Supreme Court Case 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 FOR *AMICUS CURIAE* NATIONAL SHOOTING SPORTS FOUNDATION, INC., IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Other Authorities

STATEMENT OF INTEREST

The National Shooting Sports Foundation, Inc., is the firearm industry's trade association. Founded in 1961, NSSF's mission is to promote, protect, and preserve hunting and shooting sports. NSSF has approximately 10,000 members—including thousands of federally licensed manufacturers, distributors, and sellers of firearms, ammunition, and related products. NSSF has a clear interest in this case. Its members engage in the lawful production, distribution, and sale of constitutionally protected arms. When a state like Washington tries to categorically ban such arms, that action threatens NSSF members' businesses and infringes on their and their customers' constitutional rights. NSSF also has extensive experience litigating Second Amendment questions, and is thus well placed to assist this Court.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Engrossed Substitute Senate Bill 5078 violates the Second Amendment to the United States Constitution, as well as Article 1, Section 24, of the Washington State Constitution. This Court should affirm the decision of the Superior Court.

I. Starting with the federal Constitution, "the Second Amendment extends, prima facie, to all instruments that constitute bearable arms." *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 28 (2022) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 582 (2008)); *accord United States v. Rahimi*, 144 S.Ct. 1889, 1897 (2024); *Caetano v. Massachusetts*, 577 U.S. 411, 411 (2016) (per curiam). That presumptive protection covers "'any thing that a man ... takes into his hands, or useth in wrath to cast at or strike another,'" *Heller*, 554 U.S. at 581, which an ammunition feeding device surely is. As their name suggests, feeding devices are not passive holders of ammunition, like a

cardboard cartridge box of yore; they are integral to the design of semiautomatic firearms and the mechanism that makes them work, actively feeding ammunition into the firing chamber. Keeping and bearing such instruments is thus presumptively protected, no matter whether they are in Size Small, Medium, or Large. The threshold textual inquiry here is that simple.

The historical-tradition inquiry is no more complex. The Supreme Court of the United States has repeatedly held that "arms" cannot be prohibited "consistent with this Nation's historical tradition" if they are "in common use today" for lawful purposes, as opposed to "dangerous and unusual." *Bruen*, 597 U.S. at 17, 27, 47; *accord Heller*, 554 U.S. at 625, 631. An arms ban thus can pass muster only if the banned arms are "*both* dangerous *and* unusual." *Caetano*, 577 U.S. at 417 (Alito, J., concurring in the judgment). And magazines that hold more than ten rounds of ammunition are the furthest thing from "unusual" in

modern American society. Any claim that arms more common by an order of magnitude than the Ford F-150 are "unusual" would not pass the straight-face test.

That should be the end of the matter, for our Nation's historical tradition is one of protecting the right of law-abiding citizens to keep and bear arms that are "in common use today" for lawful purposes. *Bruen*, 597 U.S. at 47. But even if one were to look beyond common use, the historical record reveals no tradition whatsoever of banning firearms or feeding devices based on firing capacity. Firearms capable of firing more than ten rounds have been around for centuries. Yet "[a]t the time the Second Amendment was adopted, there were no laws restricting ammunition capacity." David B. Kopel, *The History of Firearm Magazines and Magazine Prohibitions*, 78 Alb. L. Rev. 849, 864 (2015). And while semiautomatic firearms equipped with feeding devices holding more than ten rounds have been on the civilian market since the turn of

the twentieth century, not a single state in the Union (or Congress) restricted the manufacture, sale, or possession of magazines or other ammunition feeding devices until the 1990s. The historical record thus confirms what the common-use test suggests: There is no longstanding historical tradition in our Nation of prohibiting keeping or bearing ammunition feeding devices (or firearms) based on their capacity to fire without being reloaded. ESSB 5078 therefore violates the Second Amendment.

