DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 23-CF-514

TYREE BENSON, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

UNITED STATES' RESPONSE TO THE DISTRICT OF COLUMBIA'S PETITION FOR REHEARING OR REHEARING EN BANC

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Cr. No. 2022-CF2-5996

INTRODUCTION

The Court should grant the District's Petition for Rehearing En Banc. Although the United States is no longer defending the constitutionality of the statute prohibiting possession of a large-capacity ammunition feeding device (PLCAFD), rehearing is necessary to "maintain uniformity" of the Court's decisions and to resolve "a question of exceptional importance." D.C. App. R. 35(a).

First, this case involves issues of exceptional importance to public safety in the District. The majority should not have struck down appellant Tyree Benson's convictions for carrying a pistol without a license (CPWL), possession of an unregistered firearm (UF), and unlawful possession of ammunition (UA). Contrary to the majority's analysis, equipping a firearm with a large-capacity ammunition feeding device does not make the firearm ineligible for registration under the relevant statutes. The majority thus erroneously concluded that the constitutional infirmity with the PLCAFD statute "infect[ed]" Benson's other firearms convictions. *Benson v. United States*, --- A.3d ---, 2026 WL 628772, at *17 (D.C. Mar. 5, 2026). If the majority's remedial analysis stands, it will imperil approximately 300 pending CPWL prosecutions for conduct predating *Benson*.

Second, the majority's analysis conflicts with well-established precedent that distinguishes between facial and as-applied constitutional challenges. The majority recognized that, in a facial challenge, "the claimed constitutional violation inheres

in the terms of the statute, not its application." *Benson*, 2026 WL 628772, at *16 (internal citation and quotation omitted). The majority then acknowledged that, in its view, "[i]t might be that a ban on 30-round magazines, or 100-round magazines, would pass constitutional muster." *Id.* at *15. Given this acknowledgement, the majority should have rejected the facial challenge and considered the application of the PLCAFD statute only to Benson's own conduct. Rehearing is necessary to ensure uniformity in the Court's decisions with respect to facial and as-applied constitutional challenges.

ARGUMENT

I. The Division's Majority Opinion Imposes the Wrong Remedy, Needlessly Upending Gun Regulations in the District.

We agree with the District (at 13-15) that this Court should grant rehearing en banc to review the Division majority's remedial analysis. After a lengthy opinion on the constitutionality of the PLCAFD statute, *see Benson*, 2026 WL 628772, at *2-17, the majority devoted just three paragraphs to the more consequential portion of its decision: its conclusion that "all of Benson's convictions are infected by the Second Amendment violation," *id.* at *17-18. Ultimately, the majority's "infection" finding hinged on a single sentence:

> Finally, Benson could not have registered or procured a license to carry his firearm because it was equipped with an 11+ magazine. *See*

> Metropolitan Police Department, Application for Firearms Registration Certificate (requiring applicant to state the "No. of Shots" for the firearm being registered); D.C. Code § 7-2509.02(a)(2) (requiring applicant for license to carry a pistol to prove that the pistol is registered); *Hanson* [*v. District of Columbia*, 120 F.4th 223, 230 (D.C. Cir. 2024)] (explaining how appellant "attempted to register a firearm with a 12-round magazine in the District, but the Metropolitan Police Department denied his application because of the" 11+ magazine ban).

Id. at *17. The majority's analysis was wrong. As the D.C. firearm statutes make clear, possession of a large-capacity ammunition feeding device is not a ground for denying firearm registration. Thus, there is no "infection," and the unconstitutionality of Benson's PLCAFD conviction does not justify vacating his CPWL, UF, and UA convictions.

With exceptions not relevant here, the Firearms Control chapter of Title 7 of the D.C. Code requires any person who "possess[es] or control[s] any firearm" to "hold[ ] a valid registration certificate for the firearm." D.C. Code § 7-2502.01(a). The statutes limit which firearms can be registered. "A registration certificate shall not be issued for" firearms with certain characteristics, such as a sawed-off shotgun, a machinegun, or a "ghost gun" lacking a unique serial number. D.C. Code § 7-2502.02; *see also id.* § 7-2501.01(9B). Conspicuously missing from this list is any prohibition on registering a "firearm . . . equipped with an 11+ magazine." *Cf. Benson*, 2026 WL 628772, at *17. The statute also limits who may register a firearm. For example, it limits registration by people who are convicted felons, blind, or under age 21. *See* D.C. Code § 7-2502.03. Again, however, there is no sign that a

person who possesses a particular magazine would be ineligible for firearm registration.

