

The Honorable Judge David G. Estudillo

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON**

GABRIELLA SULLIVAN, *et al.*,

*Plaintiffs,*

v.

BOB FERGUSON, in his official capacity as  
Washington State Attorney General, *et al.*,

*Defendants,*

ALLIANCE FOR GUN RESPONSIBILITY,

*Intervenor-Defendant.*

No. 3:22-cv-05403-DGE

**PLAINTIFFS' MOTION FOR  
SUMMARY JUDGMENT**

NOTE ON MOTION CALENDAR:  
October 16, 2023

**TABLE OF CONTENTS**

**Page**

I. INTRODUCTION ..... 1

II. BACKGROUND.....3

    A. The Magazine Ban Harms Plaintiffs.....3

    B. Procedural History. ....5

III. ARGUMENT .....6

    A. The Plain Text of the Second Amendment. ....6

        1. Washington’s Magazine Ban Restricts the Use of “Arms.” .....6

        2. Magazines Are Protected By Necessary Implication of the  
Constitutional Text.....8

    B. History Provides No Justification for the Magazine Ban. ....9

        1. Only “Dangerous And Unusual Weapons” May Be Banned  
Consistent With The Second Amendment.....9

        2. Arms “In Common Use” Cannot Be “Dangerous And Unusual  
Weapons.” .....11

        3. Magazines Holding More Than Ten Rounds Are “In Common  
Use.” .....13

IV. CONCLUSION.....16

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27

**TABLE OF AUTHORITIES**

<b><u>Cases</u></b>	<b><u>Page</u></b>
<i>Ass’n of N.J. Rifle &amp; Pistol Clubs, Inc. v. Att’y Gen. N.J.</i> , 910 F.3d 106 (3d Cir. 2018) (“ANJRPC”).....	6, 7, 15
<i>Barnett v. Raoul</i> , --- F. Supp. 3d ----, 2023 WL 3160285 (S.D. Ill. Apr. 28, 2023).....	8
<i>Caetano v. Massachusetts</i> , 577 U.S. 411 (2016).....	1, 10, 11, 12
<i>Duncan v. Becerra</i> , 970 F.3d 1133 (9th Cir. 2020) .....	15
<i>Duncan v. Bonta</i> , 19 F.4th 1087 (9th Cir. 2021) .....	8, 15
<i>Fyock v. Sunnyvale</i> , 779 F.3d 991 (9th Cir. 2015) .....	8, 15
<i>Heller v. Dist. of Columbia</i> (“Heller IP”), 670 F.3d 1244 (D.C. Cir. 2011).....	15
<i>Heller v. District of Columbia</i> , 554 U.S. 570 (2008).....	1, 2, 6, 9, 10, 11, 12
<i>Jackson v. City &amp; Cnty. of San Francisco</i> , 746 F.3d 953 (9th Cir. 2014) .....	8
<i>Kolbe v. Hogan</i> , 849 F.3d 114 (4th Cir. 2017) .....	15
<i>Luis v. United States</i> , 578 U.S. 5 (2016).....	8
<i>McDonald v. City of Chicago</i> , 561 U.S. 742 (2010).....	1
<i>N.Y. State Rifle &amp; Pistol Ass’n v. Cuomo</i> , 804 F.3d 242 (2d Cir. 2015).....	15
<i>New York State Rifle &amp; Pistol Association, Inc. v. Bruen</i> , 142 S. Ct. 2111 (2022).....	1, 6, 7, 9, 10, 11, 12, 13
<i>Range v. Att’y Gen. U.S.</i> , 69 F.4th 96 (3d Cir. 2023) .....	11
<i>Teter v. Lopez</i> , slip op., No. 20-15948 (9th Cir. Aug. 7, 2023).....	10
<b><u>Constitutional Provisions and Statutes</u></b>	
U.S. CONST. amend. II .....	6

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27

Wash. Rev. Code  
     § 9.41.010(16).....3  
     § 9.41.370(1).....3

An Act More Effectually to Provide for the National Defense by Establishing an  
 Uniform Militia throughout the United States,  
 ch.33, 1 Stat. 271 (1792).....7

**Other Authorities**

CHRISTOPHER S. KOPER ET AL., U.S. DEP’T OF JUSTICE, DOC. NO. 204431, AN  
 UPDATED ASSESSMENT OF THE FEDERAL ASSAULT WEAPONS BAN:  
 IMPACTS ON GUN MARKETS & GUN VIOLENCE, 1994-2003 (July 2004),  
<https://bit.ly/3wUdGRE> .....13

*Commonly Owned: NSSF Announces Over 24 Million MSRs in Circulation,*  
 NAT’L SHOOTING SPORTS FOUND. (July 20, 2020),  
<https://bit.ly/3QBXiyy> .....14

David B. Kopel, *The History of Firearm Magazines and Magazine Prohibitions,*  
 78 ALB. L. REV. 849 (2015) .....14

GUN DIGEST 2018 (Jerry Lee & Chris Berens eds., 2017).....14

*Large-capacity magazine laws by state,* GUNTAB (May 30, 2021),  
<https://bit.ly/3rXh7cs> .....14

Lillian Mongeau Hughes, *Oregon voters approve permit-to-purchase for guns  
 and ban high-capacity magazines,* NPR (Nov. 15, 2022),  
<https://n.pr/3Veh188> .....14

MASSAD AYOUB, THE COMPLETE BOOK OF HANDGUNS (2013) .....14

NAT’L SHOOTING SPORTS FOUND., FIREARM PRODUCTION IN THE UNITED STATES  
 WITH FIREARM IMPORT AND EXPORT DATA (2020),  
<https://bit.ly/3jfdUMt> .....13

