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IN THE
SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Appellant,

v.

GATOR'S CUSTOM GUNS, INC., a Washington for-profit corporation, and
WALTER WENTZ, an individual

Respondents.

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BRIEF OF *AMICUS CURIAE* THE SECOND AMENDMENT FOUNDATION IN SUPPORT OF RESPONDENTS

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MATTHEW E. THOMAS, HISTORIC POWDER HOUSES OF NEW ENGLAND: ARSENALS OF AMERICAN INDEPENDENCE (Arcadia Publishing, Nov. 5, 2013) 7, 8, 9, 19

INTEREST OF *AMICUS CURIAE*

The Second Amendment Foundation ("SAF") is a non-profit membership organization founded in 1974 with over 720,000 members and supporters in every State of the Union, including Washington (where it is also headquartered). Its purposes include education, research, publishing, and legal action focusing on the constitutional right to keep and bear arms. *Amicus Curiae* has an intense interest in this case because it has many members who reside in the state of Washington who are prevented from exercising their right to keep and bear arms under the statute at issue, ESSB 5078 (Engrossed Substitute 13 S.B. 5078, 67th Leg., Reg. Sess. (Wash. 2022) (the "Capacity Mandate" or "ESSB 5078"), contrary to "the Second Amendment's text, as

informed by history." *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1, 19 (2022).[1]

SUMMARY OF ARGUMENT

With its enactment of ESSB 5078, Washington has mandated a limit on the capacity of magazines. This statute severely burdens the core of the right to keep and bear arms because it bans the manufacture and sale or transfer of commonly-owned firearms-related devices, that are necessary for the firearms to function, used for self-defense and other lawful purposes. Specifically, the statute at issue punishes the manufacture and/or sale of magazines with the capacity to hold over ten rounds of ammunition.

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[1] Additionally, *amicus curiae* is currently challenging ESSB 5078 in the United States District Court for the Western District of Washington, *Sullivan et al. v. Ferguson*, Case No. 3:22-cv-05403.

The State has proffered a scattershot array of "analogous" firearms laws that it contends support ESSB 5078, including laws regulating clubs (Appellant's Brief at 61), trap guns (*id.* at 59), bowie knives (*id.* at 62), pistols (*id.* at 65), and both semiautomatic and automatic firearms (*id.* at 67). None of these are sufficient to demonstrate the existence of a historical tradition of analogous regulations that is required by *Bruen*. 597 U.S. at 17.

Importantly, most of these purported analogues are from far outside the Founding Era. Respondents have convincingly argued that "[t]he first laws restricting magazine capacity were enacted during the Prohibition era, almost a century and a half after the Second Amendment was adopted, and more than half a century after the Fourteenth Amendment was adopted." Respondents' Brief at 74. This brief expands upon Respondents' argument and explores in

detail the history of Founding Era Gunpowder Laws, which are (1) timely for the purposes of *Bruen* analysis and (2) related to ESSB 5078 as they regulated the accumulation of ammunition.

However, the Gunpowder Laws do not satisfy *Bruen's* historical analogue requirement to support the Capacity Mandate. The Gunpowder Laws arose in contexts entirely separate from the round capacity of firearms, and thus, are not a proper "historical analogue" to ESSB 5078. *See Bruen*, 597 U.S. at 30. Thus, the Gunpowder Laws do not offer any "well-established and representative historical *analogue*" to the Capacity Mandate. *Id*. (emphasis in original). ESSB 5078 is simply not "consistent with this Nation's historical tradition of firearm regulation." *Bruen*, 597 U.S. at 17.

ARGUMENT

I. The Proper Analytical Framework for Determining Whether There Are Any Historical Gunpowder Laws Analogous to the Capacity Mandate

Under *Bruen*, "the government must affirmatively prove that its firearm regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." 597 U.S. at 19. Here, in order to satisfy this heavy burden, the State must point to "historical precedent . . . [that] evinces a comparable tradition of regulation." *Id.* at 27 (internal quotation marks omitted). The government need not identify a "historical *twin*"; rather, a "well-established and representative historical *analogue*" suffices. *Bruen*, 597 U.S. at 30 (emphases in original). In *Bruen*, the Court identified two metrics for comparison of analogues proffered by the government against the challenged law: "*how* and *why* the regulation[] burden[s] a law-abiding citizen's right to armed

self-defense." *Id.* at 29 (emphases added) (citing *District of Columbia v. Heller*, 554 U.S. 570 (2008); *McDonald v. City of Chicago*, 561 U.S. 762 (2010)). The key question is whether the challenged law and proffered analogue are "relevantly similar." *Id*. at 29.

Here, the relevant questions are how the Capacity Mandate burdens the right to armed self-defense, why it burdens that right, and, based on the how and why, whether ESSB 5078 is relevantly similar to any historical analogue.

The State contends that regulations of weapons that may cause "widespread societal problems" are analogous to ESSB 5078. Appellant's Br. at 59. However, the State's societal problems justification ignores a critical inquiry outlined in *Bruen.* The historical analogue test demands an assessment of *how* any analogous regulation burdens the right to keep and bear arms, in addition to the motivations for

doing so. *See generally, Bruen,* 597 U.S. at 30. Accordingly, a comparison to the Gunpowder Laws is instructive since they are (1) selected from the appropriate historical time period and (2) the closest arguable historical analogues to any magazine capacity limiting statutes in modern day.

