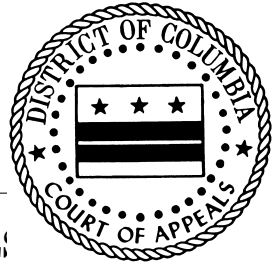


No. 23-CF-514



IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

Clerk of the Court
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TYREE BENSON,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee,

and

DISTRICT OF COLUMBIA,

Intervenor-Appellee.

On Appeal from the Superior Court of the District of Columbia

**AMICUS BRIEF OF GUN VIOLENCE PREVENTION GROUPS
IN SUPPORT OF INTERVENOR-APPELLEE'S PETITION FOR
REHEARING EN BANC**

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CORPORATE DISCLOSURE STATEMENT

Everytown for Gun Safety (formally, Everytown for Gun Safety Action Fund) has no parent corporations. It has no stock; hence, no publicly held company owns 10% or more of its stock.

Brady Center to Prevent Gun Violence has no parent corporations. It has no stock; hence, no publicly held company owns 10% or more of its stock.

Giffords Law Center to Prevent Gun Violence is a nonprofit organization. It has no parent corporations. It has no stock, and therefore no publicly held company owns 10% or more of its stock.

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INTEREST OF AMICI CURIAE

Amici curiae are three nonprofit organizations dedicated to ending gun violence through education, research, and advocacy. Everytown for Gun Safety is the nation’s largest gun-violence-prevention organization, with nearly eleven million supporters across the country. Brady Center to Prevent Gun Violence is the nation’s longest-standing nonpartisan, nonprofit organization dedicated to reducing gun violence through education, research, and advocacy. Giffords Law Center to Prevent Gun Violence is a survivor-led national policy organization dedicated to enacting and defending laws and programs proven to reduce gun violence and save lives.¹

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici agree with the District of Columbia that this case should be reheard en banc to address several issues of exceptional importance—and in particular, “to remedy the Division’s first-of-its-kind facial invalidation of [a large-capacity magazine (LCM)] prohibition, which splits from the unanimous consensus among appellate courts and

¹ Amici submit this brief pursuant to Rule 29(b). No party’s counsel authored this brief in whole or part and, apart from amici, no person contributed money to fund its preparation or submission.

creates an intra-jurisdictional split with the D.C. Circuit.” Pet. 7. The Division’s outlier ruling rests on several significant legal errors and creates an immediate and untenable threat to public safety in the District. The full Court should vacate the decision and rehear the case.

As the petition explains, the Division committed multiple errors at both the text and history steps of the Second Amendment framework set out in *New York State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1 (2022), and *United States v. Rahimi*, 602 U.S. 680 (2024). See Pet. 9-11. Amici focus here on one of the most egregious and consequential: the majority’s flawed determination that if a weapon or magazine is owned in sufficient numbers, then it is in “common use” and cannot be prohibited. This reliance on “ownership statistics” alone “dangerously paves the way for popularity contests to decide issues of public safety.” Op. 62 n.6 (Blackburne-Rigsby, C.J., dissenting).

That fundamental error—which conflicts with the reasoning of the D.C. Circuit and other federal and state appellate courts—infected the majority’s entire analysis and carries grave consequences. It puts the safety of the District’s residents and visitors at risk “because of the likelihood that [LCMs] will flood into the District.” *Hanson v. District of*

Columbia, 120 F.4th 223, 247 (D.C. Cir. 2024), *cert. denied*, 145 S. Ct. 2778 (2025). This result would threaten devastating harm, as LCMs “are ‘extraordinarily lethal’ when used in combination with semiautomatic firearms, increasing the number of individuals killed in mass shootings and other criminal activity.” *Id.* at 246; *see also, e.g., Duncan v. Bonta*, 133 F.4th 852, 862 (9th Cir. 2025) (en banc) (“More than twice as many people have been killed or injured in mass shootings that involved a large-capacity magazine than in mass shootings that involved a smaller-capacity magazine.”), *petition for cert. filed*, No. 25-198 (U.S. Aug. 15, 2025). At the same time, LCM laws like the District’s “do[] not limit the number of firearms, bullets, or magazines an individual may possess and carry,” Pet. 8, and “d[o] not impair the Second Amendment right to self-defense,” *Nat’l Ass’n for Gun Rights v. Lamont*, 153 F.4th 213, 247 (2d Cir. 2025) (“NAGR”), *petition for cert. filed*, No. 25-421 (U.S. Oct. 3, 2025).