NAT’L SHOOTING SPORTS FOUND., MODERN SPORTING RIFLE COMPREHENSIVE  
 CONSUMER REPORT (2022), <https://bit.ly/3GLmErS> .....14

NICHOLAS J. JOHNSON ET AL., FIREARMS LAW AND THE SECOND AMENDMENT:  
 REGULATION, RIGHTS, AND POLICY (3d ed. 2021),  
<https://bit.ly/43QShIp>.....7

WILLIAM ENGLISH, 2021 NATIONAL FIREARMS SURVEY: UPDATED ANALYSIS  
 INCLUDING TYPES OF FIREARMS OWNED (May 18, 2022),  
<https://bit.ly/3yPfoHw>.....13, 14

## I. INTRODUCTION

1  
2 In *New York State Rifle & Pistol Association, Inc. v. Bruen*, the Supreme Court explained  
3 that the Second Amendment “elevates above all other interests the right of law-abiding,  
4 responsible citizens to use arms for self-defense” and that it is not legislation, but “the traditions  
5 of the American people—that demands our unqualified deference.” 142 S. Ct. 2111, 2131 (2022)  
6 (quotation omitted). In this case, Washington has passed a ban on common ammunition feeding  
7 devices capable of holding more than ten rounds of ammunition that is irreconcilable with the  
8 traditions of the American people.

9 The Supreme Court has now repeatedly established that the Second Amendment absolutely  
10 “protects the possession and use of weapons that are in common use.” *Id.* at 2128 (quotation  
11 omitted). In *Heller v. District of Columbia*, the same case in which it established that the Second  
12 Amendment protects an individual right to keep and bear arms, the Supreme Court explained that  
13 the *only* bans on types of arms that are permissible are those that target “dangerous and unusual”  
14 arms, and arms “in common use” cannot be *either*. 554 U.S. 570, 627 (2008). It follows that Second  
15 Amendment “elevates above *all other interests* the right of law-abiding, responsible citizens to use  
16 arms in defense of hearth and home.” *Id.* at 635 (emphasis added). Thus, once it is determined that  
17 an arm is in common use and therefore protected, law-abiding citizens have an absolute right to  
18 possess it. The Supreme Court reiterated this principle in *McDonald v. City of Chicago*, explaining  
19 that once it is determined that the Second Amendment “applies” to a particular type of arm, it  
20 follows that “citizens *must* be permitted to use” that type of arm for self-defense. 561 U.S. 742,  
21 767–68 (2010) (emphasis added). Several years later, in 2016, the Supreme Court summarily  
22 reversed the Supreme Judicial Court of Massachusetts for departing from *Heller* when evaluating  
23 a ban on stun guns—arms in common use. *See Caetano v. Massachusetts*, 577 U.S. 411 (2016).  
24 And in *Bruen* the Supreme Court emphasized once more that the Second Amendment “protects  
25 the possession and use of weapons that are in common use,” 142 S. Ct. at 2128, and that this  
26 protection is an “unqualified command,” *id.* at 2130.

1 The Supreme Court’s clear and consistent precedent is dispositive here. Firearms equipped  
2 with the magazines Washington bans are indisputably in common use by law-abiding citizens, and  
3 it follows that Washington’s ban is unconstitutional.

4 While *Heller* provides the rule of decision (arms in common use cannot be banned), *Bruen*  
5 provides more explanation of the methodology that led to that rule of decision and that has always  
6 governed Second Amendment analysis since *Heller* under a proper understanding of that decision.  
7 As *Bruen* makes clear, Second Amendment cases proceed first by asking whether the conduct in  
8 question is covered by the plain text of the Second Amendment. Here, it plainly is. Firearms  
9 equipped with the magazines that Washington bans are “arms”—i.e., “any thing a man wears for  
10 his defence, or takes into his hands, or useth in wrath to cast at or strike another.” *Heller*, 554 U.S.  
11 at 581 (internal quotation marks omitted). It follows that possessing such arms—which necessarily  
12 entails possessing the banned magazines—is covered by the Second Amendment’s textual  
13 protection of keeping and bearing arms. It makes no difference that Washington targets the  
14 magazines themselves rather than just targeting firearms equipped with them. In both storing and  
15 feeding ammunition into the chamber of a firearm to be fired, magazines play an integral role in  
16 the functioning of a firearm. More fundamentally, by banning magazines capable of holding more  
17 than ten rounds of ammunition Washington effectively is banning firearms capable of firing more  
18 than ten rounds without reloading. Washington cannot get around the protection of the Second  
19 Amendment by banning magazines any more than it could by banning triggers or barrels.

20 Ordinarily, after assessing the text of the Amendment, the Court would move on to ask  
21 whether historical traditions with roots at the Founding demonstrate that the challenged law is  
22 consistent with the original understanding of the Second Amendment. However, in this case, that  
23 exercise is unnecessary because the Supreme Court has already analyzed the relevant history and  
24 determined that historical restrictions on “dangerous and unusual weapons” confirm the reality  
25 that any arm “in common use” today among law-abiding Americans is *per se* protected and cannot  
26 be banned. There can be no serious dispute that the magazines Washington bans are “in common  
27 use”—there are hundreds of millions of them in owned by tens of millions of Americans as private

1 surveys and industry and government data all corroborate. Indeed, courts across the country have  
2 repeatedly found that these magazines are commonly owned and widely chosen by Americans for  
3 self-defense and other lawful purposes. That fact decides this case, and Plaintiffs are entitled to  
4 judgment in their favor.