II. ESSB 5078 also violates Article 1, Section 24, of the Washington Constitution. That guarantee is "facially broader than the Second Amendment," *State v. Rupe*, 101 Wn.2d 664, 706 (1984); it certainly "cannot go" below the floor established by the federal "Supreme Court['s] application of the United States Constitution," *State v. Sieyes*, 168 Wn.2d 276, 292 (2010). So, at a minimum, the Washington constitutional analysis cannot reduce the protections the Second Amendment provides. But there is

every reason to think the Washington Constitution independently guarantees a right to acquire and possess the arms ESSB 5078 bans. As the Superior Court explained, the two dispositive questions under this Court's cases are "(1) whether or not magazines and LCMs are *designed as weapons*, and (2) whether or not they are traditionally or commonly used for self-defense." Super.Ct.Op.10; *see City of Seattle v. Evans*, 184 Wn.2d 856, 869 (2015). The answer to both questions is plainly yes. *See* pp.6-10, 10-16, *infra*; Super.Ct.Op.10-18. So under both Constitutions, the right of Washingtonians to own these common arms is secured.

ARGUMENT

I. ESSB 5078 Violates The Second Amendment To The United States Constitution.

A. The Ammunition Feeding Devices That ESSB 5078 Bans Are "Arms."

The threshold question under the Second Amendment is whether the government has "regulate[d]

arms-bearing conduct." *Rahimi*, 144 S.Ct. at 1897. If it has, then "the Constitution presumptively protects that conduct," *Bruen*, 597 U.S. at 24, and the government "bears the burden to 'justify its regulation,'" *Rahimi*, 144 S.Ct. at 1897 (quoting *Bruen*, 597 U.S. at 24). The answer to that question here is plainly yes. ESSB 5078 forbids "the people" from "keep[ing] and bear[ing]," U.S. Const. amend. II, common ammunition feeding devices that easily satisfy "the Second Amendment's definition of 'arms,'" *Bruen*, 597 U.S. at 28.

As the Supreme Court of the United States has made clear, the term "Arms" in the Second Amendment includes "'any thing that a man ... takes into his hands, or useth in wrath to cast at or strike another.'" *Heller*, 554 U.S. at 581; *see also Bruen*, 597 U.S. at 28 (reiterating that "modern instruments" are covered). Ammunition feeding devices plainly fit that bill. As their name suggests, ammunition feeding devices are not just "*holder*[*s*] of ammunition."

App.Br.25. To the contrary—and as the text of ESSB 5078 makes pellucid—they are an integral part of the mechanism that "feed[s]" "ammunition" directly into the firing chamber. RCW §9.41.010(25); *see also Garland v. Cargill*, 602 U.S. 406, 416-21 (2024).

The Superior Court got this question exactly right: Keeping and bearing magazines is covered by the plain text of the Second Amendment because magazines "are designed as critical functional components of the operational mechanism of semiautomatic weapons"; indeed, the "[a]bsence of a magazine completely defeats the function of a semi-automatic firearm." Super.Ct.Op.11. Ammunition feeding devices are essential to make semiautomatic firearms work: When a user pulls the trigger, the round in the chamber fires, and the magazine and semiautomatic action combine to feed a new round into the firing chamber. Without ammunition feeding devices, semiautomatic firearms cannot operate

semiautomatically—or in some cases, at all. *See* Super.Ct.Op.11. Even the Commissioner recognized that "a semiautomatic firearm will not function without a magazine." Comm.Op.24. Citizens thus carry firearms equipped with ammunition feeding devices for the same reason they carry firearms loaded with ammunition: "[W]ithout bullets, the right to bear arms would be meaningless." *Jackson v. City & Cnty. of San Francisco*, 746 F.3d 953, 967 (9th Cir. 2014).

In sum, the threshold question here boils down to "whether a magazine is an arm under the Second Amendment. The answer is yes." *Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Att'y Gen. N.J.* ("*ANJRPC*"), 910 F.3d 106, 116 (3d Cir. 2018). And the answer does not change if a magazine holds more than ten rounds of ammunition. Super.Ct.Op.11. After all, a bearable instrument that satisfies the definition of "Arms" in Size Small does not cease being an "Arm" in Size Medium or Size Large. When

it comes to the threshold textual inquiry, an Arm is an Arm is an Arm.

Of course, that does not mean that the Second Amendment guarantees "a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Heller*, 554 U.S. at 626. Nor does it mean that whether an arm is in common use for lawful purposes—or, conversely, is "dangerous and unusual"—is irrelevant to the final analysis. But considerations that find no purchase in the text are not part of the plain-text inquiry. The threshold inquiry thus begins and ends with the indisputable fact that the outlawed magazines "constitute bearable arms," which suffices to render them "presumptively protect[ed]." *Bruen*, 597 U.S. at 17, 24, 28.