This case plainly involves a question of exceptional importance involving a serious danger to public safety, given how lethal LCMs have proven to be. Moreover, the Division’s reasoning also has potentially dangerous implications for Second Amendment cases even beyond

LCMs, including for challenges to laws restricting assault weapons and machineguns. In fact, in just the first few weeks since the Division issued its opinion, litigants across the country have already repeatedly cited it in support of numerous Second Amendment claims.²

The full Court should vacate the Division’s decision, rehear this case, and uphold the challenged law. The petition should be granted.

ARGUMENT

The Second Amendment’s protection extends only to arms “in common use’ today for self-defense.” *Bruen*, 597 U.S. at 32 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 627 (2008)); *see, e.g., Hanson*, 120 F.4th at 232; *United States v. Morgan*, 150 F.4th 1339, 1345 (10th Cir. 2025), *cert. denied*, No. 25-6055, 2025 WL 3507095 (U.S. Dec. 8, 2025). And laws regulating those arms are constitutionally permissible if they are “consistent with the principles that underpin our regulatory tradition.” *Rahimi*, 602 U.S. at 692. The Division erred by

² *See, e.g.,* Suppl. Br. for Pet’rs, *Nat’l Ass’n for Gun Rights v. Lamont*, No. 25-421 (U.S. Mar. 17, 2026) (challenging prohibitions on LCMs and assault weapons); Appellees’ Notice of Suppl. Auth., *Barnett v. Raoul*, No. 24-3060 (7th Cir. Mar. 11, 2026), ECF No. 112 (same); Appellees’ Notice of Suppl. Auth., *Yukutake v. Lopez*, No. 21-16756 (9th Cir. Mar. 6, 2026), ECF No. 180 (challenging firearms licensing provision and inspection requirement).

turning this two-step test of “common use” for self-defense and historical inquiry into a single step focused exclusively on popularity. Op. 24-25; *see id.* at 63, 68, 71-72 (Blackburne-Rigsby, C.J., dissenting); Pet. 9-11. That is not the law.

Other courts to consider this issue, including the D.C. Circuit, have instead rejected the contention that the Second Amendment inquiry reduces to a “trivial counting exercise.” *Bianchi v. Brown*, 111 F.4th 438, 460 (4th Cir. 2024) (en banc), *cert. denied*, 145 S. Ct. 1534 (2025); *see, e.g., Hanson*, 120 F.4th at 232-33; *Duncan*, 133 F.4th at 882-83 (citing cases). As these courts have explained, “the [Supreme] Court’s choice of the phrase common *use* instead of common *possession*’ means more than ‘the number of a certain weapon in private hands.’” *Morgan*, 150 F.4th at 1347 (quoting *Bianchi*, 111 F.4th at 460, and *Hanson*, 120 F.4th at 233); *see* Pet. 9-10.

If left uncorrected, the Division’s “rigid” numbers-based approach would mean that the District would be powerless to prohibit a weapon or accessory “any time an undefined number of people own an undefined number” of that item, regardless of how rarely it is used in self-defense, its suitability for that purpose, or its excessive dangerousness. *Duncan*,

133 F.4th at 882-83; *see Bianchi*, 111 F.4th at 461. Such a standard “would strain both logic and administrability” and “would ‘lead[] to absurd consequences’ where unusually dangerous arms like the M-16 or ‘the W54 nuclear warhead’ can ‘gain constitutional protection merely because [they] become[] popular before the government can sufficiently regulate [them].” *NAGR*, 153 F.4th at 233 (quoting *Bianchi*, 111 F.4th at 460); *see* Pet. 9.

The Division’s approach is further contradicted by historical tradition. Throughout this nation’s history, jurisdictions have often moved to prohibit weapons precisely because they were becoming “all too common,” *Friedman v. City of Highland Park*, 784 F.3d 406, 408 (7th Cir. 2015), thereby creating a genuine public safety problem. “[S]ince the Founding era, legislatures have enacted laws to protect innocent persons from especially dangerous uses of weapons *once those perils have become clear.*” *Duncan*, 133 F.4th at 876-77 (emphasis added); *see also, e.g., Ocean State Tactical, LLC v. Rhode Island*, 95 F.4th 38, 46 (1st Cir. 2024) (describing “devices that have historically been prohibited once their danger became manifest”), *cert. denied*, 145 S. Ct. 2771 (2025). That pattern followed the path of the common law,

which reveals a tradition of regulation “emerg[ing] from concern about danger to the public, not statistical commonality of the threatening weapon.” *NAGR*, 153 F.4th at 252 (Nathan, J., concurring); *see id.* at 234 (majority opinion) (“We fully join in Judge Nathan’s concurrence.”).³