## 5 **II. BACKGROUND**

### 6 **A. The Magazine Ban Harms Plaintiffs.**

7 Washington Governor Jay Inslee signed Engrossed Senate Bill 5078 (“the Magazine Ban”)  
8 on March 23, 2022. On July 1, 2022, the Magazine Ban made it illegal for anyone (subject to  
9 limited exceptions for certain government employees) in Washington to “manufacture, import,  
10 distribute, sell, or offer for sale any large capacity magazine[s].” Wash. Rev. Code § 9.41.370(1).  
11 Washington defines “large capacity magazine” to mean “an ammunition feeding device with the  
12 capacity to accept more than 10 rounds of ammunition, or any conversion kit, part, or combination  
13 of parts, from which such a device can be assembled.” Wash. Rev. Code § 9.41.010(16).

14 Plaintiffs in this case are an individual, a federally licensed firearms dealer, Second  
15 Amendment Foundation (SAF), and Firearms Policy Coalition, Inc. (FPC). They seek a declaration  
16 that the Magazine Ban is unconstitutional under the Second and Fourteenth Amendments and an  
17 injunction against its enforcement by the defendants, Attorney General Bob Ferguson and Chief  
18 of the Washington State Patrol John R. Batiste, who enforce the Ban at the statewide level, as well  
19 as six local enforcement officials in the counties where the plaintiffs reside (all in their official  
20 capacities). Am. Compl. ¶¶ 16–23.

21 Plaintiff Gabriella Sullivan is a Washington citizen, resident of Kitsap County, and member  
22 of Plaintiffs SAF and FPC. Decl. of Gabriella Sullivan in Supp. of Pls.’ Mot. for Summ. J. ¶¶ 1–2  
23 (Aug. 4, 2023) (“Sullivan Decl.”). She owns a Sig Sauer P365 handgun, a Smith & Wesson M&P  
24 Sport .22 rifle, and a Colt AR-15 rifle, all of which may be equipped with magazines holding more  
25 than ten rounds of ammunition. *Id.* at ¶ 3. She owns multiple magazines of that size. *Id.* at ¶ 4.  
26 Sullivan owns these magazines for self-defense and other lawful purposes and carries her handgun  
27 in public equipped with a magazine capable of holding twelve rounds. *Id.* at ¶ 5. If it were not for

1 the Magazine Ban, Sullivan would purchase additional magazines capable of holding more than  
2 ten rounds of ammunition, both for her existing firearms as well as for other firearms she wishes  
3 to acquire. *Id.* at ¶ 7. She is unable to do so because the Magazine Ban has destroyed the legal  
4 market for magazines in the state and she fears prosecution for purchasing them out of state and  
5 importing them herself. *Id.* at ¶ 6.<sup>1</sup>

6 Plaintiff Rainier Arms is a federally licensed firearm dealer with a retail location in King  
7 County. Decl. of John Hwang in Supp. of Pls.’ Mot. for Summ. J. ¶ 2 (Aug. 6, 2023) (“Hwang  
8 Decl.”). Rainier Arms specializes in high end rifles, pistols, and shotguns as well as parts, optics,  
9 and accessories. *Id.* at ¶ 2. Prior to the enactment of the Magazine Ban, Rainier Arms sold  
10 magazines capable of holding more than ten rounds, both on their own and as standard equipment  
11 for many of the firearms it sells. *Id.* at ¶ 4. Rainier Arms has, because of the Magazine Ban, ceased  
12 selling such magazines to civilians in Washington and now only sells such items to government  
13 purchasers who are exempted from the statewide Ban. *Id.* at ¶ 5. As a result, Rainier Arms has lost  
14 sales and had its business constricted by the Magazine Ban. *Id.* at ¶ 6.

15 SAF is a nonprofit educational foundation incorporated under the laws of Washington with  
16 its principal place of business in Bellevue, Washington. Decl. of Alan Gottlieb in Supp. of Pls.’  
17 Mot. for Summ. J. ¶ 2 (Aug. 4, 2023) (“Gottlieb Decl.”). SAF seeks to preserve the effectiveness  
18 of the Second Amendment through education, research, publishing, and legal action programs  
19 focused on the constitutionally protected right to possess firearms and firearm ammunition, and  
20 the consequences of gun control. *Id.* at ¶ 4. SAF has over 700,000 members and supporters  
21 nationwide, including Gabriella Sullivan and John Hwang (CEO of Rainier Arms) and thousands  
22 of others in the state of Washington. *Id.* at ¶¶ 5–6. SAF brings this action on behalf of its members.  
23 *Id.* at ¶ 8.

---

25 <sup>1</sup> Plaintiff Daniel Martin has also challenged the Magazine Ban, on similar grounds to Sullivan.  
26 *See* Am. Compl. ¶¶ 65–72. However, since filing this lawsuit, Martin has moved out of  
27 Washington. As such, he is no longer harmed by the Magazine Ban’s destruction of the lawful  
market for magazines, nor does he face any reasonable threat of enforcement. His claims are  
therefore moot.



1 FPC is a nonprofit membership organization incorporated in Delaware with a primary place  
2 of business in Clark County, Nevada. Decl. of Brandon Combs in Supp. of Pls.’ Mot. for Summ.  
3 J. ¶ 2 (Aug. 4, 2023) (“Combs Decl.”). FPC seeks to create a world of maximal human liberty and  
4 freedom and to promote and protect individual liberty, private property, and economic freedoms.  
5 *Id.* at ¶ 4. In furtherance of this mission, FPC seeks to protect, defend, and advance the People’s  
6 rights, especially but not limited to the inalienable, fundamental, and individual right to keep and  
7 bear arms. *Id.* at ¶ 4. FPC has thousands of members across the country, including thousands of  
8 members in Washington, some of whom, including Gabriella Sullivan and John Hwang (CEO of  
9 Rainier Arms), reside in Washington. *Id.* at ¶¶ 5–6. FPC brings this action on behalf of its  
10 members. *Id.* at ¶ 8.

