No. 104072-5

IN THE SUPREME COURT FOR
THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

Christopher E. Hamilton,
Petitioner.

BRIEF OF AMICI CURIAE KING COUNTY DEPARTMENT OF PUBLIC DEFENSE AND HEYMAN SCHUELER RAIN, PLLC

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II. INTRODUCTION

"History, as much as any other interpretive method, leaves ample discretion to look over the heads of the crowd for one's friends."[1] The United States Supreme Court has adopted a "text and history" test for the Second Amendment that requires a historical analogue for modern gun regulations to survive a Second Amendment challenge. This interpretation of the Second Amendment has led to modern day gun control regulations being struck down because similar regulations did not exist in the 18th century. Meanwhile, the Court has employed a lax approach towards the Second Amendment's protections for felons, giving unexamined approval for "longstanding prohibitions on the possession of firearms by felons and the mentally ill[.]"[2]

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[1] *New York State Rifle & Pistol Ass'n, Inc. v. Bruen,* 597 U.S. 1, 113 (2022) (Breyer, J., dissenting) (citing A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 377 (2012) (cleaned up).

[2] *District of Columbia v. Heller,* 554 U.S. 570, 626 (2008).

Amici write to highlight that the Court's Second Amendment decisions have failed to faithfully apply the "text and history" test in the context of disarmament through criminal laws, and that this reveals a policy decision that perpetuates racial exclusion from the Second Amendment's protections because of the racial disproportionality that inheres in the criminal legal system.

This Court should reject the Supreme Court's implicit policy aims and racially coded shortcuts and instead strictly apply the Supreme Court's test to the Washington statutes that disarm Mr. Hamilton for life. Because the State has not established a historical analogue for lifetime disarmament based on the conviction for vehicular homicide, the felony disarmament statutes as applied to him violate the Second Amendment.

III. ISSUES OF INTEREST TO AMICI

The identity and interests of amici curiae for the King County Department of Public Defense and Heyman Schueler Rain, PLLC

are set forth in the Motion for Leave to File Brief of Amici Curiae filed concurrently with this brief.

IV. STATEMENT OF THE CASE

Mr. Hamilton was convicted of vehicular homicide, committed by driving with a "disregard for the safety of others." CP 517, 520. This is his first felony offense and it prohibits him from possessing firearms for life. CP 735, 743. He will be subject to new felony charges if he ever possesses a firearm and has no means of having his ability to possess firearms restored. Supp. Br. Pet'r. at 6-7.

V. ARGUMENT

A. The Supreme Court's "text and history" test for Second Amendment challenges is malleable and can be used to reach a court's desired outcome.

The Second Amendment's guarantee that "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" had long been interpreted by the Supreme Court to apply to the "preservation and efficiency of a well regulated militia." *United*

States v. Miller, 307 U.S. 174, 178 (1939). This was apparent from the structure of the text and history: professional linguists and historians viewed that in the 18th century, "bear arms" almost always meant to use weapons in a military context. William N. Eskridge, Jr., *Sodomy and Guns: Tradition As Democratic Deliberation and Constitutional Interpretation*, 32 Harv. J.L. & Pub. Pol'y 193, 203 (2009). Thus, "the Second Amendment's 'original meaning' was to allow citizens to 'keep' military weapons insofar as needed to 'bear' them in military service." *Id.*

But in *District of Columbia v. Heller*, the Supreme Court adopted a new interpretation of the Second Amendment, purportedly rooted in "text and history," that has set a uniquely high bar for gun control regulation. *Heller* privileged "how the Second Amendment was interpreted from immediately after its ratification through the end of the 19th century" in addition to a variety of legal and other sources to determine "*the public understanding* of [the Second Amendment] after its . . . ratification." 554 U.S. at 605, 635. The court concluded that these

historical sources revealed the Second Amendment protected an individual right to armed self-defense and struck down a prohibition on the possession of handguns in the home. 554 U.S. at 635.

