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.

Respondents' Combined Response to Amici Curiae

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I. Introduction

Amici Curiae National Association for the Advancement of Colored People ("NAACP"), Alliance for Gun Responsibility ("AGR"), and Brady Center to Prevent Gun Violence ("Brady") posit that ESSB 5078 is a "reasonable regulation" and a "common-sense gun safety" policy that will save lives. Not content to make their position known or offer their expertise to the court, amici cast aspersions on Respondents, asserting that Respondents are callous to loss of life, or simply theorizing from an elitist point of view ensconced in an ivory tower. But Respondent Gator's Custom Guns, Inc. is a small, family-owned business and Respondent Walter Wentz is a combat veteran who has honorably served his country and now faces

tens of millions of dollars in potential penalties pursuant to the allegations made by Appellant. There is no callous disregard for life, or an elitist view unmoored from reality and the facts of life. There is however, a firm commitment to individual liberty and fundamental freedoms.

Respondents simply assert that the fundamental right to defend themselves and the state, held by all Washingtonians, is impaired by ESSB 5078. Respondents' action here is but the latest in a long line of undertakings aimed at preserving individual freedom; "Eternal vigilance is the price of liberty – power is ever stealing from the many to the few … The hand entrusted with power becomes … the necessary enemy of the people." *Respectfully Quoted:*

A Dictionary of Quotations Requested from the Congressional Research Service (Suzy Platt, ed., Library of Congress, 1993) (quoting Wendell Phillips, speech in Boston, Massachusetts, January 28, 1852 – *Speeches Before the Massachusetts Anti-Slavery Society*, p.13 (1853)). The Washington Constitution is an acknowledgement that "the philosophy of natural rights or natural law also resonated with constitutional framers, including the delegates to the Washington State Constitutional Convention." Justice Debra Stephens, *The Once and Future Promise of Access to Justice in Washington's Article I, Section 10*, 91 Wash. L. Rev. Online 41, 44-45 (2016). At the time the Washington Constitution was ratified, Sir William Blackstone's commentaries were widely

read and accepted, which contained "his triune rule for absolute rights: 'The right of personal security, the right of personal liberty, and the right of private property.'" *Id.* at 45 (citing 1 William Blackstone, Commentaries *129). Respondents simply entreat this Court to protect the fundamental rights of Washingtonians.

Amici AGR and Brady urge this Court to join the "tide" of decisions upholding magazine bans–no matter what particular term is used for them, or what capacity is deemed to be "large," or "extra-large" or even if they are just "multi-bullet"–which is unmoored from any constitutional protection of the right. But "History teaches that grave threats to liberty often comes in times of urgency, when constitutional rights

seem too extravagant to endure … [W]hen we allow fundamental freedoms to be sacrificed in the name of real or perceived exigency, we invariably come to regret it." *Skinner v. Ry. Lab. Executives' Ass'n*, 489 U.S. 602, 635, 109 S. Ct. 1402 (1989) (Marshall, J., dissenting). History is replete with examples of disarmament and genocide. *See* Daniel D. Polsby and Don B. Kates Jr., *Of Holocausts and Gun Control*, 75 Wash. U. L. Q. 1237 (1997); Don B. Kates, *Genocide, Self Defense and the Right to Arms*, 29 Hamline L. Rev. 501 (2006). Fundamental freedoms require protection by the courts, not merely giving way to a "tide" and getting swept up in the current. That results in shameful depredations of individual rights.

Amici AGR and Brady also misconstrue Respondents position, as there is no "collapsing" of federal and state constitutional analysis. There is, however, an acknowledgement that the U.S. Constitution establishes the "floor" below which the Washington Constitution cannot go in protecting the rights of Washingtonians. Under either constitution, ESSB 5078 violates the fundamental rights of Washingtonians to defend themselves and this state.