11 **B. Procedural History.**

12 Plaintiffs filed this lawsuit on June 3, 2022, shortly after the Magazine Ban was signed into  
13 law. Compl., Doc. 1 (June. 3, 2022). They filed an amended complaint that is still the operative  
14 complaint in this case on the day the Ban took effect. Am. Compl., Doc. 42 (July 1, 2022). The  
15 Kitsap County defendants filed a motion to dismiss shortly thereafter for lack of subject matter  
16 jurisdiction and failure to state a claim, *see* Mot. to Dismiss, Doc. 44 (July 6, 2022), and the King  
17 County defendants filed a motion on similar grounds a month later, *see* Mot. to Dismiss, Doc. 62  
18 (Aug. 10, 2022). Following briefing over those issues, the Court largely denied both motions,  
19 finding that the Plaintiffs had standing to pursue their claims against the Kitsap and King County  
20 Defendants and had stated valid claims for relief under *Ex parte Young*. *See* Order Denying in Part  
21 & Granting in Part Defs.’ Mots. to Dismiss at 6, 14–15, Doc. 76 (Oct. 24, 2022). The Court granted,  
22 however, the King and Kitsap County Defendants’ motion to dismiss Plaintiffs’ claims to the  
23 extent they are brought under Section 1983. *Id.* at 16. The Court also granted the Alliance for Gun  
24 Responsibility’s motion to intervene as an additional Defendant. *See* Order, Doc. 72 (Oct. 18,  
25 2022).

26 Pursuant to this Court’s scheduling order, Plaintiffs now move for summary judgment in  
27 their favor. *See* Order, Doc. 100 (July 10, 2023).

### III. ARGUMENT

In *Bruen*, the Supreme Court held that “when the Second Amendment’s plain text covers an individual’s conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government . . . must demonstrate that the regulation is consistent with this Nation’s historical tradition of firearm regulation.” 142 S. Ct. at 2126. Here, the Second Amendment’s plain text covers the conduct at issue—possession of firearms equipped with the magazines Washington bans—so it falls to Defendants to justify the ban as consistent with historical tradition rooted in the Founding. They cannot possibly do so, because *Bruen* and *Heller* have already established that there is no tradition of banning commonly possessed arms.

#### A. The Plain Text of the Second Amendment.

The first question this Court must ask when confronted with a law implicating the right to keep and bear arms is whether “the Second Amendment’s plain text covers [the] conduct” that is proscribed by the law. *Id.* at 2117. The Second Amendment states: “A well regulated Militia, being necessary to the security of a free state, the right of the People to keep and bear Arms, shall not be infringed.” U.S. CONST. amend. II. The Supreme Court has left no doubt as to the meaning of “arms” in the Second Amendment: “[A]rms’ [means] ‘any thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another.’” *Heller*, 554 U.S. at 581 (internal quotation marks omitted). It includes “[w]eapons of offence, or armour of defence.” *Id.* (internal quotation marks omitted). “[T]he Second Amendment’s definition of ‘arms’ ” thus covers all “modern instruments that facilitate armed self-defense,” “even those that were not in existence at the time of the founding.” *Bruen*, 142 S. Ct. at 2132 (quoting *Heller*, 554 U.S. at 582).

#### 1. Washington’s Magazine Ban Restricts the Use of “Arms.”

Washington’s magazine ban restricts the possession of arms. Of course, a magazine, by itself, is not capable of expelling a projectile, but neither is a firearm without ammunition, a rifle barrel, or a trigger, but regulations of any of these parts are obviously recognizable as regulations

1 of the firearm itself. Magazines are no different. *See, e.g., Ass'n of N.J. Rifle & Pistol Clubs, Inc.*  
2 *v. Att'y Gen. N.J.*, 910 F.3d 106, 116 (3d Cir. 2018) (“*ANJRPC*”) (holding magazine are “arms”),  
3 *abrogated on other grounds by Bruen*, 142 S. Ct. 2111. If the Second Amendment is to mean  
4 anything, then the Second Amendment’s protection of “arms” must include not just complete  
5 firearms but also component parts. After all, in the Militia Act of 1792 Congress required  
6 militiamen to arm themselves not just with firearms but those items necessary to make those arms  
7 functional. *See An Act More Effectually to Provide for the National Defence by Establishing an*  
8 *Uniform Militia throughout the United States*, ch. 33, 1 Stat. 271 (1792). And any ban on a  
9 component part of a firearm should not be understood merely as a ban on that part, but a ban on  
10 firearms that *function with that part*.

11         Magazines are integral for the operation of many common firearms; a “semi-automatic”  
12 firearm, in which the action of the firearm automatically loads a new round after firing, cannot  
13 function semiautomatically without the use of a magazine. Indeed, in many firearms the magazine  
14 is a *fixed* component that cannot be separated from the firearm itself. It is nonsensical to consider  
15 magazines to be separate from a firearm. After all, a magazine’s function is to both hold *and feed*  
16 ammunition into the chamber to be fired. *See* NICHOLAS J. JOHNSON ET AL., FIREARMS LAW AND  
17 THE SECOND AMENDMENT: REGULATION, RIGHTS, AND POLICY 1978 (3d ed. 2021),  
18 <https://bit.ly/43QShIp>. As the Third Circuit explained in *ANJRPC*, “[b]ecause magazines feed  
19 ammunition into certain guns, and ammunition is necessary for such a gun to function as intended,  
20 magazines are ‘arms’ within the meaning of the Second Amendment.” 910 F.3d at 116. After all,  
21 “[r]egulations that eliminate a person’s ability to obtain or use ammunition could thereby make it  
22 impossible to use firearms for their core purpose.” *Id.* (cleaned up).