That understanding synchs with the PLCAFD statute itself. The PLCAFD prohibition is found in Subchapter VI (Possession of Ammunition), far from the rules in Subchapter II (Firearms and Destructive Devices) about firearm registration. It provides that "[n]o 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*." D.C. Code § 7-2506.01(b) (emphasis added). The statute never ties the prohibition on large-capacity ammunition feeding devices to the firearm registration scheme. To the contrary, the PLCAFD prohibition recognizes that the "large capacity ammunition feeding device" is something separate and detachable from the "firearm." Yet only the "firearm" is subject to registration. *See* D.C. Code § 7-2502.01(a).[1]

[1] Still further confirmation for that understanding comes from the statutory definition of and requirements for a "firearm." In line with the federal definition, the D.C. Code defines a "firearm" (with exceptions not relevant here) as "any weapon, regardless of operability, which will, or is designed or redesigned, made or remade, readily converted, restored, or repaired, or is intended to, expel a projectile or projectiles by the action of an explosive; the frame or receiver of any such device; or any firearm muffler or silencer." D.C. Code § 7-2501.01(9); *see* 18 U.S.C. § 921(a)(3). In turn, "'[f]rame' or 'receiver' means a part of a firearm that when the complete weapon is assembled is visible from the exterior and provides the housing or structure designed to hold or integrate one or more fire control components, even if pins or other attachments are required to connect those components to the housing or structure." D.C. Code § 7-2501.01(9A-i)(A). Those definitions do not capture the magazine. As

(continued . . .)

Having the registration requirement attach to the firearm itself—regardless of the characteristics of any magazine it is outfitted with—is not "subterfuge." *Cf. Benson*, 2026 WL 628772, at *17 n.17. It is the registration scheme that the D.C. Code imposes. Perhaps the D.C. Code could have sought to require registration of magazines, or conditioned firearm registration on the characteristics of the magazine. But it did not. The D.C. statutes provide no basis for denying registration to a firearm outfitted with an 11+ magazine. Indeed, MPD could confiscate the prohibited large-capacity magazine while registering the firearm itself.

The majority proffers two sources in support of its conclusion that "Benson could not have registered or procured a license to carry his firearm because it was equipped with an 11+ magazine": an ambiguous reference to the "No. of Shots" on

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Benson explains, a magazine is "basically a container that holds multiple rounds of ammunition and can be *inserted into* a gun's receiver to load ammunition into the gun." 2026 WL 628772, at *1 (emphasis added). The magazine is not itself the "firearm" (or "gun") or its "receiver." And indeed, under federal law, any "firearm"—whether the full weapon, or just the frame or receiver—"must have a serial number engraved or cast on their 'frame[s]' or 'receiver[s]'" to identify them. *Bondi v. VanDerStok*, 604 U.S. 458, 479 (2025) (discussing 18 U.S.C. § 923(i)). But it is the "firearm" (or, if only partially assembled, the "frame" or "receiver") that gets registered and stamped with a serial number, not the magazine. As the Supreme Court recently explained, the similar federal definition of "firearm" does not "reach[ ] every piece or part that can be used to produce a firearm," and specifically does not allow the federal government "to regulate standalone triggers, barrels, stocks, *or magazines*." *VanDerStok*, 604 U.S. at 474 (cleaned up) (emphasis added).

MPD's application for a registration certificate,[2] and a plaintiff's declaration in support of a preliminary injunction in *Hanson*. *See Benson*, 2026 WL 628772, at *17. Those are not the sorts of clear *statutory* prohibitions that have previously established that registration was "impossible" here, justifying vacatur of the CPWL, UF, and UA convictions. *Id.* (citing *Magnus v. United States*, 11 A.3d 237, 242-43 (D.C. 2011); *Plummer v. United States*, 983 A.2d 323, 341-42 (D.C. 2009)).

Nor can the sources that the majority cites bear the weight that the majority gives them. As the District's rehearing petition notes (at 14), the "No. of Shots" question—which has now been removed to eliminate any confusion—was best interpreted to ask about the number of shots held by the firearm *without* a magazine (which could be six for a revolver, two for a double-barreled shotgun, etc.). That is consistent with the context of the form, collecting all sorts of identifying information about the firearm, like the make, model, serial number, caliber, "no. of barrels/length," finish, type of actions, and identifying marks. And indeed, the statute specifically requires that "[e]very person applying for a registration certificate shall provide on a form prescribed by the Chief" certain information, including "[t]he caliber, make, model, manufacturer's identification number, serial number, and any

[2] Following issuance of the *Benson* decision, MPD has removed this question from the Application for Firearm Registration to eliminate any ambiguity on this point, as the District of Columbia explained in its Rule 28(k) letter filed on March 25, 2026.

