis of modern laws enacted by a state, rather than by the federal government or a federal enclave like D.C. Here, because the Second Amendment applies directly to D.C., the original meaning that controls is undoubtedly the original meaning in 1791.

2. The National Firearms Act (1934)

As for the National Firearms Act of 1934, it regulated only "*unusual*" weapons like fully automatic machine guns and sawed-off shotguns, which were "not typically possessed by law-abiding citizens for lawful purposes."[204] And to know that, you don't need to look beyond the United States Reports. The Supreme Court "stated in *Staples* and again in *Heller*" that "short-barreled shotguns and automatic 'M-16 rifles and the like' are *not* in common use."[205]

Therefore, even if the 1934 Act is representative of our historical tradition of firearm regulation,[206] it is not "relevantly similar" to D.C.'s ban on plus-ten magazines.[207] Unlike D.C.'s ban, the 1934 Act did not regulate arms "in common use," so it did not "impose a comparable burden" on the right to keep and bear arms.[208] In fact, the 1934 Act might be affirmative evidence *against* D.C. — *Bruen* said an old regulation "could be evidence that a modern regulation is unconstitutional" if "earlier generations addressed the

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[204] *Heller,* 554 U.S. at 623, 625, 627 (emphasis added); *see also Heller II*, 670 F.3d at 1287 (Kavanaugh, J., dissenting) (fully automatic machine guns "were developed for the battlefield and were *never in widespread civilian use* in the United States" (emphasis added)).

[205] *Heller II*, 670 F.3d at 1288 (Kavanaugh, J., dissenting) (emphasis added) (quoting *Heller,* 554 U.S. at 627, and citing *Staples*, 511 U.S. at 611-12).

[206] *See Heller,* 554 U.S. at 624 (considering it "startling" to think "that the National Firearms Act's restrictions on machineguns . . . might be unconstitutional").

[207] *Bruen*, 142 S. Ct. at 2132 (cleaned up).

[208] *Id.* at 2133.

[same] societal problem, but did so through materially different means."[209]

D.C. suggests that machine guns were in common use by mobsters and outlaws in 1934.[210] That could hardly matter less.[211] What matters is whether they

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[209] *Id.* at 2131; *cf. Garland v. Cargill*, No. 22-976, 602 U.S. __, slip op. at 1 (June 14, 2024) (federal ban on machine guns does not cover bump stocks, even though bump stocks enable a semiautomatic gun to approach a rate of fire similar to a machine gun).

[210] *See* Majority Op. at 22-23 (quoting then-Attorney General Cummings's estimate of "at least 500,000" criminals "who are warring against society and who are carrying about with them or have available at hand, weapons of the most deadly character," National Firearms Act: Hearing(s) on H.R. 9066 Before the Comm. on Ways and Means, 73rd Cong. 45 (1934) (cleaned up)).

For two reasons, Cummings' testimony is not best understood to suggest (let alone prove) that 500,000 law-abiding citizens possessed machine guns and sawed-off shotguns. First, he was talking about criminals. Second, "weapons of the most deadly character" could be anything from a switch blade to a Tommy gun. As for the latter, only 15,000 commercially available Tommy guns were produced; a hefty price tag led to a "lack of demand" and "few sales." Bruce N. Canfield, *The G.I. Thompson in World War II*, Am. Rifleman (Feb. 20, 2019), https://perma.cc/UN9S-3UZE. So "the bulk of the 15,000 . . . Thompson submachine guns languished in the warehouse with only a relatively small number trickling out periodically." *Id.*; *see also Heller II*, 670 F.3d at 1287 (Kavanaugh, J., dissenting) ("The Thompson machine gun (commonly known as the 'Tommy gun') entered commercial sale in the United States in the mid-1920s but saw *very limited civilian use* outside of organized crime and law enforcement." (emphasis added)).

[211] *Friedman I*, 784 F.3d at 416 (Manion, J., dissenting) ("it matters not whether fifty or five thousand mob enforcers used a particular weapon, the question is whether a critical mass of law-abiding citizens did").

were in common use "*for lawful purposes*."[212] D.C. has not shown that fully automatic machine guns were ever in common use by law-abiding citizens, and I do not understand the majority to argue otherwise.

In addition, although the Supreme Court has said Congress could ban machine guns without violating the Second Amendment, Congress did not actually do so in the 1934 Act.[213] Instead, the Act merely imposed a registration requirement, restricted transfers, and imposed special taxes.[214] Then, about five decades later, Congress prohibited the possession of machine guns made after 1986, while still grandfathering in the possession and transfer of machine guns made before then.[215] So unlike D.C.'s magazine ban, the less burdensome 1934 Act was not even a complete ban on a category of arms.

* * *

Finally, a word on the majority's "nuanced approach" to "unprecedented societal concerns or dramatic technological changes."[216] The phrase comes from dicta in *Bruen* — a decision that did not involve "unprecedented societal concerns or dramatic technological changes" and did not apply the "nuanced

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[212] *Heller,* 554 U.S. at 624 (emphasis added); *McDonald*, 561 U.S. at 780 (plurality) (emphasis added).

[213] *See* National Firearms Act, §§ 2, 3(a), 4, 5(a), (6), 10, 11, 48 Stat. at 1237-38.

[214] *Id.*; *see also id.* § 8(a) (requiring identification marks on restricted firearms); *id.* § 9 (recordkeeping requirement for transfers).

[215] *See supra* Part II.B.1; 18 U.S.C. § 922(*o*)(1) (making it "unlawful for any person to transfer or possess a machinegun"); *id.* § 922(*o*)(2)(B) (grandfather provision).

[216] Majority Op. at 26 (cleaned up); *see id.* at 25-30.

approach."[217] *Heller*, *McDonald*, and *Rahimi* didn't apply it either.

This single stray line of dicta from *Bruen* is the foundation of the majority's analysis — a slender reed compared to a *holding* of *Heller* that the government cannot ban arms in common use for lawful purposes, especially when *Heller*'s distinction between common and uncommon arms was reaffirmed again (*McDonald*) and again (*Bruen*) and again (*Rahimi*). But even if "unprecedented societal concerns or dramatic technological changes" can justify some limited regulation of common arms, a law "may not be compatible with the right if it [regulates] to an extent beyond what was done at the founding."[218]

Here, D.C. has not named a single Founding-Era law that bans an arm in common use for lawful purposes. (The majority does not say otherwise.) Nor has D.C. named a single such law from the first hundred years of the nation's independence. (Again, the majority does not say otherwise.) And even to the extent that later laws can be relevant, D.C. has identified no "well-established and representative historical analogue" that imposed a "burden" comparable to D.C.'s outright ban on an arm in common use for lawful purposes.[219]

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[217] *Bruen*, 142 S. Ct. at 2132.

[218] *Rahimi*, slip op. at 7; *see also id.* at 2 (Gorsuch, J., concurring) (regardless of an analogue's justification, "the government must establish that, in at least some of its applications, the challenged law 'imposes a comparable burden on the right of armed self-defense' to that imposed by a historically recognized regulation" (quoting *Bruen*, 142 S. Ct. at 2133) (cleaned up)).

[219] *Bruen*, 142 S. Ct. at 2133 (emphasis omitted).

V. Conclusion

Mark Twain once told a story about an evening at church. He said that at first the sermon was so inspiring that he planned to put $400 into the collection plate: "I wanted to give that and borrow more to give."[220] But then his opinion of the sermon tapered off: "My enthusiasm went down, down, down — $100 at a time, till finally when the plate came round I stole 10 cents out of it."[221]

I agree with most of what the majority says in the first 18 pages of its clear, concise, and eloquent opinion.[222] I agree that plus-ten magazines are likely "'Arms' within the meaning of the Second Amendment,"[223] "in common use" for the lawful purpose of "self-defense,"[224] and covered by "the Second Amendment's plain text."[225] And I agree that a ban on plus-ten magazines is not analogous to regulations about the storage of gunpowder; or to restrictions on the time, place, and manner of carrying arms; or to state laws from the Prohibition Era directed at machine guns.[226]

But then I part ways with the majority in two respects.

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[220] *See* "Mark Twain Says Women Should Vote," *New York Times*, p.5 (Jan. 21, 1901).

[221] *Id.*

[222] I don't mean to suggest that Twain's experience is perfectly analogous to mine. It's no "dead ringer" or "historical twin." *Bruen*, 142 S. Ct. at 2133 (emphasis omitted).

[223] *See* Majority Op. at 9 (quoting U.S. Const. amend II).

[224] *Id.* at 11.

[225] *Id.* (cleaned up).

[226] *See id.* at 15-18.

First, the majority reads *Heller* to leave open the question of whether the government can ever ban an arm in common use for lawful purposes.[227] In contrast, I read *Heller* to answer that question. It held that "a complete prohibition of their use is invalid."[228]

Second, even assuming that the validity of those bans is an open question, the majority gets the answer wrong. D.C. has failed to "demonstrate that [its] regulation is consistent with this Nation's historical tradition of firearm regulation."[229]

The majority's contrary conclusion depends on two types of regulations.[230] But neither of them is analogous. The first of them — a "handful" of laws enacted nearly a century after the Second Amendment's ratification in two outlier states and a territory — did not cover arms kept at home or carried while traveling; in addition, those laws are too little and too late to establish a historical tradition.[231] As for the second purported analogue, it covered only "unusual" arms — not arms in common use for lawful purposes.[232] So neither demonstrates a tradition of laws imposing a burden comparable to D.C.'s complete ban on commonly possessed plus-ten magazines.

Because D.C.'s law violates the right to keep and bear arms guaranteed by the Second Amendment, I

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[227] *See* Majority Op. at 12 (concluding that "*Bruen* . . . precludes th[e] argument" that *Heller* prohibits bans on arms in common use for lawful purposes, full stop).

[228] *Heller,* 554 U.S. at 629; *see also supra* Part II.B.3.

[229] *Bruen*, 142 S. Ct. at 2126.

[230] *See* Majority Op. at 19-25.

[231] *See id.* at 19-20.

[232] *See id.* at 22-24.

would reverse the district court's decision and direct it to enter a permanent injunction.[233]

I respectfully dissent.

[233] If "our holding at this stage" — review of a denial or grant of a preliminary injunction — "makes a certain outcome inevitable . . . , we have the power to dispose of it as may be just under the circumstances, and should do so to obviate further and entirely unnecessary proceedings below." *Wrenn*, 864 F.3d at 667 (cleaned up). Like the D.C. gun law in *Wrenn*, D.C.'s ban "merits invalidation under *Heller*," so it would "wast[e] judicial resources" to "remand[ ] for the court to develop the record." *Id.* (citing *Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012) (reversing denials of preliminary injunctions and remanding with instructions to enter declarations of unconstitutionality and permanent injunctions)).

