NO. 102940-3

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Appellant,

v.

GATOR'S CUSTOM GUNS, INC., A WASHINGTON FOR-PROFIT CORPORATION, AND WALTER WENTZ, AN INDIVIDUAL,

Respondents.

BRIEF OF FIREARMS POLICY COALITION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

DEREK M. SMITH,
LAW OFFICES OF SMITH AND WHITE, PLLC
717 Tacoma Ave. S.,
Suite C
Tacoma, WA 98402
derek@smithandwhite.com

DAVID H. THOMPSON
PETER A. PATTERSON
WILLIAM V. BERGSTROM
BRADLEY L. LARSON
COOPER & KIRK, PLLC
1523 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 220-9600
dthompson@cooperkirk.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page**

Constiutional Provisions

Other Authorities

I. IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus Firearms Policy Coalition, Inc. is a nonprofit membership organization that works to create a world of maximal human liberty and freedom. FPC works to protect, defend, and advance the People's rights, especially but not limited to the inalienable, fundamental, and individual right to keep and bear arms.

FPC is interested in this case because it raises the important question of whether common firearm magazines, which function as integral parts of many common semiautomatic firearms, are protected "arms" under the Second Amendment. FPC has members throughout the country, including in Washington, who own such magazines and use them for self-defense and other lawful purposes. FPC is a plaintiff in a case in federal court challenging the magazine ban at issue here, *see Sullivan v. Ferguson*, No. 3:22-cv-5403 (W.D. Wash. 2022), and has brought other challenges to similar laws around the country, *see, e.g.*, *Fitz v. Rosenblum*, No. 23-35478 (9th Cir. July 17,

2023). FPC submits this amicus brief to clarify the analysis that ought to control this case and which requires the conclusion that Washington's magazine ban violates the Second Amendment.

II. ISSUE ADDRESSED BY AMICUS

Whether the Second and Fourteenth Amendments to the United States Constitution allow for states to ban commonly owned firearm magazines.

III. INTRODUCTION

Under the Supreme Court's decision in *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1 (2022), Washington's attempt to punish a gun store for selling magazines that are commonly used must fail. *Bruen* unequivocally reaffirmed what *District of Columbia v. Heller*, 554 U.S. 570 (2008) taught: All instruments that compose bearable "arms" are covered by the plain text of the Second Amendment. That certainly includes the magazines which are necessary for the proper functioning of a firearm. By artificially limiting how many rounds a firearm can store and expel without reloading, the

State has restricted conduct covered by the plain text of the Second Amendment and so the challenged law is unconstitutional unless *the State* can prove its regulation is justified by a historical exception. *See Bruen*, 597 U.S. at 24-25; *see also United States v. Stevens*, 559 U.S. 460, 468 (2010) (describing the same framework for the First Amendment's guarantee of free speech).

It has not done so. Here again, *Bruen* and *Heller* speak in one voice. As a matter of history, arms in common use for lawful purposes, such as self-defense or target practice, are protected and their possession and use cannot be banned—full stop. There can be no question whatsoever that magazines that can hold more than ten rounds are overwhelmingly common. That requires affirming the district court's judgment.

IV. STATEMENT OF THE CASE

In 2022, the Washington legislature enacted SB 5078, which bans the sale and possession of the magazines most useful for self-defense and target shooting, those that hold over ten

rounds of ammunition. Although Washington casts this ban as outlawing "large capacity" magazines, it covers millions of popular magazines that ordinary Americans use for lawful purposes. *See Kolbe v. Hogan*, 849 F.3d 114, 129 (4th Cir. 2017) (en banc).

Not willing to let the State of Washington trample its constitutional rights, Gator's Custom Guns both refused to comply with this unconstitutional law (resulting in an enforcement action against it) and brought a suit against the state. The trial court found for Gator's, holding that SB 5078's prohibition on popular magazines used for lawful purposes violated both the Washington and United States Constitutions. This is the appeal from that ruling.

V. ARGUMENT

A. This Case Involves A Straightforward Application Of Supreme Court Precedent.

Following *Bruen*, the standard to be applied in this case is clear:

> When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation. Only then may a court conclude that the individual's conduct falls outside the Second Amendment's unqualified command.