The Division’s “ownership-statistics theory,” *Duncan*, 133 F.4th at 883, is also inconsistent with constitutional principles more generally. As other courts have found, no other right is “read to expand or contract based on nothing more than contemporary market trends.” *Bianchi*, 111 F.4th at 461; *see Nat’l Ass’n for Gun Rights v. Lamont*, 685 F. Supp. 3d 63, 102 (D. Conn. 2023) (observing that “no other constitutional right waxes and wanes based solely on what manufacturers choose to sell”), *aff’d*, *NAGR*, 153 F.4th 213. That makes perfect sense, as the reasoning of such an approach is inescapably “circular.” *Bevis v. City of Naperville*, 85 F.4th 1175, 1190 (7th Cir. 2023), *cert. denied*, 144 S. Ct. 2491 (2024); *see Bianchi*, 111 F.4th at 461 (rejecting position that “arms manufacturers can secure constitutional immunity for their products so

³ Indeed, as “every Circuit to address the question” at step two of the Second Amendment inquiry has held, LCM restrictions like the District’s align with this nation’s “historical tradition of regulating unusually dangerous weapons after their use in terror or to perpetuate mass casualties.” *NAGR*, 153 F.4th at 246 n.40.

long as they distribute a sufficient quantity before legislatures can react”). “[I]t would be absurd to say that the reason why a particular weapon can be banned is that there is a statute banning it, so that it isn’t commonly owned.” *Bevis*, 85 F.4th at 1190 (quoting *Friedman*, 784 F.4th at 409). The Division’s reasoning appears to endorse that illogical analysis. *See* Op. 34-35; Pet. 9.

Moreover, as the dissent explained, the majority’s application of its popularity test is perhaps as problematic as the test itself. Op. 72 n.9 (Blackburne-Rigsby, C.J., dissenting). The majority did not determine how many of a weapon or accessory individuals must own to immunize that item from prohibition, acknowledging this “difficult line-drawing problem.” *Id.* at 33. But it nevertheless concluded that LCMs passed the unspecified threshold based on two highly suspect sources—one of which it acknowledged was “nobody’s idea of a fair and neutral source,” *id.* at 27 n.9, and both of which courts and scholars have roundly rejected as methodologically flawed and unreliable.⁴ This Court should

⁴ *See, e.g., Barnett v. Raoul*, No. 3:23-cv-00209, 2024 WL 4719468, at *7-9 (S.D. Ill. Nov. 8, 2024) (granting government’s motion to preclude consideration of same survey evidence relied on by Division majority because it is “empirically and statistically unreliable” and “methodologically suspect and potentially biased”); Deborah Azrael et

be “duly skeptical” of such “potentially shallow, scientific-sounding statistics” and make clear that they are not a sound basis for any analysis. Op. 72 n.9 (Blackburne-Rigsby, C.J., dissenting).

In sum, as the petition explains, “[t]he Division’s decision cries out for en banc review.” Pet. 1. That is particularly so given the “substantial harm” and “lethality” the ruling could unleash if allowed to stand, *see Hanson*, 120 F.4th at 246-47, and its potential implications not only for the District’s LCM law, but for Second Amendment doctrine more generally, including future cases concerning assault weapons or machineguns.

CONCLUSION

The Court should grant the petition for rehearing en banc.

al., *A Critique of Findings on Gun Ownership, Use, and Imagined Use from the 2021 National Firearms Survey: Response to William English*, 78 S.M.U. L. Rev. 239 (2025).

Dated: March 25, 2026

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CERTIFICATE OF COMPLIANCE

This brief complies with the length limit of District of Columbia Court of Appeals Rule 29(b)(4) because, excluding the parts of the document exempted by District of Columbia Court of Appeals Rule 32(a)(5), it does not exceed ten pages.

This document complies with the typeface and formatting requirements of District of Columbia Court of Appeals Rule 32(a)(3) and (4).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 25, 2026, I electronically filed this amicus brief with the Court's electronic filing system, which will send notice of such filing to all parties.

Respectfully submitted,

/s/ Erik P. Fredericksen
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