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No.: 22-2256 (RC)

ANDREW HANSON, *et al.*,

Plaintiffs,

v.

DISTRICT OF COLUMBIA, *et al.*,

Defendants.

Re Document No.: 8

MEMORANDUM OPINION

DENYING PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

I. INTRODUCTION

Plaintiffs, four American citizens who reside in or spend time in the District of Columbia, challenge the constitutionality of D.C. law that bans possession of large-capacity magazines ("LCMs"). Plaintiffs own pistols and wish to equip them with LCMs for self-defense. They claim this conduct is protected by the Second Amendment under the test set forth in the Supreme Court's recent decision, *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022). They now move for a preliminary (and permanent) injunction that enjoins Defendants, the District of Columbia and the Chief of the Metropolitan Police Department Robert J. Contee III (together, "the

District"), from enforcing this law. The Court held oral argument on the motion. The matter is fully briefed and ripe for decision. For the reasons described below, the Court concludes that the District's LCM ban is constitutional, and therefore Plaintiffs have not shown likelihood of success on the merits. The Court will thus deny Plaintiffs' motion for a preliminary injunction.

II. BACKGROUND

A. Case Background

The sole object of Plaintiffs' constitutional challenge is D.C.'s LCM ban, which provides in full:

> 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.

D.C. Code § 7-2506.01(b). Violation of this provision carries a penalty of up to three years in prison and a fine of up to $12,500. D.C. Code §§ 7-2507.06(a)(4); 22-3571.01(b)(6).

Some context is in order to understand the gun law at issue. 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." *Ocean State Tactical, LLC v. Rhode Island*, No. 22-cv-246, 2022 WL 17721175, at *4 (D.R.I. Dec. 14, 2022). "Most modern semi-automatic firearms, whether handguns or semi-automatic rifles like AR-15s, use detachable box magazines." *Id.* The magazine is simply "inserted into and removed from the frame of the firearm, much as an extra battery-pack gets swapped in and out of a battery-operated tool, like a leaf blower, for example." *Id.* 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. "When a multiple-round device like an LCM is attached, a handgun becomes a 'semiautomatic' weapon, meaning that it is capable of rapidly firing several bullets, one right after another. However, the gun still requires a trigger-pull for each round fired." *Id.*[1]

Plaintiffs each hold a license to carry a concealed pistol issued by the D.C. Metropolitan Police Department and they regularly carry firearms in D.C. *See* Hanson Decl. ¶ 2, ECF No. 8-2; Yzaguirre Decl. ¶ 2, ECF No. 8-3; Chaney Decl. ¶ 2, ECF No. 8-4; Klun Decl. ¶ 2, ECF No. 8-5. Each Plaintiff possesses LCMs outside D.C.,

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[1] Both automatic and semi-automatic guns reload automatically; when fired, the force of a shot ejects the spent bullet casing while simultaneously pulling a fresh bullet from the magazine into the gun's chamber. *See* Tom Givens, *Concealed Carry Class* 113 (2019), Ex. C to Defs.' Opp'n, ECF No. 17-5. But whereas automatic guns fire continuously from a single pull of the trigger, semi-automatic guns fire only one bullet per pull of the trigger. *Id.*; *see, e.g.*, 1933 Ohio Laws 189, 189 ("Automatically . . . means that class of firearms which, while the trigger on the firearm is held back continues to fire successive shots. Semi-automatically means that class of firearm which discharges one shot only each time the trigger is pulled, no manual reloading operation being necessary between shots.").

and each Plaintiff claims that, but for D.C. law banning LCM possession in D.C., he would use LCMs for self-defense in D.C. Hanson Decl. ¶¶ 3–4; Yzaguirre Decl. ¶¶ 3–4; Chaney Decl. ¶¶ 3–4; Klun Decl. ¶¶ 3–4. In October 2022, Plaintiff Yzaguirre attempted to register a firearm with the Metropolitan Police Department but was denied because his firearm came with a 12-round LCM, in violation of D.C. law. Yzaguirre 2d Decl. ¶¶ 2–7, ECF No. 16-1.

Plaintiffs brought suit on August 1, 2022, seeking: a declaratory judgment that D.C.'s LCM ban violates the Second and Fifth Amendments; a preliminary and permanent injunction preventing the District from enforcing this ban; damages; and other costs. *See* Compl. at 22–24, ECF No. 1. Plaintiffs then moved for a preliminary injunction on August 19, 2022. Pls.' Appl. for Prelim. Inj. ("Pls.' Mot."), ECF No. 8. A few days later, the District moved for an extension of time to respond and also to conduct limited discovery as to the facts underlying Plaintiffs' motion for a preliminary injunction. ECF Nos. 9, 10. The Court granted both motions on September 7, 2022. Min. Order (Sept. 7, 2022). On October 31, 2022, Plaintiffs supplemented their motion for a preliminary injunction with leave of Court. Min. Order (Oct. 31, 2022). On December 1, 2022, the Court permitted three nonprofit organizations, Brady, Gifford Law Center to Prevent Gun Violence, and March for our Lives to jointly submit an amicus brief in support of the District. Min. Order (Dec. 1, 2022); *see* Amicus Brief, ECF No. 18-1. Plaintiffs' motion for a preliminary injunction was fully briefed as of January 23, 2022. The Court heard oral argument on the motion on April 13, 2023. The motion is now ripe for decision.

B. Legal Background

The Second Amendment to the United States Constitution provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed." U.S. Const. amend. II. Although short, this text is anything but simple. To understand and interpret this constitutional text, the Court looks to caselaw that is relevant to the specific question at hand. As it turns out, Plaintiffs are not the first to raise a Second Amendment challenge to the District's LCM ban: a group of plaintiffs challenged the same law over a decade ago in *Heller v. District of Columbia ("Heller II')*, 670 F.3d 1244 (D.C. Cir. 2011), which ultimately upheld the ban. *Heller II* was decided in the wake of the Supreme Court's seminal Second Amendment case, *District of Columbia v. Heller ("Heller')*, 554 U.S. 570 (2008). The Supreme Court's decision in *Bruen* last year, however, soundly rejected how the Courts of Appeals interpreted and applied *Heller*, and so calls into question the outcome of *Heller II*. Thus, although Plaintiffs' challenge to D.C.'s LCM ban is not entirely new, it demands renewed analysis under the framework *Bruen* provides.

Understanding *Bruen* requires taking a few steps back, to *Heller*. In *Heller*, the Supreme Court held that the District's ban on handgun possession in the home violated the Second Amendment. 554 U.S. at 572. At the time, the District prohibited handgun registration, made it a crime to carry an unregistered firearm, and required residents to keep any lawfully owned firearms unloaded and dissembled. *Id.* at 574. In ruling for the plaintiffs and striking down D.C. law, *Heller* established that the Second Amendment confers "the individual right to possess and carry

weapons in case of confrontation." *Id.* at 592. The Supreme Court explained in this landmark decision that "the inherent right of self-defense has been central to the Second Amendment right." *Id.* at 628.

Heller also cautioned that "[l]ike most rights, the right secured by the Second Amendment is not unlimited." *Id.* at 626. Quoting Blackstone and other sources, the Supreme Court stated that "the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Id.* Thus, the Second Amendment "does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes." *Id.* at 625. And the Court did not "cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *Id.* at 626–27.

In the wake of *Heller*, the District passed the Firearms Registration Amendment Act of 2008 ("FRA"), which updated D.C.'s gun laws. Of relevance here, the FRA added a new provision that bans LCM possession—the same provision at issue in this case. *See* D.C. Law 17-372 § 3(n), Firearms Control Amendment Act of 2008, https://code.dccouncil.gov/us/dc/council/laws/docs/17-372.pdf (adding "new subsection (b)" to D.C. Code § 7-2506.01). A group of plaintiffs once again sued the District, this time challenging the constitutionality of, *inter alia*, the District's ban on assault weapons (in particular, semi-automatic rifles) and its ban on LCM possession. *Heller II*, 670 F.3d at 1249. In assessing the plaintiffs' challenges to these laws, the D.C. Circuit followed the same framework that its sister Courts of Appeals employed in Second

Amendment challenges post-*Heller*. Under this "two-step approach," a court must "ask first whether a particular provision impinges upon a right protected by the Second Amendment; if it does, then . . . go on to determine whether the provision passes muster under the appropriate level of constitutional scrutiny." *Id.* at 1252.

As relevant here, *Heller II* applied this two-step approach to the plaintiffs' challenge to D.C.'s LCM ban. At the first step, the Circuit examined "whether the prohibited weapons are 'typically possessed by law-abiding citizens for lawful purposes.'" *Id.* at 1260 (quoting *Heller*, 554 U.S. at 625). The Circuit found it was "clear enough in the record" that LCMs are in common use and recognized that "fully 18 percent of all firearms owned by civilians in 1994 were equipped with magazines holding more than ten rounds, and approximately 4.7 million more such magazines were imported into the United States between 1995 and 2000." *Id.* at 1261. Still, the Circuit was not "certain" "based upon the record as it st[ood]" whether LCMs were in common use *for lawful purposes*—that is, "whether these weapons are commonly used or are useful specifically for self-defense or hunting" and thus "whether the prohibitions . . . meaningfully affect the right to keep and bear arms." *Id.* Ultimately, the Circuit expressly declined to resolve the first step on the merits, instead assuming without deciding that the first step was satisfied. *Id.*

At the second step of the analysis, *Heller II* applied intermediate scrutiny. It stated that this was the proper standard because given that "the plaintiffs present hardly any evidence that semi-automatic rifles and magazines holding more than ten rounds are well-suited to or preferred for the purpose of self-defense or

sport," it was "reasonably certain the prohibitions do not impose a substantial burden upon t[he] right" to keep and bear arms under the Second Amendment. *Id.* at 1262. Under the intermediate scrutiny standard, the Circuit found that the LCM ban was "substantially related" to the District's "important interests in protecting police officers and controlling crime." *Id.* The Circuit credited testimony that "high-capacity magazines are dangerous in self-defense situations because 'the tendency is for defenders to keep firing until all bullets have been expended, which poses grave risks to others in the household, passersby, and bystanders'" and studies showing that attacks with LCMs "result in more shots fired, persons wounded, and wounds per victim than do other gun attacks." *Id.* at 1263–64. Thus, the Circuit held that D.C.'s LCM ban "do[es] not violate the plaintiffs' constitutional right to keep and bear arms." *Id.* at 1264.

