No. 23-CF-0514

DISTRICT OF COLUMBIA COURT OF APPEALS

TYREE BENSON, *Plaintiff-Appellant*,

v.

UNITED STATES, *Appellee*,

and

DISTRICT OF COLUMBIA, *Intervenor-Appellee*.

On Appeal from the Superior Court of the District of Columbia
(2022-CF2-005996) (Hon. Lynn Leibovitz)

AMICI CURIAE BRIEF OF NEW JERSEY, MASSACHUSETTS, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, HAWAI'I, ILLINOIS, MARYLAND, MICHIGAN, MINNESOTA, NEVADA, NEW YORK, OREGON, RHODE ISLAND, VERMONT, VIRGINIA, AND WASHINGTON IN SUPPORT OF EN BANC REVIEW

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STATEMENT OF AMICI INTEREST

Amici States—New Jersey, Massachusetts, California, Colorado, Connecticut, Delaware, Hawai'i, Illinois, Maryland, Michigan, Minnesota, Nevada, New York, Oregon, Rhode Island, Vermont, Virginia, and Washington—are responsible for the "suppression of violent crime" within their borders, and have enacted a range of laws designed to stem the scourge of gun violence. *United States v. Morrison*, 529 U.S. 598, 618 (2000). *Amici* thus have an interest in ensuring the Second Amendment allows governments flexibility to protect the public consistent with historical traditions of firearm regulation, as *Amici*—like the District of Columbia—maintain restrictions on large-capacity magazines (LCM) or other unusually dangerous items.

Amici submit this brief pursuant to Rule 29(b)(2) to explain why the District's LCM law, like *Amici*'s similar laws, is wholly consistent with the Second Amendment. Although these laws differ in their particulars, *Amici* share the firm conviction that the Constitution allows States and municipalities to address gun violence in a manner that is adapted to their local needs and consistent with our Nation's historical traditions. The District's law falls well within that regulatory tradition. This Court should grant en banc review to bring its jurisprudence in line with the unanimous consensus of the federal circuits on this issue and to preserve the District's authority to keep its citizens safe.

ARGUMENT

I. This Court Should Rehear This Case En Banc Because LCM Restrictions Are Constitutional.

En banc review is warranted because, as every federal circuit so far has held, LCM restrictions are constitutional. Courts evaluating Second Amendment challenges ask (1) whether the Second Amendment's plain text covers an individual's conduct—which includes evaluating whether the regulated item is "'in common use' today for self-defense," and if it does, (2) whether the law is still consistent with historical traditions of firearm regulation. *NYSRPA, Inc. v. Bruen*, 597 U.S. 1, 17-18, 32 (2022). Under both steps, the District's law is valid.

1. At the first step, even assuming that LCMs qualify as "arms," *but see Duncan v. Bonta*, 133 F.4th 852, 867-68 (9th Cir. 2025) (en banc) (holding LCMS are not protected "arms"), they are not in common use for self-defense. Because "self-defense is 'the central component' of the Second Amendment," a weapon must be "'in common use' today for self-defense" to receive protection at the threshold, *Bruen*, 597 U.S. at 29, 32; the right "emphatically does not stretch to encompass excessively dangerous weapons ill-suited and disproportionate to such a purpose," *Bianchi v. Brown*, 111 F.4th 438, 452 (4th Cir. 2024) (en banc); *see also, e.g.*, *Dist. of Columbia v. Heller*, 554 U.S. 570, 627 (2008) (weapons like M-16s "most useful in military service" and not typically possessed for self-defense are unprotected).

