No. 25-153

In The
Supreme Court of the United States

GATOR'S CUSTOM GUNS, INC., and WALTER WENTZ,
Petitioners,

v.

STATE OF WASHINGTON,
Respondent.

On Petition for Writ of Certiorari to the Washington Supreme Court

BRIEF OF THE NATIONAL RIFLE ASSOCIATION OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The National Rifle Association of America (NRA) is America's oldest civil rights organization and foremost defender of Second Amendment rights. It was founded in 1871 by Union veterans—a general and a colonel—who, based on their Civil War experiences, sought to promote firearms marksmanship and expertise amongst the citizenry. Today, the NRA is America's leading provider of firearms marksmanship and safety training for both civilians and law enforcement. The NRA has approximately four million members, and its programs reach millions more.

The NRA is interested in this case because the State of Washington's ban on commonly possessed standard magazines violates the Second Amendment.

[1] All parties received timely notice of *Amicus*'s intent to file this brief. No counsel for any party authored this brief in any part. Only *Amicus* funded its preparation and submission.

SUMMARY OF ARGUMENT

Many firearms require ammunition magazines to properly function. But the State of Washington has arbitrarily deemed firearm magazines that hold over a certain number of rounds "large-capacity" and prohibited their sale and manufacture.

This case would allow the Court to resolve not one but two growing circuit splits surrounding the plain text analysis of the Second Amendment.

First, lower courts are divided over whether firearm magazines are "arms" that are presumptively protected by the plain text of the Second Amendment. Some courts hold that firearm magazines—or at least so-called "large-capacity" magazines—are merely accessories, not arms at all. Others hold that magazines are presumptively protected "arms." Still others have glossed over the question, refusing to decide.

But magazines are arms. Constitutional rights necessarily extend to corollaries that are essential for their exercise. Just as the First Amendment protects the ink and paper necessary for speech, the Second Amendment covers the bullets and magazines necessary for a firearm to function. "Without protection for these closely related rights, the Second Amendment would be toothless." *Luis v. United States*, 578 U.S. 5, 27 (2016) (Thomas, J., concurring).

Moreover, there is nothing in the Second Amendment's plain text that changes a magazine's protected status based on its capacity. Rather, any restriction based on capacity must accord with historical tradition.

Second, lower courts are divided over when to consider whether an arm is "in common use." Some courts look at whether an arm is "in common use" as part of the plain text inquiry; others consider whether a weapon is "common"—as opposed to "dangerous and unusual"—during the historical analysis. This Court's precedents show that the latter course is correct; this Court can use this case to make clear that it is the government's burden to demonstrate, through historical tradition, that an arm is so "dangerous and unusual" that it has been removed from the Second Amendment's purview—not a challenger's burden, as a threshold matter, to demonstrate that an arm is sufficiently common so as to earn presumptive protection in the first place.

Resolving these two circuit splits would help to simplify and standardize the plain text analysis of the Second Amendment for the lower courts.

ARGUMENT

I. Magazines, regardless of capacity, are bearable "arms."

Tens of millions of firearms require a magazine to hold ammunition and allow the firearm to function properly. The ammunition capacity of these magazines varies, but "[m]ost pistols are manufactured with magazines holding ten to seventeen rounds, and many popular rifles are manufactured with magazines holding twenty or thirty rounds." *Duncan v. Bonta*, 133 F.4th 852, 862 (9th Cir. 2025) (en banc) (quotation omitted).

Nevertheless, some states and the District of Columbia deem standard firearm magazines with a capacity above an arbitrary number of rounds—ranging from ten to seventeen—to be "large-capacity" magazines.[2] These states, including the State of Washington, restrict or prohibit the sale, manufacture, and/or possession of these magazines.

Firearm magazines are "arms" protected by the Second Amendment. And restrictions on magazines affect arms-bearing conduct. But lower courts are divided over whether challenges to magazine restrictions survive the Second Amendment's plain text analysis.

A. Lower courts are divided over whether magazines are "arms" under the Second Amendment.

Lower courts are split over whether and to what extent the Second Amendment protects firearm magazines generally, and in particular firearm magazines above a certain capacity.

Some courts hold that firearm magazines—or at least those of a certain capacity—are not "arms" and do not even implicate the Second Amendment.