Then came *Bruen*. In *Bruen*, the Supreme Court reaffirmed *Heller* and held that the Second Amendment "protect[s] an individual's right to carry a handgun for self-defense outside the home." 142 S. Ct. at 2122. *Bruen*, however, rejected the Courts of Appeals' two-step framework for assessing Second Amendment challenges and announced that this framework was inconsistent with *Heller*. "*Heller*'s methodology centered on constitutional text and history" and "did not invoke any means-end test." *Id.* at 2128–29. Thus, although "step one of the [Courts of Appeals'] predominant framework [wa]s broadly consistent with *Heller*," step two "[wa]s one step too many." *Id.* at 2126–27. *Bruen* declared that the proper analytical framework for assessing Second Amendment challenges is as follows: "[1] When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. [2] The government must then

justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Id.* at 2129–30 (brackets added).

With respect to the second part of *Bruen*'s test, the Supreme Court acknowledged that in some cases the "historical inquiry" will not be "straightforward." *Id.* at 2131. For "cases implicating unprecedented societal concerns or dramatic technological changes," courts should take "a more nuanced approach." *Id.* at 2132. In those situations, courts must conduct a "historical inquiry that . . . will often involve reasoning by analogy." *Id.* "Like all analogical reasoning, determining whether a historical regulation is a proper analogue for a distinctly modern firearm regulation requires a determination of whether the two regulations are 'relevantly similar.'" *Id. Bruen* provided two "metrics" for conducting this analysis: "how and why the regulations burden a law-abiding citizen's right to armed self-defense." *Id.* at 2132–33. "Therefore, whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified are '*central*' considerations when engaging in an analogical inquiry." *Id.* at 2133 (emphasis in original) (citation omitted). Analogical reasoning "is neither a regulatory straightjacket nor a regulatory blank check." *Id.* "[A]nalogical reasoning requires only that the government identify a well-established and representative historical *analogue*, not a historical *twin*. So even if a modern-day regulation is not a dead ringer for historical precursors, it still may be analogous enough to pass constitutional muster." *Id.* (emphases in original).

Bruen then applied this standard to the facts of the case, which involved a challenge to New York State's

public-carry licensing regime that required an applicant to show "proper cause" for self-defense. At the first step, the Supreme Court had "little difficulty" in concluding that the plaintiffs' desire to "carry[] handguns publicly for self-defense" was covered by the text of the Second Amendment. *Id.* at 2134. Thus, the Second Amendment "presumptively guarantee[d]" the plaintiffs the right to do so. *Id.* at 2135. *Bruen* then turned to the next step of the inquiry, where New York State had the "burden" to "show that [its] proper-cause requirement is consistent with this Nation's historical tradition of firearm regulation." *Id.* This New York could not do. After surveying history from the 12th through the 19th century, with particular emphasis on Founding-era regulations, *Bruen* concluded that "[a]part from a few late19th-century outlier jurisdictions, American governments simply have not broadly prohibited the public carry of commonly used firearms for personal defense." *Id.* at 2156. Thus, *Bruen* concluded that New York's "proper cause" licensing regime was unconstitutional. *Id.*

III. LEGAL STANDARD

"A preliminary injunction is 'an extraordinary remedy that may only be awarded upon a clear showing that the [movant] is entitled to such relief.'" *John Doe Co. v. CFPB*, 849 F.3d 1129, 1131 (D.C. Cir. 2017) (alteration in original) (quoting *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008)). "A plaintiff seeking a preliminary injunction must establish [(1)] that he is likely to succeed on the merits, [(2)] that he is likely to suffer irreparable harm in the absence of preliminary relief, [(3)] that the balance of equities tips in his favor, and [(4)] that an injunction is in the public interest." *Winter*, 555 U.S. at 20. "Of course, the movant carries the burden of persua[ding]"

the Court that these factors merit preliminary relief, *Fla. EB5 Invs., LLC v. Wolf*, 443 F. Supp. 3d 7, 11 (D.D.C. 2020) (citing *Cobell v. Norton*, 391 F.3d 251, 258 (D.C. Cir. 2004)), and must do so by making a "clear showing," *Cobell*, 391 F.3d at 258. "A preliminary injunction may be granted based on less formal procedures and on less extensive evidence than in a trial on the merits." *Cobell*, 391 F.3d at 261 (D.C. Cir. 2004).[2]

IV. ANALYSIS

The Court begins with standing. "[T]he D.C. Circuit has declared in unequivocal terms that [a] party seeking a preliminary injunction must show a substantial likelihood of standing." *Angelo v. District of Columbia*, No. 22-cv-1878, 2022 WL 17974434, at *3 (D.D.C. Dec. 28, 2022) (cleaned up) (quoting *Green v. U.S. Dep't of Just.*, 54 F.4th 738, 744 (D.C. Cir. 2022)). Plaintiffs breezed through the issue of standing in their briefing, and the District did not even bother to address standing at all. Nonetheless, the Court finds that at least one Plaintiff, Tyler Yzaguirre, has demonstrated a substantial likelihood of standing because he was denied registration for a firearm on the ground that its magazine had a 12-round capacity in violation of D.C.'s LCM ban. *See generally* 2d Yzaguirre Decl. That is a concrete injury, traceable to the allegedly unconstitutional law, which a court-issued injunction could redress. *See Lujan v. Defs. of Wildlife*,

[2] At this stage, the Court will consider all of the many exhibits and sources upon which the parties rely. In addition to providing declarations from their own experts, Plaintiffs provided five expert declarations filed in *Duncan v. Bonta*, No. 17-cv-1017 (S.D. Cal.), an ongoing case involving a Second Amendment challenge to a California law that, like the D.C. law at issue here, bans LCM possession. *See* Pls.' Reply at 2 n.1, ECF No. 24.

504 U.S. 555, 560–61 (1992); *cf. Heller II*, 670 F.3d at 1249 (in recounting the plaintiffs' injuries, finding that "Plaintiff Heller was also denied registration of a pistol because the magazine had a capacity of 15 rounds"). And "because at least one Plaintiff has standing, the Court need not analyze whether other plaintiffs have standing." *Williams v. Walsh*, No. 21-cv1150, 2022 WL 17904227, at *11 n.7 (D.D.C. Dec. 23, 2022).

On the merits, *Bruen* governs. Under *Bruen*, the Court must first determine whether "the Second Amendment's plain text covers an individual's conduct." 142 S. Ct. at 2126. If so, "the Constitution presumptively protects that conduct," and "the government must demonstrate that the regulation is consistent with the Nation's historical tradition of firearm regulation." *Id.* Thus, the first question in this case is whether the Second Amendment covers LCM possession. If yes, the second question is whether the District's LCM ban is relevantly similar to a historical analogue. The Court holds that the answer to the first question is no. Although that alone resolves the case for the District, the Court will nonetheless proceed to analyze the second question and hold that in the alternative, the District's LCM ban is also consistent with this country's historical tradition of firearm regulation.[3]

[3] Because the Court concludes that the District's LCM ban is constitutional and that Plaintiffs have "little likelihood of succeeding on the merits," the Court "[h]as no need to address the other preliminary injunction factors." *Apotex, Inc. v. Food & Drug Admin.*, 449 F.3d 1249, 1253 (D.C. Cir. 2006) (citations omitted).

A. Whether LCMs Are Covered by the Second Amendment

Under *Bruen*'s first step, the Court must determine whether the scope of the Second Amendment covers LCM possession. Notably, this first step is consistent with the first step of Courts of Appeals' decisions pre-*Bruen*. In other words, *Bruen* did not disturb the analysis Courts of Appeals conducted under the first step of their framework. *See* 142 S. Ct. at 2127 ("Step one of the [Courts of Appeals'] predominant framework is broadly consistent with *Heller*[.]"). The Court will therefore still discuss these now-abrogated cases in this section and accord their step-1 analysis persuasive weight to the extent they are instructive. At the first step in this case, the parties raise two primary disputes. First, they disagree whether LCMs are "arms" within the meaning of the Second Amendment. Second, they disagree whether LCMs are typically possessed by law-abiding citizens for lawful purposes. The Court will examine each in turn.

1. Whether LCMs Are "Arms" Under the Second Amendment

The parties dispute whether LCMs are "arms" under the Second Amendment. Recall that the Second Amendment protects an individual right to "keep and bear *Arms*" for self-defense. U.S. Const. amend. II (emphasis added). *Heller* interpreted this term as follows:

> The 1773 edition of Samuel Johnson's dictionary defined "arms" as "[w]eapons of offence, or armour of defence." 1 Dictionary of the English Language 106 (4th ed.) (reprinted 1978) (hereinafter Johnson). Timothy Cunningham's important 1771 legal dictionary defined

> "arms" as "any thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another." 1 A New and Complete Law Dictionary; *see also* N. Webster, American Dictionary of the English Language (1828) (reprinted 1989) (hereinafter Webster) (similar).

Heller, 554 U.S. at 581.

At least three Courts of Appeals have concluded that LCMs are "arms" within the meaning of the Second Amendment. *See Ass'n of New Jersey Rifle & Pistol Clubs, Inc. v. Att'y Gen. New Jersey ("ANJRPC")*, 910 F.3d 106, 116 (3d Cir. 2018); *Kolbe v. Hogan*, 813 F.3d 160, 175 (4th Cir. 2016); *Duncan v. Becerra*, 970 F.3d 1133, 1146 (9th Cir. 2020).[4] In *ANJRPC*, the plaintiffs challenged the constitutionality of a New Jersey law that, as with the D.C. law in this case, made it illegal to possess a magazine capable of holding more than ten rounds of ammunition. 910 F.3d at 110. The Third Circuit specifically addressed "the question [of] whether a magazine is an arm under the Second Amendment" and concluded "[t]he answer is yes." *Id.* at 116. It reasoned 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.*

Likewise, a panel of the Fourth Circuit in *Kolbe* reasoned that because the Second Amendment plainly covers firearms, "there must also be an ancillary right

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[4] At least two Courts of Appeals have noted this question but declined to address it. *See Worman v. Healey*, 922 F.3d 26, 33 n.3 (1st Cir. 2019); *New York State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 264 n.127 (2d Cir. 2015).

to possess the magazines necessary to render those firearms operable." 813 F.3d at 175. At issue in that case was a Maryland law that banned assault weapons like the AR-15 as well as detachable LCMs. *Id.* at 169–70. The panel in *Kolbe* found "strong historical support" for the notion that magazines constitute "arms" because "magazines and the rounds they contain are used to strike at another and inflict damages" and early American provisions protecting gun rights "suggest[] 'arms' should be read to protect all those items necessary to use the weapons effectively." *Id.* at 175 (citation omitted).

Finally, in *Duncan*, a panel of the Ninth Circuit considered the constitutionality of California's ban on LCM possession and concluded at the outset that "[f]irearm magazines are 'arms' under the Second Amendment." 970 F.3d at 1146. The Ninth Circuit reasoned that "[w]ithout a magazine, many weapons would be useless" and therefore "there must be some corollary . . . right to possess the magazines necessary to render those firearms operable." *Id.* (citation omitted).

