No. 25-153

In the Supreme Court of the United States

GATOR'S CUSTOM GUNS, INC., ET AL.,
Petitioners,
v.
STATE OF WASHINGTON,
Respondent.

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

BRIEF OF MONTANA, IDAHO AND 25 OTHER STATES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

The States of Montana, Idaho, Alabama, Alaska, Arkansas, Florida, Georgia, Iowa, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Nebraska, New Hampshire, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, West Virginia, Wyoming, and the Arizona Legislature submit this *amicus* brief to safeguard citizens' constitutional right to keep and bear arms against unnecessary intrusions. That right includes the right to possess and use essential components of modern arms like plus-ten magazines. *Amici* urge this Court to grant certiorari and reverse.*

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* Under Rule 37.2, *amici* provided timely notice of their intention to file this brief.

SUMMARY OF THE ARGUMENT

This case should not have been hard. The Washington Supreme Court below acknowledged "there are between 30 million to 159.8 million [plus-ten magazines] in circulation," and "48 percent of gun owners have owned [plus-ten magazines]." Pet. App. 7a (internal quotation marks omitted). Time and again, this Court has said that the Second Amendment protects the right of citizens to bear arms "that are unquestionably in common use today" for lawful purposes. *New York State Rifle & Pistol Ass'n, Inc.* v. *Bruen*, 597 U.S. 1, 47 (2022). Plus-ten magazines are in common use today. So they are protected by the Second Amendment.

Yet the Washington Supreme Court joined several other courts in rewriting the Second Amendment and this Court's precedents to allow hostile jurisdictions to continue infringing on their citizens' core constitutional right to keep and bear arms. The Washington Supreme Court claimed that the Second Amendment does not apply at all because Washington's ban on the possession of plus-ten magazines purportedly does not regulate arms—even though the Second Amendment protects "arms-bearing conduct," including necessary incidents like magazines. *United States v. Rahimi*, 602 U.S. 680, 691 (2024). The Washington Supreme Court went on to botch its alternative Second Amendment analysis, implausibly concluding that plus-ten magazines are not "commonly used for self-defense" and are therefore not protected by the Constitution. Pet. App. 12a.

This obvious error on a core issue of constitutional law warrants this Court's review. More fundamentally, it is time for this Court to address the repeated defiance of this Court's holdings, particularly in jurisdictions that have repeatedly infringed on citizens' Second Amendment rights. The evident errors below and in similar cases manifest a deep hostility to both the Second Amendment itself and this Court's precedents. Only this Court's review can correct these persistent misapplications, which deprive citizens of their fundamental rights, their property, and their ability to defend themselves. The Court should grant certiorari and reverse.

REASONS FOR GRANTING THE WRIT

I. Courts in jurisdictions that tend to restrict Second Amendment rights are defying this Court's precedents.

The Washington Supreme Court's "dismissive" view of the Second Amendment is no anomaly—it "is emblematic of a larger trend." *Silvester v. Becerra*, 138 S. Ct. 945, 950 (2018) (Thomas, J., dissenting from denial of certiorari). "[L]ower courts in the jurisdictions that" most often restrict Second Amendment rights "appear bent on distorting this Court's Second Amendment precedents." *Snope v. Brown*, 145 S. Ct. 1534, 1538 (2025) (Thomas, J., dissenting from denial of certiorari). Whatever the mechanism—sometimes distorting the term "Arms," other times a convoluted understanding of the "common use" test, still other times faulty historical

analogies—the effect of these lower court decisions is clear: "to trammel the constitutional liberties" of citizens, especially in jurisdictions already hostile to Second Amendment rights. *Bianchi v. Brown*, 111 F.4th 438, 483 (CA4 2024) (Richardson, J., dissenting). To address the effect this of far-reaching defiance of this Court's precedents, certiorari is needed.

