**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 THE NATIONAL RIFLE ASSOCIATION OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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## I. IDENTITY AND INTEREST OF *AMICUS CURIAE*

The National Rifle Association of America (NRA) is America's oldest civil rights organization and foremost defender of Second Amendment rights. It was founded in 1871 by Union generals who, based on their Civil War experiences, sought to promote firearms marksmanship and expertise amongst the citizenry. Today, the NRA is America's leading provider of firearms marksmanship and safety training for both civilians and law enforcement. The NRA has approximately four million members, and its programs reach millions more.

The NRA is interested in this case because Washington's ban on arms that are commonly possessed for lawful purposes violates the Second Amendment.

## II. ISSUE ADDRESSED BY *AMICUS*

*Amicus* addresses in this brief whether Washington's ban on commonly possessed arms violates the Second Amendment to the U.S. Constitution.

## III. STATEMENT OF THE CASE

SB 5078 prohibits the sale and manufacture of magazines that hold over 10 rounds. Engrossed Substitute 13 S.B. 5078, 67th Leg., Reg. Sess. (Wash. 2022). Because Americans own over 100 million magazines that hold over 10 rounds, the prohibited arms are common. CP 1029; *see also* William English, *2021 National Firearms Survey: Updated Analysis Including Types of Firearms Owned*, at 20 (May 13, 2022).[1] And the Supreme Court has held that bans on common arms violate the Second Amendment. *District of Columbia v. Heller*, 554 U.S. 570, 629 (2008).

Gator's filed this action seeking to set aside a civil investigative demand and seeking a declaration that SB 5078 is unconstitutional—both facially and as-applied to Gator's—under Article I, Section 24 of the Washington Constitution and the Second Amendment to the U.S. Constitution. CP 10. On

[1] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4109494.

April 8, 2024, the trial court held that Washington's ban violates both the Washington and U.S. Constitutions.

## IV. ARGUMENT

### A. *Heller* held that common arms cannot be banned.

The Supreme Court held that bans on common arms violate the Second Amendment in *District of Columbia v. Heller*, 554 U.S. 570 (2008). *Heller*, invalidating the District of Columbia's handgun ban, applied the test later expounded in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, which controls here:

> In keeping with *Heller*, we hold that when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. To justify its regulation…. the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation.

597 U.S. 1, 17 (2022).

Conducting the plain text analysis of the Second Amendment, *Heller* determined that "[t]he Second Amendment extends, prima facie, to all instruments that constitute bearable arms." 554 U.S. at 582.

Proceeding to the historical tradition of firearm regulation, *Heller* held that common arms cannot be banned. Historically, "[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 (quoting *United States v. Miller*, 307 U.S. 174, 179 (1939)). Therefore, "the sorts of weapons protected were those 'in common use at the time.'" *Id.* at 627 (quoting *Miller*, 307 U.S. at 179).

As for prohibitions on particular arms, the Court's extensive historical analysis identified only "the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'" *Id.* This traditional regulation "fairly supported" *Heller*'s holding that the Second Amendment protects common arms because common arms are necessarily not dangerous *and unusual*. *Id.*; *see also Bruen*, 597 U.S. at 47 ("Drawing from this historical tradition [of restrictions on 'dangerous and unusual weapons'], we explained [in *Heller*] that the Second Amendment protects only the carrying of weapons that are those 'in common use at

the time,' as opposed to those that 'are highly unusual in society at large.'") (quoting *Heller*, 554 U.S. at 627).

*Heller*'s "historical understanding of the scope of the right" was consistent with *Miller*—which held that short-barreled shotguns were not protected arms—because *Miller* established that "the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes." *Heller*, 554 U.S. at 625.[2]

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[2] *Bruen* made clear that "dangerous and unusual" arms can become common—and thus protected—arms:

> Whatever the likelihood that handguns were considered "dangerous and unusual" during the colonial period, they are indisputably in "common use" for self-defense today. They are, in fact, "the quintessential self-defense weapon." [*Heller*, 554 U.S. at 629.] Thus, even if these colonial laws prohibited the carrying of handguns because they were considered "dangerous and unusual weapons" in the 1690s, they provide no justification for laws restricting the public carry of weapons that are unquestionably in common use today.