In the instant case, the Washington Supreme Court held "that [large-capacity magazines] are not 'arms' in the constitutional sense." *State v. Gator's Custom Guns, Inc.*, 4 Wash. 3d 732, 743 (2025), *as*

[2] *Firearm Magazine Restrictions and Capacity by State*, Ship Restrict (May 9, 2025), https://shiprestrict.com/blog/shipping-restrictions/magazine-restrictions-capacity-state.

amended (May 14, 2025). That court also stated that "we have never held that magazines [regardless of capacity] are arms, and the fact that a semiautomatic weapon will not function as intended without one does not conclusively establish that they are." *Id.*

In *Duncan*, the en banc Ninth Circuit held that "large-capacity" magazines are not "arms" because they "fall clearly within the category of accessories, or accoutrements, rather than arms." 133 F.4th at 867. And in *Bevis v. City of Naperville, Ill.*, the Seventh Circuit held that large-capacity magazines are not "arms" protected by the Second Amendment's plain text because they "can lawfully be reserved for military use." 85 F.4th 1175, 1195, 1197 (7th Cir. 2023). That court did not comment on whether or not magazines considered large-capacity are "arms." *Id.*

Conversely, some circuits hold that magazines are "arms" regardless of capacity.

The Third Circuit has held that "a magazine is an arm under the Second Amendment," regardless of its capacity. *Ass'n of New Jersey Rifle & Pistol Clubs, Inc. v. Att'y Gen. New Jersey*, 910 F.3d 106, 116 (3d Cir. 2018), *abrogated on other grounds by New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022).

In *Hanson v. District of Columbia*, the D.C. Circuit held that large-capacity magazines "very likely are 'Arms' within the meaning of the plain text of the Second Amendment." 120 F.4th 223, 232 (D.C. Cir. 2024), *cert. denied*, No. 24-936, 2025 WL 1603612 (U.S. June 6, 2025). "A magazine is necessary to make meaningful an individual's right to carry a handgun for self-defense. To hold otherwise would allow the

government to sidestep the Second Amendment with a regulation prohibiting possession at the component level." *Id.*

Still other circuits have taken a middling approach, assuming for purposes of argument that magazines are "arms," without wholly deciding the issue. *See Ocean State Tactical, LLC v. Rhode Island*, 95 F.4th 38, 43 (1st Cir. 2024) ("[W]e find it unnecessary on this appeal to decide" the issue but will "assume that [large-capacity magazines] are 'arms' within the scope of the Second Amendment and proceed to consider whether HB 6614 is consistent with our history and tradition."); *Nat'l Ass'n for Gun Rts. v. Lamont*, 2025 WL 2423599, at *13 (2d Cir. 2025) (finding the question "not necessary to resolve this appeal," but "assum[ing] without deciding that the desired firearms and magazines are bearable arms within the meaning of the Second Amendment and that their acquisition and possession is presumptively entitled to constitutional protection").

From these disparate conclusions, it is clear that lower courts need this Court's guidance.

B. This Court should confirm that magazines are "arms."

District of Columbia v. Heller's plain text analysis expressly concluded that "[t]he Second Amendment extends, prima facie, to all instruments that constitute bearable arms." 554 U.S. 570, 582 (2008). This Court should intervene to clarify that firearm magazines—regardless of capacity—are bearable arms that are presumptively protected by the Second Amendment.

"Constitutional rights … implicitly protect those closely related acts necessary to their exercise," *Luis*, 578 U.S. at 26 (Thomas, J., concurring). "A constitution…. requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves." *McCulloch v. Maryland*, 17 U.S. 316, 407 (1819). In other words, "th[is] Court has acknowledged that certain unarticulated rights are implicit in enumerated guarantees" because they are "indispensable to the enjoyment of rights explicitly defined." *Richmond Newspapers v. Virginia*, 448 U.S. 555, 579–80 (1980).

"The First Amendment guarantee of a free press … implies a right to buy the inks and paper necessary for printing newspapers," *Oakland Tactical Supply, LLC, v. Howell Twp., Mich.*, 103 F.4th 1186, 1201 (6th Cir. 2024) (Kethledge, J, dissenting) (citing *Minneapolis Star and Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 582–83 (1983)). So too "[t]he right to keep and bear arms … 'implies a corresponding right to obtain the bullets necessary to use them.'" *Luis*, 578 U.S. 26 (Thomas, J., concurring) (quoting *Jackson v. City of San Francisco*, 746 F.3d 953, 967 (9th Cir. 2014)). And like bullets, "[a] magazine is necessary to make meaningful an individual's right to" keep and bear arms, *Hanson*, 120 F.4th at 232. "Because magazines feed ammunition into certain guns, and ammunition is necessary for such a gun to function as intended, magazines are 'arms' within the meaning of the Second Amendment." *Ass'n of New Jersey Rifle & Pistol Clubs*, 910 F.3d at

116. Even courts that have held that "large-capacity" magazines are not arms have admitted that magazines of *some* capacity are necessarily protected. *See, e.g., Duncan*, 133 F.4th at 868 ("A magazine is an integral part of the firing mechanism of some firearms…. [T]he Second Amendment's plain text encompasses a right to possess a magazine in that circumstance.").