other identifying marks on the firearm." D.C. Code § 7-2502.03(b)(9). This application focuses entirely on the characteristics of the firearm—not the magazine that happens to be inserted on the day of registration, which may be switched out the next day. Beyond that, the plaintiff's declaration in *Hanson* offers only weak support for the majority's decision, as it reflects a registration decision in a single instance. However, even if MPD misunderstood the statutory requirements and erroneously denied registration of firearms with inserted 11+ magazines, that mistaken implementation of the statute would not justify vacatur of Benson's CPWL, UF, and UA convictions. This Court in *Plummer* distinguished between "a lawful licensing scheme that is merely improperly administered" and "a licensing scheme that is itself unconstitutional, whether on its face or as applied to the litigant." 983 A.2d at 335. When the scheme itself imposes an unconstitutional "absolute prohibition" on registration or carrying, a defendant may attack the constitutionality of the scheme in his criminal case, even if he never applied for a registration or license. *See id.* at 335-42. By contrast, when the problem is with the *administration* of the registration requirements, there is no unconstitutional scheme.

The remedy devised by the majority has triggered significant public safety concerns in the wake of *Benson*. Months ago, the United States stopped prosecuting violations of the prohibition on possession of large-capacity ammunition feeding devices. But we continue to prosecute defendants who carry pistols without a license

or who possess unregistered firearms—even when those pistols and firearms have large-capacity magazines inserted into them. Now, *Benson*'s reasoning suggests that hundreds of pending gun cases involving pre-*Benson* firearms possession would have to be dismissed. (And that is before contemplating *Benson*'s potential effect on already-closed convictions.) Respectfully, this is not a "manufactured crisis." *Cf.* Order, *Benson v. United States*, No. 23-CF-514 (Mar. 23, 2026) (statement of Deahl, J.). And the obvious "impediment to policing and prosecuting those offenses" for any pre-*Benson* conduct is the *Benson* opinion itself. *Cf. id.* The remedial portion of the *Benson* majority's opinion warrants en banc review.

II. The Division's Majority Opinion Also Misapplied the Test for Facial Second Amendment Challenges.

We also agree with the District (at 12-13) that the majority opinion "turned the distinction between facial and as-applied challenges on its head." As the Supreme Court explained in its most recent Second Amendment decision, a facial challenge "is the 'most difficult challenge to mount successfully,' because it requires a defendant to 'establish that no set of circumstances exists under which the Act would be valid.' That means that to prevail, the Government need only demonstrate that [the statute] is constitutional in some of its applications." *United States v. Rahimi*, 602 U.S. 680, 693 (2024) (cleaned up) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)). Obviously, a statute is not facially invalid when it is

"constitutional as applied to the facts of [the defendant's] own case." *Id.*

The majority opinion inverted that analysis. Although the majority suggested that "surely some subset of larger 11+ magazines [] could be properly outlawed through a more narrowly tailored statute," the majority still struck down the entire statute, complaining that "[t]his statute draws that line in a constitutionally protected place, between 10 and 11 rounds." *Id.* at *15. In other words, because the statute had some *unconstitutional* applications—namely, banning (say) 12-round magazines—the entire statute has to fall. That analysis gets the *Rahimi* inquiry backwards: the statute should survive if it "is *constitutional* in some of its applications." 602 U.S. at 693. Put another way, when a statute sweeps too broadly, capturing a mix of constitutional and unprotected conduct, *Rahimi* and *Salerno* say that the statute withstands a facial challenge (though a defendant whose conduct is constitutionally protected may still mount an as-applied challenge). The majority opinion applied the opposite rule, holding that a statute that sweeps too broadly must be struck down.

To see the problems with the majority opinion's approach, it is worth looking to another arena of Second Amendment litigation where facial and as-applied challenges are frequently litigated: the federal felon-in-possession statute, which makes it unlawful for any person "who has been convicted in any court of[ ] a crime punishable by imprisonment for a term exceeding one year" to possess a firearm. 18 U.S.C. § 922(g)(1). Most circuits hold that laws categorically disarming felons are

constitutional, regardless of the nature of the underlying felony.[3] But other courts—the ones that matter for our purposes—hold that the Second Amendment allows disarmament only for certain felons.[4] Yet "[n]o federal appellate court has held since *Bruen* that Section 922(g)(1) is facially unconstitutional." *United States v. Johnson*, 158 F.4th 200, 209 (D.C. Cir. 2025) (cleaned up). Instead, circuits in this second group consistently hold that § 922(g)(1) is facially constitutional, even while allowing as-applied challenges based on the defendant's specific case.[5] Thus, these courts have held that even if Congress drew the line too broadly by disarming all felons, the remedy is an as-applied challenge tailored to the defendant's particular

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[3] *See, e.g.*, *Zherka v. Bondi*, 140 F.4th 68, 93 (2d Cir. 2025); *United States v. Duarte*, 137 F.4th 743, 761 (9th Cir. 2025) (en banc).