597 U.S. at 47.

Concluding that the nation's tradition of firearm regulation allows only dangerous and unusual weapons to be banned, and that handguns—as "the most popular weapon chosen by Americans"—are common, *Heller* held that "a complete prohibition of their use is invalid." *Id.* at 629.

After *Heller*, the Supreme Court invalidated Chicago's handgun ban in *McDonald v. City of Chicago*, 561 U.S. 742 (2010). *McDonald* reaffirmed that the Second Amendment "applies to handguns because they are 'the most preferred firearm in the nation'" for self-defense. 561 U.S. at 767 (quoting *Heller*, 554 U.S. at 628–29).

In *Caetano v. Massachusetts*, the Supreme Court summarily reversed a ruling that upheld a stun gun prohibition. 577 U.S. 411 (2016). Concurring, Justice Alito, joined by Justice Thomas, explained that because "stun guns are widely owned and accepted as a legitimate means of self-defense across the country[,] Massachusetts' categorical ban of such weapons

therefore violates the Second Amendment." *Id.* at 420 (Alito, J., joined by Thomas, J., concurring).

Justice Thomas, who authored the *Bruen* opinion, joined by Justice Scalia, who authored the *Heller* opinion, provided additional confirmation of this application of the Court's test in a dissent from a denial of certiorari:

> *Heller* asks whether the law bans types of firearms commonly used for a lawful purpose…. Roughly five million Americans own AR-style semiautomatic rifles. The overwhelming majority of citizens who own and use such rifles do so for lawful purposes, including self-defense and target shooting. Under our precedents, *that is all that is needed* for citizens to have a right under the Second Amendment to keep such weapons.

*Friedman v. City of Highland Park, Ill.*, 577 U.S. 1039, 1042 (2015) (Thomas, J., joined by Scalia, J., dissenting from the denial of certiorari) (citations omitted) (emphasis added).

Thus, for arms prohibitions, "the pertinent Second Amendment inquiry is whether [the arms] are commonly possessed by law-abiding citizens for lawful purposes today."

*Caetano*, 577 U.S. at 420. (Alito, J., joined by Thomas, J., concurring) (emphasis omitted).

Washington bans magazines capable of holding over 10 rounds. These magazines are common: "48.0% of gun owners, about 39 million people, have owned magazines that hold over 10 rounds, and up to 542 million such magazines have been owned." William English, *2021 National Firearms Survey: Updated Analysis Including Types of Firearms Owned*, at 20 (May 13, 2022);[3] *see also* Respondents' Br. 16–18. And these magazines are "Arms" within the meaning of the Second Amendment: "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), and "[a] magazine is necessary to make meaningful an individual's right to" keep and bear arms, *Hanson v. District of Columbia*, No. 23-7061, 2024 WL 4596783, at *3 (D.C. Cir. Oct. 29, 2024); *see*

[3] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4109494.

*also Duncan v. Bonta*, 695 F. Supp. 3d 1206, 1224 (S.D. Cal. 2023) ("a magazine is an essential component with out which a semiautomatic firearm is useless for self-defense"); *Ass'n of New Jersey Rifle & Pistol Clubs, Inc. v. Att'y Gen. New Jersey*, 910 F.3d 106, 116 (3d Cir. 2018), *abrogated on other grounds by Bruen*, 597 U.S. 1 ("Because magazines feed ammunition into certain guns, and ammunition is necessary for such a gun to function as intended, magazines are 'arms' within the meaning of the Second Amendment."). "To hold otherwise would allow the government to sidestep the Second Amendment with a regulation prohibiting possession at the component level, such as a firing pin." *Hanson*, 2024 WL 4596783, at *3 (quotation omitted).