Widespread infringement of the Second Amendment is not a hypothetical concern but a reality. Several courts have already upheld outright bans on "America's most common civilian rifle," the AR-15. *Harrel v. Raoul*, 144 S. Ct. 2491, 2493 (2024) (Thomas, J., statement respecting the denial of certiorari); see, *e.g.*, *Capen v. Campbell*, 134 F.4th 660, 677 (CA1 2025); *Bevis v. City of Naperville*, 85 F.4th 1175, 1182 (CA7 2023). Plus-ten magazines have faced similar bans, which have been upheld by the Washington Supreme Court below and other courts. See, *e.g.*, *Duncan v. Bonta*, 133 F.4th 852 (CA9 2025) (en banc); *Ocean State Tactical, LLC v. Rhode Island*, 95 F.4th 38, 52 (CA1 2024).

Judicial defiance, not a careful application of the *Bruen* framework, seems to have driven these outcomes. One specific form of judicial defiance stands out in the case below: a convoluted understanding of the "common use" test.

Begin with a brief explanation of the *Bruen* framework of "common use." In *Bruen*, this Court described two steps "for applying the Second Amendment." 597 U.S. at 24. The first step explains

that "[w]hen the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct." *Ibid.* Step one is a purely "'textual analysis' focused on the 'normal and ordinary' meaning of the Second Amendment's language." *Id.* at 20 (cleaned up) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 576–77, 578 (2008)); see J. Joel Alicea, *Bruen* Was Right, 174 U. Pa. L. Rev. (forthcoming 2025) (manuscript at 9) ("[T]he first step focuses on the original semantic meaning of the text."). So to succeed at step one, a citizen must show that the object he seeks to possess is an "Arm" according to the "normal and ordinary" meaning of the Second Amendment. *Bruen*, 597 U.S. at 20.

The original "meaning [of 'Arms'] is no different from the meaning today." *Heller*, 554 U.S. at 581. "Arms" are "weapons of offence, or armour of defence." *Ibid.* (cleaned up). Thus, at step one, "it does not matter whether the object in question is a handgun or a machine gun." Alicea, *supra*, at 15 (cleaned up). But it would matter if the relevant object were a banana. A banana receives no presumptive protection under the Second Amendment, but a firearm does.

Bruen step two requires "[t]he government" to "justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." 597 U.S. at 24. Courts must use "analogical reasoning" to assess whether the modern regulation is "relevantly similar" to historical regulations. *Id.* at 28–29. "Why and how the regulation burdens the right are central to this

inquiry." *Rahimi*, 602 U.S. at 692. "The law must comport with the principles underlying the Second Amendment, but it need not be a 'dead ringer' or a 'historical twin.'" *Ibid.* (quoting *Bruen*, 597 U.S. at 30).

The "common use" test, in turn, is the test for discerning whether an arm may be regulated according to the "tradition of prohibiting the carrying of 'dangerous and unusual weapons.'" *Heller*, 554 U.S. at 627. An arm is not "dangerous and unusual" if it is "typically possessed by law-abiding citizens for lawful purposes." *Id.* at 625, 627. Put another way, if an arm is "in common use today" by "American society" for a "lawful purpose," then it cannot be banned. *Id.* at 628; see *Bruen*, 597 U.S. at 47; see also *Hanson v. District of Columbia*, 120 F.4th 223, 271 (CADC 2024) (Walker, J., dissenting) ("*Heller* and its progeny . . . have *already* held that the government cannot ban an arm in common use for lawful purposes.").

The next question is how common an arm must be to receive protection. "Commonality is determined largely by statistics. But a pure statistical inquiry may hide as much as it reveals," for "protected arms may not be numerically common by virtue of an unchallenged, unconstitutional regulation." *Duncan v. Becerra*, 970 F.3d 1133, 1147 (CA9 2020), *rev'd en banc sub. nom.*, *Duncan v. Bonta*, 19 F.4th 1087 (CA9 2021). Courts should "look[] to the usage of the American people to determine which weapons *they* deem most suitable for lawful purposes." *Bianchi*, 111 F.4th at 522 (Richardson, J., dissenting); see *Heller*, 554 U.S. at 629 ("It is enough to note . . . that the American

people have considered the handgun to be the quintessential self-defense weapon.").