The Court solidified this approach in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022), deploying *Heller's* "text and history" test for assessing the constitutionality of a New York firearm regulation that required an applicant to demonstrate "a special need for self-defense." *Id.* at 11. This test requires courts to ask whether a person is part of "the people" the Second Amendment protects, and also if the regulated conduct is covered by the plain text of the Second Amendment. If so, the State must then establish the challenged statute is "consistent with this Nation's historical tradition of firearm regulation." *Id.* at 24. The Court applied this "text and history" test to find New York's public-carry license regulation violated the Second and Fourteenth Amendments, which "protect an individual's right to carry a handgun for self-defense outside the home." *Id.* at 10-11.

The Court declared its preference for specific historical periods and texts in declaring "not all history is created equal." *Bruen*, 597 U.S. at 34. This use of "text and history" has been critiqued for being fundamentally ahistorical: while *Heller* relies on historical claims, "[a]nachronism leaps off the early pages of Justice Scalia's opinion . . ." Eskridge, Jr.*, supra*, at 206. For example, *Heller* relies on the broad meaning of "bear arms" today and "imputes that meaning back to the eighteenth century." *Id; see also Bruen,* 597 U.S. at 32. (This definition of "bear" naturally encompasses public carry). *Heller* "illustrates the malleability of tradition" where Scalia's citation to the "'traditional' right to bear arms actually entailed varies dramatically from point to point in his opinion." Eskridge, Jr., *supra*, at 208.

More broadly, the Court makes "assumptions about meaning and interpretation" that "cannot be exported from the Founding era to modern regulations without establishing that the categories and social concerns addressed by past regulations are sufficiently similar." Pratheepan Gulasekaram, *The Second*

Amendment's "People" Problem, 76 Vand. L. Rev. 1437, 1469 (2023). As one historian has explained, "[n]o one who seriously studies firearms in 18th-century American life can fail to appreciate the profound differences between then and now;" but there is a mistaken "myth of continuity" in American gun culture that underlies this focus on historical antecedents. Brian DeLay, *The Myth of Continuity in American Gun Culture,* 113 Calif. L. Rev. 1, 6 (2025). "The myth of continuity's perniciousness—or its promise, depending on your viewpoint—comes from the way it confidently projects our modern experience with guns and gun violence back onto the late eighteenth century." *Id.* This is apparent in *Heller*'s "ahistorical premise that pistols played a similar role in crime and self-defense in 1791 as they did in 2008." *Id.* at 7-8.

Even the purported project of originalism that drives the Court's analysis in *Heller* had to be reimagined when it was not helpful to the Justices' desired outcome: "Perhaps recognizing that his account of original meaning was highly controversial (and

substantially rejected by professional linguists and historians), Justice Scalia added a discussion of public understanding of the right to keep and bear arms *after* 1791—a period the professional linguists and historians failed to cover in their submissions to the Court." Eskridge, *supra*, at 205. This attention to the *public understanding* of the legal text after its enactment is not evidence of "original meaning" in which Scalia claimed to ground his textual analysis. Rather, the selective historical considerations demonstrate "normative precommitments" in favor of the particular historical lens advanced by the *Heller* court to strike down the gun regulation. *See Id.*

The malleability of the text and history test makes it a vehicle for the court to advance policy, personal, and political objectives: "If the Court wants to uphold the law, it can easily find a way to do so—including by raising the level of generality at which it defines our regulatory traditions so this law can be characterized as fitting within those traditions." Cary Franklin,

History and Tradition's Equality Problem, 133 Yale L.J. Forum 946, 952 (2024).

This is apparent in *United States v. Rahimi*, where the Court considered a facial challenge to a statute that prohibited a person from possessing a firearm if a restraining order included a finding that he poses "a credible threat to the physical safety" or separately, if the restraining order "prohibits the use, attempted use, or threatened use of physical force." 602 U.S. 680, 693 (2024); 18 U.S.C. § 922(g)(8). As "[t]here were no laws stripping perpetrators of domestic violence of their guns at the time the Second Amendment was ratified," the law would have been struck down under *Bruen* if the *Heller* test was narrowly applied. Franklin, *supra,* at 952.

Indeed, the Fifth Circuit Court of Appeals narrowly applied the Court's test in considering the government's proffer of "potential historical analogues" that included "laws of varying antiquity as evidence of its 'dangerousness' analogues." *United States v. Rahimi,* 61 F.4th 443, 456 (5th Cir. 2023), *rev'd and*

remanded, 602 U.S. 680. The court acknowledged *Bruen's* caveat that the modern day regulation need not be a "dead ringer for historical precursors," but the court found these failed "under one or both of the metrics the Supreme Court articulated in *Bruen* as the baseline for measuring 'relevantly similar' analogues: 'how and why the regulations burden a law-abiding citizen's right to armed self-defense.'" *Rahimi,* 61 F.4th at 454, 461.