597 U.S. at 24 (internal quotation marks omitted). This is not a case where extensive historical research and analysis is required. This case involves a ban on common semiautomatic firearm magazines, and the Supreme Court has already done both the textual and historical work. In *Heller*, the Court defined what an "arm" is for the purposes of the Second Amendment and explained how to adjudicate prohibitions on arms possession. Far from disturbing any of *Heller*'s analysis, *Bruen* and *Rahimi* reaffirmed the approach taken in *Heller*, made its implicit methodology explicit, and reiterated that the key historical work of determining what sorts of weapons can be banned consistent with the Second Amendment had been conclusively completed in *Heller*.

1. *Heller* Held That Arms In Common Use May Not Be Banned.

In *Heller*, the Supreme Court was tasked with deciding the constitutionality of a District of Columbia law prohibiting the possession of fully functional handguns in the home. To answer the question, the Court, following the same process made explicit years later in *Bruen* and *Rahimi*, first set about interpreting the plain text of the Amendment. *See Heller*, 554 U.S. at 576 ("We turn first to the meaning of the Second Amendment."); *cf. United States v. Rahimi*, 144 S. Ct. 1889, 1897 (2024) ("[O]ur inquiry into the scope of the right beg[ins] with constitutional text." (citation omitted)). And with respect to the key question in that case and this one, whether the banned item is an "arm" that falls within the scope of the Second Amendment's plain text, *Heller* made clear that the term "arm" covers "all instruments that constitute bearable arms, even those that were not in existence at the time of the founding." 554 U.S. at 582; *see also Caetano v. Massachusetts*, 577 U.S. 411, 411 (2016) (per curiam) (stun guns). In short, "[t]he 18th-century meaning is no different from

the meaning today . . .. '[A]rms' [means] 'any thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another.'" *Heller*, 554 U.S. at 581 (quoting 1 A NEW AND COMPLETE LAW DICTIONARY). That definition was not limited to only those weapons "specifically designed for military use" or "employed in a military capacity," but encompassed all things designed to be "use[d] in wrath to cast at or strike another." *Id.*

After interpreting the text, *Heller* proceeded to address the extent to which any "historical tradition" of regulation qualified the plain-text sweep of the right's protection of all bearable arms. *Id.* at 626. The Court explained that that it had determined that there was an "important limitation" incorporated into "the right to keep and carry arms" that would permit the government to ban a firearm even though it fell within the plain text meaning of "arms." *Id*. at 627. Specifically, the Court found that the "historical tradition of prohibiting the carrying of 'dangerous and unusual weapons,'" permitted certain arms to be banned if the

government proved they fell into this exception. *Id.* But the Court made clear, arms that were "in common use" for lawful purposes were "protected," even if they were inherently dangerous in some abstract sense. *Id.* Arms that are in common use for lawful purposes, by definition, cannot be dangerous and unusual. This exception was, the Court explained, consistent with another historical tradition: as the prefatory clause of the Second Amendment notes, the explicit purpose for which the right to keep and bear arms was included in the Constitution was to ensure the preservation of the militia, and "[t]he traditional militia was formed from a pool of men bringing arms 'in common use at the time' for lawful purposes like self-defense." *Id.* at 624.

This interpretation did have one difficulty, which the Supreme Court confronted directly. In an oft-misunderstood passage, the Court noted that "[i]t may be objected" that some of the "weapons that are most useful in military service—M-16 rifles and the like" are "highly unusual in society at large" and

therefore potentially "may be banned." *Id.* at 627. This problem went away, however, when one considered that historically the members of the militia would bring to militia service the common arms that they possessed in their homes. *Id.*

(Mis)relying on this analysis from *Heller*, the Seventh Circuit held that arms "most useful in military service" are entirely excluded from the *text* of the Second Amendment. *See Bevis v. City of Naperville*, 85 F.4th 1175, 1193 (7th Cir. 2023); *but see id.* at 1209 (Brennan, J., dissenting). But that position is utterly inconsistent with *Heller*, which held "all firearms" are "arms" under the text, and was merely explaining why as a historical matter the Second Amendment did not restrict government from outlawing limited arms that were not commonly possessed by the people. *See Hanson v. District of Columbia*, 120 F.4th 223, 232 (D.C. Cir. 2024). As the Court in *Heller* explained, "the conception of the militia at the time of the Second Amendment's ratification was the body of all citizens capable of military service, who would bring the sorts of lawful

weapons that they possessed at home to militia duty"; in other words, they would be armed with those weapons that were "in common use" as opposed to those "that are highly unusual in society at large." 554 U.S. at 627. But *Heller* did not, of course, mean that merely because a firearm is used by the military, it could not *also* be in common use for lawful purposes by civilians.