As a matter of plain text, if *any* magazines are "arms" (and they are), then *all* magazines are "arms." The Washington Supreme Court misunderstands this, as do the Ninth and Seventh Circuits. The Washington Supreme Court finds "problematic" "the trial court's logic that magazines are arms, and thus large capacity magazines are necessarily also arms." *Gator's Custom Guns, Inc.*, 4 Wash. 3d at 284. Further, that court states, "the constitutional protection of some instruments in a category does not require the protection of all instruments belonging to the same category." *Id.*

Yet that is precisely the conclusion the plain text requires. Nothing in the plain text of the Second Amendment mentions the size of a magazine or the specific features of a firearm. The plain text provides categorical, presumptive protection for all bearable arms. *Heller*, 554 U.S. at 582 ("[t]he Second Amendment extends, prima facie, to all instruments that constitute bearable arms."); *see also Snope v. Brown*, 145 S. Ct. 1534, 1535 (2025) (Thomas, J., dissenting from the denial of certiorari) ("AR-15s are clearly 'Arms' under the Second Amendment's plain text."). Thus, whether a subset of a protected category—be it magazines of a certain capacity or

certain types of firearms—may be regulated or prohibited is a question of history, not plain text.

A different view of the Second Amendment standard further demonstrates that Petitioner's challenge survives the plain text analysis: the Second Amendment presumptively protects not just "arms" but also arms-bearing conduct. This Court has held that "when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct." *Bruen*, 597 U.S. at 17. A challenger's plain text "burden is met if the law at issue regulates Americans' arms-bearing conduct." *Snope*, 145 S. Ct. at 1536 (Thomas, J., dissenting from the denial of certiorari) (quotations omitted). And limiting the capacity of a firearm magazine clearly "regulates … arms-bearing conduct." *Id*.

II. The "common use" consideration is part of the historical analysis—not the plain text analysis.

The Washington Supreme Court, in addition to holding that large-capacity magazines are merely accessories (not "arms"), further held that large-capacity magazines are not presumptively protected arms because the state and federal constitutional "provisions protect only those arms that are commonly used for self-defense." *Gator's Custom Guns*, 4 Wash. 3d at 284.

This holding adds to a growing split among the lower courts over whether the question of an arm's "common use"—as opposed to its "dangerous and

unusual" nature—should be considered as part of the plain text analysis or the historical analysis.

A. Lower courts are divided over whether "common use" is part of the plain text analysis or the historical analysis.

The Tenth Circuit considers "common use" as part of the plain text inquiry. *United States v. Morgan*, 2025 WL 2502968, at *4 (10th Cir. 2025). The Fifth Circuit has done the same. *United States v. Rahimi*, 61 F.4th 443, 454 (5th Cir. 2023), *rev'd and remanded*, 602 U.S. 680 (2024). And the D.C. Circuit "assume[s], without deciding, this issue falls under *Bruen* step one." *Hanson*, 120 F.4th at 232 n.3.

The Second Circuit has also "understood the 'in common use' analysis to fall under the first step of *Bruen*." *Lamont*, 2025 WL 2423599, at *12. However, that court also states that "the Supreme Court has not made clear" whether "common use" is a text or history inquiry, and claims "the Court's precedents may reasonably be read" either way. *Id.*

The Seventh Circuit claims to address commonality as part of the historical tradition. *See Bevis*, 85 F.4th at 1198 ("We will assume (without deciding the question) that [common use] is a step two inquiry."). In recent practice, however, that court actually applied "common use" as a limitation on the scope of the plain text. *United States v. Rush*, 130 F.4th 633, 640 (7th Cir. 2025) ("[W]e decline to make a step one finding that short-barreled rifles are 'arms' protected by the Second Amendment's text" because "[t]he record does not show such firearms are

commonly used by ordinary, law-abiding citizens for a lawful purpose like self-defense.").

Noting that "[t]his question has divided panels of our court," four dissenting judges on the Ninth Circuit agreed that "the 'common use' inquiry best fits at *Bruen*'s second step," although the majority in that case did not resolve the issue. *Duncan*, 133 F.4th at 900 (Bumatay, J., dissenting) (quotation omitted).

The en banc Fourth Circuit wrestled with this split in *United States v. Price*, 111 F.4th 392 (4th Cir. 2024) (en banc). The nine-judge majority considered common use in its plain text inquiry, while Judge Niemeyer in concurrence, Judge Quattlebaum joined by Judge Rushing in concurrence, and Judge Richardson in dissent all agreed that "common use falls under *Bruen*'s historical tradition step." *Id.* at 415 (Quattlebaum, J., concurring) (describing the judges' various approaches).