The Supreme Court overruled the Circuit Court's assiduous application of the test it announced in *Heller* and *Bruen.* 602 U.S. at 691. The Court relaxed the standard to require the modern regulation only "comport with the *principles* underlying the Second Amendment," emphasizing that it need not be a "'dead ringer' or a 'historical twin.'" *Id.* at 692. (emphasis added). This shift from looking to tradition alone to the *principles underlying* that tradition is significant, as the *Bruen* opinion never used the term "principle" in this context. Case Comment, *United States v. Rahimi*, 138 Harv. L. Rev. 325, 331 (2024). Indeed, "applying

Bruen's test in *Rahimi* likely would have led the Court to strike down § 922(g)(8), as Justice Thomas's dissent argued." *Id.* at 332.

Rahimi confirmed courts can use the "text and history" approach to reach their desired end. If a court wanted to preserve a particular gun regulation under the Second Amendment, "a broad definition could permit new forms of regulation that did not exist at the time of the Founding." Franklin, *supra,* at 949. Conversely, "a court more skeptical of gun regulation may define regulatory traditions governing firearms with a greater degree of specificity and use that narrower definition to invalidate [the] modern regulation." *Id.* The malleability of this test allows "Justices to make covert determinations about the weight of constitutional equality concerns."[3] *Id.* at 968. This is apparent in the Court's generalized treatment of felon in possession statutes.

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[3] Concerningly, "[t]he Justices currently in the majority on the Roberts Court seem very willing to raise the level of generality at which they define our historical traditions when doing so will result in the punishment of perpetrators of domestic violence or increase the number of weapons protected under the

B. The Court's conclusory claims about felon disarmament is a policy shorthand for a disfavored group, not a faithful application of its "text and history" test.

In *Heller,* the Court telegraphed that its rigorous test for firearms regulation need not be strictly applied to certain individuals: "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill [. . .]" *Heller,* 554 U.S. at 626. But in making this statement, the Court admitted it had conducted "an exhaustive historical analysis today of the full scope of the Second Amendment[.]" *Id*. The Court noted that "if and when" these statutes come before the Court, they would require separate "historical justifications." *Id.* at 635. But because those laws were not at issue, the Court had "no occasion to identify those

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Second Amendment. But when doing so would extend constitutional protections to LGBTQ+ people, they take a very different view of ratcheting up levels of generality; in the LGBTQ+ cases, they insist we must abide very closely by the practices and understandings of our great, great, great grandfathers." Franklin, *supra*, at 968.

justifications." *United States v. Williams,* 113 F.4th 637, 643 (6th Cir. 2024) (citing *Id.*).

Only the concurring justices, not the majority in *Bruen*, repeated *Heller*'s "assurances" that felon-in-possession laws were constitutionally permissible. *Id.* (citing *Bruen*, 597 U.S. at 72 (Alito, J., concurring); *id.* at 80–81 (Kavanaugh, J., joined by Roberts, C.J., concurring); *id.* at 129–30 (Breyer, J., joined by Sotomayor and Kagan, JJ., dissenting)). "But neither the majority nor any separate opinion provided any historical justifications for those laws." *Williams*, 113 F.4th at 644.

Notably, the cases the State cites in its supplemental brief claiming the Supreme Court's dicta is binding authority are largely issued before *Bruen*. Supp. Br. Resp't. at 11-12. And while *Rahimi* again repeated the Court's well-worn statement that felon-dispossession laws were "presumptively lawful," 602 U.S. at 682 (quoting *Heller*, 554 U.S. at 626), it was not necessary to its holding and remains dicta. This Court should reject the State's effort to patch together these statements made in concurring

opinions on an issue not before the Court because this unexamined end-run around the Second Amendment's protections is not race neutral. It perpetuates the historic race-based exclusions that have been present from the enactment of the Second Amendment.