Because the prohibited magazines are "Arms," "not dangerous or unusual," and "in common use," *Barnett v. Raoul*, No. 23-CV-00141-SPM, 2024 WL 4728375, at *48 (S.D. Ill. Nov. 8, 2024), "a complete prohibition of their use is invalid," *Heller*, 554 U.S. at 629.

### B. The State misunderstands Supreme Court precedent.

#### 1. It is not the plaintiff's burden to prove that the plain text covers bearable arms; rather, the Second Amendment extends prima facie to all bearable arms.

The State contends that "*Heller* and *Bruen* place the burden on Gator's to show that LCMs are in common use for self-defense." Appellant's Br. 52.

*Heller*'s plain text analysis expressly concluded that "[t]he Second Amendment extends, prima facie, to all instruments that constitute bearable arms." 554 U.S. at 582. "In other words," *Heller* "identifies a presumption in favor of Second Amendment protection, which the State bears the initial burden of rebutting." *New York State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 257 n.73 (2d Cir. 2015); *see also Virginia v. Black*, 538 U.S. 343, 369 (2003) (Scalia, J., concurring in part, concurring in the judgment in part, and dissenting in part) (defining "prima facie evidence" as "'sufficient to establish a given fact'" and "'if unexplained or uncontradicted … sufficient to sustain a

judgment in favor of the issue which it supports'") (quoting BLACK'S LAW DICTIONARY 1190 (6th ed. 1990)). Thus, in *Cuomo*, the Second Circuit appropriately struck a ban on a pump-action rifle because the government's evidence focused exclusively on semiautomatic weapons and "the presumption that the Amendment applies remain[ed] unrebutted." 804 F.3d at 257 n.73.

Here, because the banned arms are bearable arms and thus covered by the plain text, the State may justify its ban only by proving that it is consistent with historical tradition.

**2. The "common use" consideration is part of the historical analysis—not the plain text analysis.**

The State argues that "Gator's Second Amendment claim fails at *Bruen*'s first step [plain text analysis]" because the banned magazines are not "commonly used for self-defense" and are "dangerous and unusual." Appellant's Br. 50–51 (quoting *Bruen*, 597 U.S. at 21). But *Heller* and *Bruen* demonstrate that these considerations must occur in the historical analysis.

*Heller* referred to "the *historical tradition*" of regulating "dangerous and unusual weapons." 554 U.S. at 627 (emphasis added). And *Bruen* explained that the *Heller* Court was "[d]rawing from this *historical tradition*" of restricting "dangerous and unusual weapons" in holding that the Second Amendment protects arms "'in common use at the time,' as opposed to those that 'are highly unusual in society at large.'" 597 U.S. at 47 (quoting *Heller*, 554 U.S. at 627) (emphasis added).

Moreover, the *Heller* Court considered that "historical tradition" in its own historical analysis. After completing the plain text analysis of the Second Amendment, 554 U.S. at 576–600, the Court began focusing on historical tradition, including "how the Second Amendment was interpreted from immediately after its ratification through the end of the 19th century," *id.* at 605. Only after reviewing "Postratification Commentary," *id.* at 605–10, "Pre–Civil War Case Law," *id.* at 610–14, "Post–Civil War Legislation," *id.* at 614–16, "Post–Civil War

Commentators," *id.* at 616–19, and Supreme Court precedents, *id.* at 619–26, did the Court identify the "historical tradition" of regulating "dangerous and unusual weapons" and determine that arms "in common use at the time" are protected. *Id.* at 627 (quotation omitted). What is more, the Court identified the traditional "dangerous and unusual" regulation in the same paragraph as other "longstanding" regulations, *id.* at 626–27, while promising to "expound upon the *historical justifications* for" those regulations another time, *id.* at 635 (emphasis added). Indeed, *Heller* "did not say that dangerous and unusual weapons are not arms," but rather, "that the relevance of a weapon's dangerous and unusual character lies in the '*historical tradition*[.]'" *Teter v. Lopez*, 76 F.4th 938, 949 (9th Cir. 2023), *reh'g en banc granted, opinion vacated*, 93 F.4th 1150 (9th Cir. 2024) (quoting *Heller*, 554 U.S. at 627) (emphasis in *Teter*).

