No. 25-153

IN THE

Supreme Court of the United States

GATOR'S CUSTOM GUNS, INC., *et al.*,

Petitioners,

v.

WASHINGTON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF WASHINGTON

BRIEF OF NATIONAL ASSOCIATION FOR GUN RIGHTS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

BARRY K. ARRINGTON
Counsel for Amicus Curiae
ARRINGTON LAW FIRM
4195 Wadsworth Boulevard
Wheat Ridge, CO 80033
(303) 205-7870
barry@arringtonpc.com

131463

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Page

Cases

Cited Authorities

INTEREST OF AMICUS

The right to keep and bear arms is a fundamental right that existed prior to the Constitution. The right is not in any sense granted by the Constitution. Nor does it depend on the Constitution for its existence. Rather, the Second Amendment declares that the pre-existing "right of the people to keep and bear Arms shall not be infringed." The National Association for Gun Rights ("NAGR")[1] is a nonprofit membership and donor-supported organization with hundreds of thousands of members nationwide. The sole reason for NAGR's existence is to defend American citizens' right to keep and bear arms. In pursuit of this goal, NAGR has filed numerous lawsuits seeking to uphold Americans' Second Amendment rights. NAGR has a strong interest in this case because the guidance the Court will provide in its resolution of this matter will have a major impact on NAGR's ongoing litigation efforts in support of Americans' fundamental right to keep and bear arms.

SUMMARY OF ARGUMENT

Washington Engrossed Substitute Senate Bill 5078 (the "Statute") bans detachable firearm magazines with a capacity greater than ten rounds. The Washington Supreme Court acknowledged that the Second Amendment protects those items necessary to make the use of a firearm

1. No counsel for a party authored this brief in whole or in part, and no entity or person, other than amicus curiae, its members, and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Amicus curiae provided timely notice to the parties of its intention to file this brief.

meaningful, and it also conceded that magazines are essential for semiautomatic firearms to operate. But the lower court erred when it held that the plain text does not cover magazines with a capacity of eleven or more rounds. The court provided no principled standard for determining the dividing line between magazines that are covered by the text and those that are not. Indeed, the court's opinion rests solely on its "magic bullet" theory—i.e., its subjective assessment of whether citizens truly need the extra rounds in the magazines banned by the state. This is clearly contrary to *D.C. v. Heller*, 554 U.S. 570, 634 (2008), where the Court wrote that "[a] constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all."

The lower court erred by confusing *Bruen* step one (text) with *Bruen* step two (history and tradition). Under step one, magazines—which are instruments that facilitate armed self-defense—are clearly covered by the plain text. Under step two, the government has no hope of demonstrating that its ban is consistent with the tradition of banning dangerous and unusual arms, because law-abiding citizens possess over 100 million magazines of the type banned by the state.

The lower court's holding that banning some magazines is permissible because other magazines are available is directly contrary to this Court's Second Amendment precedents. See *Heller*, 554 U.S. at 629 (It is no answer to say that it is permissible to ban certain arms so long as other arms are allowed). Finally, the lower court's holding that plaintiffs are required to conduct extensive empirical studies about the use of arms in actual self-defense situations is contrary to *Heller*, which imposed no such requirement.

ARGUMENT

A. The Court Should Reject the Lower Court's Magic Bullet Theory

The Washington Supreme Court acknowledged that under *Bruen's* "plain text" step (i.e., *Bruen* step one)[2], the Second Amendment presumptively protects those rights necessary to make the use of a firearm meaningful. *State v. Gator's Custom Guns, Inc.*, 568 P.3d 278, 285 (Wash. 2025).[3] The court also acknowledged "the *fact* that a semiautomatic weapon will not function" as intended without a detachable magazine. *Id.*, 568 P.3d at 284 (emphasis added). Combining these two factors appears to lead to the conclusion that the plain text presumptively protects detachable magazines.

Surprisingly, according to the court below, that conclusion does not follow. See *Id.*, 568 P.3d at 286. The lower court was able to reach this startling conclusion by invoking its magic bullet theory. Under this theory, the plain text of the Constitution means one thing with respect to magazine X (which is covered) but something completely different with respect to magazine Y (which

2. See *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 17 (2022) ("when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct").