C. Using a felony conviction as a basis for lifetime disarmament creates a throughline of racial exclusion from the Second Amendment's origins and the criminal legal system as a tool of racial repression.

"For much of American history, gun rights did not extend to Black people and gun control was often enacted to limit access to guns by people of color." Franklin, *supra,* at 954 (citing Adam Winkler, *Racist Gun Laws and the Second Amendment*, 135 Harv. L. Rev. F. 537 (2022)). From the U.S. Supreme Court's incredulity at the suggestion that the 2nd Amendment could apply to Black people to the proliferation of Black codes that expressly restricted the firearm possession rights of Black people, our nation's criminal legal system has been a tool of racial control throughout the nation's history. Felon disenfranchisement and criminalizing firearm possession by people of color is yet another

way the criminal legal system perpetuates racial inequality. For these reasons, this Court should reject the Supreme Court's dicta that generalizes the history and tradition approach as to felons and their exclusion from the Second Amendment's protections and instead require the State meet its heavy burden under the Court's test.

Although the 13th Amendment abolished chattel slavery, it maintained "both involuntary servitude and perpetual slavery as constitutionally sanctioned punishments for committing crimes."[4] Michele Goodwin, *The Thirteenth Amendment: Modern Slavery, Capitalism, and Mass Incarceration*, 104 Cornell L. Rev. 899, 925 (2019). The "strategic use of law enforcement as a vehicle for the punishment of slaves was already in practice decades before slavery's abolition," particularly through fugitive slave laws and

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[4] The text of the 13th Amendment reads: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. Const. Amend. XIII.

local ordinances that allowed slaveowners to use local police and jails to arrest, discipline, and punish enslaved people. *Id.* at 930-31. "This type of surveillance and punishment directed at Blacks predated the Punishment Clause and set in place a pattern of race-based policing, arrests, and criminal convictions of Blacks, seemingly just for being." *Id.* at 930.

Following the 13th Amendment, "southern states almost immediately used the Punishment Clause to systematically criminalize and incarcerate Blacks." *Id.* at 930. From the Black Codes to Jim Crow, restrictions on Black people's employment and freedom made them subject to endless fines and criminal punishment that ensured their indentured servitude on plantations or prisons. *Id.*at 930-33. "Despite the end of the Black Codes and the eventual demise of explicit race classifications in state action, the enforcement of anticrime policies continues to result in pronounced racial disparities." Darren Lenard Hutchinson, *"With All the Majesty of the Law": Systemic Racism, Punitive Sentiment, and Equal Protection*, 110 Calif. L. Rev. 371, 377 (2022). The use

of police, jails, and criminal laws to reinforce racial subjugation after slavery is a throughline to the racial disproportionality of the criminal legal system today.

The result is that America's criminal legal system is defined by the racial inequality from which it derived, and the label "felon" is a category that cannot be extricated from the racialized system that produced it. As one scholar explained, "racial coding throughout the twentieth century's drug wars firmly linked Blacks to drug crimes and transformed the word 'felon' into a synonym for Black." Lahny Silva, *The Trap Chronicles, Vol. 3: Felons & Firearms,* 84 Md. L. Rev. 309, 314 (2025).

The entrenched use of the criminal legal system to enforce racial subjugation continued through policies like the "War on the Drugs," in which "Drug felons were heavily targeted for disarmament during the 1980s." *Id.* This "culminated in an excessive and imbalanced burden on the fundamental and individual right to bear arms experienced by a particular segment of American society: Black America." *Id.*

Racial disproportionality is thus a feature, not a bug, of the criminal legal system. Despite this Court's effort to eradicate this disproportionality from our legal system over the years, people of color continue to accrue felony convictions at a disproportionate rate compared to White people. Nationally, it has been estimated that 8% of all adults have a felony conviction, and about 33% of the African American population does.[5] Sarah K. Shannon et al, *The Growth, Scope, and Spatial Distribution of People With Felony Records in the United States, 1948–2010*, Demography (October 2017).