### 3. "Common use" is not limited to self-defense, it includes all lawful purposes.

The State errors by limiting the Second Amendment's protections to arms "in common use *for self-defense*." Appellant's Br. 52 (emphasis added).

To be sure, the banned arms are commonly used for self-defense. *See* Respondents' Br. 56–57. But self-defense is not the only purpose the Second Amendment protects. *Heller* explained that the right protects weapons "typically possessed by law-abiding citizens for *lawful purposes*," 554 U.S. at 625 (emphasis added), which made sense because "[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 (emphasis added).

*Heller* approvingly quoted the Supreme Court of Tennessee stating that "the right to keep arms involves, necessarily, the right to use such arms *for all the ordinary purposes*." *Id.* at 614 (quoting *Andrews v. State*, 50 Tenn. 165, 178 (1871)) (emphasis

added). *Heller* also acknowledged that "most [founding-era Americans] undoubtedly thought [the right] even more important for self-defense *and hunting*" than militia service. *Id.* at 599 (emphasis added), and that the right includes "learning to handle and use [arms] in a way that makes those who keep them ready for their efficient use," *id.* at 618 (quoting Thomas M. Cooley, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 271 (1880)). Indeed, Justice Stevens's dissent recognized that "[w]hether [the Second Amendment] also protects the right to possess and use guns for nonmilitary purposes like hunting and personal self-defense is the question presented by this case." *Id.* at 636–37 (Stevens, J., dissenting).

In *McDonald*, the Court summarized the "central holding in *Heller*: that the Second Amendment protects a personal right to keep and bear arms *for lawful purposes*, most notably for self-defense within the home." 561 U.S. at 780 (emphasis added); *see also Friedman*, 136 S. Ct. at 1042 (Thomas, J., joined by Scalia,

J., dissenting from the denial of certiorari) ("The overwhelming majority of citizens who own and use such rifles do so for lawful purposes, including self-defense and target shooting. Under our precedents, that is all that is needed[.]") (citation omitted).

In *New York State Rifle & Pistol Ass'n, Inc. v. City of New York*—a case that was dismissed as moot—four Justices of the Supreme Court recognized that "still another" protected right "is to take a gun to a range in order to gain and maintain the skill necessary to use it responsibly." 590 U.S. 336, 365 (2020) (Alito, J., joined by Thomas and Gorsuch, JJ., dissenting); *id.* at 340 (Kavanaugh, J., concurring) ("agree[ing] with Justice ALITO's general analysis of *Heller* and *McDonald*").

Aside from the fact that the banned magazines are commonly kept for self-defense, that they are commonly kept for other lawful purposes such as hunting, target shooting, and competitive shooting secures Second Amendment protection. *See* English, *2021 National Firearms Survey*, at 23.

**4. How commonly the People possess arms for lawful purposes is dispositive, not the government's assessment of their suitability for those purposes.**

The State defends its ban by asserting that the prohibited magazines "have virtually no utility for self-defense," Appellant's Br. 30, and are even "disadvantageous for self-defense," *id.* at 9. But that determination is for the People to make, not the government.

The relevant inquiry is whether the arms are commonly *possessed* for a lawful purpose. As Justice Stevens explained, "The [*Heller*] Court struck down the District of Columbia's handgun ban not because of the *utility* of handguns for lawful self-defense, but rather because of their *popularity* for that purpose." *McDonald*, 561 U.S. at 890 n.33 (Stevens J., dissenting).