3. Citing *Teixeira v. County of Alameda*, 873 F.3d 670, 677 (9th Cir. 2017) (recognizing right to purchase arms); and *Jackson v. City & County of San Francisco*, 746 F.3d 953, 967 (9th Cir. 2014) (recognizing right to purchase ammunition). See also, *Rhode v. Bonta*, 145 F.4th 1090, 1104 (9th Cir. 2025) (reiterating the holdings in *Jackson* and *Teixeira*).

is not covered). The difference? Magazine Y has had an additional magic bullet added to its capacity. But which bullet is the magic one that transmogrifies a magazine from the category "covered by the text" to the category "not covered by the text"? Is it the third? The fifth? The eleventh? What is it about that magic bullet that when it is added to a magazine, it becomes radically different from a magazine without it? The lower court did not say. The court held that banning magazines with a capacity greater than ten rounds is permitted, but, conspicuously, it did not say whether it is permissible for the state to lower that threshold. In summary, under the lower court's holding, there is a magic bullet, and citizens are also left to guess which bullet that is.

To be sure, the court hinted (but did not actually hold) that the dividing line between "covered by the text" and "not covered by the text" is based on minimal functionality. It wrote that a "firearm's purpose as a tool for realizing the core right of self-defense" is fulfilled as long as it "is still capable of firing." *Id.*, 568 P.3d at 285-86. And it observed that this purpose can be achieved with magazines that have a capacity of ten or fewer rounds. *Id.*

The obvious problem with this argument is that minimal functionality can also be achieved with magazines that have a capacity of nine or fewer rounds, and eight or fewer rounds, and seven or fewer rounds, etc., all the way down to two or fewer rounds. Surely, the Washington Supreme Court did not mean to imply that the state has the power to limit the capacity of semiautomatic firearms to two rounds.[4]

4. Though this is not exactly clear from the court's opinion, because it observed that minimum functionality is achieved even

If "minimum functionality" is not the dividing line, then what is? Again, the lower court did not say. But unless a court announces a workable principle, it has done nothing but announce its gestalt.[5] Here, the Washington Supreme Court has announced its gestalt. It says that "ten" feels about right. However, it has provided no guidance on whether nine, eight, seven, six, five, four, three, two (or perhaps even one) would also feel right. That is not a way to run a constitutional railroad, and this Court should grant the petition, reverse the lower court, and apply actual principles of constitutional law to the issues raised by this case.

B. The Washington Supreme Court Should Have Moved to *Bruen* Step Two

Instead of making an unprincipled ad hoc determination that the plain text covers some magazines but not others, the Washington Supreme Court should have applied both steps of the *Bruen* analysis. Under that analysis, the "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." *Bruen*, 597 U.S. at 28 (citation omitted; emphasis added). As such, it "covers modern instruments that facilitate armed self-defense." *Id*. There cannot be

---

if the operator must load one round at a time. *Id*. The point of this observation is unclear, because it would be truly astounding if the lower court believed the government has the power to require all semiautomatic firearms to be converted into single-shot breechloaders.

5. See *Am. Jewish Cong. v. City of Chicago*, 827 F.2d 120, 129 (7th Cir. 1987) (Easterbrook, J., dissenting).

the slightest doubt that detachable firearm magazines (which even the lower court admitted were essential for the operation of semiautomatic firearms) are instruments that facilitate armed self-defense. Thus, the plain text covers the plaintiffs' proposed conduct, which means that the Statute is presumptively unconstitutional. *Id.*, 597 U.S. at 17.

The State can rebut this presumption only if it can demonstrate that the Statute is consistent with the Nation's history and tradition of firearms regulation. *Id*. The usual way governments attempt to do this is to argue that the banned arm is "dangerous and unusual." This is a conjunctive test.[6] *Caetano v. Massachusetts*, 577 U.S. 411, 417 (2016) (Alito, J., concurring). See also *Heller*, 554 U.S. at 627 (test cast in the conjunctive); *Snope v. Brown*, 145 S. Ct. 1534, 1537 (2025) (Thomas, J., dissenting from denial of certiorari) (citing *Caetano*); *United States v. Rahimi*, 602 U.S. 680, 714 (2024) (Kavanaugh, J. concurring); and *Bruen*, 597 U.S. at 21 (test cast in the conjunctive, citing *Heller*). It follows that if a weapon is in common use, it cannot be both dangerous and unusual.