II. Argument

Amici collectively argue that ESSB 5078 will save lives. But the legislature wasn't that sure; the legislative findings only go so far as to assert that ESSB 5078 "is likely to reduce gun deaths and injuries." NAACP Br. App. One at 3. Respondents

have briefed the standard necessary to have a statute repugnant to the constitution–which ESSB 5078 is–declared unconstitutional. But Respondents note here the irony that amici AGR and Brady misconstrue Respondents' position that the federal and state constitutions should be analytically "collapsed" into a single, uniform test. That is not so; Respondents merely point out that this Court has previously determined that "application of the United States Constitution establishes a floor below which the state courts cannot go to protect individual rights. But states of course can raise the ceiling to afford greater protections under their own constitutions." *State v. Sieyes*,

168 Wn.2d 276, 292, 225 P.3d 995 (2010).

Logically, that means that if ESSB 5078 violates the United States Constitution–which it does–then it also violates the Washington Constitution. From an analytical standpoint, it also means that means-end scrutiny is not the correct mode of analysis, as recent U.S. Supreme Court cases have foreclosed such an approach in Second Amendment cases. It would be an awkward fit to have means-end scrutiny unavailable when analyzing the federal constitution, which establishes the "floor" of protection, while the state constitution, which can provide "greater protections" is analyzed from a means-end perspective. Regardless, intermediate scrutiny is not the proper level as urged by Appellant and Amici.

Amici AGR and Brady again urge this Court follow *State v. Jorgenson* beyond its bounds; this Court determined that the statute at issue in that case was "sufficiently limited in the scope of affected persons and its duration to warrant review under intermediate scrutiny." *Jorgenson*, 179 Wn.2d 145, 162, 312 P.3d 960 (2013). But ESSB 5078 does not affect a limited scope of persons, nor is its duration curtailed. It applies to everyone, forever. This aligns with the recent U.S. Supreme Court decision of *United States v. Rahimi*, where statutes that are limited in duration and only after "a court has found that the defendant 'represents a credible threat to the physical safety' of another" are constitutional. *Rahimi*, 602 U.S. 680, 699, 144 S. Ct. 1889 (2024). Again, ESSB

5078 is divorced from any limitations in affected persons or duration. But the analysis under both constitutions is similar, and predicated upon a presumption of protection of the fundamental right, with due process afforded the accused.

To further demonstrate how the analysis of the respective constitutions is separate and distinct, but still informed by the other is the erroneous "no set of circumstances" test urged by Appellant in declaring a statute unconstitutional. That test, which stems from *United States v. Salerno*, 481 U.S. 739, 107 S. Ct. 2095 (1987), is dictum and is not "applied to a state court challenge, particularly a challenge under the state constitution." *Robinson v. City of Seattle*, 102 Wn. App. 795, 807-08, 10 P.3d 452 (2000) (citing *City of*

Chicago v. Morales, 527 U.S. 41, 119 S. Ct. 1849 (1999) (the no set of circumstances test "has never been the decisive factor in any decision of this Court, including *Salerno* itself."). While not binding, it can perhaps provide an "excellent framework" for analysis. *In re Detention of Turay*, 139 Wn.2d 379, 417 n.27, 986 P.2d 790 (1999).

Instead, this Court should utilize the test "dictated by the nature of the challenge." *Robinson*, 102 Wn. App. at 808. That test comes from *City of Seattle v. Evans*, 184 Wn.2d 856, 366 P.3d 906 (2015) and largely tracks the text-history framework set forth by the U.S. Supreme Court in *District of Columbia v. Heller*, 554 U.S. 570, 128 S. Ct. 2783 (2008) and reiterated in *New York State Rifle & Pistol*

Ass'n v. Bruen, 597 U.S. 1, 42 S. Ct. 2111 (2022). This Court, when deciding cases regarding the right to bear arms, takes an approach "rooted in the United States Supreme Court's decision in *Heller* and the Oregon Supreme Court's interpretation of its state constitution's article I, section 27" which "protects instruments that are designed as weapons traditionally or commonly used by law-abiding citizens for the lawful purpose of self-defense." *Evans*, 184 Wn.2d 869. Then, the Court "look[s] to the historical origins and use of that weapon, noting that a weapon does not need to be designed for military use to be traditionally or commonly used for self-defense. We will also consider the weapon's purpose and intended function." *Id.* That test protects magazines,

regardless of capacity. If magazines above a certain capacity are not weapons, then no magazine is a weapon protected by the constitution and the state may eventually ban all ammunition feeding devices. There is no historical basis for such a determination; ammunition capacity limitations are not "consistent with the principles that underpin our regulatory tradition." *Rahimi*, 602 U.S. at 692 (citing *Bruen*, 597 U.S. at 26-31).