B. The Magazines ESSB 5078 Bans Are Typically Possessed by Law-Abiding Citizens for Lawful Purposes.

Because the magazines ESSB 5708 bans fit "the Second Amendment's definition of 'arms,'" the state bears

the burden of proving that they nevertheless can be banned "consistent with this Nation's historical tradition of firearm regulation." *Id.* at 17, 28. It cannot do so. While laws that regulate arms-bearing conduct around the edges require independent inquiry, when it comes to a flat ban on possession, the Supreme Court has already done the work. As *Heller* held and *Bruen* reiterated, the only "arms" a state may ban "consistent with this Nation's historical tradition of firearm regulation" are those that are (at a minimum) "highly unusual in society at large," as opposed to "in common use today." *Id.* at 17, 47.

The Superior Court correctly recognized as much. As it explained, "[t]here is no need to re-do the historical analysis in an arm ban case" because "[t]he Supreme Court has already done" it. Super.Ct.Op.24; *see* Super.Ct.Op.23-25. Under "the historical analysis" of *Heller* and *Bruen*, "only weapons that [a]re both 'dangerous' and 'unusual' c[an] be banned." Super.Ct.Op.23; *accord Caetano*, 577

U.S. at 417 (Alito, J., concurring in the judgment) ("A weapon may not be banned unless it is *both* dangerous *and* unusual.").

The critical question, then, is whether the arms the state bans are in common use for lawful purposes, or whether the state (which bears the burden of persuasion at this stage) has demonstrated that they are dangerous and unusual. And the answer again is easy, as the arms Washington outlaws are the furthest thing from "highly unusual" in modern America. Magazines that hold more than ten rounds are commonly owned by tens of millions of Americans for all manner of lawful purposes, including self-defense, sporting, and hunting. As the Superior Court held, "[n]o one seriously disputes that there are millions of LCMs in the possession of the public." Super.Ct.Op.30. Indeed, even the Commissioner recognized that "[t]he country is awash in them." Comm.Op.18.

That much is undeniable. "One estimate based in part on government data shows that … half of all magazines in America hold more than ten rounds." *Duncan v. Becerra*, 970 F.3d 1133, 1142 (9th Cir. 2020)[1]; *see also* William English, PhD, *2021 National Firearms Survey: Updated Analysis Including Types of Firearms Owned* 22-23 (May 13, 2022), https://bit.ly/3yPfoHw (finding that 39 million Americans own or have owned ammunition feeding devices that hold more than ten rounds). Another more recent estimate using industry data found that Americans purchased 717 million magazines between 1990 and 2021 that had a capacity of more than ten rounds. Nat'l Shooting Sports Found., *Detachable Magazine Report 1990-2021* (2024), https://tinyurl.com/2452umcy. That is *44.5 times more common* than the most common automobile. Brett

[1] The panel decision in *Duncan* was vacated by the en banc Ninth Circuit; the en banc decision was vacated after *Bruen*. 988 F.3d 1209 (9th Cir. 2021); 19 F.4th 1087 (9th Cir. 2021) (en banc); 142 S.Ct. 2895 (2022); 49 F.4th 1228 (9th Cir. 2022).

Foote, *There Are Currently 16.1 Million Ford F-Series Pickups on U.S. Roads*, Ford Auth. (Apr. 9, 2021), https://bit.ly/3GLUtaB. In short, what the D.C. Circuit said over a decade ago now is even more true today: While "[t]here may well be some capacity above which magazines are not in common use[,] ... that capacity surely is not ten." *Heller v. District of Columbia*, 670 F.3d 1244, 1261 (D.C. Cir. 2011).

Nor is there any question that the typical individual who possesses these commonplace arms does so for lawful purposes. In the vast majority of states, they are perfectly lawful. *See* Lillian Mongeau Hughes, *Oregon Voters Approve Permit-to-Purchase for Guns and Ban High-Capacity Magazines*, NPR (Nov. 15, 2022), https://n.pr/3QMJCC1. And the most frequently cited reasons by the millions of Americans who own magazines capable of holding more than ten rounds are target shooting (64.3% of owners), home defense (62.4%),

hunting (47%), and defense outside the home (41.7%). English, *supra*, at 23. That makes sense: "When a firearm being used for defense is out of ammunition, the defender no longer has a functional firearm." Kopel, *supra*, at 851.

