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 *Amici Curiae* Gun Owners of America, Inc., Gun Owners Foundation, Heller Foundation, America's Future, U.S. Constitutional Rights Legal Defense Fund, and Conservative Legal Defense and Education Fund in Support of Respondents

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INTEREST OF *AMICI*

The *amici* are nonprofit organizations which work to defend constitutional rights and protect liberties, including the right to keep and bear arms.

STATEMENT OF THE CASE

In July 2022, the State of Washington enacted Senate Bill 5078 ("ESSB 5078"), making it illegal to sell or possess "large capacity magazines" ("LCMs") with a capacity of more than 10 rounds. Gator's Custom Guns, Inc. sought injunctive relief as well as a declaratory judgment that ESSB 5078 violates the state's constitution, which promises:

> The right of the individual citizen to **bear arms** in defense of himself, or the state, **shall not be impaired**…." [Washington Constitution, Article 1, Sec. 24 (emphasis added).]

Superior Court for Cowlitz County Judge Gary B. Bashor carefully considered the constitutionality of the LCM ban under both state and federal constitutions and enjoined the operation of

the law supported by an opinion issued on April 8, 2024. *State v. Gator's Custom Guns, Inc.*, 2024 Wash. Super. LEXIS 912 ("*Gator's Guns*").

On the same day as the injunction was issued, the State of Washington filed in this Court an emergency motion for stay, in response to which the Commissioner issued a stay pending further review of that order. *State v. Gator's Custom Guns, Inc.,* Ruling No. 102940-3 (Apr. 8, 2024).

ARGUMENT

I. THE SUPERIOR COURT'S DECISION CAREFULLY REVIEWED AND WAS SOLIDLY GROUNDED ON CONTROLLING AUTHORITIES.

This Court's stay of the Superior Court's injunction only hours after it was issued should not be seen to indicate in any way that the Superior Court's opinion was not thorough and well grounded in established federal and state case law. It was both.

To establish the basic right to bear arms, the Superior

Court relied on this Court's decision in *State v. Sieyes*, 168 Wn.2d 276, 287 (2010), which was decided in the aftermath of *District of Columbia v. Heller*, 554 U.S. 570 (2008), explaining: "Article I, § 24 plainly guarantees an individual right to bear arms. '[T]here is quite explicit language about the "right of the individual citizen to bear arms in defense of himself".'" *Gator's Guns* at *6. The Superior Court noted the principle articulated by this Court, that the: "Supreme Court application of the United States Constitution establishes a floor below which state courts cannot go to protect individual rights…." *Id.* at *7 (quoting *Sieyes* at 292).

To establish that an LCM is an arm, the court relied on this Court's decision in *City of Seattle v. Evans*, 184 Wn.2d 856, 869 (2015): "the right to bear arms protects instruments that are designed as weapons traditionally or commonly used by lawabiding citizens for the lawful purpose of self-defense."

Gator's Guns at *9. Accordingly, the court ruled that "[m]agazines have no other design purpose than as a weapon…. Magazines are only useful as weapons." *Id.* at *11. The court noted, "*Heller* further protects the various instruments or parts that constitute a weapon…. '[T]he Second Amendment extends, prima facie, to all *instruments that constitute bearable arms*, even those that were not in existence at the time of the founding….'" *Id.* at *11-12 (quoting *Heller* at 582). "The Washington Supreme Court differentiates between 'instruments' and 'weapons', which coincides with the language of *Heller*. Neither Court limits weapons only to 'firearms,'" the court noted. *Id.* at *12.

The court considered and rejected the State's "novel theory that an LCM is not used for self-defense unless it is actually fired in self-defense." *Id.* at *14. "The right to bear arms under Art 1, § 24 is the right to own, possess, or to carry,

in anticipation of a confrontation, the same as under the Second Amendment," the court ruled. *Id.* "The plain language of both the State and Federal Supreme Court decisions discussing keep and carry focus on possession," not firing. *Id.*

The court also rejected the State's contention that if an arm is "most useful" for "military purposes," it is not protected by the constitutional text. "The fact an arm may have been originally designed as an offensive weapon does not erase its utility as a defensive weapon. Even in a military confrontation the use of any weapon may be offensive or defensive at any moment." *Id.* at *16.