A. ESSB 5078 does not protect public safety.

The sole purported rationale advanced by Appellant and Amici is that ESSB 5078 will "likely save lives." But it is clear that ESSB 5078 will have no discernable impact to public safety when considering the data: in the most recent years in

which figures are available, 2019 and 2020, suicides greatly outpace homicides. In 2019, there were 165 homicides, with 35 of those classified as "justifiable self defense/law enforcement" or "other legal intervention circumstance." Wash. State Dep't of Commerce Office of Firearm Safety and Violence Prevention Dashboard.[1] In 2019, there were 647 suicides. *Id.* The two figures are closer together in 2020, with 211 homicides (44 classified as "justifiable self defense/law enforcement") and 618 suicides. As succinctly stated: "[s]uicide continues to be the most common form of death from firearms, accounting for

[1] Available at: https://public.tableau.com/app/profile/ofsvp.community.safety/viz/OfficeofFirearmSafetyandViolencePreventionDashboard/Story_OFSVPDataReport.

76% of gun fatalities in Washington. Three out of every four gun deaths are from suicide, and nearly 48% of all suicide deaths in Washington involve firearms.", Washington State Dep't of Commerce Office of Firearm Safety and Violence Prevention, *Office of Firearm Safety and Violence Prevention 2021 Report*, January 27, 2022, p.9. That means that of homicides involving firearms, one fifth involve justified self-defense or law enforcement action (21.2 percent in 2019, and 20.8 percent in 2020), and suicide accounts for more than three quarters of all gun fatalities. ESSB 5078 will have no impact on suicides, and as conceded by the Office of Firearm Safety and Violence Prevention: "[a]lthough firearm violence levels remain below historic peaks in the mid-1990s,

recent increases are thought to be attributable to an undermining of services and stability due to the pandemic and social unrest related to policing." *Id.*

The State of Washington has seen a precipitous decline in police officers per capita since the 1980s, and currently sits at 1.12 commissioned officers per 1,000 Washingtonians which is less than half of the national average.[2] Governor-elect Bob Ferguson proposed a $100 million program to hire more police officers statewide; any city or county with less than the national average of police officers–2.33 officers per

[2] Washington Association of Sheriffs and Police Chiefs, *Crime in Washington 2023 Annual Report*, p.545.

1,000 residents–can use incentives to hire recruits.[3] The right to bear arms becomes ever more salient when the state does not protect life and property adequately.

Strictly looking at the exceedingly low rate of police officers per capita is only half of the equation, however, as crime rates also demonstrate that the right to bear arms is necessary for Washingtonians. When looking at the total violent crime rate and total property crime rate per 100,000 residents, Washington is the second-most dangerous state based

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[3] Seattle Times, *Coming about! What it means that Bob Ferguson just tacked right on cops*, March 27, 2024, last accessed November 29, 2024, available at: https://www.seattletimes.com/seattle-news/politics/coming-about-what-it-means-that-bob-ferguson-just-tacked-right-on-cops/

on FBI crime data.[4] The state is now essentially telling Washingtonians that adequate police presence will not be provided, yet Washingtonians are also prohibited from choosing the means of defending themselves, their families, and their property. There is no "second class" premise undergirding Respondents' position; the fundamental right to bear arms is held by all citizens, regardless of race, religion, or other protected class. And as to public interest, "it is always in the public interest to prevent the violation of a party's constitutional rights." *Black Lives Matter Seattle-King Cty. v. City of Seattle*, 466

[4] Lynnwood Times, *FBI crime data shows Washington second-most dangerous state*, May 8, 2024, last accessed November 30, 2024, available at: https://lynnwoodtimes.com/2024/05/08/fbi-crime-data-240508/

F. Supp. 3d 1206, 1215 (2020) (quoting *de Jesus Ortega Melendres v. Arpiao*, 695 F.3d 990, 1002 (2012) (internal quotation marks omitted).