Felony convictions in Washington state are also racially disproportionate. Black Washingtonians comprised approximately

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[5] https://pmc.ncbi.nlm.nih.gov/articles/PMC5996985/

4.4% of the state's population in 2024,[6] but received 14.0% of all adult felony sentences in state fiscal year 2024.[7]

Firearm related convictions are even more racially disproportionate. Nationally, for people sentenced for firearm offenses, 56% were Black and only 21% were White. U.S. Sentencing Comm'n, 2024 *Annual Report* 18 (Mar. 18, 2025).[8] Based on 2021-2024 data from the King County Prosecuting

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[6] Washington State Office of Financial Management, Forecasting Division (2024). Small Area Demographic Estimates: Census Tracts [Data file], https://ofm.wa.gov/sites/default/files/public/dataresearch/pop/asr/sade/ofm_pop_sade_tract_2020_to_2023.xlsx. Note that the 4.4% figure includes people who identified as Black or African-American alone and does not include people who identified as two or more races.

[7] Washington Caseload Forecast Council, Adult General Disproportionality Report, Fiscal Year 2024, Report to the Legislature, December 2024, p. vi, https://cfc.wa.gov/sites/default/files/Publications/AdultDisproportionalReport_FY2024.pdf.

[8] available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2024/2024-Annual-Report.pdf

Attorney's Office, Violations of the Uniform Firearms Act (VUFA) are applied in a racially disproportionate manner. A VUFA 2 disposition is:

- 10 times more likely to be given to a Black person in King County than a White person
- 10 times more likely to be given to a Black person with a felony conviction history in King County than a White person with a felony conviction history
- 8 times more likely to be given to a Black person without a felony history in King County than a White person without a felony history[9]

King County Department of Public Defense, *Black/White Disproportionality of VUFA 2 Charges and Dispositions in King County* (Dec. 15, 2025). Besides being disproportionately applied, Washington's VUFA statutes demonstrate how a law racially neutral on its face can yield a racially disproportionate impact. For instance, under RCW 9.41.040(2)(a)(v), it is unlawful for a person under the age of 18 to knowingly own or have a firearm in their

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9 https://cdn.kingcounty.gov/-/media/king-county/depts/dpd/documents/documents-for-links/vufa-2-racial-disproportionality-in-king-county---2025-12-15.pdf.

possession. Violating this statute constitutes a class C felony punishable by up to five years in prison and up to a ten thousand dollar fine. RCW 9A.20.021. Our state legislature exempted a number of activities from violating RCW 9.41.042—such as hunting and trapping. Per a recent nationwide study, virtually all hunters, roughly 97 percent, are white. U.S. Census Bureau, 2016 National Population Characteristics (FHW16-NAT) 33 (Dec. 2018)[10]. These exceptions, while appearing race-neutral on their face, offer protection to activities that are disproportionately enjoyed by White Washingtonians.

Whereas criminal punishment for firearm possession is primarily reserved for youth of color. In King County, VUFA 2 charges are 31 times more likely to be filed against Black youth

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[10] U.S. Census Bureau, The National Survey of Fishing, Hunting, and Wildlife-Associated Recreation (2018), https://www.census.gov/content/dam/Census/library/publications/2018/demo/fhw16-nat.pdf.

than their White counterparts.[11] King County Department of Public Defense, *supra*.

The State posits that people with felony convictions, like children and non-citizens, are rightfully excluded from those who are afforded rights under the 2nd Amendment. Supp. Br. Resp't. at 16. But the State fails to grapple with the fact that a real-world application of this rule would largely apply to communities of color, just like a real-world application of RCW 9.41.040(2)(a)(v) functionally applies primarily to children of color.

Another example of a facially neutral gun law that disproportionately impacts communities of color is RCW 9.41.050, Washington's prohibition against carrying a loaded firearm in a vehicle without a proper license. Violating this statute carries a penalty of up to 90 days in jail and a $1000 fine. RCW 9.92.030. Several exceptions to RCW 9.41.060(8) are activities

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[11] https://cdn.kingcounty.gov/-/media/king-county/depts/dpd/documents/documents-for-links/vufa-2-racial-disproportionality-in-king-county---2025-12-15.pdf.

not typically associated with communities of color, such as horseback riding, hiking, and camping. Emma Stuck, *Nature Gap: Why Outdoor Spaces Lack Diversity and Inclusion*, College of Natural Resources News (Dec. 2020)[12], Through these exceptions, unlawful acts become lawful by virtue of engagement with hobbies historically linked to White America.