Turning to the federal constitutional analysis, the court turned first to *Heller*. "Using the historical analysis in *Heller*, the US Supreme Court determined that only weapons that were both 'dangerous' *and* 'unusual' could be banned. The test is conjunctive, requiring the weapon to be *both* 'dangerous' *and*

'unusual.'" *Id.* at *26. The court noted that the *Heller* Court defined "unusual" as those weapons not "commonly possessed by civilians for lawful purposes, including self-defense." *Id.* at *26.

The court ruled that "[t]here is no need to re-do the historical analysis in an arm ban case. The Supreme Court has already done the historical analysis to establish the constitutional principle controlling which arms can be banned. The Court needs only apply the in common use constitutional principle…. [I]f an arm is commonly and lawfully owned by civilians for lawful purposes, including self-defense, then the arm is in common use and cannot be banned." *Id.* at *26-27. "If the law is a mere regulation of use or carry, then the State has the burden to show there exists a historical analogue law that justifies the regulation," the court added. *Id.* at *28. But the

court ruled that a weapon in common use cannot be completely banned, and that historical analogues need not be consulted.

The court went on to find that "[n]o one seriously disputes that there are millions of LCMs in the possession of the public…. As in *Heller* handguns were the overwhelming choice of weapon chosen for self-defense, here, millions of Americans have chosen LCMs as the format of their weapon." *Id.* at *34. Accordingly, the court ruled, LCMs cannot be banned consistent with *Heller*. *Id.* at *35-36.

The court rejected the State's contention that a weapon must be commonly used expressly for self-defense to be covered by the Second Amendment. Instead, the test is whether a weapon is commonly used for lawful purposes, including but not limited to self-defense:

> This Court cannot determine the genesis of the "used for self-defense" test as argued by the State. It is not a derivative of any Supreme Court decision or *dicta* this Court has found. To the contrary, the

> used-for-self-defense analysis does not have a logical or rational basis and the test conflicts with the Supreme Court definitions. [*Id*. at *35-36].

Finally, the court undertook a review of the historical analogues proffered by the State and its experts, and rejected them, noting that most of the purported analogues were from laws originating after the passage of the Fourteenth Amendment, too late to be evidence of the original meaning of the Second Amendment. *Id*. at *48-52. The court noted that, unlike the LCM ban, "[n]one of the laws outside of … trap gun laws appear to be outright bans" on the regulated weapons. *Id*. at *49.

Accordingly, the court ruled that the LCM ban violates both the Washington and U.S. Constitutions, and enjoined the State from enforcing it. *Id*. at *65-66.

II. THE STATE ASKS THIS COURT TO FABRICATE AN ATEXTUAL AND AHISTORIC DISTINCTION BETWEEN "MILITARY" AND "DEFENSIVE" WEAPONS.

In an effort to justify its law which clearly impairs the ability of individual Washingtonians to bear a type of arm, LCMs, the State seeks to create an artificial distinction between weapons used for "military" purposes and those used for "defensive" purposes. Its brief simply asserts: "LCMs are military-style accessories, designed to kill more rapidly on the battlefield, and virtually never used for self-defense." Appellant's Brief at 2 ("Aplt. Br."). "LCMs enable military-style assaults, not self-defense." *Id.* at 3. This proffered dichotomy persists throughout the State's argument.

The State then concludes that whatever weapons states deem to be "military" in nature may be regulated at will under the state's police powers, because by definition, military weapons cannot be "defensive" weapons.