LCMs are not in common use for self-defense. LCMs were "developed for military use" in order to permit "soldiers to fire without pausing to reload." *Or. Firearms Fed'n v. Kotek*, 682 F.Supp.3d 874, 909-10 (D. Or. 2023). That is only more true today, as modern weapons "fed continuously by [LCMs]—are dramatically and reliably lethal." *NAGR v. Lamont*, 153 F.4th 213, 238 (2d Cir. 2025); *see Ocean State Tactical, LLC v. Rhode Island*, 95 F.4th 38, 47 (1st Cir. 2024) (agreeing that "magazine capacity directly corresponds to lethality") ("*OST*"); *Duncan*, 133 F.4th at 860 (9th Cir. 2025) (en banc) (noting "ability to use" an LCM is an "especially dangerous feature" of certain firearms). Indeed, LCMs are ill-suited for self-defense since "civilian self-defense rarely—if ever—calls for the rapid and uninterrupted discharge of many shots." *OST*, 95 F.4th at 45. An average case in which a gun is fired in self-defense involves 2 shots, not more than 10. *See Bianchi*, 111 F.4th at 459. Since the District's law only limits access to the *eleventh* bullet before pausing to reload, it does not have any impact on common magazine usage in self-defense.

The panel erroneously relied primarily on the notion that LCMs are "ubiquitous" and "facilitate armed self-defense." Op. 13, 26. But the proper inquiry assesses whether a particular weapon is "'in common *use*' today for self-defense." *Bruen*, 597 U.S. at 32 (emphasis added). Just because something *could* facilitate self-defense and is allegedly commonly owned does not imply it is commonly *used* for and actually *does* facilitate real-world self-defense. *See Hanson v. District of Columbia*,

120 F.4th 223, 232 (D.C. Cir. 2024) (explaining these are distinct inquiries). The panel placed too much weight on a single sentence in *Bruen,* which merely stated that "Arms" "covers modern instruments that facilitate armed self-defense." 597 U.S. at 28. But that is incomplete: the question remains *which* such arms that could theoretically facilitate self-defense are covered. But *Bruen* does not hold that any item that could facilitate self-defense is covered by the Second Amendment. Instead, both *Bruen* and first principles make clear that the threshold distinguishing line is common use: only those items commonly used for self-defense are protected by the Second Amendment. A person could use a machinegun for self-defense, but no court has held that an M-16 is in common use for self-defense. Neither are LCMs.

2. In any event, at the second step, LCM bans are "consistent with the principles that underpin our regulatory tradition." *United States v. Rahimi*, 602 U.S. 680, 692 (2024). That tradition permits restrictions on "dangerous or unusual" weapons, *id.* at 697—that is, on "unusually dangerous" items, *NAGR*, 153 F.4th at 233-34. *See also id.* at 251 (Nathan, J., concurring) (citing treatises and concluding that government can regulate weapons which are "unusually dangerous").

The panel misunderstood that Founding evidence. The panel insisted that a weapon can only be prohibited based on a conjunctive "dangerous *and* unusual" test, such that the "inquiry is over" if an arm is "in common and ubiquitous use." Op. 25. But that simply ignores Blackstone and other commentators who also said weapons

could be regulated when they were "dangerous or unusual"—indeed, using it interchangeably with the "dangerous and unusual" construction. Rather than grapple with this evidence, the panel insisted *Heller* already used the dangerous *and* unusual formulation. Op. 30 n.11. But more recently, *Rahimi* utilized the disjunctive phrase, dangerous or unusual, thus undermining the idea that *Heller* had established some conjunctive rule. *See* 602 U.S. at 697. Moreover, this Court cannot ignore compelling historical evidence in an area where "the Supreme Court has instructed us to take historical analysis seriously." *NAGR*, 153 F.4th at 252 (Nathan, J., concurring).

Indeed, this Court can also rely on our longstanding history of weapons regulation to reject a circulation-only test and hold that unusually dangerous weapons may be regulated after market distribution. States have long regulated weapons "once it bec[ame] clear that [the weapon was] exacting an inordinate toll on public safety and societal wellbeing." *Bianchi*, 111 F.4th at 446. Consider bans on the Bowie knife, a popular blade in the 18th Century which was nonetheless "liable to criminal misuse" and implicated in "an alarming proportion of the era's murders and serious assaults." *NAGR*, 153 F.4th at 243. Following their proliferation, "the District of Columbia and [almost] every state … passed laws restricting Bowie knives." *OST*, 95 F.4th at 48; *id.* at 46 (discussing "the severe restrictions … once their popularity in the hands of murderers became apparent"). No court invalidated these laws, nor is there evidence they were questioned by Legislatures or commentators.