Indeed, the reasons why the Founders valued the militia render nonsensical any argument that an amendment meant to preserve the efficacy of that institution would fail to protect arms *because* they could be useful for military purposes in addition to civilian purposes. *See* W. Baude & R. Leider, *The General-Law Right to Bear Arms*, 99 N.D. L. REV. 1467, 1498 (2024) ("Historically, constitutionally protected 'arms' were those arms particularly appropriate for defense of the community."). It would be counterintuitive, to say the least, that an amendment designed to preserve the people's right to defend themselves "against both public and private violence" would categorically

exclude the types of arms most suited to the militia's purposes. *See Heller*, 554 U.S. at 594.

2. *Bruen* Reaffirmed *Heller*'s Methodological Approach And Holding That Commonly Owned Arms Cannot Be Banned

Bruen did not alter *Heller*'s conclusion in any way. Rather, it made *Heller*'s text-informed-by-history standard more explicit, explaining that it was applying the same "test that we set forth in *Heller*." *Bruen*, 597 U.S. at 26. In directing lower courts how to analyze the text of the Second Amendment, *Bruen* noted that in some cases they will need to account for "technological changes," and explained that *Heller* demonstrated "at least one way in which the Second Amendment's historically fixed meaning applies to new circumstances: Its reference to 'arms' does not apply 'only [to] those arms in existence in the 18th century.' " *Id.* at 28 (quoting *Heller*, 554 U.S. at 582). Instead, the Second Amendment's "general definition" of "arms" "covers modern instruments that facilitate armed self-defense." *Bruen*, 597 U.S. at 28.

And in characterizing the historical analysis, *Bruen* once again pointed to *Heller*, noting that *Heller* used the "historical understanding of the Amendment to demark the limits on the exercise of [the] right," and it was on this basis that it had found that "the Second Amendment protects the possession and use of weapons that are 'in common use at the time.'" 597 U.S. at 21 (quoting *Heller*, 554 U.S. at 627).

In short, *Bruen* reaffirmed that *Heller*'s analysis is the analysis this Court must apply today and furthermore, that *Heller*'s historical holding—that arms in common use cannot be banned—remains good law that should control any case involving a ban on a type of bearable arm. *See* Mark W. Smith, *What Part of "In Common Use" Don't You Understand?: How Courts Have Defied* Heller *in Arms-Ban-Cases—Again*, PER CURIAM, HARV. J.L. & PUB. POL'Y (Sept. 27, 2023), https://bit.ly/3PWhqwH.

B. Law-Abiding Citizens Have a Right to Possess the Banned Magazines.

1. Magazines are "Arms," so the Second Amendment Presumptively Protects Their Use.

Applying this text-informed-by-history standard in this case is straightforward. As to the text, Washington has banned certain firearm magazines based on capacity. The text covers "all" arms, *Heller*, 554 U.S. at 581, and the Amendment commands that the right to keep and bear them "shall not be infringed," U.S. Const. amend. II. The same Founding-era sources the Supreme Court has used to interpret the Second Amendment make clear that anything that in any way hinders the exercise of the Second Amendment right, "infringe[s]" that right. *See, e.g.*, 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES 143 n.40 (1803) ("The right of the people to keep and bear arms shall not be infringed . . . and this without any qualification as to their condition or degree . . .."); *see also Nunn v. State*, 1 Ga. 243, 251 (1846) ("The right of the whole people . . . to keep and bear *arms* . . . shall not be *infringed*, curtailed, or broken in upon, in

the smallest degree." (emphasis in original)). Therefore, by artificially limiting the magazine capacity of semiautomatic firearms, the challenged law here necessarily "infringes" the Second Amendment right and is presumptively unlawful under *Bruen*.