Thus, currently, "[t]here is no consensus on whether the common-use issue belongs at *Bruen* step one [plain text] or *Bruen* step two [history]." *Bevis*, 85 F.4th at 1198; *see also Bianchi v. Brown*, 111 F.4th 438, 477 (4th Cir. 2024) (en banc) (Gregory, J., concurring) ("The Supreme Court has not yet defined the purview or instructed on the proper placement of the dangerous and unusual analysis. In that vacuum, courts have struggled to interpret the scope of the constitutional right to bear arms as informed by *Bruen* and other Supreme Court precedent.").

B. This Court should clarify that "common use" is a question of history, not plain text.

This Court's precedents have already demonstrated that the "common use" and "dangerous and unusual" questions must be answered through historical analysis. *Heller* referred to "the *historical tradition*" of regulating "dangerous and unusual weapons." 554 U.S. at 627 (emphasis added). And *Bruen* further explained that the *Heller* Court was "[d]rawing from this *historical tradition*" of restricting "dangerous and unusual weapons" in holding that the Second Amendment protects arms "'in common use at the time,' as opposed to those that 'are highly unusual in society at large.'" 597 U.S. at 47 (quoting *Heller*, 554 U.S. at 627) (emphasis added); *see also Snope*, 145 S. Ct. at 1534 (Statement of Kavanaugh, J., respecting the denial of certiorari) (discussing the "*historically based* 'common use' test") (emphasis added).

Moreover, the *Heller* Court considered that "historical tradition" in its own historical analysis. After completing the plain text analysis of the Second Amendment, 554 U.S. at 576–600, this Court began focusing on historical tradition, including "how the Second Amendment was interpreted from immediately after its ratification through the end of the 19th century," *id.* at 605, 605–19, as well as Supreme Court precedents, *id.* at 619–26. *Only then* did this Court identify the "historical tradition" of regulating "dangerous and unusual weapons" and determine that arms "in common use at the time" are protected. *Id.* at 627 (quotations omitted).

What is more, this Court identified the traditional "dangerous and unusual" regulation in the same paragraph as other "longstanding regulations," *id.* at 626–27, while promising to "expound upon the historical justifications for" those regulations "if and when those exceptions come before us," *id.* at 635 (emphasis added). Indeed, *Heller* "did not say that dangerous and unusual weapons are not *arms*," but rather "that the relevance of a weapon's dangerous and unusual character lies in the '*historical tradition*[.]'" *Teter v. Lopez*, 76 F.4th 938, 949–50 (9th Cir. 2023), *reh'g en banc granted, opinion vacated*, 93 F.4th 1150 (9th Cir. 2024) (quoting *Heller*, 554 U.S. at 627) (emphasis in *Teter*).

Justice Thomas made this abundantly clear in his dissent from the denial of certiorari in *Snope*, 145 S. Ct. at 1534–39. "A challenger need *only* show that the 'plain text' of the Second Amendment covers his conduct. This burden is met if the law at issue regulates Americans' arms-bearing conduct." *Id.* at 1536 (Thomas, J., dissenting from the denial of certiorari) (emphasis added) (quotations omitted). "Once the challenger makes this initial showing, it is *the government's* burden to show that a historic limit on the right to bear arms nevertheless justifies its regulation." *Id.* at 1536 (Thomas, J., dissenting from the denial of certiorari). Challengers do not have to prove that "their conduct falls outside the historical exceptions to the right to keep and bear arms" *Id.* (Thomas. J., dissenting from the denial of certiorari). In other words, it is not a challenger's burden to prove that an arm is sufficiently common such that it has earned Second Amendment protection; rather, it is the

government's job to demonstrate that an arm is so "dangerous and unusual" that it is excepted from protection.

This accords with the treatment of other constitutional rights. Just as there are unprotected arms, there are "historically unprotected categories of speech such as 'libel, incitement, true threats, fighting words, or falsely shouting fire in a crowded theater.'" *Id*. at 1537 (Thomas, J., dissenting from the denial of certiorari) (quoting *Bianchi*, 111 F.4th at 447). But unprotected speech is still speech, just as unprotected arms are still arms. And "the Government bears the burden of … showing whether the expressive conduct falls outside of the category of protected speech." *Bruen*, 597 U.S. at 24 (quotation omitted). So too is "the burden on the government to show that a regulation of arms-bearing conduct falls outside the Second Amendment's protection." *Snope*, 145 S. Ct. at 1537 (Thomas, J., dissenting from the denial of certiorari).

By determining that firearm magazines are arms protected by the plain text of the Second Amendment, regardless of their capacity or commonality, this Court can clarify that the plain text is a threshold analysis, and consideration of an arm's specific features—its capacity, its dangerousness, its commonality—is part of the historical analysis, not the plain text.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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