Of course, as with any arms, there are some who misuse these arms for unlawful—indeed, awful—purposes. But that was equally true of the handguns at issue in *Heller*. The *Heller* dissenters protested that handguns "are specially linked to urban gun deaths and injuries" and "are the overwhelmingly favorite weapon of armed criminals." 554 U.S. at 682 (Breyer, J., dissenting). The majority did not dispute these points; it just found them irrelevant to whether handguns are constitutionally protected, because that question does not turn on whether arms are misused by criminals. It turns on whether law-abiding citizens commonly own and use them for lawful purposes. That is why it was enough in *Heller* that handguns are "typically

possessed by law-abiding citizens for lawful purposes." *Id.* at 624-25 (majority op.).

This was the principal error of the Commissioner's opinion, which focused pervasively on the potential misuse of the arms Washington has banned by a small number of criminals, rather than their lawful use by millions of citizens.[2] *See, e.g.*, Comm.Op.20-21. As the Superior Court correctly understood, Washington's ban flunks the historical-tradition test for the same reason the District of Columbia's ban did in *Heller*: because millions of law-abiding Americans own for lawful purposes the arms Washington has banned. *See* Super.Ct.Op.23-24, 30-31.

[2] Indeed, the Commissioner repeatedly invoked the fear that, if he did not grant a stay, large numbers of Washingtonians would purchase "millions" of these magazines. Comm.Op.2-3. This alone is virtually a confession of error under *Bruen* (unless, as no one argues here, the state could show that large numbers of those citizens were going to misuse those magazines for criminal purposes).

C. To the Extent Further Historical Analysis Is Warranted, Washington Cannot Shoulder Its Historical-Tradition Burden.

The Court can and should end its analysis there. "[T]he traditions of the American people … demand[] our unqualified deference," *Bruen*, 597 U.S. at 26, and the tradition of the American people is that law-abiding citizens may keep and bear arms that are commonly possessed for self-defense and other lawful purposes. When it comes to a flat ban on arms, that *is* the historical test—and it forecloses the state's effort to ban these unquestionably common arms. After all, a state may not prohibit what the Constitution protects.

In all events, even if further historical inquiry were necessary, Washington has not come close to meeting its burden of demonstrating that ESSB 5078 is consistent with this Nation's historical tradition. Indeed, the very fact that millions of Americans have chosen these arms in the hundreds of millions confirms that there is not, and never

has been, any tradition of banning them. To the contrary, the historical record reveals a long tradition of welcoming technological advancements that enable civilian firearms to fire more rounds more accurately and efficiently.

1. There is no longstanding historical tradition of regulating firing or ammunition capacity, let alone of banning ammunition feeding devices above a certain threshold.

While arms that could fire more than ten rounds without reloading would by no means have been "unforeseen inventions to the Founders," *Duncan*, 970 F.3d at 1147, laws prohibiting their possession most certainly would. "At the time the Second Amendment was adopted, there were no laws restricting ammunition capacity." Kopel, *supra*, at 864. That did not change anytime soon: Laws regulating firing capacity did not start to appear for another hundred-plus years. And no state restricted the manufacture, sale, or possession of magazines themselves (of any capacity) *until the 1990s*.

To be sure, a few states enacted laws restricting firing capacity of semiautomatic weapons in the early twentieth century. *See* 1927 Mich. Pub. Acts 887, 888; 1927 R.I. Acts & Resolves 256, 256-57; 1933 Minn. Laws ch. 190. But all of these laws were either repealed outright or replaced with laws that restricted only fully automatic weapons, i.e., machine guns—which, unlike semiautomatics, were never widely adopted by law-abiding citizens for lawful purposes. *See* 1959 Mich. Pub. Acts 249, 250; 1959 R.I. Acts & Resolves 260, 260, 263; 1963 Minn. Sess. L. ch. 753, at 1229. And none of these laws—which were outliers even while on the books—was ever understood to apply to magazines, regardless of capacity. *See* Kopel, *supra*, at 864-66.[3] Only the District of Columbia restricted