II. The Gunpowder Laws and the Magazine Capacity Mandate are not Analogues

A. Chronological Summary of Gunpowder Laws

Gunpowder Laws that existed in the American Colonies and the early Republic generally restricted the quantity of gunpowder to be stored in a single location. Powder houses were commonly used in the Colonies to store the collective powder, guns, and armaments of a town. MATTHEW E. THOMAS, HISTORIC POWDER HOUSES OF NEW ENGLAND: ARSENALS OF AMERICAN INDEPENDENCE (Arcadia Publishing, Nov. 5, 2013). These storage locations served to consolidate

the munitions of a town at a safe distance from flammable structures. *Id.* at 17. Many New England communities without powder houses elected to store their ammunition in the attics and cellars of meeting houses and barns since these structures were devoid of stoves until about 1820. *Id.* at 16. In fact, "Sunday worshippers were known to flee meetinghouses during lightning storms in the event that lightning might strike the building and ignite the hidden supply of gunpowder." *Id.*

Powder houses were commonly constructed with an eye to safety. Some powder houses went so far as "not to Suffer [allow] any Person to enter said [powder] house with Shoes on." *Id.* at 144. Importantly, shoes at the time were held together by nails, and stepping on a stone risked creating a spark in the powder house, which in turn could have devastating (and explosive) consequences. *Id.* In addition to

fire prevention and protection of structures, these statutes were enacted in an effort to *preserve* critical arms assets in view of the growing conflict with the British at the time. *Id.* "The first battles and skirmishes of the American Revolution were fought over preventing the British from capturing the arms and ammunition stored at powder houses in New Castle, New Hampshire, on December 14 and 15, 1774, and at Concord, Massachusetts, on that eventful day of April 19, 1775, when the 'shot heard round the world' took place at Concord's historic North Bridge." *Id.* at 18. Thus, pre-Founding Gunpowder Laws sought to preserve arms by minimizing the risk of explosions, rather than restricting access to them.

Other statutes sought to improve the safety of powder houses by prohibiting the use of firearms in their close proximity. In 1762, Rhode Island enacted a fire-prevention

statute to this effect, which provided that "no person whatsoever shall fire a gun or other fireworks within one hundred yards of the said powder house, upon the penalty of paying a fine . . . ." 1762 R.I. Pub. Laws 132, "An act, providing in case of fire breaking out in the town of Newport." Like the other Gunpowder Laws from the same era, this regulation differed from the Capacity Mandate in both purpose and execution. The Rhode Island law did not restrict the accumulation of gunpowder in a particular space but sought to prevent people from igniting the gunpowder.

Other examples of Gunpowder Laws include a 1763 statute in the City of New York prohibited the storage of "any more or greater quantity of gunpowder at one time, than twenty-eight pounds weight . . . under the penalty of ten pounds current money of New York, for every offense." *A Law for the Better Securing of the City of New York from the Danger*

of Gun Powder (1763), reprinted in *Laws, Statutes, Ordinances and Constitutions, Ordained, Made and Established, by the Mayor, Aldermen, and Commonalty, of the City of New York, Convened in Common-Council, for the Good Rule and Government of the Inhabitants and Residents of the Said City 39, Image 40.* This statute was limited to the City of New York, a densely populated area that was, at the time, significantly more prone to inadvertent sparks and accidental fires than the surrounding area. Accordingly, this statute aimed to preserve valuable ammunition and avoid risking large-scale destruction of gunpowder, rather than to limit the use of firearms by ordinary citizens. The Pennsylvania legislature took a different approach, adopting a statute in 1781 that required gunpowder be stored on the top story of a house rather than in a designated powder house. Act of Apr. 13, 1782, Ch. XIV, 1781-1782, Pa. Laws § XLII, at 41.

Recognizing the dangers of improper storage of combustible material, other cities adopted similar requirements for storage of gunpowder when not in use. In 1783, the city of Boston adopted "An Act in Addition to the Several Acts Already Made for the Prudent Storage of Gun Powder within the Town of Boston," which explicitly defines its purpose in the opening clause: "Whereas the depositing of loaded arms in the houses of the town of Boston, is dangerous to the lives of those who are disposed to exert themselves **when a fire happens to break out in said town**." 1783 Mass. Acts 37, *An Act in Addition to the Several Acts Already Made for the Prudent Storage of Gun Powder within the Town of Boston*, §§ 1-2 (emphasis added). Philadelphia passed a similar law in 1783, prohibiting the private storage of gunpowder in quantities larger than thirty pounds. Act of Dec. 6, 1783, Ch. MLIX, 11 Pa. Stat 209, § 1, "An Act for the better

securing the city of Philadelphia and its liberties from danger of gunpowder."