Because the ammunition magazine determines how many rounds a firearm can store and expel without removing a critical piece of the firearm—the magazine—and either reloading and reinserting that magazine or inserting a new, full magazine in its place (thus re-assembling the firearm into a functional state), any distinction between the firearm itself and the magazine is artificial. Limiting magazine capacity to a certain size effectively bans firearms capable of firing more rounds than the limit without reloading. *See Duncan v. Bonta*, 695 F. Supp.3d 1206, 1222 (S.D. Cal. 2023) ("[W]hether thought of as a firearm able to fire a certain number of rounds because of its inserted magazine, or as a separate ammunition feeding component, magazines are usable 'arms' within the meaning of the Second

Amendment."); *see also Hanson*, 120 F.4th at 232 (magazines holding over 10 rounds "very likely are 'Arms' within the meaning of the plain text of the Second Amendment"). And it is not the gun itself, but bullets in ammunition cartridges *fed by the magazine*, that "strike another." *See Heller*, 554 U.S. at 581. Citizens carry semiautomatic firearms equipped with magazines and other ammunition feeding devices for the same reason they carry firearms loaded with ammunition: "[W]ithout bullets, the right to bear arms would be meaningless." *Jackson v. City & Cnty. of S.F.*, 746 F.3d 953, 967 (9th Cir. 2014), *abrogated on other grounds by Bruen*, 597 U.S. 1 (2022); *Hanson*, 120 F.4th at 232 ("A magazine is necessary to make meaningful an individual's right to carry a handgun for self-defense.").

A magazine is, in fact, an integral part of the firearm to which it is equipped. And just as the First Amendment would not permit the government to ban the printing press used to print newspapers, the Second Amendment would be a dead letter if it protected "arms" but permitted the government to ban parts like

triggers, barrels, or magazines. *See Hanson*, 120 F.4th at 3232. The fact that some firearms do not require a magazine (or a so-called large-capacity magazine) is irrelevant. A publisher in 1791 could have handwritten his pamphlets instead of printing them, but the mere existence of a less-efficient alternative does not mean that a printer was failing to exercise his First Amendment rights. Similar examples abound. Not every gun requires a barrel longer than two inches, but a law that outlawed every firearm except the derringer would surely infringe on the right to keep and bear arms. Indeed, *Heller* held as much when it said that the government could not prohibit the ownership of handguns even though it was undisputed that it allowed the ownership of rifles. 554 U.S. at 631-33.

As the Third Circuit recognized before *Bruen*: "magazines feed ammunition into certain guns, and ammunition is necessary for such a gun to function as intended, [so] magazines are 'arms' within the meaning of the Second Amendment." *Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Att'y Gen. N.J.*, 910 F.3d 106, 116

(3d Cir. 2018) ("*ANJRPC*") (quoting *Jackson*, 746 F.3d at 967), *abrogated on other grounds by Bruen*, 597 U.S. 1 (2022)). Because they are integral to the functionality of a firearm, the State's "magazine ban," is practically a ban on "arms" that are capable of firing more than ten times without reloading. Such a law obviously implicates the text of the Second Amendment.

At a minimum, the magazines banned by the State are protected by necessary implication of the constitutional text. Constitutional rights "implicitly protect those closely related acts necessary to their exercise." *Luis v. United States*, 578 U.S. 5, 26 (2016) (Thomas, J., concurring in the judgment) (explaining that the right to counsel means nothing if the government can simply freeze any assets that a defendant may potentially use to furnish counsel). As the Ninth Circuit has previously recognized, "case law supports" a "right to possess the magazines necessary to render . . . firearms operable." *Fyock v. Sunnyvale*, 779 F.3d 991, 998 (9th Cir. 2015), *abrogated on other grounds by Bruen*, 597 U.S. 1 (2022); *see also Hanson*, 120 F.4th at 323.

2. Washington's Arguments That Magazines Are Not "Arms" Fail To Persuade.

Washington contends that magazines are not "arms" within the meaning of the Second Amendment, thus are wholly unprotected. Instead, the State asserts that magazines are mere "accessories" that fall outside the scope of the right to keep and bear arms. As explained above, Washington is wrong for a variety of reasons.