In *McDonald*, the Supreme Court explained why it struck the handgun ban in *Heller*: "we found that this right applies to handguns because they are the most preferred firearm in the nation to 'keep' and use for protection of one's home and family.

Thus, we concluded, citizens must be permitted to use handguns for the core lawful purpose of self-defense." *McDonald*, 561 U.S. at 767–68 (cleaned up). Because handguns are "preferred," they "must be permitted."

It is for the People, not the State, to decide which arms are protected by the Second Amendment. "To limit self-defense to only those methods acceptable to the government is to effect an enormous transfer of authority from the citizens of this country to the government—a result directly contrary to our constitution and to our political tradition." *Friedman v. City of Highland Park, Ill.*, 784 F.3d 406, 413 (7th Cir. 2015) (Manion, J., dissenting); *see also Caetano*, 577 U.S. at 422 (Alito, J., joined by Thomas, J., concurring) (Disapproving "the safety of all Americans [being] left to the mercy of state authorities who may be more concerned about disarming the people than about keeping them safe."). Rather, *Heller* affirmed that the People have the right to choose their preferred arms: "*Whatever the reason*, handguns are the most popular weapon chosen by

Americans for self-defense in the home, and a complete prohibition of their use is invalid." 554 U.S. at 629 (emphasis added). Whether the State agrees with the choices made by the People is immaterial. "[T]he enshrinement of constitutional rights necessarily takes certain policy choices off the table," *id.* at 636, including the choice to deprive Americans of their preferred arms.

In the First Amendment context, "the general rule" is "that the speaker and the audience, not the government, assess the value of the information presented." *Edenfield v. Fane*, 507 U.S. 761, 767 (1993). Just as the People have the right to determine the value of the information they exchange, they have the right to determine the value—including the defensive value—of the arms they keep and bear.

**5. The relevant inquiry is how commonly arms are possessed for self-defense, not how often they are actually fired in self-defense.**

The State claims that the prohibited magazines "are not … commonly used for self-defense" because most self-defense

incidents do not require more than 10 shots. Appellant's Br. 7. That is irrelevant. *Heller* held that weapons "typically *possessed*" for "lawful purposes" are protected. 554 U.S. at 625 (emphasis added). And the *Caetano* concurrence explained that "the pertinent Second Amendment inquiry is whether [the arms] are commonly *possessed* by law-abiding citizens for lawful purposes today." 577 U.S. at 420 (Alito, J., joined by Thomas, J., concurring) (emphasis altered).

It does not matter how often a firearm is actually fired in self-defense. A firearm that is possessed for self-defense is *used* for self-defense, even when it is not being fired. *Heller* did not attempt to quantify defensive handgun incidents—it focused only on how commonly handguns were kept for self-defense. Moreover, if Second Amendment protection depended on the frequency of defensive gun uses, the People's rights would diminish as the nation became safer, because their arms would be fired less frequently in self-defense. Rather, unfired firearms

are protected by the Second Amendment just as unread books are protected by the First Amendment.

### 6. The Second Amendment does not exclude arms because they are most useful in military service.

The State contends that the banned magazines are "not protected by the Second Amendment" because they are "'most useful in military service.'" Appellant's Br. 53 (quoting *Heller*, 554 U.S. at 627). The State misreads *Heller*, which merely "acknowledged that advancements in military technology might render many commonly owned weapons ineffective in warfare," *Caetano*, 577 U.S. at 419 (Alito, J., joined by Thomas, J., concurring) (citing *Heller*, 554 U.S. at 627–28), while some weapons most effective in warfare may be unprotected. Immediately after explaining that arms "in common use" are protected but "dangerous and unusual weapons" are not, *Heller* noted that this test may allow some "weapons that are most useful in military service" to be banned *if* they "are highly unusual in society at large." 554 U.S. at 627 (quotation marks

omitted). And even though such applications of the common use test would "limit[] the degree of fit between the prefatory clause and the protected right" in "modern" times, it "cannot change our interpretation of the right," *id.* at 627–28—*i.e.*, that the right protects arms "in common use," *id.* at 627. Put simply, *Heller* explained that "dangerous and unusual weapons" may be banned *despite*—not *because of*—the fact that they are "most useful in military service."