[3] California and Ohio also enacted licensing laws for certain semiautomatics but did not enact outright bans. *See* 1933 Cal. Stat., ch. 450; 1933 Ohio Laws 189, 189. And while a Virginia law enacted in this era could be read to include semiautomatic firearms that hold more than 16 rounds, it was not a general ban, but rather just heightened the penalties for using such a weapon in a "crime of violence" or "for offensive or aggressive purpose." 1934 Va. Acts ch. 96, §§1(a), 4(d). As with the three laws cited in the text, moreover, all

magazines or other ammunition feeding devices before 1990, and that law was even more of an outlier than the handful of state laws just mentioned.[4]

That explains why the U.S. Supreme Court, when discussing modern semiautomatic rifles that come standard with 20- or 30-round magazines, observed (correctly) that such arms "traditionally have been widely accepted as lawful possessions" in this country. *Staples v. United States*, 511 U.S. 600, 612 (1994). In all events, particularly given the ubiquity by the Prohibition Era of firearms with a capacity of more than ten rounds, these

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of these laws were either repealed outright or replaced in short order with laws restricting only fully automatic weapons. *See* 1965 Cal. Stat., ch. 33, at 913; 1972 Ohio Laws 1866, 1963; 1975 Va. Acts, ch. 14, at 67; *see* Kopel, *supra*, at 864-66.

[4] In 1932, Congress banned possession in the District of Columbia of firearms that "shoot[] automatically or semiautomatically more than twelve shots without reloading." Act of July 8, 1932, Pub. L. No. 72-275, §§1, 14, 47 Stat. 650, 650, 654 (1932), *repealed by* 48 Stat. 1236 (1934), *currently codified as amended at* 26 U.S.C. §§5801-72. That law was not originally understood to ban magazines. But after the District achieved home rule in 1975, the new D.C. government interpreted its law to "outlaw[] all detachable magazines and all semiautomatic handguns." Kopel, *supra*, at 866. The latter portion of that D.C. law was invalidated in *Heller*.

few, late-breaking state laws do not an enduring tradition make. *See Bruen*, 597 U.S. at 36-37. Moreover, outside the District of Columbia, the first state law restricting magazine capacity did not come *until 1990*—two centuries after the founding and well over a century after the ratification of the Fourteenth Amendment. *See* 1990 N.J. Laws 217, 221, 235 (codified at N.J. Stat. Ann. §2C:39-1(y), -3(j)). And the vast majority of states still allow ordinary law-abiding citizens to choose for themselves what ammunition capacity they believe best suits their needs.

As for the federal government, it did not regulate magazine capacity until 1994, when Congress adopted a nationwide ban on ammunition feeding devices with a capacity of more than ten rounds. *See* Pub. L. No. 103-322, 108 Stat. 1796 (1994) (formerly codified at 18 U.S.C. §922(w)). But Congress allowed the law to expire in 2004 after a study by the Department of Justice revealed that it had produced "no discernable reduction" in violence with

firearms across the country. Christopher S. Koper et al., *An Updated Assessment of the Federal Assault Weapons Ban: Impacts on Gun Markets & Gun Violence*, 1994-2003, Rep. to the Nat'l Inst. of Just., U.S. Dep't of Just. 96 (2004), https://bit.ly/3wUdGRE.

In short, while there is a long historical tradition of law-abiding citizens possessing for lawful purposes the class of arms Washington has now prohibited, there is no similar national tradition of government regulation of these commonplace arms—let alone of outright bans. *See Heller*, 670 F.3d at 1260; *ANJRPC*, 910 F.3d at 116-17.

2. The state cannot save its ban by claiming that the devices it covers are some dramatic technological change.

The lack of any historical (or even modern-day) tradition supporting the state's ban is certainly not owing to any "dramatic technological changes." *Bruen*, 597 U.S. at 27. Firearms capable of firing more than ten rounds of ammunition without reloading are nothing new—and

neither are ammunition feeding devices up to that task. "[T]he first firearm that could fire more than ten rounds without reloading was invented around 1580." *Duncan*, 970 F.3d at 1147; *see also* William Wellington Greener, *The Gun and Its Development* 80-81 (8th ed. 1907). Several such arms pre-dated the Revolution, some by nearly a hundred years. For example, the popular Pepperbox-style pistol could "shoot 18 or 24 shots before reloading individual cylinders," and the Girandoni air rifle, which "had a 22-round capacity," "was famously carried on the Lewis and Clark expedition." *Duncan*, 970 F.3d at 1147. These and other models of firearms capable of firing more than ten rounds of ammunition without reloading became widespread in the United States well before the framing of the Fourteenth Amendment.