A. Federal Constitutional Analysis.

Addressing the U.S. Constitution first, it is clear that the State's proffered dichotomy has no basis in the text, history, or tradition of the Second Amendment. And if it were adopted by the courts, its use could quickly be employed to destroy the Second Amendment by degrees, as states simply decree one type of weapon after another to be "military." For all practical purposes, the distinction would restore the "judge-empowering interest-balancing test" explicitly rejected both in *Heller* and in *New York State Rifle & Pistol Assn. v. Bruen*, 597 U.S. 1 (2022).

Washington's brief makes it all too clear that this is its strategy, as the State gives away both its intent, and its method. "LCMs are disproportionately used — and disproportionately deadly — in mass shootings and other horrific crimes, whereas they have little if any use in self-defense. SB 5078 is, therefore,

'reasonably necessary to protect public safety or welfare' and is 'substantially related' to the 'legitimate ends' of reducing gun violence in Washington." Aplt. Br. at 2. By defining an LCM as a "military" weapon, and not a "defensive" weapon, the State finds it to be damaging to public safety. The State then uses explicit balancing language of "substantial relation," "legitimate ends," and "reasonableness," under which the State's "interest" in "public safety" trumps, and the right to keep and bear arms may be "infringed." Moreover, the State's formulation uses classic "rational basis scrutiny" language, making the State's effort to regulate the disfavored weapon all but a *fait accompli*.

But the Second Amendment itself, and *Heller* and *Bruen*, make no such distinction. Indeed, in *United States v. Miller*, 307 U.S. 174 (1939), which upheld a ban on sawed-off shotguns in 1939, the Court made clear that not only are military weapons permitted to the people by the Second Amendment, but that their

military character itself is one of the reasons the Amendment protects the right to bear them.

In ruling that sawed-off shotguns were not protected by the Amendment, the Court stated that "it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense." *Id.* at 178. Thus, expressly because the weapon **did not** have military application, the Court held it was not protected. The Court noted that the Constitution as originally adopted allowed Congress to call out the People's "unorganized" militia to "suppress Insurrections and repel Invasions." *Id.* The Court added, "[w]ith obvious purpose to assure the continuation and render possible the effectiveness of such forces the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view." *Id.* Accordingly, the people are entitled to keep and bear arms with

sufficient military application to suppress insurrections and repel invasions.

Miller effectively destroys twin arguments the State proffers. First, it destroys the State's false dichotomy between "military" and "defensive" weapons. Further, it destroys the argument that "military" action is always "offensive" in nature. Indeed, suppressing insurrection is arguably defensive, and repelling invasions is defensive by definition.

Heller goes further. On the basis of extensive historical evidence — not least the fact that the Constitution itself was ever adopted only because America had gained independence from Britain by force of arms — *Heller* makes clear that American citizens — the civilian population — must be armed to resist the government should it be become tyrannical toward the People. Resistance to a despotic state is also a "lawful use" of arms

specifically envisioned an provided for by the Second Amendment.[1]

In describing the political climate in which the Second Amendment was written, the Court pointed to the "abuses" of the Stuart kings of England,[2] in "suppress[ing] political dissidents, in part by disarming their opponents." *Heller* at 592. "These experiences caused Englishmen to be extremely wary of concentrated military forces run by the state and to be jealous of their arms." *Id.* at 593.

> And, of course, what the Stuarts had tried to do to their political enemies, George III had tried to do to the colonists. In the tumultuous decades of the 1760's and 1770's, the Crown began to disarm the inhabitants of the most rebellious areas. That provoked polemical reactions by Americans invoking their rights as Englishmen to keep arms. [*Id.* at 594.]

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[1] The U.S. Supreme Court has made this purpose of the Second Amendment clear on multiple occasions. *See, e.g.*, *McDonald v. City of Chicago*, 561 U.S. 742, 768-69 (2010).

[2] *Heller* at 594.