The "common use" test is best understood as part of *Bruen* step two because it is a limitation on the Second Amendment's scope "supported by the historical tradition" of regulating "dangerous and unusual weapons." *Heller*, 554 U.S. at 627; see *Bianchi*, 111 F.4th at 502 (Richardson, J., dissenting) ("the 'common use' inquiry best fits at *Bruen*'s second step"); see also *Alicea*, *supra*, at 13. The "common use" test is not part of *Bruen*'s plain-text analysis at step one—whether an arm is "in common use" does not determine whether it is actually an arm. See *Bevis*, 85 F.4th at 1209 (Brennan, J., dissenting) ("The nature of an object does not change based on its popularity, but the regulation of that object can.").

"*Rahimi* confirms this" understanding. *Bianchi*, 111 F.4th at 502 n.29 (Richardson, J., dissenting). This Court considered Mr. Rahimi to be part of the "the people" at step one—despite his violent history that ultimately justified his temporary dispossession at step two—because "the term unambiguously refers to all members of the political community." *Rahimi*, 602 U.S. at 773 (Thomas, J., dissenting) (internal quotation marks omitted). "[J]ust as the term 'the people' includes but is not limited to ordinary, law-abiding, adult citizens, the term 'Arms' includes but is not limited to arms in common use." *Bianchi*, 111 F.4th at 502 n.29 (Richardson, J., dissenting). And it matters which step the "common use" test occurs at

because the burden of proof shifts from the litigant to the government at step two. See *Bruen*, 597 U.S. at 24.

With those principles in mind, turn to the lower courts' treatment of the "common use" test. Considering Maryland's ban on AR-15s, the Fourth Circuit chastised the test as a "trivial counting exercise" and an "ill-conceived popularity test." *Bianchi*, 111 F.4th at 460. Then, the court misapplied an incorrect version of the test at the wrong step to conclude that AR-15s are not "Arms" presumptively protected by the Second Amendment—putting an AR-15 and a banana on equal footing. See *id.* at 452–53. The court reasoned that an individual must *first* demonstrate that a weapon is not "dangerous and unusual" for the weapon to be considered an "Arm" presumptively protected by the Second Amendment. See *id.* at 450–53. Rather than look to common usage among citizens, the Fourth Circuit concocted an interest balancing test that asks whether an arm is "excessively dangerous [and] not reasonably related or proportional to the end of self-defense." *Id.* at 450, 452. In so doing, the court "balance[d] away Second Amendment freedoms" and "decide[d] [for itself] which weapons are most suitable" for Americans. *Id.* at 522, 531 (Richardson, J. dissenting).

Likewise, considering Illinois's ban on AR-15s, the Seventh Circuit warped the "common use" analysis to conclude that AR-15s are not "Arms." See *Bevis*, 85 F.4th at 1195. The court misinterpreted the "common use" test to mean that the government may ban weapons that "may be reserved for military use,"

simply because *Heller* mentioned that M-16s could be banned. *Id.* at 1194. And the court placed the burden on the plaintiff to make a showing of "common use" at step one. See *id.* So rather than focus on the "normal and ordinary meaning" of "Arm" historically, the court engaged in a "matching exercise between" "the characteristics of the" AR-15 and the M-16. *Bruen*, 597 U.S. at 20 (internal quotation marks omitted); see *Bevis*, 85 F.4th at 1221–22 (Brennan, J., dissenting). And, in the Seventh Circuit's eyes, "the AR-15 is almost the same gun as the M16 machinegun" used by the military, so the AR-15 is not an arm and can be banned. *Bevis*, 85 F.4th at 1195. But to the extent the M-16 "'may be banned,'" that is "not because of its military use but because of the 'historical tradition of prohibiting the carrying of dangerous and unusual weapons.'" *Hanson*, 120 F.4th at 233 (quoting *Heller*, 554 U.S. at 627); see *Snope*, 145 S. Ct. at 1534 (Kavanaugh, J., statement respecting the denial of certiorari). Other courts have repeated the Fourth and Seventh Circuit's error. See *Nat'l Ass'n of Gun Rights v. Lamont*, 685 F. Supp. 3d 63, 103 (D. Conn. 2023) (also wrongly placing the burden on the Plaintiffs to show that an arm is commonly used).