The State's "most useful in military service" argument contradicts the rest of the *Heller* opinion. *Heller* recognized that "[i]n the colonial and revolutionary war era, small-arms weapons used by militiamen and weapons used in defense of person and home were one and the same." 554 U.S. at 624–25 (quoting *State v. Kessler*, 289 Ore. 359, 368 (1980)) (brackets omitted); *see also id.* at 627 ("[T]he 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."). Ordinary

people possessing weapons most useful for military service was "precisely the way in which the Second Amendment's operative clause furthers the purpose announced in its preface." *Id.* at 625. But if those arms were not protected, as the State argues, the prefatory and operative clauses would have been completely contradictory.

Indeed, the Second Amendment "could be rephrased, 'Because a well regulated Militia is necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed.'" *Id.* at 577. But under the State's interpretation, it could read, "Because a well regulated Militia is necessary to the security of a free State, the right of the people to keep and bear *non-militia* Arms shall not be infringed."

The State's interpretation also contradicts *Miller*. In *Miller*, the lack of evidence showing that the regulated "weapon is any part of the ordinary military equipment or that its use could contribute to the common defense" precluded the Court from taking judicial notice "that the Second Amendment guarantees

the right to keep and bear such an instrument." 307 U.S. at 178. While *Heller* clarified that *Miller* did not hold "that *only* those weapons useful in warfare are protected," 554 U.S. at 624 (emphasis added), *Miller* makes certain that weapons most useful in warfare may be protected.

As the *Caetano* concurrence explained, "*Miller* and *Heller* recognized that militia members traditionally reported for duty carrying 'the sorts of lawful weapons that they possessed at home,' and that the Second Amendment therefore protects such weapons as a class, *regardless of any particular weapon's suitability for military use*." *Caetano*, 577 U.S. at 419 (Alito, J., joined by Thomas, J., concurring) (emphasis added).

The State's argument leaves unprotected every arm founding-era militiamen were required to keep for militia service and severs the Second Amendment's operative clause from the purpose announced in its preface. This anti-historical military test violates *Miller* and *Heller*, undermines the right to self-defense, and contradicts the purpose for which the Second

Amendment was codified. *See Heller*, 554 U.S. at 599 ("[T]he purpose for which the right was codified" was "to prevent elimination of the militia.").

### C. There is no historical tradition of banning common arms.

Because the Second Amendment's plain text "extends, prima facie, to all instruments that constitute bearable arms," *Heller*, 554 U.S. at 582, the "government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation," *Bruen*, 597 U.S. at 17. But for common arms, the Supreme Court has already held that prohibitions violate the Second Amendment. *See Heller*, 554 U.S. at 629; *supra*, Part IV.A.

As noted above, *Heller*'s historical analysis identified only "the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'" 554 U.S. at 627. A weapon that is common is the antithesis of a weapon that is unusual, so a common weapon is necessarily not "dangerous and unusual."

To be sure, "dangerous and unusual" is a conjunctive test—so common arms cannot be banned even if they are dangerous. Thus, in *Caetano*, after determining that the Massachusetts Supreme Judicial Court's analysis of whether stun guns were "unusual" was flawed, the Court declined to consider whether stun guns qualified as "dangerous." 577 U.S. at 412. Justice Alito, joined by Justice Thomas, explained in a concurring opinion that the Court ended its analysis there because a weapon must be *both* dangerous *and* unusual to be banned:

> As the *per curiam* opinion recognizes, this is a conjunctive test: A weapon may not be banned unless it is *both* dangerous *and* unusual. Because the Court rejects the lower court's conclusion that stun guns are "unusual," it does not need to consider the lower court's conclusion that they are also "dangerous."