23         Though Washington may claim to dispute this, it *must* agree that restricting magazines  
24 effectively restricts “arms” or else the State would have no plausible basis for regulating them.  
25 Imagine, for example, that Washington banned laser sights, which project a red laser dot on  
26 whatever a firearm is aiming at and facilitate aimed fire. The effect of that law would not be to  
27 make laser pointers illegal—since the act of pointing a laser at something is not the defining feature

1 of a laser sight. It is that laser-dot sights function, in conjunction with a firearm, to assist a shooter  
2 in aiming. In other words, such a law would, in reality, ban firearms that have the ability to aim  
3 assisted by a laser. In the same way, Washington’s ban on magazines capable of holding more than  
4 10 rounds is effectively a ban on *firearms* that are capable of firing 11 or more rounds without  
5 reloading. Recently, a district court in Illinois, confronting this same issue, had no difficulty  
6 finding that magazines, though they did not function themselves as firearms, were nonetheless  
7 “arms” within the Second Amendment because even the State’s expert could not describe a firearm  
8 without describing its capacity (a function of the magazine not the gun). *Barnett v. Raoul*, --- F.  
9 Supp. 3d ----, 2023 WL 3160285, at \*8 (S.D. Ill. Apr. 28, 2023); *see also id.* (“[T]his is not even  
10 a close call.” (internal quotation marks omitted)).

## 11 **2. Magazines Are Protected By Necessary Implication of the Constitutional** 12 **Text.**

13 Even if this Court finds a restriction on magazines is not the equivalent to a restriction on  
14 a firearm itself—and to be clear, that would be incorrect—it still should find that Washington’s  
15 ban restricts conduct protected by the plain text of the Second Amendment. Constitutional rights  
16 “implicitly protect those closely related acts necessary to their exercise.” *Luis v. United States*, 578  
17 U.S. 5, 26 (2016) (Thomas, J., concurring in the judgment). In this case, that means that the right  
18 to keep and bear arms must also protect the right to keep and bear the ammunition magazines that  
19 make those arms functional, since “without bullets, the right to bear arms would be meaningless.  
20 A regulation eliminating a person’s ability to obtain or use ammunition could thereby make it  
21 impossible to use firearms.” *Jackson v. City & Cnty. of San Francisco*, 746 F.3d 953, 967 (9th Cir.  
22 2014). Indeed, the Ninth Circuit recognized before *Bruen* that its “caselaw supports the conclusion  
23 that there must also be some corollary, albeit not unfettered, right to possess the magazines  
24 necessary to render those firearms operable.” *Fyock v. Sunnyvale*, 779 F.3d 991, 998 (9th Cir.  
25 2015); *see also Duncan v. Bonta*, 19 F.4th 1087, 1151 (9th Cir. 2021) (Bumatay, J., dissenting).  
26 Nothing in *Bruen* upsets the conclusion that magazines are protected by the Second Amendment.  
27

1 **B. History Provides No Justification for the Magazine Ban.**

2 “The Second Amendment’s plain text thus presumptively guarantees” Plaintiffs the right  
 3 to keep and bear firearms equipped with the magazines at issue, and under *Bruen*, that means that  
 4 the inquiry shifts from text to history, and the burden is on Washington to “justify its regulation  
 5 by demonstrating that it is consistent with the Nation’s historical tradition of firearm regulation.”  
 6 142 S. Ct. at 2130, 2135.

7 Washington will not be able to do that here. The Magazine Ban is a complete prohibition  
 8 on commerce in ammunition magazines capable of holding more than 10 rounds. The Supreme  
 9 Court has three times answered the specific question of what historical traditions of firearms  
 10 regulation can possibly support modern day bans on certain types of “arms.” Those cases establish  
 11 that states can only ban arms that are “dangerous and unusual.” Magazines capable of holding  
 12 more than 10 rounds are neither.

13 **1. Only “Dangerous And Unusual Weapons” May Be Banned Consistent**  
 14 **With The Second Amendment.**

15 The historical rule is clear from Supreme Court precedent. In *Heller*, the District of  
 16 Columbia enacted a ban on the possession of handguns. As *Bruen* would later make explicit, *Heller*  
 17 began by analyzing the scope of the text of the Second Amendment. *See Heller*, 554 U.S. at 576–  
 18 600. It then proceeded to analyze the history of the Second Amendment and firearm regulation,  
 19 which it considered a “critical tool of constitutional interpretation,” that allowed the Court to assess  
 20 “the public understanding of [the Second Amendment] in the period after its . . . ratification.” *Id.*  
 21 at 605. It was in this context that *Heller* concluded that history disclosed an “important limitation  
 22 on the right to keep and carry arms,” namely, that “*the historical tradition* of prohibiting the  
 23 carrying of ‘dangerous and unusual weapons’” showed that “the sorts of weapons protected were  
 24 those ‘in common use at the time.’” *Id.* at 627 (emphasis added). This was, the Court explained, a  
 25 rule developed from “*the historical understanding* of the scope of the right.” *Id.* at 625 (emphasis  
 26 added). And lest there be any doubt that this conclusion was part of *Heller*’s binding holding,  
 27 remember, the case was about the validity of a ban on a type of “arm,” and, after elucidating this

1 historical limitation on the right, the Court had to assure itself that the handguns that were the  
2 subject of D.C.’s ban were not “dangerous and unusual weapons” that could lawfully be banned,  
3 an easy task in that case given that “handguns are the most popular weapon chosen by Americans  
4 for self-defense in the home [so] a complete prohibition of their use is invalid.” *Id.* at 629.