Even courts that address the common use test at the right step still confuse the analysis. In a case involving Rhode Island's ban on plus-ten magazines, the First Circuit declared that this Court has not "intimated that a weapon's prevalence in society (as opposed to, say, the degree of harm it causes) is the sole measure of whether it is 'unusual.'" *Ocean State*

Tactical, 95 F.4th at 50–51; see also *Capen*, 134 F.4th at 669–71 (upholding Massachusetts's ban of AR-15s based largely on this reasoning). And the First Circuit said that courts should look beyond the "ownership rate of the weapons at issue" to the weapon's "usefulness for self-defense." *Ocean State Tactical*, 95 F.4th at 51. To the contrary, *Heller* concluded that the District of Columbia could not "totally ban[] handgun possession in the home" because handguns were "overwhelmingly chosen by American *society* for [lawful purposes]." *Heller*, 554 U.S. at 628 (emphasis added). "Our Constitution allows the American people—not the government—to decide which weapons are useful for self-defense." *Snope*, 145 S. Ct. at 1537 (Thomas, J., dissenting from denial of certiorari).

These consistent misapplications of the common use test, especially in jurisdictions most likely to restrict Second Amendment rights, require this Court's attention.

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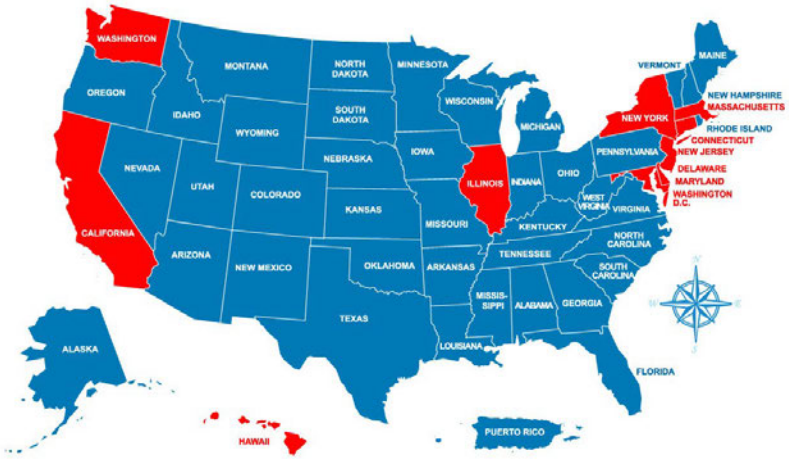
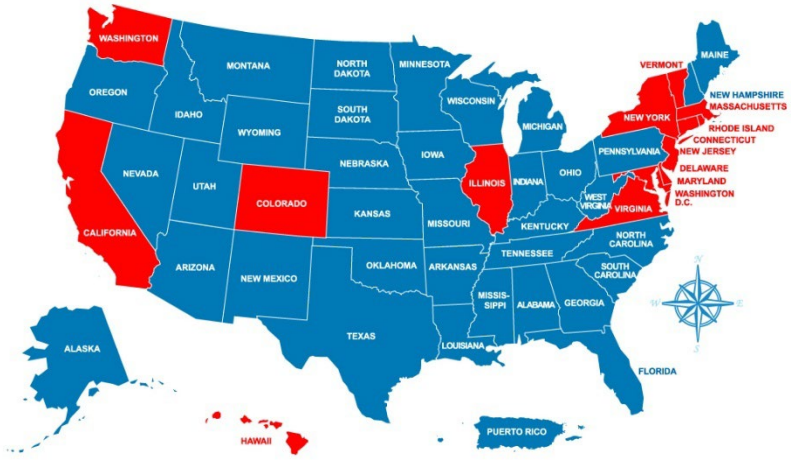
Lower courts are not faithfully applying this Court's Second Amendment precedents. Outcomes like upholding blanket bans on "America's most common civilian rifle" did not result from analytical disagreements about historical gun regulation analogues. *Harrel*, 144 S. Ct. at 2493 (statement of Thomas, J.). Instead, too many lower courts use "'cherrypicked language' that is 'mis- and over-applied from the Court's prior precedents' to uphold any

firearms regulation that comes before [them]." *United States v. Duarte*, 137 F.4th 743, 782 (CA9 2025) (en banc) (VanDyke, J., concurring). And too many of those decisions come from circuits whose jurisdictions are most likely to restrict their citizens' Second Amendment rights:





U.S. STATES WITH MAGAZINE RESTRICTIONS

See U.S. Concealed Carry Ass'n, *Which States Have Assault Weapons Bans?* (June 30, 2025), https://perma.cc/RQ5Y-WDGU; U.S. Concealed Carry Ass'n, *Gun Magazine Capacity Laws by State* (Sept. 25, 2023), https://perma.cc/5JTS-DV86.