ANJRPC, *Kolbe*, and *Duncan* all recognized that the Second Amendment covers not just possession of a firearm, but the sorts of things that make a firearm operable. *See Bruen*, 142 S. Ct. at 2132 ("[E]ven though the Second Amendment's definition of 'arms' is fixed according to its historical understanding, that general definition covers modern instruments that *facilitate* armed self-defense." (emphasis added)). The same logic prevails in other Second Amendment contexts as well. *See, e.g.*, *Ezell v. City of Chicago*, 651 F.3d 684, 704 (7th Cir. 2011) (finding that city's ban on firing ranges implicated the Second Amendment because "[t]he right to possess firearms for protection implies a corresponding right to acquire and maintain proficiency

in their use; the core right wouldn't mean much without the training and practice that make it effective").[5]

The District, however, argues that LCMs are not "arms" but rather "accoutrements" (*i.e.*, accessories). Defs.' Opp'n to Pls.' Appl. for Prelim. Inj. ("Defs.' Opp'n") at 9–11, ECF No. 17. According to the District, the term "arms" at the Founding did not encompass accoutrements such as ammunition or cartridges that stored such ammunition. *Id.* at 10. And the District argues that even if the Second Amendment covers accessories which are integral to the operation of a firearm, LCMs are not one of them because Plaintiffs could still use their existing firearms with magazines that carry ten bullets or less, and in fact, currently carry these smaller magazines on their firearms. *Id.* at 11–12; *see also Ocean State Tactical*, 2022 WL 17721175, at *11 (finding similar arguments persuasive in holding that LCMs are not "arms" under the Second Amendment).

The Court is unpersuaded by the District's exacting standard. Its position contradicts the conclusions that *ANJRPC*, *Kolbe*, and *Duncan* reached on this question. In *ANJRPC*, for example, the Third Circuit found that LCMs are "arms" under the Second Amendment

[5] Although *Kolbe* and *Duncan* were both subsequently vacated by en banc decisions in those circuits, the respective en banc decisions did not cast doubt on the panels' analysis of this specific question. *See Kolbe v. Hogan*, 849 F.3d 114, 137 n.12 (4th Cir. 2017) (en banc) (explaining that because it found LCMs "most useful in military service" and "not constitutionally protected," it would not reach the question whether LCMs were "arms" under the Second Amendment); *Duncan v. Bonta*, 19 F.4th 1087, 1103 (9th Cir. 2021) (en banc) ("assuming, without deciding, that California's law implicates the Second Amendment" and not discussing the question of whether LCMs are "arms" under the Second Amendment).

because "magazines *feed* ammunition into certain guns, and ammunition is necessary for such a gun to function as intended." 910 F.3d at 116 (emphasis added). The District's logic, by contrast, would allow it to ban *all* magazines (not just LCMs)—a result even the District does not endorse here—because a firearm technically does not require *any* magazine to operate; one could simply fire the single bullet in the firearm's chamber. *See Ocean State Tactical*, 2022 WL 17721175, at *12 (noting that "a firearm can fire bullets without a detachable magazine"). The Court will therefore follow the persuasive reasoning of *ANJRPC*, *Kolbe*, and *Duncan* in concluding that LCMs are "arms" within the meaning of the Second Amendment.

2. Whether LCMs Are Typically Possessed by Law-Abiding Citizens for Lawful Purposes

Even though LCMs are "arms" within the meaning of the Second Amendment, they must still satisfy another inquiry to fall within the amendment's scope. The next question under step one of *Bruen* is whether LCMs are "typically possessed by law-abiding citizens for lawful purposes." *Heller II*, 670 F.3d at 1260 (quoting *Heller*, 554 U.S. at 625). In *Heller II*, the D.C. Circuit noted in passing that the record in that case showed that "magazines holding more than ten rounds are indeed in 'common use.'" *Id.* at 1261. As evidence, it observed that "fully 18 percent of all firearms owned by civilians in 1994 were equipped with magazines holding more than ten rounds, and approximately 4.7 million more such magazines were imported into the United States between 1995 and 2000." *Id.*; *see also New York State Rifle & Pistol Ass'n, Inc. v. Cuomo ("NYSRPA")*, 804 F.3d 242, 255 (2d Cir. 2015) ("Even accepting the most conservative estimates cited by the

parties and by amici, the . . . large-capacity magazines at issue are 'in common use' as that term was used in *Heller*.").

Plaintiffs seize on this observation as if it alone decides the question of whether LCMs are covered by the Second Amendment. It does not. *Heller II*'s comment was dicta because the Circuit ultimately assumed, without deciding, that LCMs were covered by the Second Amendment. 670 F.3d at 1261. More importantly, *Heller II* recognized that whether LCMs are "in common use" is merely the beginning of the analysis. The full inquiry is "whether the prohibited weapons are 'typically possessed . . . *for lawful purposes*.'" *Heller II*, 670 F.3d at 1260 (emphasis added) (quoting *Heller*, 554 U.S. at 625). On *that* critical question, *Heller II* expressed uncertainty: "based upon the record as it stands, we cannot be certain whether these weapons are commonly used or are useful specifically *for self-defense*[.]" *Id.* at 1261 (emphasis added). That is the question this Court must now resolve.

The parties unsurprisingly stake divergent positions. Plaintiffs maintain that LCMs "are overwhelmingly used for lawful purposes" such as self-defense. Pls.' Mem. of P. & A. in Reply to Opp'n to Appl. for Prelim. Inj. ("Pls.' Reply") at 12, ECF No. 24.[6] The District

[6] Plaintiffs also argue that LCMs are commonly used for lawful purposes such as training and competition. Pls.' Reply at 11–12. But given that "individual self-defense is 'the *central component*' of the Second Amendment right," it is unclear whether a weapon that is *not* typically possessed for self-defense may nonetheless be covered by the Second Amendment on the ground that it is typically possessed for sporting. *Bruen*, 142 S. Ct. at 2118 (emphasis in original) (citation omitted). The Court has no occasion to address that novel question here, because the Complaint and the motion for a preliminary injunction focus on

disagrees; it argues that LCMs are not in common use for self-defense for two reasons. First, it claims that LCMs' military characteristics make them a poor fit for self-defense and take them outside the scope of the Second Amendment. Second, the District claims that law-abiding individuals do not use LCMs for self-defense because incidents where a civilian actually expends more than ten bullets in self-defense are "vanishingly rare." Defs.' Opp'n at 18. The Court agrees with the District on both arguments.

a. Whether LCMs are Most Useful in Military Service

Heller specifically contemplated that "weapons that are most useful in military service" fall outside of Second Amendment protection. 554 U.S. at 627; *see NYSRPA*, 804 F.3d at 256 ("*Heller* expressly highlighted 'weapons that are most useful in military service,' such as the fully automatic M–16 rifle, as weapons that could be banned without implicating the Second Amendment."); *Duncan*, 19 F.4th at 1102 (en banc) (noting in dicta "significant merit" to the plaintiffs' argument that because "large-capacity magazines have limited lawful, civilian benefits, whereas they provide significant benefits in a military setting," they are not covered by Second Amendment). Plaintiffs counter that "the Supreme Court's precedents do not withhold protection from arms merely because they are useful in militia service." Pls.' Reply at 15. That may be true, but it is beside the point. *Heller* established that weapons that are "*most* useful in military service" are excluded from Second Amendment

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Plaintiffs' right of self-defense. *See* Compl. ¶¶ 27–36; Pls.' Mot. at 7–14. Indeed, Plaintiffs' counsel agreed at oral argument that *Heller* and its progeny focus on self-defense.

protection. 554 U.S. at 627 (emphasis added). "Most" is a superlative. A weapon may have *some* useful purposes in both civilian and military contexts, but if it is *most* useful in military service, it is not protected by the Second Amendment.

Here, in passing the LCM ban, D.C. lawmakers took the position that LCMs were not suitable for civilian self-defense. The D.C. Council's Committee on Public Safety and the Judiciary, which referred this legislation for approval, favorably referenced D.C. Chief of Police's observation that "magazines holding[] over 10 rounds are more about firepower than self-defense." Council of the District of Columbia Committee on Public Safety and the Judiciary, Committee Report at 9, https://perma.cc/YN6H-2U9M. That view is shared by judges, too. The Fourth Circuit's en banc decision in *Kolbe v. Hogan*, 849 F.3d 114, 131 (4th Cir. 2017), held that LCMs are unprotected by the Second Amendment because they are most useful in military service. In *Kolbe*, the plaintiffs challenged the constitutionality of a Maryland law that banned assault weapons like the AR-15 as well as detachable LCMs. *Id.* at 120. After describing the many "difficult questions" that *Heller* raised concerning what the Second Amendment protects, the court remarked that *Heller* offers "a dispositive and relatively easy inquiry: Are the banned assault weapons and large-capacity magazines 'like' 'M-16 rifles,' i.e., 'weapons that are most useful in military service,' and thus outside the ambit of the Second Amendment?" *Id.* at 136. The "line that *Heller* drew," the court stated, was "between weapons that are most useful in military service and those that are not." *Id.* at 137. The court then found that "[t]he answer to that dispositive and relatively easy inquiry is plainly in the affirmative." *Id.* at 136. It held that "[w]hatever their other potential uses—including self-defense—

the AR-15, other assault weapons, and large-capacity magazines prohibited . . . are unquestionably most useful in military service." *Id.* at 137. Turning to LCMs in particular, the court found that they "are particularly designed and most suitable for military and law enforcement applications" because of their "ability to reload rapidly," "hit multiple human targets very rapidly," and "deliver extraordinary firepower." *Id.* (citations omitted). *Kolbe* did not limit its analysis of LCMs as they are used in assault weapons—to the contrary, it found that the "uniquely military feature[]" of LCMs' rapid-fire capacity also applied to "other firearms to which they may be attached"—for example, the handguns that Plaintiffs in this case carry. *Id.*; *cf. Friedman v. City of Highland Park, Illinois*, 784 F.3d 406, 409 (7th Cir. 2015) ("We know . . . that semi-automatic guns with large-capacity magazines enable shooters to fire bullets faster than handguns equipped with smaller magazines.").

Kolbe is no outlier. The en banc Ninth Circuit cited *Kolbe* approvingly for the proposition that "[large-capacity] magazines likely are 'most useful in military service,' at least in an ordinary understanding of that phrase." *Duncan*, 19 F.4th at 1102. The Ninth Circuit found that "[e]vidence supports the common-sense conclusion that the benefits of a large-capacity magazine are most helpful to a soldier: 'the use of large-capacity magazines results in more gunshots fired, results in more gunshot wounds per victim, and increases the lethality of gunshot injuries.'" *Id.* at 1105. *Duncan* also cited two reports by the Bureau of Alcohol, Tobacco, Firearms and Explosives (a federal agency) which concluded that "large capacity magazines are indicative of military firearms," in part because they "provide[ ] the soldier with a fairly large ammunition supply" and that "detachable large

capacity magazine[s] [were] originally designed and produced for . . . military assault rifles." *Id.* at 1105–06. *See also Or. Firearms Fed'n, Inc. v. Brown*, No. 22-cv-01815, 2022 WL 17454829, at *10–11 (D. Or. Dec. 6, 2022) (favorably citing *Kolbe* and *Duncan* en banc decisions and finding that evidentiary record showed that LCMs "are often used in law enforcement and military situations").