*Id.* at 417 (Alito, J., joined by Thomas, J., concurring) (citing *Heller*, 554 U.S. at 636); *see also Miller v. Bonta*, 699 F. Supp. 3d 956, 969 (S.D. Cal. 2023), *appeal held in abeyance*, No. 23-2979, 2024 WL 1929016 (9th Cir. Jan. 26, 2024) ("The Supreme Court carefully uses the phrase 'dangerous and unusual arms,'

while the State, throughout its briefing, refers to 'dangerous [or] unusual arms.' That the State would advocate such a position is disheartening.") (brackets in original).

Contrary to the State's contention that its regulation is constitutional because the banned magazines are "especially dangerous," Appellant's Br. 59, "[i]f *Heller* tells us anything, it is that firearms cannot be categorically prohibited just because they are dangerous." *Caetano*, 577 U.S. at 418 (Alito, J., joined by Thomas, J., concurring).

Because magazines that hold over 10 rounds are common, they necessarily are not "dangerous and unusual" and cannot be banned. *Heller*, 554 U.S. at 624, 629.

### D. There were no historical prohibitions on common arms.

The State failed to provide a historical tradition of prohibiting common arms. Nor could it; as *Heller* held, there is no such tradition. 554 U.S. at 629; *see also* David B. Kopel & Joseph G.S. Greenlee, *The History of Bans on Types of Arms*

*Before 1900*, 50 J. LEGIS. 223, 369–70 (2024) (listing historical weapon prohibitions, which were "uncommon" and applied only to dangerous and unusual weapons).

The State attempts to excuse its failure to carry its burden by asserting that the banned arms represent "recently developed technology." Appellant's Br. 56. In fact, repeating arms predate the Second Amendment by roughly three centuries; repeating arms utilizing magazines predate the Second Amendment by over one century; the Founders embraced repeating arms—including Joseph Belton's 16-shot firearm during the Revolutionary War and Joseph Chambers's 12-shot muskets and 226-shot swivel guns purchased by the U.S. military and Pennsylvania militia in the early 19th century; myriad repeating arms with greater than 10-round capacities were invented in 19th-century America—including the commercially successful 16-shot Henry Rifle in 1861 and the overwhelmingly popular Winchester Rifles starting in 1866; and semiautomatic firearms were invented in 1885, while detachable box magazines were

invented in 1862. Kopel & Greenlee, *The History of Bans on Types of Arms Before 1900*, 50 J. LEGIS. at 232–36, 254–57, 268–83. Despite continuous technological advancements over hundreds of years and their widespread popularity in the 19th century, neither the sale nor possession of repeating arms of any capacity were ever banned in America. *Id.* at 369–70.

Although magazines and repeating arms with greater than 10-round capacities existed during the relevant historical periods, the State instead relies on restrictions—not prohibitions—on weapons such as trap guns, clubs, Bowie knives, and handguns.

For starters, *Heller* and *Bruen* already held that historical handgun regulations cannot justify a ban on possessing or carrying common arms.

No state forbade the sale or possession of trap guns. "Rather, a few states forbade the actual setting of a gun to function as a trap gun (whether designed for that purpose or not), and sometimes only forbade setting the trap for a specific purpose"

such as hunting or deliberately injuring another person. Kopel & Greenlee, *The History of Bans on Types of Arms Before 1900*, 50 J. LEGIS. at 365–66.