This combination of legislative and judicial defiance of this Court's precedents is a compounded blow to the constitutional rights of law-abiding Americans. It is again time for the Court to step in.

II. The decision below badly erred.

The Washington Supreme Court below repeated many of the errors discussed above, leading to the under-protection of Second Amendment rights. *First*, it contorted the meaning of "Arms" to hold that magazines carrying ammunition necessary to a gun's operation are unprotected by the Second Amendment.

Second, it held that plus-ten magazines are not protected arms—despite their exceedingly widespread private ownership—because the plaintiffs purportedly did not show that they are "commonly used for self-defense." Both moves were egregiously wrong.

A. Magazines are protected by the Second Amendment.

The Second Amendment preserves the right of the people to keep and bear "arms," which "covers modern instruments that facilitate armed self-defense." *Bruen*, 597 U.S. at 28. Its protections extend, "prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding." *Heller*, 554 U.S. at 582.

"Constitutional rights," including those within the Second Amendment, "implicitly protect those closely related acts necessary to their exercise." *Luis v. United States*, 578 U.S. 5, 26 (2016) (Thomas, J., concurring). For instance, the Second Amendment includes "necessary concomitant[s] [like] the right to take a gun outside the home for certain purposes." *N.Y. State Rifle & Pistol Ass'n v. City of New York*, 590 U.S. 336, 364 (2020) (Alito, J., dissenting). And it encompasses components of operable firearms like bullets and magazines. Just as the First Amendment prohibits, for instance, indirect regulation via differential taxes on paper and ink, *Minneapolis Star & Trib. Co. v. Minnesota Com'r of Revenue*, 460 U.S. 575, 593 (1983), the Second Amendment prohibits regulations that burden the right to keep and bear

arms. See *Ezell v. City of Chicago*, 651 F.3d 684, 704 (CA7 2011).

Several courts, both pre- and post-*Bruen*, have recognized that magazines are within the Second Amendment's protections. See *Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Att'y Gen. N.J.*, 910 F.3d 106, 116 (CA3 2018); *Kolbe v. Hogan*, 813 F.3d 160, 175 (CA4 2016). Even the D.C. Circuit, which upheld a plus-ten magazine ban, concluded that magazines are protected. *Hanson*, 120 F.4th at 232. And rightly so. "A magazine is necessary to make meaningful an individual's [Second Amendment] right." *Ibid.* (cleaned up).

As Justice McCloud's dissent explained below, "if law abiding people cannot obtain . . . an integral component of a firearm . . . then 'the core Second Amendment right to keep and bear arms for self-defense wouldn't mean much.'" Pet. App. 31a (dissenting op.) (quoting *Teixeira v. Cnty. of Alameda*, 873 F.3d 670, 677 (9th Cir. 2017) (en banc)) (internal quotation marks omitted). Indeed, magazines are inherently tied to the arm itself.

Below, the Washington Supreme Court claimed that plus-ten magazines "are not weapons—they are attachments to weapons, or accessories." Pet. App. 10a. But "a magazine is not an optional accessory . . . . [i]t is a defining characteristic of a repeating firearm." *Id.* 28a (dissenting opinion). They are only accessories in the same sense that a motor vehicle's gas tank is an accessory. It's theoretically possible to operate a gas-

powered vehicle without a gas tank, but that would severely limit its functionality and utility. See *Ass'n of N.J. Rifle & Pistol Clubs*, 910 F.3d at 116 ("[M]agazines feed ammunition into certain guns, and ammunition is necessary for such a gun to function as intended."). Likewise, it's theoretically possible to operate a newspaper by paying higher taxes on ink and paper, but that did not free those taxes from First Amendment scrutiny. See *Minneapolis Star*, 460 U.S. at 583.