To begin with, the fact that the regulated magazines hold more than ten rounds does not mean that they fall outside of *Heller*'s definition of an arm. It is the magazine that a man "useth to cast" bullets, regardless of how many bullets it can "cast." 554 U.S. at 581. There is no other use for a magazine aside from holding and reloading bullets. As Washington admits, magazines are "not merely [a] cosmetic" accessory but form an integral part of the firearm. State Br. at 30 (quoting H.R. Rep. No. 103-489 (1994)). Any attempt to draw an arbitrary line between "magazines" and "large-capacity magazines" is fallacious. Both are either "arms" or neither are. If an eleven-round magazine

somehow falls outside of the definition of an "arm," why wouldn't a ten-round magazine? Nine? Eight? Five? Two? There is no principled way to answer the question.

If only the final step in the process of "cast[ing]" bullets were protected, *Heller*, 554 U.S. at 581, then States could ban everything except for the firing pin and ammunition, *Hanson*, 120 F.4th at 323. But that position is too much for Washington, which admits that a ban on "triggers" would implicate the Second Amendment. State Br. at 25.

Turning from faulty logic to faulty analogy, Washington's attempt to equate magazines that carry more than ten rounds with short-barrel shotguns and armor-piercing ammunition fails to show that magazines are not "arms." State br. at 27, 68-69. If anything, that analogy demonstrates that magazines are protected by the text of the Second Amendment.

It may be that, assuming they are uncommon, short-barrel shotguns and armor-piercing ammunition are currently outside of the protection of the Second Amendment under the Supreme

Court's precedents. *See Heller*, 554 U.S. at 625; *United States v. Miller*, 307 U.S. 174, 178 (1939). But it is equally true that both are "arms" within both *Heller*'s definition and common sense; they are obviously used "to cast at or strike another." *Heller*, 554 U.S. at 581 (quoting Founding-era sources). And to the extent they can currently be banned under those precedents, it would be because they are not commonly possessed by the people and thus "dangerous and unusual." *Bruen*, 597 U.S. at 21 (citation omitted). But even weapons that are considered "dangerous and unusual" are not somehow stripped of their textual status as "arms." *Id.*

Finally, Washington contends that magazines are "accessories" because a corpus-linguistics analysis shows that "arms" would not have been understood to include "cartridge boxes." State br. at 47. But even if a corpus linguistics analysis could somehow supplant the Supreme Court's interpretation of "arms" in *Heller*, which it cannot, that study proves nothing. A "cartridge box" did not serve the same purpose as a magazine, so

it does not matter whether "cartridge box[es]" were considered "arms."

A "cartridge box" was a bag worn at the hip that contained the necessary ingredients to load a musket. The Militia Act of 1792 required each American solider to carry one that held "not less than twenty-four cartridges." ch. 33, 1 Stat. 271. Notably, the cartridge box was not a part of the firearm itself nor was it even attached to a firearm. It was just a specialized bag used to keep firing materials in an orderly manner. Because the bag was not part of the firearm itself, it could not automatically reload the chamber as modern magazines do, enabling semi-automatic fire. Without the ability to even connect to a firearm, a cartridge box is too far afield from a magazine to draw an inference regarding the term "arms."

After arguing that cartridge boxes and magazines are similar in its opening brief, Washington's reply brief does an about-face. In response to Gator's argument that laws *requiring* militiamen to carry 20-24 cartridges in their bag show that

capacity restrictions are unfounded, Washington posits that the cartridge bags are dissimilar from magazines because they do not automatically reload the firearm after each shot. Reply br. at 27. That concession wholly undercuts the argument that Washington made in its opening brief about corpus-linguistics analysis.