In this case, American citizens possess over a hundred million magazines with a capacity exceeding ten rounds. See Nat'l Shooting Sports Found., *Detachable Magazine Report, 1990-2021* (2024), (available at https://tinyurl.com/4p2j5xbz). This utterly precludes any finding

6. All arms are dangerous. That is the point of arms. Thus, a rule that allows a court to uphold an arms ban any time it subjectively determines that the banned arms are too "dangerous" is a license to ban all arms.

that such magazines are dangerous and unusual. Thus, the State cannot meet its step two burden. The Statute is unconstitutional.

This does not necessarily mean that all magazines are protected. Whether 50-round, 75-round, or 100-round drum magazines are protected is a different question, as they may be much less common and therefore unusual.[7] There may well be some capacity above which magazines are not in common use, but whatever that capacity is, it "surely is not ten." *Heller v. D.C.*, 670 F.3d 1244, 1261 (D.C. Cir. 2011), abrogated on other grounds by *Bruen*.

C. The Washington Supreme Court Ignored *Heller*

The central thrust of the Washington Supreme Court's opinion is that the government may ban magazines with a capacity of eleven or more rounds, because citizens will still be able to acquire magazines with a capacity of ten or fewer rounds. *Gator's Custom Guns*, 568 P.3d at 285. In other words, the court held that it is permissible to ban the possession of a certain type of magazine so long as the possession of a different type of magazine is allowed. An analysis of this type was expressly prohibited in *Heller*, where the Court wrote: "It is no answer to say … that it is permissible to ban the possession of [a certain kind of firearm] so long as the possession of other firearms … is allowed." 554 U.S. at 629.

---

7. *Duncan v. Bonta*, 695 F. Supp. 3d 1206, 1234 (S.D. Cal. 2023), hearing en banc ordered, 131 F.4th 1019 (9th Cir. 2025), and rev'd and remanded, 133 F.4th 852 (9th Cir. 2025), cert. petition pending.

D. Plaintiffs Are Not Required to go Down "Statistical Rabbit Holes"

The Washington Supreme Court held that even if the plaintiffs were to prove that Americans own over one hundred million magazines of the type banned by the Statute, it would have no bearing on the constitutional analysis unless they also provided statistical evidence that such magazines are commonly used in self-defense scenarios. *Gator's Custom Guns*, 568 P.3d at 284. This is an "overly cramped" reading of this Court's Second Amendment precedents. *Duncan v. Bonta*, 83 F.4th 803, 815 (9th Cir. 2023) (Bumatay, J., dissenting). Rather than going down this statistical rabbit hole, this Court has looked to Americans' overall *choice* to use a firearm for self-defense. *Id.*

In *Heller,* the Court didn't dissect statistics on self-defense situations or look at anecdotes of a handgun's use in self-defense. *Id.* Instead, "[i]t is enough to note," the Court observed, "that the American people have considered the handgun to be the quintessential self-defense weapon." *Heller*, 554 U.S. at 629. It was sufficient that the banned arm was "overwhelmingly chosen by American society for th[e] lawful purpose" of self-defense. *Id.*, at 628. And "banning from the home the most preferred firearm in the nation to keep and use for protection of one's home and family [fails] constitutional muster." *Id.*, at 628-29 (cleaned up). Nothing in *Heller* requires plaintiffs to demonstrate the number of times that commonly possessed arms have been actually used in self-defense situations. Certainly, no such evidence was introduced in *Heller.* Therefore, the court below erred in holding that *Heller* actually *required* such evidence.

CONCLUSION

For the reasons set forth herein, NAGR respectfully requests the Court to grant the petition for writ of certiorari.

Respectfully submitted,

BARRY K. ARRINGTON
Counsel for Amicus Curiae
ARRINGTON LAW FIRM
4195 Wadsworth Boulevard
Wheat Ridge, CO 80033
(303) 205-7870
barry@arringtonpc.com

September 2025