As the district court in *Hanson* observed, classifying magazines as mere "accoutrements" would allow states "to ban *all* magazines . . . because a firearm technically does not require *any* magazine to operate; one could simply fire the single bullet in the firearm's chamber." *Hanson v. District of Columbia*, 671 F. Supp. 3d 1, 10 (D.D.C. 2023). And if magazines are not protected by the Second Amendment, states could make an easy end-run around the Second Amendment by banning all firearm components. *Duncan*, 133 F.4th at 897 (Bumatay, J., dissenting). As the dissent below observed, "if the State can classify firearm components as unprotected accessories, then the State could completely bar modern weapons and force the people to use outdated, poor-performing, less accurate versions of those components." Pet App. 42a. The Washington Supreme Court's logic would likewise permit states to limit the capacity of revolvers or other firearms without detachable magazines.

Because magazines are integral to "arms," they are protected by the Second Amendment, and Washington bears the burden of proof under *Bruen*'s history and tradition framework. See *Bruen*, 597 U.S. at 17.

B. Washington bans magazines typically possessed by law-abiding citizens for lawful purposes.

The Washington Supreme Court also botched the "common use" analysis. The Second Amendment protects arms "typically possessed by law-abiding citizens for lawful purposes." *Heller*, 554 U.S. at 625 (cleaned up). This "common use" test accounts for the historical "tradition of prohibiting the carrying of 'dangerous and unusual weapons.'" *Id.* at 627. Arms "in common use today" are not "dangerous and unusual." *Bruen*, 597 U.S. at 47 (internal quotation marks omitted).

So are plus-ten magazines typically possessed by law-abiding citizens for lawful purposes? The answer is unequivocally yes—so they cannot be considered dangerous *and* unusual. Those magazines are commonly used for self-defense, hunting, and sporting purposes. Washington's restrictions, like similar restrictions in other States, burden the rights of millions of law-abiding citizens to keep and bear magazines (or "arms") that have long been considered appropriate for self-defense.

The superior court properly found that "[h]andguns sold with magazines with capacities over ten have been widely available for many years." Pet.

App. 88a. "It is indisputable in the modern United States that magazines of up to thirty rounds for rifles and up to twenty rounds for handguns are standard equipment for many popular firearms." David B. Kopel, *The History of Firearm Magazines and Magazine Prohibitions*, 78 Alb. L. Rev. 849, 874 (2015). And they are legal in "at least 38 States and under Federal law." *Duncan*, 133 F.4th at 892 (footnote omitted) (Bumatay, J., dissenting). In one comprehensive study, 48% of respondents confirmed that they owned plus-ten magazines. Pet. App. 41a (dissenting opinion). Estimates vary, but another study found that Americans own 542 million plus-ten magazines. William English, *2021 National Firearms Survey: Updated Analysis Including Types of Firearms Owned* 25 (Geo. McDonough Sch. of Bus. Rsch. Paper No. 4109494, 2022), available at https://perma.cc/83XT-75YG. So they're not just common, they're *ubiquitous* in common guns.

Take the "nationally popular" 9mm Glock 17 handgun. *Duncan v. Bonta*, 695 F. Supp. 3d 1206, 1216 (S.D. Cal. 2023), *rev'd by Duncan v. Bonta*, 133 F.4th 852, 859 (CA9 2025) (en banc). There are likely millions of Glock 17s in the United States, and even more worldwide.[1] Its popularity stems from its price,

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[1] Although the exact number of Glock 17s in circulation isn't known, Glock has sold more than 23 million pistols worldwide

light weight, and reliability. The Glock 17 comes with a standard 17-round magazine. *Duncan*, 970 F.3d at 1142. And almost all Glock models, except for subcompact variants designed for concealed carry, come standard with magazine capacities greater than ten rounds. *Id.*

Of course, an arm need not number in the millions to be in common use. This Court held that stun guns are in common use even though only a few hundred thousand citizens own such arms. *Caetano v. Massachusetts*, 577 U.S. 411, 420–21 (2016) (Alito, J., concurring). "While less popular than handguns, stun guns are widely owned and accepted as a legitimate means of self-defense across the country." *Id.* at 420. Thus, the common use threshold is relatively low. And if a few hundred thousand stun guns reach that threshold, then millions of plus-ten magazines far surpass it.