5 In the period after *Heller* and before *Bruen*, the Supreme Court decided *Caetano v.*  
6 *Massachusetts*, another arm ban case, this time about stun guns. In resolving that case in a short  
7 per curiam opinion, the Court returned to *Heller*’s controlling “in common use” versus “dangerous  
8 and unusual” distinction to vacate the judgment of the Massachusetts Supreme Judicial Court  
9 holding that the ban was constitutional. *Caetano*, 577 U.S. at 412 (per curiam). Justice Alito, in  
10 his concurrence laying out a rationale for finding the law unconstitutional, similarly zeroed in on  
11 the controlling “in common use at the time” language from *Heller*, which he understood to  
12 “reflect[] the reality that the founding-era militia consisted of citizens ‘who would bring the sorts  
13 of lawful weapons that they possessed at home to militia duty,’ and that the Second Amendment  
14 accordingly guarantees the right to carry weapons ‘typically possessed by law-abiding citizens for  
15 lawful purposes.’ ” *Id.* at 416 (Alito, J., concurring).

16 In *Bruen*, the Supreme Court reiterated that *Heller*’s textual and historical analysis is  
17 controlling in this case. *Bruen* corrected more than a decade’s worth of misinterpretation of *Heller*  
18 by the lower courts, doing away with the interest balancing regime that the circuit courts had  
19 developed and making the structure of *Heller*’s text-and-history analysis explicit. *Bruen*, 142 S.  
20 Ct. at 2131. In so doing, it explained that *Heller*’s conclusion that firearms “in common use” are  
21 protected by the Second Amendment was “[d]raw[n] from . . . *historical tradition*” and comported  
22 with the enactments of colonial legislatures that *Bruen* analyzed in its own historical review. *Id.* at  
23 2143 (emphasis added); *see also Teter v. Lopez*, slip op. at 21, No. 20-15948 (9th Cir. Aug. 7,  
24 2023). And ultimately, even if *Heller* were not controlling in this case, the State would still fail to  
25 demonstrate a relevant historical tradition other than the limits put on “dangerous and unusual  
26 weapons” because *Heller* was right and no other tradition works. In any event, because *Bruen*  
27

1 makes it clear that the burden is on Washington to justify its law, Plaintiffs will respond to any  
2 history the State puts forward in their response to its brief.

3       What this means for this case is that, in applying *Bruen*'s methodology to Washington's  
4 ban on magazines capable of holding more than ten rounds of ammunition, when the focus shifts  
5 to the Second Amendment's history, the Supreme Court has already done the historical spadework.  
6 *Bruen* leaves no doubt that this Court is bound to follow the same historical tradition that controlled  
7 *Heller* and *Caetano* here. So although, in other types of Second Amendment challenges, the  
8 historical analysis will involve the government seeking to demonstrate, through reference to  
9 historical statutes and regulations, that a challenged law "is part of the historical tradition that  
10 delimits the outer bounds of the right to keep and bear arms," *id.* at 2127; *see also Range v. Att'y*  
11 *Gen. U.S.*, 69 F.4th 96, 103 (3d Cir. 2023) (en banc) (applying *Bruen* in challenge to law banning  
12 possession of firearms by criminal offenders), here, that work has been done. The question is: Are  
13 firearms equipped with the banned magazines "dangerous and unusual weapons?"

## 14                   **2. Arms "In Common Use" Cannot Be "Dangerous And Unusual** 15                   **Weapons."**

16       The answer to that question is a resounding "no." To understand why, we again must turn  
17 to the Supreme Court's decisions addressing bans on types of arms. They teach that "this is a  
18 conjunctive test: A weapon may not be banned unless it is *both dangerous and unusual.*" *Caetano*,  
19 577 U.S. at 417 (Alito, J., concurring). Thus, an arm that is "in common use" for lawful purposes  
20 by definition does not fall within this category and cannot be banned. *Bruen*, 142 S. Ct. at 2143.  
21 And when assessing whether a firearm is "in common use" the Supreme Court has likewise made  
22 clear that the Second Amendment focuses on the practices of the American people *nationwide*, not  
23 just in Washington. *See id.* at 2131 ("It is this balance—struck by the traditions *of the American*  
24 *people*—that demands our unqualified deference." (emphasis added)); *Heller*, 554 U.S. at 628  
25 (handguns are "overwhelmingly chosen by *American society*" for self-defense (emphasis added));  
26 *Caetano*, 577 U.S. at 420 (Alito, J., concurring) ("stun guns are widely owned and accepted as a  
27 legitimate means of self-defense *across the country*" (emphasis added)). Therefore, the

1 Amendment protects those who live in states or localities with a less robust practice of protecting  
2 the right to keep and bear firearms from outlier legislation (like Washington’s ban here) just as  
3 much as it protects those who live in jurisdictions that have hewed more closely to America’s  
4 traditions.