C. The Ban on Commonly Owned Magazines Cannot Be Justified By Reference To History.

Because the plain text is implicated, if Washington's magazine ban is to survive, the State must prove that it is "consistent with this Nation's historical tradition of firearm regulation." *Bruen*, 597 U.S. at 17. To be clear, it is the *State* that bears this burden. *Id.*; *see also Rahimi*, 144 S. Ct. at 1897 ("[W]hen the Government regulates arms-bearing conduct, as when the Government regulates other constitutional rights, it bears the burden to justify its regulation." (citation omitted)). Washington contends that Gator's must establish the lack of a "historical tradition," State br. at 52, but it is wrong because the historical-tradition exceptions are not part of the text of the

Second Amendment but are preexisting, widely understood limits on the scope of the right to keep and bear arms were incorporated into the Constitution, *see Bruen*, 597 U.S. at 17.

The only historical tradition that could plausibly justify restricting magazines with greater than ten rounds is the prohibition on the carrying of "dangerous and unusual weapons." *Id.* at 47 (citation omitted). But Washington's law cannot be justified by this historical tradition because magazines that can hold more than ten rounds are "commonly possessed by law-abiding citizens for lawful purposes." *Fyock*, 779 F.3d at 997. Thus, they are not the type of "dangerous and unusual" weapons that are a mark of impending criminal violence.

Under *Bruen*, the State bears the burden to show that the banned magazines are not in common use. That is an impossible task, as there can be no dispute that the banned magazines are commonly possessed for lawful purposes—including but not limited to self-defense. Indeed, the trade association for the firearms industry has estimated that of the nearly 1 billion

firearm magazines produced for the U.S. commercial market from 1990 to 2021, over *700 million* have a capacity over 10 rounds. *See Detachable Magazine Report, 1990-2021* at 2, NSSF, https://bit.ly/3YEGL2i (last visited Nov. 26, 2024). This reflects the fact that many of the most popular semiautomatic firearms are manufactured with standard magazines holding more than ten rounds. *See, e.g.*, David B. Kopel, *The History of Firearm Magazines and Magazine Prohibitions*, 78 ALB. L. REV. 849, 859 (2015) ("The most popular rifle in American history is the AR-15 platform, a semiautomatic rifle with standard magazines of twenty or thirty rounds."); *see also Kolbe*, 849 F.3d at 129 ("Most pistols are manufactured with magazines holding ten to seventeen rounds."). In truth, magazines capable of holding more than 10 rounds are standard capacity, not large capacity.

The banned magazines are commonly possessed for lawful purposes, such as target shooting, self-defense, and defense outside of the home. And such magazines may be lawfully

owned in the vast majority of states. *See* Lillian Mongeau Hughes, *Oregon Voters Approve Permit-to-Purchase for Guns and Ban High-Capacity Magazines*, NPR (Nov. 15, 2022), https://n.pr/3QMJCC1. Reviewing the evidence, a district court in Illinois recently concluded that "it is clearly apparent . . . that law-abiding citizens choose . . . large-capacity magazines[] and assorted firearm attachments for self-defense." *Barnett v. Raoul*, 2024 WL 4728375 at *42 (S.D. Ill. Nov. 8, 2024).

As courts around the country have concluded, magazines holding over ten rounds are commonly owned and used overwhelmingly used by law-abiding Americans for lawful purposes. *See Fyock*, 779 F.3d at 998 ("[W]e cannot say that the district court abused its discretion by inferring from the evidence of record that, at a minimum, [large-capacity] magazines are in common use."); *ANJRPC*, 910 F.3d at 116–17 (3d Cir. 2018) ("The record shows that millions of magazines are owned, often come factory standard with semi-automatic weapons, are typically possessed by law-abiding citizens for hunting, pest-

control, and occasionally self-defense, and there is no longstanding history of [large capacity magazine] regulation.") (internal citations omitted); *N.Y. State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 255 (2d Cir. 2015), *abrogated on other grounds by Bruen*, 597 U.S. 1 (2022) ("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*."); *Heller v. District of Columbia*, 670 F.3d 1261 (2011) ("There may well be some capacity above which magazines are not in common use but, if so . . . that capacity surely is . . . not ten."). As a result, under *Bruen* and *Heller*, California's magazine ban is unconstitutional and no further historical analysis needs to be done.

Washington disagrees. Despite the fact that these magazines are ubiquitous across the country (and certainly in Washington), the State contends that they are not actually "used" for lawful purposes because it is rare for a person to fire more

than ten shots in self-defense. State br. at 7, 40. But Washington contorts what it means to "use" a magazine.