So too for slungshots, a type of concealed weapon "use[d] by criminals and as fighting implements." *Knife Rights, Inc. v. Bonta*, 165 F.4th 1330, 1344 (9th Cir. 2026). Once states came to understand their injurious capacity, "many" jurisdictions banned their possession. *Id.* If the panel were correct that commonality is dispositive, these prohibitions would not have withstood Second Amendment scrutiny, as their popularity would preclude an inquiry into their dangerousness. But their regulation followed, rather than preceded, the weapons' popularity.[1]

3. The panel's contrary position linking the ubiquity of LCMs with their constitutionality fails as a matter of both history and precedent. When *Heller* held that it would be "startling" to read the Second Amendment to prohibit restrictions on machinegun ownership, it did so without a word as to the weapon's popularity. 554 U.S. at 624. So too in *United States v. Miller*, where the Court declared the Second Amendment did not "guarantee[] the right to keep and bear" the sawed off shotgun without assessing circulation. 307 U.S. 174, 178 (1939); *see also OST*, 95 F.4th at 51 (noting that *Miller* did not assess sawed off shotgun's popularity).

[1] That tradition has continued at every period of American history. During the 1920s and 1930s, the Nation witnessed a new wave of regulation of emergent weapons that threatened public safety. Restrictions of this era "include[] bans on sawed-off shotguns … [and] restrictions on machine guns." *OST*, 95 F.4th at 46. Sawed-off shotguns were regulated federally in 1934, "after they became popular with the 'mass shooters of their day.'" *Id.* at 47. Machineguns were also regulated federally in 1934, about fifty years after their invention, *id.* at 50, and largely "banned nationally since 1986," *id.* at 46. The same lesson is clear: restrictions *after* items circulate and pose a danger is common, not forbidden.

Further, a commonality-only test "strain[s] both logic and administrability." *NAGR*, 153 F.4th at 233. Because circulation depends largely on lawfulness, the test is circular. *Bevis v. City of Naperville*, 85 F.4th 1175, 1190 (7th Cir. 2023). And it "hinge[s] the right on … a trivial counting exercise that would lead[ ] to absurd consequences where unusually dangerous arms like the M-16 … can gain constitutional protection merely because [they] become[ ] popular before the government can sufficiently regulate [them]." *NAGR*, 153 F.4th at 233 (cleaned up). That arms race between legislatures on the one hand and gun manufacturers and advertisers on the other is far afield from the historical analysis *Bruen* requires. Indeed, if one "looked to numbers alone, the federal [assault weapons] ban would have been constitutional before 2004, but unconstitutional thereafter," when "these weapons began to occupy a more significant share of the market." *Bevis*, 85 F.4th at 1199. That "lacks both textual and historical provenance," *id.*, and is illogical. *Bianchi*, 111 F.4th at 461.

The commonality framework also risks untenable consequences: namely, affording constitutional protection to machineguns and bump stocks. According to the ATF, as of June 2025, there were more than 230,000 registered machineguns that could be transferred between private individuals. *See United States v. Morgan*, 150 F.4th 1339, 1347 (10th Cir. 2025). That is more than the 200,000 stun guns in lawful circulation that two justices on the U.S. Supreme Court indicated were sufficiently common to receive Second Amendment protection, were a popularity test actually

adopted. *Caetano v. Massachusetts*, 577 U.S. 411, 420 (2016) (Alito, J., concurring in the judgment). Of course, that cannot be right: the Supreme Court has held that granting Second Amendment protections to machineguns would be "startling." *Heller*, 554 U.S. at 624. And the same concerns apply to bump stocks, where circulation may exceed 500,000. *See Bump-Stock-Type Devices*, 83 Fed. Reg. 13,442, 13,451 (March 29, 2018); *Garland v. Cargill*, 602 U.S. 406, 429 (2024) (Alito, J., concurring) (noting that Congress could regulate bump stocks). So it cannot be the case that constitutional protections attach to a firearm based only on market circulation.