Thus, the Court concluded, "the right secured in 1689 as a result of the Stuarts' abuses was by the time of the founding understood to be an individual right protecting against both **public** and private violence." *Id.* at 594 (emphasis added). The Court noted that "[t]here are many reasons why the militia was thought to be 'necessary to the security of a free State.' [One reason was that] when the able-bodied men of a nation are trained in arms and organized, they are better able to resist tyranny." *Id.* at 597-598. The Amendment was designed to protect the right to the entire people, not just an "organized" militia under government control, such as the National Guard.

> If, as [the District of Columbia] believe[s], the Second Amendment right is no more than the right to keep and use weapons as a member of an organized militia … if, that is, the organized militia is the sole institutional beneficiary of the Second Amendment's guarantee--it does not assure the existence of a "citizens' militia" as a safeguard against tyranny. [*Id.* at 600.]

The Court made clear that the Amendment was expressly designed to "assure the existence of a 'citizens' militia' as a safeguard against tyranny" such as the Framers themselves had just overcome through force of arms. "[The District of Columbia identif[ies] the wrong thing, namely, the organized militia. Unlike armies and navies, which Congress is given the power to create … the militia is assumed by Article I already to be in existence." *Id.* at 596.

In Federalist 46, James Madison reminded readers that the general population, through the state governments and the militia, could and would resist federal overreach, through force if necessary. To the consternation, perhaps, of some modern readers, he flatly assumed that Americans would defend themselves against a tyrannical government by armed force again if necessary, as they had just finished doing:

> [A]mbitious encroachments of the federal government, on the authority of the state

> governments … would be signals of general alarm. Every government would espouse the common cause. A correspondence would be opened. Plans of resistance would be concerted…. **The same combination in short would result from an apprehension of the federal, as was produced by the dread of a foreign yoke**; and unless the projected innovations should be voluntarily renounced, **the same appeal to a trial of force would be made in the one case, as was made in the other**.[3]

It may be exceedingly difficult for a modern court to put themselves into the position of the Framers and ratifiers of the Second Amendment, but it should be remembered that not many years previous, the Continental Army had just thrown off the yoke of suppression by the British government, and were determined that the national government being formed would not be empowered to again suppress the People of the nation, in

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[3] Federalist No. 46 (Madison), G. Carey & J. McClellan, The Federalist at 246 (Liberty Fund: 2001) (emphasis added).

whom the sovereignty of the nation was vested, as evidenced by the Declaration of Independence.[4]

> Let a regular army … be formed; and let it be entirely at the devotion of the federal government; still … the state governments with the people on their side would be able to repel the danger…. To these would be opposed **a militia … of citizens with arms in their hands**, officered by men chosen from among themselves, fighting for their common liberties, and united and conducted by governments possessing their affections and confidence. [Federalist No. 46 (emphasis added).]

Madison assumed the existence of an armed populace, and one not at an insurmountable disparity of force with the government. Washington State's insistence that it alone may determine for the people which weapons are "appropriate for self-defense" and may ban all weapons suitable for "military" use is antithetical to the Madisonian vision.

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[4] "That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, --That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it…." Declaration of Independence.

B. State Constitution.

The state constitution expressly protects the right to bear arms for two reasons: "for the defense of himself" and "for the defense of … the state." Taking the second aspect first, the State's brief notes that ESSB 5078 preserves "exemptions for the military and law enforcement," to allow the government to acquire and bear and use any "military-style" weapons it desires, while denying to the people those rights. This provision ignores the requirement of the state constitution which expressly guarantees individual Washingtonians to bear arms "in defense … of the state." Aplt. Br. at 6.

What type of weapons would Washingtonians require? The statute provides the answer — LCMs which it authorizes the military and law enforcement to have. Under the state constitution, when Washingtonians are called upon to assist "in the defense … of the state," they certainly would need to have

the same weaponry as the State has deemed essential for "the military and law enforcement" — "military-style" weapons.