5 Furthermore, courts and legislatures do not have the authority to second-guess the choices  
6 made by law-abiding citizens by questioning whether they really “need” the arms that ordinary  
7 citizens have chosen to possess. While *Heller* noted several “reasons that a citizen may prefer a  
8 handgun for home defense,” the Court held that “[w]hatever the reason, handguns are the most  
9 popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of  
10 their use is invalid.” 554 U.S. at 629 (emphasis added). And in *Bruen* the Court reaffirmed that  
11 “the traditions of the American people”—which includes their choice of preferred firearms—  
12 “demand[ ] [the courts’] unqualified deference.” 142 S. Ct. at 2131. Thus, unless the State can  
13 show that a certain type of arm is “not typically possessed by law-abiding citizens for lawful  
14 purposes,” *Heller*, 554 U.S. at 625, that is the end of the matter. Arms owned by law-abiding  
15 citizens for lawful purposes cannot be banned.

16 Finally, the Second Amendment inquiry focuses on the choices commonly made by  
17 contemporary law-abiding citizens. *Heller* rejected as “bordering on the frivolous” “the  
18 argument . . . that only those arms in existence in the 18th century are protected,” *id.* at 582. And  
19 in *Caetano*, the Supreme Court reiterated this point, holding that “Arms” protected by the Second  
20 Amendment need not have been “in existence at the time of the Founding.” 577 U.S. at 411–12  
21 (quoting *Heller*, 554 U.S. at 582). The *Caetano* Court flatly denied that a particular type of  
22 firearm’s being “a thoroughly modern invention” is relevant to determining whether the Second  
23 Amendment protects it. *Id.* (internal quotation marks omitted). And *Bruen* cements the point.  
24 Responding to laws that allegedly restricted the carrying of handguns during the colonial period,  
25 the Court reasoned that “even if these colonial laws prohibited the carrying of handguns because  
26 they were considered ‘dangerous and unusual weapons’ in the 1690s, they provide no justification  
27



1 for laws restricting the public carry of weapons that are unquestionably in common use today.”  
2 142 S. Ct. at 2143.

3 **3. Magazines Capable of Holding More Than Ten Rounds Are “In Common**  
4 **Use.”**

5 This case thus reduces to the following, straightforward inquiry: are the magazines banned  
6 by Washington “in common use,” according to the lawful choices of contemporary Americans?  
7 They unquestionably are and so the State, which bears the burden of proving that they are not, *id.*  
8 at 2135, must fail to make the historical showing necessary to save the Ban.

9 There is no question that magazines capable of holding more than 10 rounds are in common  
10 use. Government and industry data prove that they are. *See, e.g.*, NAT’L SHOOTING SPORTS FOUND.,  
11 FIREARM PRODUCTION IN THE UNITED STATES WITH FIREARM IMPORT AND EXPORT DATA 7 (2020),  
12 <https://bit.ly/3jfdUMt> (finding, based on industry sales data, that American consumers purchased  
13 more than 304 million magazines across both pistols and rifles from 1990 to 2018, 52% of which—  
14 almost 160 million—had a capacity over 10 rounds); CHRISTOPHER S. KOPER ET AL., U.S. DEP’T  
15 OF JUSTICE, DOC. NO. 204431, AN UPDATED ASSESSMENT OF THE FEDERAL ASSAULT WEAPONS  
16 BAN: IMPACTS ON GUN MARKETS & GUN VIOLENCE, 1994-2003 at 65–67 (July 2004),  
17 <https://bit.ly/3wUdGRE> (analyzing expected increase in imports of magazines holding more than  
18 10 rounds after the sunseting of the federal assault weapons ban). Recent survey data confirms  
19 this: Forty-eight percent of gun owners report having owned magazines that hold more than 10  
20 rounds. WILLIAM ENGLISH, 2021 NATIONAL FIREARMS SURVEY: UPDATED ANALYSIS INCLUDING  
21 TYPES OF FIREARMS OWNED 22 (May 18, 2022), <https://bit.ly/3yPfoHw>. Given the survey’s  
22 estimate that 81.4 million Americans own firearms, that means approximately 39 million  
23 Americans have owned at least one magazine that holds more than 10 rounds. And that is a  
24 conservative estimate since only current gun owners were polled. Owners of the banned magazines  
25 frequently owned more than one such magazine. In fact, Professor English found that American  
26 gun owners have owned as many as 269 million handgun magazines that hold over 10 rounds and  
27

1 an additional 273 million rifle magazines over that threshold for a total of **542 million** such  
2 magazines. *Id.* at 24.

3         There should be nothing surprising about these facts—many of the most popular handguns  
4 in the country are manufactured with magazines capable of holding more than 10 rounds. *See, e.g.,*  
5 GUN DIGEST 2018 at 386–88 (Jerry Lee & Chris Berens eds., 2017) (Glocks); *id.* at 374 (Beretta);  
6 *id.* at 408 (Smith & Wesson); *id.* at 408 (Sig Sauer); Massad Ayoob, THE COMPLETE BOOK OF  
7 HANDGUNS 87, 90 (2013) (noting that Glock pistols, which are “hugely popular for . . . home and  
8 personal defense,” typically come equipped with magazines with a capacity over ten rounds). The  
9 same is true of many of the most popular semi-automatic rifles. *See, e.g.,* David B. Kopel, *The*  
10 *History of Firearm Magazines and Magazine Prohibitions*, 78 Alb. L. Rev. 849, 859 (2015) (“The  
11 most popular rifle in American history is the AR-15 platform, a semiautomatic rifle with standard  
12 magazines of twenty or thirty rounds.”); *see also Commonly Owned: NSSF Announces Over 24*  
13 *Million MSRs in Circulation*, NAT’L SHOOTING SPORTS FOUND. (July 20, 2020),  
14 <https://bit.ly/3QBXiYv>. Data from the Firearm Industry Trade Association indicates that over *three*  
15 *quarters* of modern sporting rifle magazines in the country have a capacity of more than 10 rounds,  
16 and 52% have a capacity of 30 rounds. *See* NAT’L SHOOTING SPORTS FOUND., MODERN SPORTING  
17 RIFLE COMPREHENSIVE CONSUMER REPORT (2022), <https://bit.ly/3GLmErS>.