Moreover, amici NAACP does not hold a monopoly on the viewpoint, or voices, of marginalized communities. In September, several associations which represent the interest of multiple marginalized communities filed an amicus curiae brief in support of the petition for writ of certiorari to the United States Supreme Court in *Ocean State Tactical, LLC v. Rhode Island*, No. 24-131.[5] Amici in that case recognize that

[5] Br. of Amici Curiae National African American Gun Assoc., Inc., Asian Pacific American Gun Owners Assoc., DC Project Foundation, Inc., Operation Blazing Sword, Inc., Gabriela Franco, and Liberal Gun Club, Available at: https://www.supremecourt.gov/DocketPDF/24/24-

"[f]or a significant portion of American history, gun laws bore the ugly taint of racism." Adam Winkler, *Racist Gun Laws and the Second Amendment*, 135 Harv. L. Rev. F. 537 (2022). The Second Amendment is indeed not a second class right. This is more than a "catchy slogan," it is a recognition that the right is held by the people, regardless of race or class. It is not disputed that marginalized groups "are disproportionately the targets of violence and discrimination relating to the exercise of their Second Amendment rights and rely upon these arms to defend themselves, as is their constitutional right." Br. of Amici Curiae NAAGA, et al., p.1. But ESSB

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5078 will do little more than increase the possibility of additional charges to communities most impacted by law enforcement action.

Amicus NAACP posits that the tautology that only law-abiding citizens will obey the law is wrong. It is not, by definition. One problem is that enforcement of ESSB 5078 is almost impossible; how will law enforcement prove that an LCM was acquired prior to the effective date of ESSB 5078? Magazines are not serialized and they are largely fungible in the same caliber. "Since the government's ability to enforce such laws is constitutionally and practically limited, criminal charges for banned magazines are usually incidental to stops or arrests by police for other offenses." Amicus Br. of NAAGA, et al., p.8-9.

There is also the fact that LCMs number at least in the tens of thousands in the State of Washington alone, and the tens of millions in the nation. If criminals want to use an LCM to perpetrate a crime, they will be able to do so. Take for instance the terrible tragedy at Red Lake High School: there the shooter obtained the LCMs he utilized in the mass shooting by shooting his grandfather, an off-duty police officer, while his grandfather napped. The Red Lake High School shooting would not have been prevented by ESSB 5078, even if ESSB 5078 required law-abiding citizens to turn in their commonly owned LCMs.

B. The trial court properly applied constitutional analyses.

Amici posit that a "tide" of court decisions have found that magazine capacity restrictions are constitutional. But there is no consensus among the decisions relied upon by Appellant and Amici, which underscores the incorrect nature of those decisions. Some courts have held that magazines are not "arms," while some have found that there are analogous laws sufficient to meet the test under *Heller* and *Bruen*. And others, such as the recent decision of *Hanson v. District of Columbia*, 120 F.4th 223 (D.C. Cir. 2024) provided by Amici, perfectly illustrate the unworkability of approaches which attempt to avoid *Heller* and *Bruen*. There, the district court found that

magazines (which it termed "extra-large capacity magazines") are "arms" and that there are no sufficiently analogous laws restricting ammunition capacity, and yet the challenge was unlikely to succeed on the merits. That is because the court treated the *Heller* reference to "dangerous and unusual weapons" to mean "uncommonly dangerous" weapons. But that is wrong. The court utilized a literary flourish of treating "dangerous and unusual" as hendiadys, thereby contorting the phrase.

A figurative literary technique is an ill fit with legal interpretation; "[h]endiadys can only serve legal interpretation by betraying its own essence, which is multiplicity and complexity … Our takeaway is therefore simple: some literary devices, like

hendiadys, have no proper place in the language of the law or in its interpretation[.]" Elizabeth Fajans & Mary R. Falk, *Hendiadys in the Language of the Law: What Part of "and" Don't You Understand?*, 17 Legal Comm. & Rhetoric 39, 60 (2020).

That is because "the language of the law developed at a remove from both ordinary and literary English." *Id.* at 40 n.6 (See Dale Barleben, *Legal Language, Early Modern English and their Relationship* (2003); John O. McGinnis & Michael B. Rappaport, *The Constitution and the Language of the Law*, 59 Wm. & Mary L. Rev. 1321 (2018)).