As to the first protected purpose — self-defense — the State's briefing asserts that LCMs are "virtually never" used for self-defense.[5] "Virtually never" is an admission that they "sometimes are" used for self defense. Washington's position, apparently, is that when self-defense requires the additional capacity of a LCM, that type of self-defense need is irrelevant, and may be compromised. What is the distinction between the number of rounds to defend oneself, and too many rounds in most cases? Also, who makes that decision — the individual who possesses the constitutional protection, or the state that seeks to impair that right? The government's foundational premise that all weapons fall into one mutually exclusive

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[5] Aplt. Br. at 1.

category or the other, and there is no overlap, cannot be defended.

Indeed, Washington's own experts demonstrate that LCMs are relied on by law enforcement to address many self-defense situations. Seattle Police Department Chief Adrian Diaz stated that "SPD patrol officers routinely carry 17-round magazines because they need to be prepared for every scenario they might encounter." *Gator's Guns* at *13. Presumably, Seattle police are not routinely carrying LCM's to conduct military-style offensive assault operations, but rather encounter situations where defense of self and third parties would require additional rounds for many reasons, including where there might be a number of armed attackers. There is no reason to think that civilians might not encounter similar situations. Washington claims that "individuals on average fire 2.2 shots in self-defense." Aplt. Br. at 31. The state appears to assume a

romanticized, sanitized version of encounters with violent criminals, where most assaults would be one-on-one, in broad daylight, with some level of warning to the victim, so no more than two shots should be necessary to resolve the situation. As Diaz conceded, the reality of inner-city crime often does not fit Washington's sanitized, movie-set picture.

Second, Washington's self-serving claims about the "rarity" of self-defense uses have been debunked by numerous courts, which have made findings that LCMs in fact are used for purposes of self-defense. "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." *Ass'n of N.J. Rifle & Pistol Clubs v. AG N.J.*, 910 F.3d 106, 113 (3d Cir. 2018).

"Magazines holding more than 10 rounds are used for self-defense by law-abiding citizens. And they are common," noted the district court in *Duncan v. Becerra*, 366 F. Supp. 3d 1131, 1143 (S.D. Cal. 2019).

> When thousands of people are rioting, as happened in Los Angeles in 1992, or more recently with Antifa members in Berkeley in 2017, a 10-round limit for self-defense is a severe burden. When a group of armed burglars break into a citizen's home at night, and the homeowner in pajamas must choose between using their left hand to grab either a telephone, a flashlight, or an extra 10-round magazine, the burden is severe. [*Duncan* at 1157.]

The Ninth Circuit has agreed that "large-capacity magazines are the most common magazine chosen by Americans for self-defense. Indeed, millions of semiautomatic pistols, the 'quintessential self-defense weapon' for the American people, … come standard with magazines carrying over ten rounds. That many citizens rely on large-capacity magazines to respond to an unexpected attack is enough for our inquiry." *Duncan v. Bonta*,

83 F.4th 803, 816 (9th Cir. 2023) (vacated and remanded for further consideration in light of *Bruen* at *Duncan v. Bonta*, 49 F.4th 1228 (9th Cir. 2022), currently pending on second appeal in the Ninth Circuit, Docket No. 23-55805). California's self-serving claims that LCMs are not used for self-defense are notably unpersuasive.

III. WASHINGTON'S PURPORTED HISTORICAL ANALOGUES DO NOT SUPPORT A BAN ON LCM'S.

As the Court below clearly demonstrated, Washington's purported historical analogues utterly fail to support the flat ban on sale or possession of new LCM's imposed by ESSB 5078. *Gator's Guns* at *48-52. Washington cleverly devises an interpretive lens so general as to cover almost any conceivable gun regulation — it claims "a well-established tradition of regulating dangerous weapons when their proliferation leads to widespread societal problems." Aplt. Br. at 59.