The evidence before the district court was neither surprising nor unique. The superior court concluded that "millions of Americans have chosen [plus-ten magazines] as the format of their weapon[s]. . . . lawfully owned for lawful purposes." Pet. App. 89a. And courts across the country have recognized the

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and the Glock 17 is one of the most popular models. *See* Logan Metesh, *A (Mostly) Complete History of the Glock 17*, HANDGUNS MAGAZINE, Dec. 26, 2024, https://www.handgunsmag.com/editorial/glock-17-pistol-complete-history/513089.

widespread use of these magazines by law-abiding citizens. See *N.Y. State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 255 (CA2 2015) (agreeing that the "large-capacity magazines at issue are 'in common use'"); *Heller v. District of Columbia*, 670 F.3d 1244, 1261 (CADC 2011) (noting that the record showed that "magazines holding more than ten rounds are indeed in 'common use'").

Moreover, there's a longstanding history and tradition of law-abiding Americans owning and using these magazines for self-defense. "Firearms or magazines holding more than ten rounds have been in existence—and owned by American citizens—for centuries. Firearms with greater than ten round capacities existed even before our nation's founding, and the common use of [plus-ten magazines] for self-defense is apparent in our shared national history." *Duncan*, 970 F.3d at 1147; see also *Duncan v. Bonta*, 83 F.4th 803, 814 (CA9 2023) (Bumatay, J., dissenting) ("In terms of large-scale commercial success, rifle magazines of more than ten rounds had become popular by the time the Fourteenth Amendment was being ratified." (quoting Kopel, *supra*, at 851)).

The majority below concluded that because Plaintiffs had not shown plus-ten magazines are "traditionally or commonly used for self-defense," they may be banned. Pet. App. 9a. But that's wrong in several respects.

First, though self-defense is a core component of the Second Amendment, *Bruen*, 597 U.S. at 29, the constitutional right to keep and bear arms is not limited to self-defense. The right extends to other "lawful purpose[s]" too, like community defense, hunting, and sporting. *Heller*, 554 U.S. at 624; see, *e.g.*, *id.* at 599; 15 U.S.C. § 7901(b)(2); William Baude & Robert Leider, *The General-Law Right to Bear Arms*, 99 Notre Dame L. Rev. 1467, 1498–1502 (2024). Similarly, the Second Amendment protects arms "in common use" generally, not merely those in common use *for self-defense*. *Bruen*, 597 U.S. at 21; *see Heller*, 554 U.S. at 625 (holding that constitutional protection is afforded to arms "typically possessed by law-abiding citizens for lawful purposes"). Despite these clear rulings, the Washington Supreme Court below disregarded evidence of common possession, requiring instead that plus-ten magazines be "commonly used *for self-defense*." Pet. App. 12a–13a (emphasis supplied).

But even if the test were "in common use for self-defense," the Washington Supreme Court would still be wrong. These magazines facilitate armed self-defense. Plaintiffs presented evidence, which the court below inexplicably ignored, that of the 27.3 million individuals who own plus-ten magazines, 71% of them own them *for self defense*. Pet. App. 41a (dissenting opinion); William English, *2021 National Firearms Survey: Analysis of Magazine Ownership and Use* 4 (Geo. McDonough Sch. of Bus., Research Paper No. 4444288, 2023), https://ssrn.com/abstract=4444288. If

this doesn't amount to "in common use for self-defense," it is hard to imagine what does.