Finally, there is no serious question that LCMs—designed to facilitate a rapid spray of bullets to respond to warlike threats—are unusually dangerous, especially in comparison to their lack of self-defense utility. LCMs "make it possible to fire a large number of rounds without re-loading, then to reload quickly when those rounds are spent," so "a single person with a single [semiautomatic] weapon can easily fire literally hundreds of rounds within minutes." H.R. Rep. No. 103-489, at 19 (1994). This allows mass shooters to wreak havoc without pausing to reload—pauses that are critical for law enforcement or bystanders to intervene, or for the victims to flee. Because our tradition permits States and localities to ban unusually dangerous weaponry, and LCMs fit the bill, the District's restrictions were constitutional.

II. This Court Should Rehear This Case En Banc Given Its Importance.

This Court grants en banc review where "the proceeding involves [a] question[] of exceptional importance," Rule 40(b)(2)(C). The unprecedented Second Amendment holding below, which limits the District's ability to protect its citizens and creates a split of authority, presents such an occasion.

First, the decision below is the first post-*Bruen* to hold an LCM restriction unconstitutional. This Court does not "depart from a clear path already taken by the courts in the Federal system." *Eastern Sav. Bank v. Pappas*, 829 A.2d 953, 958 n.9 (D.C. 2003) (citation omitted). But every federal circuit court to consider this issue post-Bruen has held that the Second Amendment permits restrictions on LCMs. *See, e.g.*, *OST*, 95 F.4th at 52 (1st Cir.); *NAGR*, 153 F.4th at 236 (2d Cir.); *Bianchi*, 111 F.4th at 442 (4th Cir.); *Bevis*, 85 F.4th at 1202 (7th Cir.); *Duncan*, 133 F.4th at 869 (9th Cir.). Indeed, the panel decision conflicts with a D.C. Circuit decision reviewing the very same D.C. law challenged here. *See Hanson*, 120 F.4th at 241.

The decision further undermines the District's ability to protect public safety. The Second Amendment allows "representative democracy to respond to an urgent public safety crisis" by restricting the possession of unusually dangerous weapons, like LCMs. *Bianchi*, 111 F.4th at 472. After all, States exercising their police power have "great latitude … to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons." *United Haulers Ass'n v. Oneida-Herkimer Solid*

Waste Mgmt. Auth., 550 U.S. 330, 342-43 (2007). But the panel's decision upends that legislative judgment as to how best protect public safety and, in so doing, deprives the legislature of the flexibility necessary to ensure peace within the District's borders, flexibility that is of particular importance to the *Amici* States.

Indeed, LCMs represent a significant threat to public safety. Alone and especially when combined with assault rifles, LCMs are "especially dangerous in mass shootings," *NAGR*, 153 F.4th at 241, and can result in "mass produced mayhem," *United States v. Price*, 649 F.3d 857, 861 (8th Cir. 2011). *See also supra* at 3 (noting LCMs' military origin). Whether District residents have a constitutional right to possess such unusually dangerous items is a question the full Court should resolve.

Last, the panel's decision has potentially wide-reaching effects. If left in place, its reasoning—particularly its adoption of a numerical commonality test as the dispositive Second Amendment inquiry—would be cited by litigants to challenge restrictions on other unusually dangerous items that have at least some broad circulation, such as machineguns and bump stocks. A ruling that could lead to inviolable protection for such items further harms public safety. This full Court's review is necessary to bring its precedent in line with all federal appellate courts to consider this issue and to ensure the continued rejection of a simple popularity test.

CONCLUSION

This Court should grant en banc review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 25, 2026, the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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