> First, someone invents a weapon, which initially has no significant impact on society…. The military will often adopt it…. Afterward, military-style weapons often wind up on the commercial market and pass into civilian use…. If so, they sometimes contribute to criminal violence that terrorizes the public…. Here is where, time and again, states decide to regulate these sorts of weapons. [*Id*. at 58.]

But the State quickly gives away the game, that its intent is to be able to regulate essentially all weapons as "military." "Eventually, 'every state in the nation had laws restricting one or more types of clubs,' owing to their widespread use in criminal violence," the State argues. Aplt. Br. at 61.

This level of generality suits the State's purposes perfectly. If a club can be banned, so can every weapon imaginable, rendering the State's control absolute, and the Second Amendment neatly excised from the Constitution.

As *Bruen* makes clear, *Heller* "addressed each purported analogue" individually, to see whether each was "a

well-established and representative historical analogue" to the specific challenged regulation. *Bruen* at 22, 30. The mere idea that states have "regulated weapons that had potential military uses" is far too broad a metric to uphold a specific challenged regulation.

The court's analysis of the late-nineteenth and twentieth-century regulations proffered by Washington was correct. As the Supreme Court warned in *Bruen*, "we must … guard against giving postenactment history more weight than it can rightly bear." *Bruen* at 35. And "to the extent later history contradicts what the text says, the text controls." *Id.* at 36.

> As we recognized in Heller itself, because post-Civil War discussions of the right to keep and bear arms took place 75 years after the ratification of the Second Amendment, they do not provide as much insight into its original meaning as earlier sources. The belated innovations of the mid- to late-19th-century courts come too late to provide insight into the meaning of [the Constitution in 1787]. [*Id.* at 36-37 (internal quotations omitted).]

Consistent with the *Heller/Bruen* approach, the court below reviewed generally an "extensive arms law charts and report provided by State's expert." *Id.* at *48. As the court noted, "[m]ost of the laws provided are post-1868 and are not relevant to the analysis." *Id.* at *48.

But while recognizing the reality that most of the state's analogues were too late to bear on the meaning of the Second Amendment right, the court nonetheless did a more searching review of the specific analogues the state offered, "address[ing] each purported analogue" individually as *Bruen* commands. This more searching review produced the same result — the analogues utterly fail to support ESSB 5078's categorical ban.

First, Washington cites to prohibitions against "trap guns." "New Jersey prohibited setting trap guns in 1771, and 15 more states followed between then and 1925." Aplt. Br. at 59. Of course, no one "bears" a trap gun anyway. But the

court below quickly dispensed with the "trap gun" analogy. "The New Jersey law was a hunting regulation so its purpose was not firearms regulation. No other State enacted a trap gun law until two around Reconstruction and all others were much later." *Gator's Guns* at *48. Three lonely state laws in more than two centuries of American history can hardly establish a "historical tradition of firearm regulation." *Bruen* at 17. The *Bruen* Court expressed its "doubt that three colonial regulations could suffice to show a tradition." *Id.* at 46.

Washington then turns to restrictions on Bowie knives. Aplt. Br. at 62-64. It fares no better here. As the Superior Court noted, Bowie knife restrictions were "primarily no earlier than 1837 and most congregating between 1860-1900, far after the target historical period, and none are close to the founding." *Gator's Guns* at *48. The court then noted the fatal flaw in the Bowie knife analogy, that virtually no regulation Washington

offers amounted to a complete ban. *Id.* Indeed, Washington offers only one complete ban, in Georgia in 1837. Aplt. Br. at 63. As *Bruen* noted in striking down New York's "may issue" handgun regime, regulations on "manner of carry, or the exceptional circumstances under which one could not carry arms" cannot support a statute involving a complete ban on possession or transfer of a weapon. *Bruen* at 38.

Washington then turns to regulations on pistols. Aplt. Br. at 65-66. *Heller*, of course, determined that the handgun is "the quintessential self-defense weapon," and "the most popular weapon chosen by Americans for self-defense in the home," and as such, "a complete prohibition of their use is invalid." *Heller* at 629. Thus, regulations on handguns cannot support a ban on LCMs, and the court below did not even find it necessary to address the pistol "analogue."