If *Kolbe* and other courts are correct that LCMs are most useful in military service, one would expect to find support for this in history. Exactly so. The District's historical evidence in this case shows that LCMs' lethality was popular in military settings, and indeed many of them were designed specifically for military (and law enforcement) use. The District's expert, Brian DeLay, who has a Ph.D. in history and has extensively studied the history of firearms and arms trades, found that in the United States, "high-capacity firearms went almost exclusively to military buyers through the early 1870s and . . . very few were in the hands of private persons." Delay Decl. ¶ 23, ECF No. 17-9. Mr. DeLay further concluded that "in the 1860s and 1870s . . . [d]etachable magazines were still decades away from practical success, and would be produced for militaries long before they made their way into civilian markets in meaningful quantities." *Id.* ¶ 25. This trend continued into the 20th century. *See, e.g.*, Pauly Decl. ¶ 77, ECF No. 17-8 (expert with a Ph.D. in history explaining that the first Lugers, which were semiautomatic pistols with a pistol-grip magazine, "w[ere] adopted by the German army in 1908"); Paul M. Barrett, *Glock: The Rise of America's Gun* 6–11 (2012) (explaining that in 1980, Glock, the founder of the popular pistol many Americans own, designed a pistol for the Austrian military that could hold more than eight rounds); Jeff Kinard, *Pistols: An*

Illustrated History of Their Impact 270–75 (2003) (explaining that Switzerland firm SIG developed the SIG-Sauer P226 in 1983 which could accept a 15-round magazine, and was used by the U.S. Navy SEALs as well as police and military organizations in Europe, and that the 1989 SIG-Sauer P228 and P229, which contain 13 and 12 round-magazines, "earned universal reputations as highly reliable and accurate weapons for military and police use"); Roth Decl. ¶ 48, ECF No. 17 11 (observing that semi-automatic weapons with LCMs such as the M-16 rile "were designed for offensive military applications rather than individual self-defense" and "emerged from technologies developed for military use during the Cold War").

Even Plaintiffs' experts seem to believe that LCMs are best suited for military and law enforcement use. *See, e.g.*, Murphy Decl. ¶ 9, ECF No. 24-6 (acknowledging that "magazines holding more than 10 rounds are most useful in the military or in a law enforcement context"); Harnish Decl. ¶ 7, ECF No. 24-7 ("The Beretta M9 [which has a 15-round magazine] was adopted by the United States Armed Forces as the official service pistol in 1985."); *id.* ¶ 9 ("Pistols with the capacity to hold ten rounds, or more than ten rounds . . . [are] selected by law enforcement and military agencies in the United States for the practicality and performance they provide to the organization, but more importantly the capability they provide to the end user."). Thus, the Court concludes that LCMs are not covered by the Second Amendment because they are most useful in military service.

b. Whether LCMs Are in Fact Used for Self-Defense

The District also argues that LCMs are not covered by the Second Amendment because they are not "in

fact used for th[e] purpose" of self-defense. Defs.' Opp'n at 18. As support, it relies on a study of the National Rifle Association's ("NRA") "Armed Citizen Stories" website which concluded that law-abiding citizens on average fire only *two* bullets in self-defense situations and virtually never more than ten. *Id.* This study, which assessed data from the years 1997 – 2001, was actually conducted by one of Plaintiffs' experts, Claude Werner. Mr. Werner is a retired U.S. Army officer who has experience in competitive shooting, self-defense, and firearms instruction. Werner Decl. ¶¶ 2–5, 7, ECF No. 24-8. In his study, titled "Analysis of Five Years of Armed Encounters (With Data Tables)," Mr. Werner explained that he reviewed a total of 482 reports in that time period from the NRA's database. *See* https://perma.cc/QTL7-U8EM. Upon collecting and organizing the data from these reports, Mr. Werner concluded that the average number of shots a civilian fired in a self-defense incident in this time period was 2.2. *Id.*

Courts and scholars alike have relied on the findings of this study, specifically the 2.2 bullets per incident figure. *See, e.g.*, Robert J. Spitzer, *Gun Accessories and the Second Amendment*, 83 J. L. & Contemp. Probs. 331, 244–45 (2020); *Kolbe*, 849 F.3d at 127 (en banc) ("[T]he State's evidence substantiates 'that it is rare for a person, when using a firearm in self-defense, to fire more than ten rounds.' Studies of 'armed citizen' stories collected by the National Rifle Association, covering 1997-2001 and 2011-2013, found that the average number of shots fired in self-defense was 2.2 and 2.1, respectively." (citations omitted)); *Duncan*, 19 F.4th at 1105 (en banc) ("[T]he 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." (emphasis in original)); *cf.*

Heller II, 670 F.3d at 1262 ("[T]he plaintiffs present hardly any evidence that . . . magazines holding more than ten rounds are well-suited to or preferred for the purpose of self-defense or sport.").

Plaintiffs raise primarily two arguments in response. First, they try to back away from the findings of the 1997 – 2001 study that their own expert conducted. Mr. Werner claims that his 1997 – 2001 timeframe is "dated." Werner Decl. ¶ 7, ECF No. 24-8. To the contrary, the 2.2 figure has remained exceptionally stable over time. NERA Economic Consulting ("NERA"), a reputable economic consulting firm, reviewed 736 reports from the same NRA Armed Citizen database in the *2011 – 2017 period* and concluded that the average number of shots a civilian fired in a self-defense incident in this time period was 2.1. *See* Amicus Brief at 19 & n.70; Decl. of Lucy P. Allen ("Allen Decl.") ¶ 8, *Ass'n of New Jersey Rifle & Pistol Clubs, Inc. v. Grewal*, No. 3:18-cv-10507, 2018 WL 4688345 (D.N.J. Sept. 28, 2018), ECF No. 31-2. The NERA study tracked essentially the same metrics from the NRA Armed Citizen database over a more recent time period and arrived at a virtually identical data point.[7] Tellingly, one of Plaintiffs' other experts concedes that "the average amount of rounds fired in self-defense is

[7] In addition to studying the NRA Armed Citizen database from 2011 – 2017, NERA performed another study of self-defense (in the home only) in the 2011 – 2017 timeframe based on "comprehensive search of published news stories" online and concluded that the average number of shots fired per incident was 2.34—again, a substantially similar figure. *See* Allen Decl. ¶¶ 12–17 (explaining methodology and findings).

usually less than 10, generally only two or three." Murphy Decl. ¶ 8.[8]

Mr. Werner next argues that his study is flawed because it is heavily skewed toward "positive outcomes"—that is, successful self-defense incidents that are reported. Werner Decl. ¶ 8; Ellifritz Decl. ¶¶ 14–16, ECF No. 24-7 (same). Selection bias is no doubt a legitimate concern in any statistical inquiry. The problem for Plaintiffs is that Mr. Werner does not provide any studies, arguments, or even logic that remotely suggests that were the study able to properly capture negative outcomes, the average number of bullets fired in self-defense would somehow *skyrocket* to 11 or more bullets. The best Mr. Werner can say is that "[w]e don't know how may [bullets] have been fired in non-positive outcomes." Werner Decl. ¶ 8. But if no one knows, how does this support the idea that LCMs are commonly used for self-defense?

Finally, Mr. Werner points out that his study had "very little data as to the ammunition capacity of the citizen employed firearm." *Id.* ¶ 9. He reasons that although "a substantial number of citizen defenders would have used plus 10 magazines" in these incidents, "i[f] we were doing the study today using current data, the percentage of citizens using plus 10 magazines would be even higher." *Id.* This argument actually undermines Plaintiffs' position. If civilians only fired a few bullets on average *despite* using an

[8] The Complaint attempts to describe six self-defense incidents in the country that involved firing more than ten rounds. But amicus correctly points out that *five* out of these incidents were "officer involved" shootings, Compl. ¶¶ 28–33, and the sole example of civilian self-defense involved a "[f]amed Los Angeles watch shop owner," Compl. ¶ 30—hardly representative of ordinary civilian self-defense incidents.

LCM-equipped firearm, it was not for a lack of ammunition. The data shows that they simply did not need the extra ammunition in the LCM for self-defense.

Perhaps realizing that their own expert's study has backfired, Plaintiffs try a different tack: they claim that a law-abiding citizen nonetheless "uses" a LCM for self-defense even when he does not necessarily expend double-digit bullets in a self-defense incident. *See* Pls.' Reply at 13 ("If a citizen fires two rounds out of a 15 round magazine to save his life, he nevertheless uses the 15 round magazine for self-defense."). That is a creative argument, but the Court is unconvinced. The dictionary defines "use" as "[t]he application or employment of something; esp., a long-continued possession and employment of a thing *for the purpose for which it is adapted*, as distinguished from a possession and employment that is merely temporary or occasional." *Use*, Black's Law Dictionary (11th ed. 2019) (emphasis added); *cf. Voisine v. United States*, 579 U.S. 686, 692 (2016) ("Dictionaries consistently define the noun 'use' to mean the 'act of employing' something."). Here, LCMs are best suited for a military "purpose" and are poorly "adapted" for self-defense. As the Ninth Circuit en banc put it, civilians do not "use" LCMs for self-defense, because "the added benefit of a large-capacity magazine—being able to fire more than ten bullets in rapid succession—has [virtually n]ever been realized in self-defense." *Duncan*, 19 F.4th at 1105 (en banc); *see* Allen Decl. ¶ 10 ("Out of 736 incidents [in the Armed Citizen database between 2011 – 2017], there were two incidents (0.3% of all incidents), in which the defender was reported to have fired more than 10 bullets."); *Or. Firearms Fed'n*, 2022 WL 17454829, at *11 (finding record showed that "large-capacity magazines are rarely used by civilians for self-defense").