To "use" is to "put into action or service." *Use*, MERRIAM-WEBSTER, https://bit.ly/4142rYs (last viewed Nov. 17, 2024). A magazine, which *stores* ammunition and automatically feeds a cartridge into the chamber of a semi-automatic firearm, is "put into action or service" when it stores ammunition or feeds ammunition into the chamber. *Id.*

Thus, a person does not even need to fire a round to "use" a magazine. A magazine is "put into . . . service" when it merely holds ammunition while inside of a firearm. *See Bailey v. United States*, 516 U.S. 137, 148–49 (1995) (discussing hypothetical statement "I *use* a gun to protect my house, but I've never had to *use* it"). A person who keeps a weapon with a loaded magazine in a safe for home-protection reasons is "using" that magazine. *Bruen*, 597 U.S. at 32 ("[I]ndividuals often 'keep' firearms in their home, at the ready for self-defense."). The same goes for a person who loads his magazine, places it into his firearm, and

takes it with him when picking his daughter up from a bad part of town. No shots are fired, but the magazine is functioning as intended by holding the ammunition and keeping the gun "ready for offensive or defensive action in a case of conflict with another person." *Heller*, 554 U.S. at 584 (citation omitted).

Keeping and carrying loaded magazines are, of course, not the only way to use them. A person who defensively brandishes his loaded firearm at a mugger has "used" the firearm as a whole, including the magazine, as a way to scare off danger. And most defensive gun uses involve brandishing, not firing the firearm. *See* Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence & Nature of Self-Defense With a Gun*, 86 J. CRIM. L. & CRIMINOLOGY 150, 185 tbl.3 (1995) (finding that 15.5% of defensive gun uses involve firing gun at offender). Finally, shooting even a single shot involves "using" the magazine, as the magazine will automatically transfer a new round into the chamber of the firearm.

Not only is Washington's definition of "use" unduly narrow in a semantic sense, it also runs up against the reasoning of *Heller* and *Bruen*. In *Heller*, the Supreme Court concluded that handguns are in "common use" without comparing possession statistics to self-defense incidents or anything of the like. *Heller* further referred to the Washington, D.C. ban on owning handguns as "a complete prohibition of their *use*." 554 U.S. at 629 (emphasis added); *id.* at 625 (describing the common-use test as not protecting "those weapons not typically *possessed* by law-abiding citizens"). *Heller* used the terms "possession" and "use" interchangeably, which shows that the Supreme Court wanted courts to examine how often arms were owned, not how often they were necessary for self-defense. Indeed, such judgments are the exact point the Supreme Court eschewed the interest balancing that accompanies the tiers of scrutiny. *Bruen*, 597 U.S. at 26. And this also is consonant with the twin verbs of the Second Amendment—to keep and to bear—with the former denoting possession and the latter carrying. It would improperly

"nullify half of the Second Amendment's operative protections" to discount possession as a relevant type of use. *See id.* at 32.

CONCLUSION

The Court should affirm the judgment below.

This document contains 4,991 words, excluding the parts of the document exempted from the word count by RAP 18.17.

November 26, 2024 Respectfully submitted,

/s/ Derek M. Smith
Derek M. Smith, WSBA #26036
LAW OFFICES OF SMITH AND WHITE, PLLC
717 Tacoma Ave. S., Suite C
Tacoma, WA 98402
derek@smithandwhite.com
Counsel of Record

David H. Thompson
Peter A. Patterson
William V. Bergstrom
Bradley L. Larson
COOPER & KIRK, PLLC
1523 New Hampshire Ave. NW
Washington, D.C. 20036
(202) 220-9600
dthompson@cooperkirk.com
ppatterson@cooperkirk.com

wbergstrom@cooperkirk.com
blarson@cooperkirk.com

Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that on November 26, 2024, I electronically filed the foregoing with the Clerk of the Court using the Washington State Appellate Courts' Secure Portal, which sends a copy of uploaded files and a generated transmittal letter to active parties on the case. The generated transmittal letter specifically identifies recipients of electronic notice.