As for "cartridge-fed" "repeating" firearms in particular, they came onto the scene "at the earliest in 1855 with the Volcanic Arms lever-action rifle that contained a

30-round tubular magazine, and at the latest in 1867, when Winchester created its Model 66, which was a full-size lever-action rifle capable of carrying 17 rounds" that "could fire 18 rounds in half as many seconds." *Duncan*, 970 F.3d at 1148; *see* Louis A. Garavaglia & Charles G. Worman, *Firearms of the American West 1866-1894* 128 (1984); *see also* Kopel, *supra*, at 854-55 (discussing the advent of the "first metallic cartridge ... similar to modern ammunition" in the 1850s). These multi-shot arms were not novelties; they were ubiquitous among civilians by the end of the Civil War. "[O]ver 170,000" Winchester 66's "were sold domestically," and the successors that replaced the Model 66 (the 73 and 92) sold more than ten times that amount in the ensuing decades. *Duncan*, 970 F.3d at 1148. And Winchesters were far from unique in this regard. *See, e.g.*, Nicholas J. Johnson, et al., *Firearms Law and the Second Amendment: Regulation, Rights, and Policy* 437 (3d ed.

2021) (discussing the popular Henry lever action rifle, which could fire 16 rounds without reloading).

To be sure, feeding devices capable of holding more than ten rounds were not as common in the nineteenth century as they are today. But the same could be said of pretty much any type of arm (not to mention all manner of other things). The Commissioner thus pervasively misunderstood the role of this history; the relevant point is simply that history refutes any notion that there is something novel about what Washington has banned. What fed ammunition into the chamber of these firearms were magazines and other ammunition feeding devices capable of holding more than ten rounds. "The Winchester M1873 and then the M1892 were lever actions holding ten to eleven rounds in tubular magazines." Kopel, *supra*, at 855; *see, e.g.*, *Model 1873 Short Rifle*, Winchester Repeating Arms, https://bit.ly/4hZB40J (last visited Nov. 26, 2024). The Evans Repeating Rifle, which first hit "the

market in 1873," came standard with a fixed magazine located in the buttstock that "held thirty-four rounds." Kopel, *supra*, at 856; *see also* Dwight B. Demeritt, Jr., *Maine Made Guns and Their Makers* 293-95 (rev. ed. 1997). In short, semiautomatic firearms and feeding devices capable of holding more than ten rounds have been part of the fabric of American life for well more than 100 years.

The fact that modern firearms and magazines are more accurate and capable of quickly firing more rounds than their founding-era predecessors does not make them any less linear descendants of the "small-arms weapons used by militiamen ... in defense of person and home" when the Second Amendment was ratified. *Heller*, 554 U.S. at 624-25 (brackets omitted); *see also Caetano*, 577 U.S. at 416-17 (Alito, J., concurring in the judgment) (noting that "revolvers and semiautomatic pistols" are protected as descendants of arms in common use at the founding). After

all, the point of the technological developments of the nineteenth century was the same as those of the twentieth: to enable someone to fire more rounds more quickly and accurately.

And it would be particularly perverse to confine the people to outdated arms that are less accurate, efficient, and reliable for self-defense than their modern descendants—which likely explains why no such historical tradition exists. Moreover, much of what the state said below about why the magazines it now deems too "large" are supposedly different from arms long in common use could be said equally of the handguns *Heller* held protected.

In short, the historical tradition in this country focuses on what law-abiding citizens commonly conclude best serves their needs, not which arms are capable of doing the most damage in the hands of the small number of people bent on misusing them. The state derides that

test—as it must, since it enacted a law that bans arms that tens of millions of people have chosen for self-defense. But the Second Amendment is more than a mere parchment barrier against government disarmament. Because the state's effort to ban arms commonly chosen by the people for self-defense flatly contradicts constitutional text and historical tradition, it violates the Second Amendment.