Plaintiffs protest that the District's reasoning would allow it to "justify a ban on all firearms able to fire more than two or three shots" because "on average, only 2.2 shots are fired by defenders." Pls.' Reply at 13. But no such ban exists anywhere in the country, and the Court doubts that the District will see this as an invitation to go down Plaintiffs' slippery slope. Recall that the studies show that two bullets is merely the *average* amount of bullets fired in self-defense situations; thus, a law that restricts magazine capacity to say, five or six bullets, might meaningfully hinder the common and lawful usage of magazines for self-defense. In any event, this is not a case that requires the Court to delineate the constitutional limits of a hypothetical restriction. It suffices to say that the District's LCM ban, which limits magazine capacity to ten bullets, enables law-abiding people in D.C. to possess magazines with ample ammunition to defend themselves.[9]

In conclusion, the Court finds that the Second Amendment does not cover LCMs because they are not typically possessed for self-defense. LCMs fall outside of the Second Amendment's scope because they are most useful in military service and because they are not in fact commonly used for self-defense. Given that the District prevails at step one of *Bruen*'s framework, the Court finds that D.C.'s LCM ban is constitutional. Nonetheless, to round out the analysis, the Court will consider *Bruen*'s second step in the alternative.

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[9] The District's magazine capacity limit (10) also prevents civilians from maintaining greater firepower than law enforcement. Law enforcement in the District routinely carry 15- and 17-round magazines. Parsons Decl. ¶¶ 14–16, ECF No. 17-7. The District's LCM ban keeps the advantage police have over armed civilians who may be suspects or engaged in criminal activity. *Id.* ¶¶ 17–18.

B. Whether the Ban Is Consistent with this Nation's Tradition of Firearm Regulation

Even were LCMs covered by the scope of the Second Amendment, the Court finds that D.C.'s ban is constitutional for the independent reason that the District has shown that it is consistent with this country's historical tradition of firearm regulation. "Like all analogical reasoning, determining whether a historical regulation is a proper analogue for a distinctly modern firearm regulation requires a determination of whether the two regulations are 'relevantly similar.'" *Bruen*, 142 S. Ct. at 2132. *Bruen* provides two "metrics" for conducting this analysis: "how and why the regulations burden a law-abiding citizen's right to armed self-defense." *Id.* at 2132–33. "Therefore, whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified are '*central*' considerations when engaging in an analogical inquiry." *Id.* at 2133 (emphasis in original).

Although the burden is on the government to identify a historical analogue, *Bruen* stressed that this is not an impossible standard. *See Bruen*, 142 S. Ct. at 2162 (Kavanaugh, J., concurring) ("Properly interpreted, the Second Amendment allows a 'variety' of gun regulations."). *Bruen* acknowledged that in today's world, centuries after the ratification of the Second Amendment, it is not unusual to see "modern regulations that were unimaginable at the founding." *Id.* at 2132. Thus, "cases implicating unprecedented societal concerns or dramatic technological changes" require "nuanced" consideration. *Id.* at 2131–32. For that reason, analogical reasoning is not "a regulatory straightjacket": it "requires only that the government identify a well-established and representative

historical *analogue*, not a historical *twin*." *Id.* at 2133 (emphases in original). "So even if a modern-day regulation is not a dead ringer for historical precursors, it still may be analogous enough to pass constitutional muster." *Id.* After all, "the Constitution, can, and must, apply to circumstances beyond those the Founders specifically anticipated." *Id.* at 2132; *see id.* (quoting *McCulloch v. Maryland*, 4 Wheat. 316, 415 (1819), for the principle that the Second Amendment was "intended . . . to be adapted to the various crises of human affairs").

1. Whether a Nuanced Approach to History Applies Here

Although D.C.'s LCM ban has yet to be tested under step two of *Bruen*'s framework, the Court is not the first in the country to apply *Bruen* to this kind of regulation. In *Oregon Firearms Federation*, a federal district court employed *Bruen*'s test to a substantially similar challenge to Oregon's LCM ban. 2022 WL 17454829 (D. Or. Dec. 6, 2022). That case analyzed the constitutionality of Measure 114, a ballot initiative passed by Oregon voters in November 2022 which outlawed the use and sales of LCMs. *Id.* at *2. The ballot measure provided limited exceptions, such as allowing existing owners of LCMs to continue to use them on their property or for recreation, and giving firearms manufacturers a 180-day grace period to fulfill existing contracts to out-of-state buyers. *Id.* at *4. The plaintiffs, gun owners and users of LCMs, brought suit and sought a temporary restraining order "aimed primarily" at the LCM ban. *Id.* at *5. The court first held that under *Bruen*, LCMs are not covered by the Second Amendment. *Id.* at *8–11. Then, "[a]ssuming for the sake of argument that the Second Amendment's plain text covers large-capacity magazines," the court

"next consider[ed] whether Measure 114 is consistent with the Nation's historical tradition of firearm regulation." *Id.* at *12.

Oregon Firearms Federation answered this second question in the affirmative. The court observed that LCMs are "a dramatic change in firearms technology" because although some multi-shot firearms existed before the Founding era, they were "experimental, designed for military use, rare, defective, or some combination of these features," and the evidence showed that "semi-automatic weapons did not become 'feasible and available' until the beginning of the twentieth century." *Id.* at *12 & n.17. The court also found that "large-capacity magazines implicate unprecedented societal concerns" because of their frequent use in recent mass shootings. *Id.* at *13. Turning to historical analogues, *Oregon Firearms Federation* observed that "in the 1800s, states often regulated certain types of weapon, such as Bowie knives, blunt weapons, slungshots, and trap guns because they were dangerous weapons commonly used for criminal behavior and not for self-defense." *Id.* The court also found a historical tradition of banning private military organizations as evidence that "demonstrates the government's concern with the danger associated with assembling the amount of firepower capable of threatening public safety—which, given firearm technology in the 1800s, could only arise collectively." *Id.* at *14. The court found that Oregon's LCM ban was "comparably justified" with these historical regulations because just as the historical regulations were rooted in public safety concerns, the LCM ban "consider[ed] the public safety concerns of today" in "the rise in mass shooting incidents and the connection between mass shooting incidents and large-capacity magazines." *Id.* And Oregon's ban placed a "comparable burden" as the

historical regulations on the right to self-defense: the burden was "minimal," the court explained, because "in over seven hundred self-defense incidents, less than one half of a percent involved more than ten shots." *Id.*

In this case, the District's evidence also shows that LCMs are the object of "dramatic technological changes" and implicate "unprecedented societal concerns," and thus its ban requires "nuanced" consideration. *Bruen*, 142 S. Ct. at 2132. First, with respect to the technological pedigree of LCMs, Mr. DeLay explained that while "firearms with ammunition capacity in excess of 10 rounds date back to the 1500s," "such weapons amounted to little more than experimental curiosities" and that "[m]ost never advanced beyond proof of concept." DeLay Decl. ¶ 7. The airgun, "the only high-capacity weapons from the [founding] period that enjoyed even experimental military use" was "so rare that owners could charge people to see them." *Id.* ¶¶ 14–16; *see* "To the Curious," *The Weekly Museum* (New York, NY), Feb. 11, 1792 (Ex. B to DeLay Decl.). Based on his twelve years of studying the arms trade in the Founding era, Mr. DeLay found zero "evidence in primary sources that large-capacity firearms were anything other than exotic curios in this era." *Id.* ¶ 19; *cf.* Sweeney Decl. ¶¶ 15, 31, ECF No. 17-5 (expert with Ph.D. in history observing that review of 1,170 newspaper ads and reports in the 18th century shows that "repeating firearms in eighteenth-century America" "were extraordinarily rare"); *Friedman*, 784 F.3d at 410 (observing that assault weapons and LCMs, which city ordinance banned, "were not common in 1791" and that "[s]emi-automatic guns and large-capacity magazines are more recent developments"). Against this backdrop, statements such as "magazines of more than ten rounds are older than the United States" are

misleading and grossly exaggerate the state of affairs at the Founding. *See* David Kopel, *The History of Firearm Magazines and Magazine Prohibitions*, 78 Alb. L. Rev. 849, 851 (2015) (hereinafter "Kopel"); Pls.' Mot. at 14–15 (relying on Mr. Kopel's "heavy lifting" research). Even some of Plaintiffs' experts concede this point. *See, e.g.*, Helsley Decl. ¶ 8, ECF No. 24-2 (acknowledging that multi-shot weapons like the Giradoni air rifle were "complex, likely unreliable, and fragile" and only "a window into the future"); Hlebinsky Decl. ¶ 23, ECF No. 24-3 (acknowledging it is "typical" to find "one-off examples" of multi-shot weapons at the Founding era).

High-capacity firearms became more common in military settings in the second half of the 19th century, but they were still rare. DeLay Decl. ¶ 22. The "Henry" rifle in 1860 could fire sixteen rounds without reloading, and the "Winchester Model 1866" also became an iconic high-capacity rifle. *Id.* But these "high-capacity firearms went almost exclusively to military buyers through the early 1870s," and "constituted less than 0.2% of all firearms in the United States in the late 1860s and early 1870s." *Id.* ¶¶ 23–24 (describing production numbers); *see also* Pauly Decl. ¶ 62 ("Henry rifles were developed by the start of the American Civil War but were quite expensive—exorbitantly priced for regular rank-and-file troops—and did not see much combat. By the end of the hostilities, the War Department had only officially bought 1,731 of the guns."). Moreover, these rifles did not resemble the semiautomatic weapons of today: they had fixed magazines, and "[u]sers of these 'lever-action' weapons were still required to pull a lever between shots, slowing the firing rate to about one shot every three seconds." Defs.' Opp'n at 23 (citing Pauly Decl. ¶ 61); *see* Rivas Dec. ¶¶ 29–30, ECF No. 17-

12 (same, from expert with Ph.D. in history). Only near the "turn of the [20th] century" were "[t]he semiautomatic firearm and its detachable box magazine . . . invented." Kopel at 857; *see* Rivas Decl. ¶ 29 ("The semi-automatic weapons with which twenty-first century Americans associate large capacity magazines were either not in existence or not manufactured in large numbers until the twentieth century.").[10] It would take yet even more time for these inventions to "improve[] and become more affordable." Pls.' Reply at 11 (citing Kopel at 857–64, which describes firearms in the 20th century). "[T]he first handheld firearm that both (a) had a detachable magazine holding more than ten rounds and (b) was commercially available to civilians in the United States was the Thompson submachine gun, introduced to the market in the 1920s." DeLay Decl. ¶ 25; *see also* Kopel at 851 ("Handgun magazines of more than ten rounds would become popular in the 1930s."). As this history shows, LCMs reflect "dramatic technological changes" in comparison to the weapons of the Founding era. *Bruen*, 142 S. Ct. at 2132.