DATED this 26th Day of November 2024,
at Tacoma, Washington

/s/ Derek M. Smith
Derek M. Smith, WSBA #26036
Counsel for Amicus Curiae

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Appellant, vs. GATOR'S CUSTOM GUNS, INC., A WASHINGTON FORPROFIT CORPORATION, AND WALTER WENTZ, AN INDIVIDUAL, Respondents.	CASE NO. 102940-3 CERTIFICATE OF SERVICE

I, Danely Bravo, am over the age of 18, not a party involved in the case, and hereby certify that on November 26, 2024, a copy of the following documents:

- ***Motion for Leave to File Amicus Brief on Behalf of Firearms Policy Coalition in Support of Respondents***
- ***Brief of Firearms Policy Coalition as Amicus Curiae in Support of Respondents***

Were served on the party below as noted:

Noah G. Purcell
Attorney General's Office
800 Fifth Ave., Suite 2000
Seattle, WA 98104

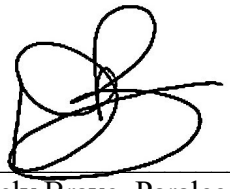
[x] by causing a full, true and correct copy thereof to be MAILED in a sealed, postage-paid envelope, addressed as shown above, which is the last-known service address for the party, and deposited with the U.S. Postal Service at Tacoma, WA, on the date set forth below;

[] By causing a full, true and correct copy thereof to be HAND-DELIVERED BY ABC MESSENGER SERVICE to the party, at the address listed above, which is the last-known address for the party's office, on the date set forth below;

[] By causing a full, true and correct copy thereof to be FAXED to the party, at the fax number shown above, which is the last-known fax number for the party's office, on the date set forth below.

[] By causing a full, true and correct copy thereof to be EMAILED to Petitioner, at the email addresses shown above, which is the last-known email addresses for petitioner, on the date set forth below.

Dated the 26th day of November 2024.



Danely Bravo, Paralegal

Derek M. Smith & James J. White
717 Tacoma Ave. S. Suite C Tacoma, WA 98402
T. 253-203-1645 F. 844-331-1637
www.smithandwhite.com

THE LAW OFFICES OF SMITH AND WHITE, PLLC

November 26, 2024 - 3:02 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	102,940-3
Appellate Court Case Title:	State of Washington v. Gator's Custom Guns, Inc., et al.
Superior Court Case Number:	23-2-00897-0

The following documents have been uploaded:

- 1029403_Briefs_20241126143855SC901010_9118.pdf
  This File Contains:
  Briefs - Amicus Curiae
  The Original File Name was gator guns - amicus br vf2.pdf
- 1029403_Cert_of_Service_20241126143855SC901010_0603.pdf
  This File Contains:
  Certificate of Service
  The Original File Name was Certificate of Service_ Case Header.pdf
- 1029403_Motion_20241126143855SC901010_4511.pdf
  This File Contains:
  Motion 1 - Other
  The Original File Name was gator guns - Amicus Motion vf2.pdf

A copy of the uploaded files will be sent to:

- Christine.Truong@atg.wa.gov
- SGOOlyEF@atg.wa.gov
- Victoria.Johnson@atg.wa.gov
- andrew.hughes@atg.wa.gov
- austin.f.hatcher@gmail.com
- austin@hatcherlawpllc.com
- ben.carr@atg.wa.gov
- bob.hyde@atg.wa.gov
- comcec@atg.wa.gov
- cprreader@atg.wa.gov
- don@dklawoffice.com
- eerhardt@nrahq.org
- jennah.williams@atg.wa.gov
- jgreenlee@nrahq.org
- john.nelson@atg.wa.gov
- july.simpson@atg.wa.gov
- kristin.beneski@atg.wa.gov
- noah.purcell@atg.wa.gov
- pete@silentmajorityfoundation.org
- serrano4pascocitycouncil@gmail.com
- william.mcginty@atg.wa.gov

Comments:

Sender Name: Danely Bravo - Email: danely@smithandwhite.com
Filing on Behalf of: Derek Michael Smith - Email: derek@smithandwhite.com (Alternate Email: derek@smithandwhite.com)

Address:
717 Tacoma Ave S.
Suite C
Tacoma, WA, 98402
Phone: (253) 203-1645

Note: The Filing Id is 20241126143855SC901010