[4] *See, e.g.*, *Range v. Att'y Gen.*, 124 F.4th 218, 232 (3d Cir. 2024) (en banc) ("the Government has not shown that our Republic has a longstanding history and tradition of" barring firearm possession by people like defendant, who "was convicted of food-stamp fraud and completed his sentence" two decades ago, and there was "no evidence" he "pose[d] a physical danger to others"); *United States v. Diaz*, 116 F.4th 458, 467 (5th Cir. 2024) ("To survive Diaz's as-applied challenge, the government must demonstrate that the Nation has a longstanding tradition of disarming someone with a criminal history analogous to this."); *United States v. Williams*, 113 F.4th 637, 657 (6th Cir. 2024) ("our nation's history and tradition demonstrate that Congress may disarm individuals they believe are dangerous").

[5] *See, e.g.*, *United States v. Moore*, 111 F.4th 266, 273 n.5 (3d Cir. 2024) ("Since we reject Moore's as-applied challenge to § 922(g)(1), his facial challenge also fails"); *Diaz*, 116 F.4th at 471-72 (defendant cannot "sustain a facial challenge" "because the statute is constitutional as applied to the facts of his own case"); *United States v. Hostettler*, --- F.4th ---, 2026 WL 787913, at *2 (6th Cir. Mar. 20, 2026) ("§ 922(g)(1) was 'constitutional on its face and as applied to dangerous people'").

circumstances, not facial invalidation of the entire statute.

Instead of building its facial/as-applied analysis on Second Amendment cases like *Rahimi*, *Benson* built around a due-process case that had not been cited in the briefing: *Conley v. United States*, 79 A.3d 270 (D.C. 2013). However, *Conley*'s approach to a facial due-process challenge offers no guidance for the facial Second Amendment claim presented here. *See* Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 Harv. L. Rev. 1321, 1324 (2000) ("the availability of facial challenges varies on a doctrine-by-doctrine basis and is a function of the applicable substantive tests of constitutional validity"). *Conley* considered "a statute criminalizing a person's mere presence in an automobile that they know contains a firearm whenever that firearm happens to be unlawful." *Benson*, 2026 WL 628772, at *15. The statute was "an anomaly, a unique departure from the fundamental and intuitive premise of our legal system that one does nothing wrong and does not become a criminal merely by being a bystander to a crime." *Conley*, 79 A.3d at 286. Contrary to the *Benson* majority's description, the constitutional problem was not that the person might not know the *firearm* was illegal, 2026 WL 628772, at *15; in fact, *Conley* explained that in that "more usual situation" of a missing mens rea, courts in fact routinely interpret silent statutes to include the missing intent element, 79 A.3d at 289. Instead, the constitutional problem in *Conley* was the Council's creation of a surprising crime of omission,

"present[ing] the rare instance in which due process forbids the imposition of a criminal sanction unless the government is required to prove that the defendant had actual knowledge of the law or the probability of such knowledge." *Id.* at 288-89 (cleaned up). Given the "the well-established tenet that ignorance of the law normally is not a defense to criminal prosecution," as well as "the Council's intent to alleviate the government's burden of proof," *Conley* declined to read the required "knowledge-of-the-law element" into the statute. *Id.* at 289 (cleaned up). *Conley* did not purport to enact a more general framework for judging facial and as-applied challenges—particularly outside of the due-process context. And even if it did, its reasoning would support "sav[ing] the statute in substantial part" here by preserving any constitutional reach of the statute. *Conley*, 79 A.3d at 281.

The United States moved to vacate Benson's conviction for possession of a large-capacity ammunition feeding device, and we are no longer prosecuting violations of that statute. Thus, we are not concerned with whether that statute remains on the books. But the majority's analysis of the facial Second Amendment challenge here conflicts with *Rahimi* and other cases in this Court, such as *Valdez v. United States*, 320 A.3d 339 (D.C. 2024) (declining to declare sodomy statute facially invalid where it could validly apply to nonconsensual conduct). For this reason, too, this Court should grant rehearing en banc.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have caused a copy of the foregoing to be served by electronic means, through the Court's EFS system, upon counsel for appellant, Alice Wang, Esq., Public Defender Service; counsel for intervenor-appellee the District of Columbia, Marcella Coburn, Esq.; counsel for amicus Gun Violence Prevention Groups, Erik P. Fredericksen, Esq.; and counsel for amicus States, Shankar Duraiswamy, Esq., New Jersey Deputy Solicitor General, on this 6th day of April, 2026.

/s/
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