Second, the record also shows that LCMs implicate "unprecedented societal concerns." *Id.* The District

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[10] Mr. Kopel nevertheless claims that weapons such as the multi-shot flintlock rifle, "Pepperbox" pistols, Colt multi-shot revolver, and 1873 Winchester rifle were common in the 1800s. Kopel at 853–57. In view of the record, the Court joins *Oregon Firearms Federation* in concluding that "those firearms were experimental, designed for military use, rare, defective, or some combination of these features." 2022 WL 17454829 at 12 & n.17; *see also* Amicus Brief at 12–15 (analyzing firearms Plaintiffs identified in this era and concluding that "no firearm capable of firing more than ten rounds without reloading achieved widespread commercial success prior to ratification of the Fourteenth Amendment" (emphasis omitted)).

claims that "[t]he proliferation of modern semiautomatic arms, coupled with the availability of LCMs, directly correlates with the contemporary problem of mass shootings in America today." Defs.' Opp'n at 26. The District's expert, Randolph Roth, has a Ph.D. in history and has spent decades studying homicide and mass violence data. Roth Decl. ¶¶ 9–10. He found that "the development of semiautomatic rifles and handguns dramatically increased the number killed and wounded in mass shootings from 1966 to the present." *Id.* ¶ 53.[11] Mr. Roth claims that "with extended magazines, semiautomatic rifles [in this period] cause an average of 299 percent more deaths and injuries than regular firearms, and semiautomatic handguns 184 percent more than regular firearms." *Id.* ¶ 55. He concluded that "[i]n combination, semiautomatic firearms and extended magazines are extraordinarily lethal." *Id.*; *see also* Amicus Brief at 17 ("[A]s of July 2020, LCMs were used in the ten deadliest mass shootings of the prior decade, and mass shootings from 1990 to 2017 involving LCMs resulted in a 62 percent higher death toll compared to those that did not involve an LCM."); *Or. Firearms Fed'n*, 2022 WL 17454829, at *13 ("Every mass shooting since 2004 resulting in fourteen or more deaths involved

[11] Mr. Roth defined "mass shooting" as "a multiple homicide incident in which four or more victims are murdered with firearms not including the offender(s) within one event, and at least some of the murders occurred in a public location or locations in close geographical proximity (e.g., a workplace, school, restaurant, or other public settings), and the murders are not attributable to any other underlying criminal activity or commonplace circumstance (armed robbery, criminal competition, insurance fraud, argument, or romantic triangle)." *Id.* ¶ 53 n.103. This is similar, although not identical, to the FBI's definition of "mass murder." Cramer Decl. ¶ 3 n.1, ECF No. 24-14.

large-capacity magazines with ten or more bullets."); *Worman*, 922 F.3d at 39 (observing that semiautomatic rifles "equipped with LCMs have been the weapons of choice in many of the deadliest mass shootings in recent history"); *Duncan*, 19 F.4th at 1096 (en banc) ("About three-quarters of mass shooters possess their weapons and large-capacity magazines lawfully. In the past half-century, large-capacity magazines 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 large-capacity magazine as compared with mass shootings that involved a smaller-capacity magazine."); *NYSRPA*, 804 F.3d at 263–64 ("Large-capacity magazines are disproportionately used in mass shootings, like the one in Newtown, in which the shooter used multiple large-capacity magazines to fire 154 rounds in less than five minutes. Like assault weapons, large-capacity magazines result in 'more shots fired, persons wounded, and wounds per victim than do other gun attacks'").[12]

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[12] Plaintiffs' expert, Clayton Cramer, claims that "individual mass murder" is not "particularly modern" and gives examples of mass murders committed by axes or by drowning in prior centuries. Cramer Decl. ¶¶ 19, 23. But this is consistent with the District's claim that individual mass *shootings* and the lethality associated with LCMs are a uniquely contemporary problem. Furthermore, Plaintiffs' expert Gary Kleck concedes that "mass shooters who used LCMs inflicted more casualties than those who did not." Kleck Decl. ¶ 17, ECF No. 24-15. Although Mr. Kleck challenges any inference of causality, the Court need not resolve that debate here. That this is a hotly contested issue only reinforces the fact that LCMs are the subject of unprecedented societal concerns today.

Small wonder that in recent years, numerous state legislatures—at least nine so far—have banned LCMs. *See ANJRPC*, 910 F.3d at 110 & n.1 (citing regulations and observing that they responded to the fact that "[a]ctive shooting and mass shooting incidents have dramatically increased during recent years," and that "[i]n addition to becoming more frequent, these shootings have also become more lethal"); *see also, e.g.*, *Kolbe*, 849 F.3d at 120 (en banc) ("In response to Newtown and other mass shootings, the duly elected members of the General Assembly of Maryland saw fit to enact the State's Firearm Safety Act of 2013 (the "FSA"), which bans the AR-15 and other military-style rifles and shotguns (referred to as "assault weapons") and detachable large-capacity magazines."); *Duncan*, 19 F.4th at 1095 (en banc) ("In response to mass shootings throughout the nation and in California, the California legislature enacted Senate Bill 1446, and California voters adopted Proposition 63.").

Because LCMs implicate "unprecedented societal concerns" and are the object of "dramatic technological changes," the Court's analysis of historical analogues to modern LCM bans requires "nuanced" consideration. *Bruen*, 142 S. Ct. at 2132. In what follows, the Court examines one such historical analogue that the District has proffered: numerous states' high-capacity weapon bans during the Prohibition Era.

2. Whether Prohibition-Era Bans Are Historically Analogous

"Regulations concerning removable magazines and magazine capacity were in fact common as early as the 1920s . . . these regulations were adopted by nearly half of all states, representing approximately 58% of the American population at that time." Spitzer Decl. ¶ 22, ECF No. 17-10 (expert with Ph.D. in

government); Tbl. 1 to Spitzer Decl. (listing states). These regulations largely banned the mere possession of a gun that was capable of holding a certain number of rounds without reloading. Plaintiffs attempt to dismiss these regulations as "restrictions on machine guns," and claim that what makes a machine gun worthy of regulation is "its ability to fire automatically, not [its ability to] accept detachable magazines of more than 10 rounds." Pls.' Reply at 25 & n.17. But it is wrong to characterize these laws as only regulating automatic weapons and their magazine capacity. At least five states in this era, plus the District of Columbia, defined "machine gun" in their statutes *to include semi-automatic weapons* capable of shooting a certain number of bullets without reloading. *See* Act of July 8, 1932, ch. 465, §§ 1, 8, 47 Stat. 650, 650, 652 (District of Columbia); 1927 Mass. Acts 413, 413-14 (Massachusetts); Act of Apr. 10, 1933, ch. 190, 1933 Minn. Laws 231, 232 (Minnesota); Act of Apr. 8, 1933, no. 64, 1933 Ohio Laws 189, 189 (Ohio); 1927 R.I. Pub. Laws 256, 256 (Rhode Island); Act of Mar. 7, 1934, ch. 96, 1934 Va. Acts 137, 137 (Virginia).[13] Indeed, D.C.'s ban—which Congress passed—was modeled heavily after the Uniform Act, "a model law" that the National Rifle Association endorsed. Spitzer Decl. ¶¶ 12–13; *compare* Act of July 8, 1932, ch. 465, §§ 1, 8, 47 Stat.

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[13] These statutes are reproduced in Appendix 3 to the Spitzer Decl. In addition to these six jurisdictions, Michigan banned the possession of "any firearm which can be fired more than sixteen times without reloading" without specifying whether such a firearm was considered a machine gun. Act of June 2, 1927, no. 372, 1927 Mich. Pub. Acts 887, 888; Mich. Pub. Acts 1929, Act No. 206, Sec. 3, Comp. Laws 1929.

These seven jurisdictions capped capacity as follows: D.C. (12); Massachusetts (any); Michigan (16); Minnesota (12); Ohio (18); Rhode Island (12); Virginia (16). *See* App'x 3 to Spitzer Decl.

650, 650, 652, *with* Report of Firearms Committee, Handbook of the National Conference on Uniform State Laws and Proceedings of the Thirty-Eighth Annual Meeting (1928) (attached as Ex. P to Defs.' Opp'n). The D.C. statute defined "machine gun" as "any firearm which shoots automatically *or semiautomatically more than twelve shots without reloading*," and it prohibited the possession of any machine gun within D.C. *See* Act of July 8, 1932, ch. 465, §§ 1, 8, 47 Stat. 650, 650, 654 (emphasis added). As these regulations demonstrate, "[r]estrictions on fully automatic and semi-automatic firearms were closely tied to restrictions on ammunition magazines or their equivalent." Spitzer Decl. ¶ 19. Like fully automatic weapons, semi-automatic weapons "utilize the same fundamental firearms technology: an action that automatically loads a new round into the chamber after each shot is fired . . . and is capable of firing numerous rounds without reloading." *Id.* ¶ 17. By defining "machine gun" broadly, these regulations revealed a widespread tradition dating back to the 1920s and 1930s of regulating high-capacity weapons that could fire rapidly without reloading.

These Prohibition-era bans closely resemble D.C.'s ban today. It is therefore no surprise that the "how" and "why" of D.C.'s LCM ban is analogous to that of the Prohibition-era regulations. Consider the "how," or the "comparable burden," first. *Bruen*, 142 S. Ct. at 2133. The District's LCM ban is similar to the Prohibition-era regulations in that the burden it places on an individual's right of self-defense is relatively light. Recall that studies show that an individual expends on average two bullets in a self-defense incident where she fires her weapon. *See supra* at subsection IV.A.2.b. Similar to the regulations from a century ago, the District's ban does *not* prohibit individuals from

obtaining magazines with capacities of ten or less rounds. Magazines with capacities of ten or less are plentiful. *Cf. Fyock v. City of Sunnyvale*, 25 F. Supp. 3d 1267, 1275 (N.D. Cal. 2014) (citing evidence that LCMs make up minority of all magazines owned). And it appears that these smaller-capacity magazines can readily replace an LCM in a firearm: every Plaintiff in this case admits that the firearms he currently carries— "even those for which the standard magazine is an LCM"— "are all equipped with magazines that are not LCMs." Defs.' Opp'n at 12 (citing Plaintiffs' declarations and Ex. A, Pls.' Answers to Interrogs. at 7–10). Furthermore, like the regulations from a century ago, D.C. law does not prohibit an individual from possessing multiple guns, or multiple magazines. Thus, the burden that the District's ban imposes on ordinary individuals is commensurate to that of the Prohibition-era regulations, and not at all onerous.

Similarly, with respect to the "why," D.C.'s LCM ban is "comparably justified" with the Prohibition-era regulations. The Prohibition era witnessed the growth of gangster and criminal organizations who availed themselves of the enhanced firing capacity of these new technologies. Spitzer Decl. ¶¶ 12–18. In response, numerous states enacted sweeping bans on high-capacity semi-automatic and automatic weapons during this era that applied to *all individuals*, not just a certain subset of the population such as gangsters or criminals. *Id.* This shows that the states confronted the public safety issues of their time with vigor; indeed, these regulations were at the time "obviously uncontroversial" from a constitutional perspective. Robert J. Spitzer, *Gun Law History in the United States and Second Amendment Rights*, 80 L. & Contemp. Probs. 55, 69 (2017) (hereinafter "Spitzer, *Gun Law History*"). Likewise, the District's ban seeks

to promote public safety by limiting the number of rounds in one magazine that an individual may lawfully carry for self-defense in an attempt to mitigate the carnage of mass shootings in this country.[14] Just as states and the District enacted sweeping laws restricting possession of high-capacity weapons in an attempt to reduce violence during the Prohibition era, so can the District now. *See supra* subsection IV.B.1 (describing mass shootings with LCMs as an "unprecedented societal concern").