Washington next makes yet another generalization, creating the broad category of "automatic and semiautomatic weapons." Aplt. Br. at 67. "32 states enacted anti-machinegun laws between 1925 and 1934," Washington argues. It then tries to conflate semiautomatic weapons with machine guns.

> Many of these laws regulated semi-automatic weapons in addition to automatics, often using magazine capacity as the metric to distinguish between regulated and unregulated weapons…. In fact, magazine capacity/firing limits were imposed in at least 23 states, representing approximately 58% of the American population. [*Id.* at 68.]

But as the Superior Court notes, while machine guns were a twentieth-century phenomenon, semiautomatic weapons and large capacity firing platforms were not. "Semi-automatic weapons and magazine capacity laws were not in place until 1927 and later even though some forms of semi-automatic weapons were available on a limited basis at the time of the founding." *Gator's Guns* at *49.

> The first known firearm that was able to fire more than ten rounds without reloading was a sixteen-shooter created around 1580, using "superposed" loads (each round stacked on top of the other). Multi-shot guns continued to develop in the next two centuries, with such guns first issued to the British army in 1658. One early design was the eleven-round "Defence Gun," patented in 1718 by lawyer and inventor James Puckle. It used eleven preloaded cylinders; each pull of the trigger fired one cylinder.[6]

Repeating muskets were manufactured as early as the Kalthoff Repeater in Europe in the 1600s.[7] Elijah Collier patented the Collier flintlock revolver in 1818 in Boston.[8] By 1857, black powder-and-ball weapons had begun to be replaced by cartridges. *Id.* This enabled weapons such as the Walch

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[6] D. Kopel, "The History of Firearm Magazines and Magazine Prohibitions," 78 ALBANY L. REV. 849, 852 (2015) (hereinafter "Kopel").

[7] "The Kalthoff Repeater," *Firearmshistory.blogspot.com* (Feb. 2, 2014).

[8] "A Brief History of Firearms: Birth of the Modern Revolver," *IFATactical.com* (Mar. 28, 2022).

Navy 12-shot revolver.[9] The Gatling gun was invented in 1862, enabling a rate of fire up to 200 rounds per minute.[10] By 1866, the Winchester repeating rifle was produced.

> Winchester touted the Model 1866 for defense against "sudden attack either from robbers or Indians." According to advertising, the M1866 "can . . . be fired thirty times a minute," or with seventeen in the magazine and one in the chamber, "eighteen charges, which can be fired in nine seconds." The gun was a particularly big seller in the American West. There were over 170,000 Model 1866s produced.[11]

Yet as the Superior Court noted, "[m]agazine laws did not come into effect at all until at least 1917 (one state) and most others were post-1925." *Gator's Guns* at *49. Repeating weapons were in military use during the time of the Framers, and fully a half-century passed between the advent of mass-

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[9] I. McCollum, "RIA: Walch Navy 12-Shot Revolver," *ForgottenWeapons.com* (Apr. 22, 2016).

[10] "Gatling Gun," *History.com* (Sep. 9, 2021).

[11] Kopel at 855.

produced repeating weapons for civilian use, and the first magazine restrictions around the time of World War I. Washington's attempt to justify a blanket ban on all magazines of more than ten-round capacity, on the basis of generalized "gun regulations" utterly fails to meet the *Heller/Bruen* test.

CONCLUSION

The decision of the trial court should be affirmed.

CERTIFICATE OF COMPLIANCE

This document contains 4,940 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted,

/s/ Richard B. Sanders

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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that, due to the unavailability of the Court's filing system, service of the foregoing Brief *Amicus Curiae* of Gun Owners of America, *et al*. in Support of Appellants, was made, this 27th day of November, 2024, by email upon the following attorneys for the parties:

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