In 1784, New York again took regulatory action to minimize the risk of explosions posed by improperly stored gunpowder, this time limiting the storage restrictions to "less than one mile to the northward of the city hall of the said city, except in the public magazine at the Fresh-water." 1784 Laws of N.Y. 627. Ch. 28, "An ACT to Prevent the Danger Arising from the Pernicious Practice of Lodging Gun Powder in Dwelling Houses, Stores, or Other Places within Certain Parts of the City of New York, or on Board of Vessels within the Harbour Thereof."

Portsmouth, New Hampshire limited private storage to "ten pounds of gunpowder at any one time, which ten pounds shall be kept in a tin canister properly secured for that purpose." 1786 N.H. Laws 383, "An Act To Prevent The

Keeping Of Large Quantities Of Gun-Powder In Private Houses In Portsmouth And For Appointing A Keeper Of The Magazine Belonging To Said Town." Around the same time, Providence, Rhode Island required that whoever kept gunpowder "in greater quantity that [sic] twenty-eight pounds" was subject to forfeiture and fine of twenty dollars. 1798-1813 R.I. Pub. Laws 85, "An Act Relative To the Keeping Gun-Powder In The Town of Providence," § 2.

In 1803, Boston expanded its regulation to require that all gun powder be stored in powder houses when it adopted 1801 Mass. Acts 507, "An Act to Provide for the Storing and Safe Keeping of Gun Powder in the Town of Boston, and to Prevent Damage from the Same." Lexington, Kentucky similarly regulated storage of gunpowder and "prohibit[ed] any inhabitants of said town, from keeping in the settled parts thereof, any quantity of gun powder **which might in case of**

fire be dangerous." 1806 K.Y. Acts 122, § 3 (emphasis added).

An 1811 New Jersey statute regulating the manufacture of gunpowder "within a quarter of a mile from any town or village or house of public worship, . . . dwelling house, barn or out house," required only "the consent under hand and seal of all and every the owner or owners of such dwelling house, barn, or out house as aforesaid" as a prerequisite to opening an independently operated powder mill. 1811 N.J. Laws 300, §1.

Each of the aforementioned regulations were founded in response to concern over the danger that could be posed by inadvertent ignition of large quantities of stored gunpowder. Accordingly, these regulations sought to alleviate the threat posed by the collection of a large amount of an explosive substance, not the potential for criminal use of objects that

"sometimes contribute to criminal violence." Appellant's Br. at 58.

B. The How and Why

Having reviewed the potential historical analogues, the final step of the analysis is assessment of the "how" and "why" of the Capacity Mandate versus the "how" and "why" of the Gunpowder Laws identified above. *Bruen*, 597 U.S. at 29 ("*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.").

ESSB 5078 burdens the right to self-defense by mandating the use of limited capacity magazines. This unconstitutional statute is applicable only to the mechanism by which ammunition is loaded into a firearm and does not seek to regulate the quality or quantity of stored explosive material.

The "how" is therefore not analogous to any of the Gunpowder Laws, which were entirely directed to non-use storage of explosive material. The Capacity Mandate is highly dissimilar when compared to the limited historical restrictions reviewed *supra.* Importantly, the Gunpowder Laws required that combustible material over a certain quantity be stored in certain conditions to prevent inadvertent ignition of highly combustible material. They did not impose restrictions on the quantities of powder that could be owned by any person, nor did they restrict the amounts of powder that could be used at one time. In short, this Nation's historical tradition of firearms regulation does not include any Founding Era regulations which restrict the amount of ammunition that can be stored at one time or in any one location. To the extent any regulations limited the quantities of combustible material that could be accumulated in a single

place, they only sought to avoid the tragedy of a potential wildfire which could be occasioned upon the inadvertent ignition of a large amount of combustible material, and to minimize the effect of such ignition. Gunpowder storage laws from the Founding Era are more closely analogous to OSHA regulations controlling the storage of flammable chemical compounds than to the Capacity Mandate.

Moreover, the "why" of ESSB 5078 and Gunpowder Laws are also not analogous. The Capacity Mandate burdens the right to self-defense in order to mitigate the purported danger posed by "weapons that were invented for offensive purposes and were ultimately proven to pose exceptional dangers to innocent civilians." Appellant's Reply Brief at 25. In contrast, the Gunpowder Laws were specifically directed at fire safety and minimizing the risk of explosions to protect towns from fire danger, and also to preserve gunpowder

supply for the Patriot cause during the Revolutionary War. THOMAS, *supra*, at 18. These storage requirements were adopted with the goal of *preserving and maximizing* the ability to generate an armed response for the purpose of self-defense while minimizing the risks associated with improper storage of explosive material. Both of these purposes are contrary to the goal of ESSB 5078. Since the Gunpowder Laws did not impose a comparable burden and were not comparably justified, they are not historical analogues to ESSB 5078.

CONCLUSION

No historical analogue exists to carry ESSB 5078 through the analysis required by *Bruen*. Accordingly, the decision of the trial court should be affirmed.

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation of RAP 18.17(6) because it consists of **2,650** words.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court for the Supreme Court of Washington using the Washington State Appellate Courts' Secure Portal Electronic Filing system on November 29, 2024. I certify that all participants in this case are registered with that system and that service will be accomplished through that system.

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