Further, the U.S. Supreme Court has rejected readings of phrases as hendiadys. *See*, *National Federation of Independent Business v. Sebelius*, 567

U.S. 519, 559, 132 S. Ct. 2566 (2012) (the "Necessary and Proper" clause is not hendiadys as both necessary and proper have distinct significance and analysis); *Printz v. United States*, 521 U.S. 898, 923-24; 117 S. Ct. 2365 (1997) (same); *City of Grants Pass v. Johnson*, 603 U.S. ____, 144 S. Ct. 679 (2024) ("Cruel and Unusual" clause in Eighth Amendment is not hendiadys as both terms have distinct significance and meaning).

Again, hendiadys is not a stylistic device that should be a default interpretation of phrases using the word 'and.' That is because the "very ambiguity and indeterminacy that is a trademark of hendiadys and that would make it sit uncomfortably in legal texts, or for that matter, in instructional materials on

assembling an IKEA couch, is what makes it appropriate in some literary works." Fajans, *Hendiadys is the Language of the Law* at 41. Accordingly, "armed and dangerous" is not hendiadys. *Id.* at 51 (citing *Pennsylvania v. Mimms*, 434 U.S. 106, 107, 110-11, 98 S. Ct. 330 (1977); and neither is "advice and consent" of the Senate vis-a-vis presidential appointments to the Supreme Court. *Id.* (citing Josh Blackman, *Scotus After Scalia*, 11 N.Y.U. J. L. & Liberty 48, 133-35 (2017)).

A principled approach to this case results in upholding the trial court's decision. That is because the plain text of the respective constitutional provisions protecting the fundamental right to bear arms covers ammunition feeding devices, and there

are no sufficiently analogous laws which support ammunition capacity limitations.

As excellently briefed by amicus curiae Goldwater Institute, the provision in the Washington (and Oregon) Constitution that protects the individual right to bear arms in defense of self, *or the state*, must be given meaning. Amici AGR and Brady would simply read those words out of the fundamental right. That does not square with logic or statutory construction, for "[c]onstitutional provisions should be construed so that no portion is rendered superfluous." *State ex rel. Heavey v. Murphy*, 138 Wn.2d 800, 811, 982 P.2d 611 (1999) (citing *Sim v. Wash. State Parks & Rec. Com*, 90 Wn.2d 378, 383, 583 P.2d 1193 (1978)). A straightforward reading of the plain text of

the federal and state constitutions protects ammunition feeding devices.

As sagely noted by "a leading and early proponent of emancipation observed, "Disarm a community and you rob them of the means of defending life. Take away their weapons of defense and you take away the inalienable right of defending liberty." *Rahimi*, 602 U.S. at 690 (quoting Cong. Globe, 40th Cong., 2d Ses., 1967 (1868) (statement of Rep. Stevens)); *see also* David B. Kopel, *Guns Kill People, and Tyrants with Gun Monopolies Kill the Most*, 25 Gonzaga J. Int'l L. 1 (2022).

The trial court correctly and faithfully applied the constitutional tests set forth by both the U.S. Supreme Court and this Court. The trial court

utilized the test set forth in *Heller* and reaffirmed in *Bruen* when analyzing the Second Amendment scope of protections. The trial court also dutifully analyzed the Washington Constitution and gave meaning to the text, noting the right is textually absolute other than the two textual exceptions.

III. Conclusion

This Court should affirm the trial court ruling because LCMs are "arms" that are commonly possessed and facilitate armed self-defense and defense of the state. Ammunition feeding devices have been traditionally and commonly used since the founding of the nation and the ratification of the Washington Constitution and admission to the United States. There is no historical tradition of limiting

ammunition capacity or prohibiting commonly possessed arms overwhelmingly chosen by law-abiding citizens.

This document contains 3,461 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 27, 2024, I electronically filed the foregoing with the Clerk of the Court using the Washington State Appellate Courts' Secure Portal, which sends a copy of uploaded files and a generated transmittal letter to active parties on the case. The generated transmittal letter specifically identifies recipients of electronic notice.

DATED this 27th day of December, 2024, at Spokane, Washington.

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