18         These magazines are commonly possessed for lawful purposes. According to the National  
19 Firearms Survey, the most common reasons cited for owning these magazines are target shooting  
20 (64.3% of owners), home defense (62.4%), hunting (47%), and defense outside the home (41.7%).  
21 English, *supra*, at 23. And such magazines may be lawfully owned in the vast majority of states;  
22 as of November of last year, only eight other states have laws as strict as Washington’s that limit  
23 magazine capacity to ten rounds for all firearms. *See* Lillian Mongeau Hughes, *Oregon voters*  
24 *approve permit-to-purchase for guns and ban high-capacity magazines*, NPR (Nov. 15, 2022),  
25 <https://n.pr/3Veh188>. The vast majority do not regulate magazine size at all. *See, e.g., Large-*  
26 *capacity magazine laws by state*, GUNTAB (May 30, 2021), <https://bit.ly/3rXh7cs>.

1           These statistics conclusively demonstrate that the banned magazines are commonly owned  
2 and used overwhelmingly by law-abiding Americans for lawful purposes. Indeed, the conclusion  
3 is so inescapable that “courts throughout the country [including in this Circuit,] agree that large-  
4 capacity magazines are commonly used for lawful purposes.” *Duncan*, 19 F.4th at 1155–56  
5 (Bumatay, J., dissenting); *see also Duncan v. Becerra*, 970 F.3d 1133, 1142 (9th Cir. 2020) (“One  
6 estimate based in part on government data shows that from 1990 to 2015, civilians possessed about  
7 115 million LCMs out of a total of 230 million magazines in circulation.”); *Fyock*, 779 F.3d at 998  
8 (“[W]e cannot say that the district court abused its discretion by inferring from the evidence of  
9 record that, at a minimum, [large-capacity] magazines are in common use.”); *Kolbe v. Hogan*, 849  
10 F.3d 114, 129 (4th Cir. 2017) (en banc) (“46% of all magazines owned”); *ANJRPC*, 910 F.3d at  
11 116–17 (“The record shows that millions of magazines are owned, often come factory standard  
12 with semi-automatic weapons, are typically possessed by law-abiding citizens for hunting, pest-  
13 control, and occasionally self-defense, and there is no longstanding history of [large capacity  
14 magazine] regulation.”) (cleaned up); *N.Y. State Rifle & Pistol Ass’n v. Cuomo*, 804 F.3d 242, 255  
15 (2d Cir. 2015) (“Even accepting the most conservative estimates cited by the parties and by amici,  
16 the . . . large-capacity magazines at issue are ‘in common use’ as that term was used in *Heller*.”);  
17 *Heller v. Dist. of Columbia* (“*Heller II*”), 670 F.3d 1244, 1261 (D.C. Cir. 2011) (“As for  
18 magazines, fully 18 percent of all firearms owned by civilians in 1994 were equipped with  
19 magazines holding more than ten rounds, and approximately 4.7 million more such magazines  
20 were imported into the United States between 1995 and 2000.”). As the D.C. Circuit noted in  
21 *Heller II*, “There may well be some capacity above which magazines are not in common use but,  
22 if so . . . that capacity surely is not ten.” *Id.*

23           Just as they chose handguns in *Heller*, the American people in large numbers have chosen  
24 to arm themselves for their protection with ammunition feeding devices capable of holding more  
25 than ten rounds. Because the arms at issue are “in common use” and typically possessed by law-  
26 abiding citizens for lawful purposes, Washington’s ban violates the Second Amendment.

**IV. CONCLUSION**

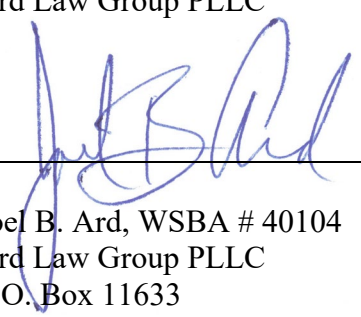
For these reasons, the Court should grant summary judgment in Plaintiffs' favor and against Defendants.

August 7, 2022.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27

Ard Law Group PLLC

By: \_\_\_\_\_

  
Joel B. Ard, WSBA # 40104  
Ard Law Group PLLC  
P.O. Box 11633  
Bainbridge Island, WA 98110  
206.701.9243  
Joel@Ard.law  
Attorneys For Plaintiffs

Cooper & Kirk, PLLC

/s/ David H. Thompson  
David H. Thompson\*  
dthompson@cooperkirk.com

/s/ Peter A. Patterson  
Peter A. Patterson\*  
ppatterson@cooperkirk.com

/s/ William V. Bergstrom  
William V. Bergstrom\*  
wbergstrom@cooperkirk.com

1523 New Hampshire Avenue, N.W.  
Washington, D.C. 20036  
(202) 220-9600  
(202) 220-9601 (fax)

Mountain States Legal Foundation

/s/ Brian A. Abbas  
Brian A. Abbas\*

2596 S. Lewis Way  
Lakewood, CO 80227  
Phone: (303) 292-2021

FPC Action Foundation

/s/ Cody J. Wisniewski  
Cody J. Wisniewski\*

5550 Painted Mirage Road  
Las Vegas, NV 89149  
Phone: (916) 517-1665

\*Admitted pro hac vice