As for clubs and Bowie knives, "the mainstream American legal tradition was to limit the mode of carry (no concealed carry), to limit sales to minors (either with bans or requirements for parental permission), and/or to impose extra punishment for use in a crime." *Id.* at 383; *see also id.* at 298–328, 358–59. The Supreme Court has made clear, however, that non-prohibitory regulations cannot justify a prohibition. *Bruen* held that lesser historical restrictions—including "restrictions governing the intent for which one could carry arms, the manner of carry, or the exceptional circumstances under which one could not carry arms"—cannot justify "broadly prohibiting the public carry of commonly used firearms." 597 U.S. at 38. And *United States v. Rahimi* reaffirmed that lesser historical restrictions—including laws requiring sureties or preventing carrying in a terrifying manner to "mitigate demonstrated threats of physical

violence"—cannot justify laws that "broadly restrict arms use by the public generally." 144 S. Ct. 1889, 1901 (2024). Likewise, lesser, non-prohibitory restrictions—such as laws regulating the manner of carry or imposing extra punishment for use in a crime—cannot justify a prohibition on possessing common arms. Otherwise, the handgun ban would have been upheld in *Heller* and the carry ban would have been upheld in *Bruen*.

## V. CONCLUSION

Washington's ban on commonly possessed magazines is unconstitutional. It is not only the plain text of the Second Amendment that is made applicable to the states by the Fourteenth Amendment, but also the Supreme Court's interpretation of that text. *Cooper v. Aaron*, 358 U.S. 1 (1958). The trial court's decision is faithful to both the plain text of the Second Amendment and the Supreme Court's interpretation of that Amendment. It should be affirmed.

This document contains 4,970 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted,

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November 15, 2024

## CERTIFICATE OF SERVICE

I certify that on November 15, 2024, pursuant to instructions from the Clerk of the Court and due to the current unavailability of the Court's networks and filing system, I emailed the foregoing to the Clerk of the Court and copied the following counsel of record for the active parties in the case:

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Dated this 15th day of November 2024, at Caldwell, Idaho.

/s/ *Donald Kilmer*
Counsel for *Amicus Curiae*

Outlook

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**Re: State of Washington v. Gator's Custom Guns, Inc., et al. | Case No.: 102940-3 | Motion to File Amicus Brief, Proposed Amicus Brief**

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**From** OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>

**Date** Fri 11/15/2024 8:12 AM

**To** Donald Kilmer <don@dklawoffice.com>

**Cc** Noah.Purcell@atg.wa.gov <Noah.Purcell@atg.wa.gov>; Kristin.Beneski@atg.wa.gov <Kristin.Beneski@atg.wa.gov>; Andrew.Hughes@atg.wa.gov <Andrew.Hughes@atg.wa.gov>; William.McGinty@atg.wa.gov <William.McGinty@atg.wa.gov>; July.Simpson@atg.wa.gov <July.Simpson@atg.wa.gov>; Ben.Carr@atg.wa.gov <Ben.Carr@atg.wa.gov>; Bob.Hyde@atg.wa.gov <Bob.Hyde@atg.wa.gov>; John.Nelson@atg.wa.gov <John.Nelson@atg.wa.gov>; austin@hatcherlawpllc.com <austin@hatcherlawpllc.com>; pete@smfjb.org <pete@smfjb.org>; eerhardt@nrahq.org <eerhardt@nrahq.org>; jgreenlee@nrahq.org <jgreenlee@nrahq.org>

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**Subject:** State of Washington v. Gator's Custom Guns, Inc., et al. | Case No.: 102940-3 | Motion to File Amicus Brief, Proposed Amicus Brief



Dear Clerk of the Supreme Court of Washington State —

Due to the continuing outage of the Court's e-file system, and pursuant to your instructions, I am emailing this Motion for Leave to File Brief of the National Rifle Association as *Amicus Curiae* in Support of Respondents, along with the proposed *amicus curiae* brief.

The Certificate of Service reflects this email "filing" and that this email and attachments were copied to the parties noted in the email header and the certificates of service.

Thank you.

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Coauthor of Law School Casebook: Firearms Law and the Second Amendment: Regulation, Rights, and Policy. 3rd ed. Aspen Publishing. ISBN: 9781543826814



Sent from Don Kilmer’s MacBook Pro