II. ESSB 5078 Violates The Washington State Constitution.

As this Court has long recognized, while the U.S. "Supreme Court['s] application of the United States Constitution establishes a floor below which state courts cannot go," Washington "of course can raise the ceiling to afford greater protections under [its] own constitution[]." *Sieyes*, 168 Wn.2d at 292; *see Mai v. United States*, 952 F.3d 1106, 1120 n.9 (9th Cir. 2020); *see also* U.S. Const. art. VI, cl. 2. The Washington constitutional analysis thus, at a minimum, cannot reduce the protections the U.S. Constitution affords citizens who wish to own the arms the

state has banned. But there is every reason to think that the Washington Constitution independently guarantees a right to acquire and possess these common arms.

When Washingtonians adopted the State Constitution in 1889, they enshrined an unqualified guarantee of the "right of the individual citizen to bear arms in defense of himself." Wash. Const. art. I, §24; *see Sieyes*, 168 Wn.2d at 293 (holding that, except for its two textual exceptions, this right is "otherwise textually absolute").[5] This Court has indeed held that the Washington guarantee is "facially broader than the Second Amendment." *Rupe*, 101 Wn.2d at 706.

Under Article I, §24, ESSB 5078's broad ban on common arms is plainly unconstitutional. The Superior Court correctly held that the two key questions under this

[5] Notably, 1889 was well after fixed magazines had become commonplace via weapons such as the Winchester and contemporaneous with the invention of the detachable magazine. *See* pp.23-26, *supra*; Kopel, *supra*, at 856-57.

Court's caselaw are "(1) whether or not magazines and LCMs are *designed as weapons*, and (2) whether or not they are traditionally or commonly used for self-defense." Super.Ct.Op.10. The answer to the first question is plainly yes. *See* pp.6-10, *supra*; Super.Ct.Op.10-12. So too with the second. *See* pp.10-16, *supra*; Super.Ct.Op.12-18.

The state's argument that "use" must mean actually firing a weapon in a self-defense situation is as frivolous under state law as it is under federal law (and under logic). As the Superior Court put it, this test would "require <u>any</u> weapon to be fired, or in the case of the knife - to stab someone, before the arm could be considered 'kept, borne, or carried' in self-defense." Super.Ct.Op.14-15. That cannot be correct since the Washington Constitution protects a right to "bear arms," not just to use them—which likely explains why this Court in *Evans* considered whether Evans' knife was the type of weapon traditionally *carried*

for self-defense, not whether people routinely stab others with that type of knife. 184 Wn.2d at 871-72.

The Commissioner's contrary conclusion, grounded in what "makes sense" and seems "reasonable" to him, is inherently subjective and, taken in the most favorable light, akin to rational-basis analysis—hardly a protection befitting an enumerated constitutional right. Comm.Op.22. Indeed, even though this Court has squarely forbidden application of interest-balancing to the state right to bear arms, *Sieyes*, 168 Wn.2d at 295 & n.20, the Commissioner did so anyway. *See* Comm.Op.31-32 (conducting a "balancing test" between the "harm to … public safety" and the "harm … [to] lawful firearms owners"). That is as forbidden by *Sieyes* as it is by *Bruen*.[6]

[6] Because "Washington's article I, section 24 was drawn from Oregon's article I, section 27," this Court has recognized that "Oregon's … interpretation of its analogous provision" is especially persuasive. *Evans*, 182 Wn.2d at 868. In *Arnold*, the Oregon courts concluded that banning magazines with a capacity of over ten rounds was unconstitutional. *Arnold v. Brown*, 2022 WL 17826476, at *10-12 (Or. Cir. Ct. Dec. 15, 2022). And despite having nearly two years and several opportunities to do so, other courts have refused to

CONCLUSION

This Court should affirm the Superior Court's decision.

LR 18.17(b) Certification: I certify that this motion and memorandum contains 4,993 words, exclusive of words in the title sheet, the table of contents, the table of authorities, the certificate of compliance, the certificate of service, and signature blocks, in compliance with RAP 18.17(b).

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disturb that conclusion. *See* Order Denying Stay, *Arnold v. Kotek*, No. A183242 (Or. Ct. App. Apr. 12, 2024); *see also Arnold v. Kotek*, 524 P.3d 955 (Or. 2023). This Court should follow that example.

DATED this 27th day of November, 2024.

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