Further, Washington's reliance on one methodologically flawed, "limited, non-peer reviewed study" concluding that people fired only an average of 2.2 rounds in self defense is misplaced. Pet. App. 22a (dissenting opinion); see *Id.* 38a n. 21. Even if this were true, "we don't measure whether an arm is in 'common use' for 'self-defense' or 'other lawful purposes by counting the number of rounds an 'average' desperate victim is able to discharge when forced to return fire." *Id.* 22a. (dissenting opinion). As discussed, nearly half of gun owners possess plus-ten magazines. And there are likely hundreds of millions of those magazines in circulation—many used in popular firearms such as the Glock 17. So when someone uses a firearm in self-defense, whether to fend off an intruder in the middle of the night or a grizzly bear in the middle of nowhere, there's a good chance that person is "using" a plus-ten magazine. The same is true when individuals use firearms as a deterrent in self-defense situations without firing a shot. The "use" of the firearm isn't limited to firing the weapon. This is analogous to wearing a seatbelt in case of collision or using a reserve canopy on a parachute. *See Duncan*, 695 F. Supp. 3d at 1227. Firing a weapon in self-defense—one time or fifteen times—is always a worst-case scenario. Fortunately, the Second Amendment protects the right of Americans to adequately prepare themselves for those contingencies.

To get around the factual issues with their reasoning, the Washington Supreme Court's simply put the burden to the Plaintiffs to prove common use—then proceeded to ignore all the evidence they offered. To support this move, the court below erroneously incorporated a *Bruen* step two inquiry—where the burden is on the government—into step one. *Heller*, 554 U.S. at 627; see Pet. App. 14a (concluding there was not "evidence . . . sufficient to bear [the Plaintiffs'] burden" that plus-ten magazines are "commonly used for self-defense," so the Plaintiffs had not "prove[d] [plus-ten magazines] fall within constitutional protection"). This inverts *Bruen*'s requirement that "the *government* must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation." *Bruen*, 597 U.S. at 17 (emphasis supplied).

C. The plus-ten magazine ban does not align with this Nation's tradition of firearm regulation.

Because the Washington Supreme Court erred in interpreting the "Second Amendment's plain text," misconstruing "Arms" to exclude magazines, it never determined if the State had "justified [plus-ten magazine bans] by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Bruen*, 597 at 25. Considering the technology to fire ten or more rounds without reloading has existed since before the founding, Kopel, *supra*, at 852–53 (giving examples dating to 1580), Washington should have no trouble identifying a

"relevantly similar" law in terms of "how and why the regulations burden a law-abiding citizen's right to armed self-defense." *Id.* at 29.

Yet it's proposed analogues come nowhere close. Laws regulating "trap guns" are not relevantly similar because unlike magazines, they receive no Second Amendment protection—"[t]rap guns don't have an operator and would not be considered 'bearable.'" Pet. App. 103a. Further, the only founding era trap gun restriction was a hunting law, not a safety measure, so the comparison fails *Bruen*'s "why" prong. *Ibid*; *see An Act for the Preservation of Deer and other Game, and to prevent trespassing with Guns*, Ch. 540, § 10 1702–1776 N.J. Laws 346 (1771); see also *Duncan*, 133 F.4th at 908 (Bumatay, J., dissenting). Similarly, gunpowder regulations existed for fire control, not to address gun violence, so those too fail at the "why." Pet. App. 105a.

Laws regulating Bowie knives were rare before 1837 and were most popular from 1860-1900. Pet App. 103a. This "late-19th-century evidence cannot provide much insight into the meaning of the Second Amendment." *Bruen*, 597 U.S. at 66. Further, Bowie knife laws did not ban possession like Washington's law, so they fail *Bruen*'s "how" prong. Pet. App. 103a. Early concealed carry regulations, the common law offense of "affray," and surety statutes also did not ban any arm or regulate ammunition capacity, so they also fail *Bruen*'s "how" prong. *Id.* at 103a–105a. *See Bruen*, 597 U.S. at 50–51, 55.

Washington's failure to come up with any remotely analogous regulation to its magazine ban underscores the importance of a proper interpretation of the Second Amendment at *Bruen*'s step one. Otherwise, laws regulating conduct covered by the "Second Amendment's plain text," with no basis in "this Nation's historical tradition of firearm regulation," are allowed to stand without meaningful constitutional scrutiny. *Bruen*, 597 U.S. at 17.

CONCLUSION

The Court should grant the petition and reverse.

Respectfully submitted, SEPTEMBER 8, 2025

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