Plaintiffs raise three main counterarguments to this analysis, but none is persuasive. First, Plaintiffs argue that under *Bruen*, "20th century laws do not establish a historical tradition." Pls.' Reply at 26. But *Bruen* said no such thing. *Bruen* merely stated that "when it comes to interpreting the Constitution, not all history is created equal." 142 S. Ct. at 2136. Because "[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them," the years leading up to 1791 (the adoption of the Second Amendment) and 1868 (the adoption of the Fourteenth Amendment) are particularly important touchstones of constitutional meaning. *Id.* at 2136 (emphasis omitted; citation omitted). Outside these windows, "post-ratification adoption or acceptance of laws" are insignificant to the extent that they are "*inconsistent* with the original meaning of the constitutional text." *Id.* at 2137 (emphasis added) (cleaned up). Thus, in *Bruen*, the Supreme Court paid little heed to 19th and 20th-century evidence because "it contradict[ed] earlier evidence" in that case. *Id.* at 2154 & n.28. That result, however, is not a directive to

[14] Whether LCM bans empirically increase public safety is again not an issue for the Court to resolve. These policy decisions are appropriate for the legislature to consider.

discard 20th century history in *every* case. *Bruen* left open the possibility that in an appropriate case, 20th century history that is not contradicted by earlier evidence can illuminate a modern-day regulation's constitutional vitality. *Cf. Bruen*, 142 S. Ct. at 2136 (citing James Madison for the interpretive principle that "'a regular course of practice' can 'liquidate & settle the meaning of' disputed or indeterminate 'terms & phrases' in the Constitution" (citation omitted)). The 20th century, after all, began over a hundred years ago, and that is no inconsequential length of time. *Cf. Heller II*, 670 F.3d at 1253 ("*Heller* tells us 'longstanding' regulations are 'presumptively lawful.'" (citation omitted)).

In this case, it is appropriate to apply 20th century history to the regulation at issue. The historical tradition of high-capacity regulations in the 1920s and 1930s—over a hundred years ago—does not contradict any earlier evidence, and it supports the constitutionality of the District's LCM ban. To reiterate, *Bruen* had no occasion to consider 20th century history because while "handguns . . . had gained a fairly secure footing in English culture" leading up to the Founding era, there was no evidence that public carry was limited "only to those who demonstrate some special need for self-protection" like New York's proper cause regime. 142 S. Ct. at 2142. *Bruen* then ventured into the 18th century, where it found that "the history reveals a consensus that States could *not* ban public carry altogether." *Id.* at 2146 (emphasis in original). By contrast, in this case, the 1920s and 1930s regulations do not contradict any earlier evidence. That is so because semiautomatic and high-capacity weapons were *not* technologically feasible and commercially available in meaningful quantities until the early 1900s. *See supra* subsection IV.B.1; Amicus Brief at 16

("[C]rucially, when multi-shot firearms did begin to gain widespread civilian use, states across the country passed laws limiting access to these weapons." (emphasis omitted)). Unlike the handguns at issue in *Bruen*, the weapons here did not gain a "secure footing" in American society prior to the 1900s. 142 S. Ct. at 2142. Accordingly, they did not pose "a general societal problem that has persisted since the 18th century," and it would make no sense to divine constitutional significance from non-existent legislation concerning non-existent problems. *Id.* at 2131. States do not "regulate for problems that do not exist"; instead, they "adopt laws to address the problems that confront them." *McCullen v. Coakley*, 573 U.S. 464, 481 (2014); *see also McGrain v. Daugherty*, 273 U.S. 135, 175 (1927) ("A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change[.]").

To flesh this principle out a little more, consider personal jetpacks, an "expensive and experimental curiosity" that are unregulated today despite the obvious safety issues and dangers they pose. DeLay Decl. ¶ 21. "A future historian (or jurist) discovering evidence that a patent was taken out on a jetpack design as early as 1919 (it was); that militaries remained intrigued by the technology throughout the century (indeed, they still are); and that the jetpack commanded enduring popular interest, could conclude that the absence of public regulation reflected an ideological disposition against regulating jetpacks. But the simpler and more accurate explanation would be that jetpacks remained too rare to attract regulatory attention in 2022." *Id.*

Second, Plaintiffs attempt to dismiss the Prohibition-era regulations as "irrelevant outliers." Pls.' Reply at 25. But unlike "only three restrictions on public carry" that the government could produce in *Bruen*, which the Supreme Court "doubt[ed] . . . could suffice to show a tradition of public-carry regulation," 142 S. Ct. at 2142, the District here has pointed to no less than *six states plus D.C.* that regulated semi-automatic and automatic weapons based on their high firing capacity. *See supra* subsection IV.B.2.[15] Of particular significance, the D.C. law that the Court has discussed above was passed by Congress (a nationwide body) and drew heavily from the Uniform Act (a model law). Like D.C., Massachusetts, Michigan, Minnesota, and Rhode Island all banned mere possession. *See* Act of July 8, 1932, ch. 465, §§ 1, 8, 47 Stat. 650, 650, 652; 1927 Mass. Acts 413, 413-14; Act of June 2, 1927, no. 372, 1927 Mich. Pub. Acts 887, 888; Mich. Pub. Acts 1929, Act No. 206, Sec. 3, Comp. Laws 1929; Act of Apr. 10, 1933, ch. 190, 1933 Minn. Laws 231, 232; 1927 R.I. Pub. Laws 256, 256. Plaintiffs try to distinguish the Ohio and Virginia laws as outliers because the former permitted *licensed* carry and the latter permitted defensive uses of these weapons. Pls.' Reply at 26. But Ohio's licensing law in 1933 required one to post $5,000 bond—today's equivalent of over $115,000—effectively "prevent[ing] law-abiding citizens with ordinary self-defense needs from carrying" these

[15] Actually, that number could be potentially as high as ten jurisdictions, if one reads three ambiguous state statutes in favor of the District. *See* Spitzer, *Gun Law History* at 69 (describing statutory ambiguity in machine gun bans from Illinois, Louisiana, and South Carolina).

weapons. *Bruen*, 142 S. Ct. at 2150.[16] As for Virginia, although it prohibited possession of a machine gun only "for offensive and aggressive purpose," it "*presumed*" this purpose whenever the weapon was possessed outside the home. Act of Mar. 7, 1934, ch. 96, 1934 Va. Acts 137, 137 (emphasis added). In short, Plaintiffs cannot avoid the conclusion that there is a historical tradition of severe restrictions, if not outright bans, on these high-capacity weapons. Accordingly, the District's law is at the very least "analogous enough to pass constitutional muster." *Bruen*, 142 S. Ct. at 2133.

Third, Plaintiffs argue that the subsequent repeal of some of these state regulations undercuts the District's reliance on this history. Pls.' Reply at 26. But Plaintiffs do not explain why the decision of some states to "devise solutions to social problems that suit local needs and values" is anything more than permissible "experimentation with reasonable firearms regulations . . . under the Second Amendment." *McDonald v. City of Chicago*, 561 U.S. 742, 785 (2010). Take Rhode Island, for example. Although it eventually repealed its 1927 statute banning possession of machine guns (defined, by the way, to include "any weapon which shoots more than twelve shots semiautomatically without reloading"), Rhode Island changed course in 2022 "[i]n the wake of recent mass shootings" and amended its law to "specifically ban LCMs," *Ocean State Tactical*, 2022 WL 17721175, at *4. And other jurisdictions, like D.C., made modifications to its law without ever repealing it. *See* Kopel at 874 ("The District of Columbia ban, with modifications, is still in

[16] *See* U.S. Bureau of Labor Statistics, CPI Inflation Calculator, at https://www.bls.gov/data/inflation_calculator.htm (last visited April 20, 2023).

effect."). The Second Amendment gives states space to experiment, and that is what Rhode Island and D.C. have done. *Bruen* did contemplate that state regulations that were "rejected on constitutional grounds" can "provide some probative evidence of [a similar modern regulation's] unconstitutionality." 142 S. Ct. at 2131. But Plaintiffs have not suggested that any repeal was related to constitutional infirmity. The Court has conducted independent research on this question and did not find anything suggesting this was the reason, either. Thus, the Court is satisfied that the District has met its burden to produce a historical analogue justifying its LCM ban.[17]

V. CONCLUSION

For the foregoing reasons, Plaintiffs' Motion for a Preliminary Injunction (ECF No. 8) is denied. An order consistent with this Memorandum Opinion is separately and contemporaneously issued.

Dated: April 20, 2023

/s/ Rudolph Contreras
RUDOLPH CONTRERAS
United States District Judge

[17] The parties also dispute whether other potential historical analogues that the District introduced are relevantly similar to the ban at issue here. These include regulations on gunpowder, trap guns, and dangerous weapons such as Bowie knives. Defs.' Opp'n at 28–32, 35–39. Because the Court holds that the District has adequately identified a historical analogue in the Prohibition-era regulations, it has no occasion to consider additional examples.

APPENDIX C

D.C. Code § 7-2506.01

*** The Official Code is current through January 16, 2025 ***

District of Columbia Official Code > Division I. Government of District. (Titles 1 — 10) > Title 7. Human Health Care and Safety. (Subts. A — L) > Subtitle J. Public Safety. (Chs. 22 — 28B) > Chapter 25. Firearms Control. (§§ 7-2501.01 — 7-2551.03) > Unit A. Firearms Control Regulations. (Subchs. I — X) > Subchapter VI. Possession of Ammunition. (§ 7-2506.01)

§ 7-2506.01. Persons permitted to possess ammunition.

(a) No person shall possess ammunition in the District of Columbia unless:

(1) He is a licensed dealer pursuant to subchapter IV of this unit;

(2) He is an officer, agent, or employee of the District of Columbia or the United States of America, on duty and acting within the scope of his duties when possessing such ammunition;

(3) He is the holder of a valid registration certificate for a firearm pursuant to subchapter II of this chapter; except, that no such person shall possess one or more restricted pistol bullets;

(4) He holds an ammunition collector's certificate on September 24, 1976; or

(5) He temporarily possesses ammunition while participating in a firearms training and safety class conducted by a firearms instructor.

(b) No person in the District shall knowingly possess, sell, or transfer any ammunition feeding device that is, in fact, a large capacity ammunition feeding device regardless of whether the device is attached to a firearm.

(c) For the purposes of this section, 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.