These parallels are not coincidental. The exclusion of Black people from the right to bear arms is a throughline that began with our nation's history beginning with the enactment of the Second Amendment. As one scholar explains, the Second Amendment's reference to a "militia" was a concession to Southern slaveholders who feared armed slave rebellion: "Through awkward wording and punctuation about the right to bear arms *and* the well-regulated militia," the amendment provided "another constitutional provision prohibiting Congress from emasculating

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12 https://cnr.ncsu.edu/news/2020/12/outdoor-diversity-inclusion/ (last visited Dec. 8, 2025).

the South's primary instrument of slave control[,]" the militia. Carol Anderson, *The Second: Race and Guns in a Fatally Unequal America* 38 (2021) (citing Carl T. Bogus, *The Hidden History of the Second Amendment*, 31 U.C. Davis L. Rev. 309, 371 (1998)).

Most notoriously, in the case of *Dred Scott v. Sandford,* then U.S. Supreme Court Chief Justice Roger B. Taney reasoned Black people residing in this country must not be considered citizens because to do so would grant them the right "to keep and carry arms wherever they went." *Dred Scott v. Sandford,* 60 U.S. 393, 417 (1857) (superseded by Constitutional Amendment (1868)). The *Scott* holding, and its progeny at lower court levels, attest to the fact that "[T]he subordination of particular groups was the aim of the status-based prohibitions of the past, not their unfortunate corollary." Gulasekaram, *supra,* at 1437. These measures exist in tandem with the criminalization of gun possession in the criminal legal system and cement the long

tradition of excluding Black Americans from the Second Amendment's protections.

Given this Court's expressed intent of addressing the insidious impact racial bias has had on the criminal legal system, it is imperative that this critical lens be applied to our firearm statutes as well. In other contexts, this Court has recognized the role structural racism plays within the criminal legal system. Seven years ago, this Court took "judicial notice of implicit and overt racial bias against black defendants in this state" and declared that "the association between race and the death penalty is not attributed to random chance." *State v. Gregory*, 192 Wn. 2d 1, 22, 427 P.3d 621 (2018). Years earlier, this Court gave credence to the assertion that racial and ethnic disproportionality in Washington's criminal system is indisputable. *State v. Saintcalle*, 178 Wn.2d 34, 45, 309 P.3d 326 (2013). With these realities in mind, this Court acknowledged its ability to "administer justice and support court rules in a way that brings greater racial justice to our system as a whole." Open Letter from

Wash. State Sup. Ct. to Members of Judiciary & Legal Cmty. 1 (June 4, 2020).[13]

Given that the racial disproportionality impacting people of color throughout the criminal legal system also extends to our nation's gun laws, this Court should take further steps to address the racist ideologies underpinning firearm statutes. As one legal scholar recently put it, "[H]ow deep does the taint of discrimination need to be before courts break with tradition? Franklin, *supra*, at 955. Amici respectfully posit that the time to break has arrived.

This Court should take the important step of confronting the racist origins of firearm disenfranchisement efforts and reject the Supreme Court's racially coded shortcut for the disproportionate exclusion of felons from the Second Amendment's protections. Rather than reflexively exclude "felons," it should strictly apply

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[13] http://www.courts.wa.gov/content/publicUpload/Supreme% 20Court% 20News/Judiciary% 20Legal% 20Community% 20SIGNED% 20060420.pdf.

the test to the offense at hand and reject the generality that it applies to gun regulations it seeks to uphold.

D. The State fails to establish a historical analogue to Washington's lifetime felony disarmament statute for a person convicted of vehicular homicide.

The State fails to meet its burden to establish that the statutes that disarm Mr. Hamilton for life based on his conviction for vehicular homicide are "consistent with this Nation's historical tradition of firearm regulation." *Bruen,* 597 U.S. at 17.

The State primarily relies on the unanalyzed assertions about "longstanding prohibitions on the possession of firearms by felons . . ." in the *Heller*, *Bruen,* and *Rahimi* decisions and to other courts that treat this historical gloss as "binding authority." Supp. Br. Resp't. at 11. The State also cites to federal circuit courts that have approved of felony disarmament, while admitting that other courts have rejected this facile shortcut. *Id.* at 11-12.

The only concrete historical analogue the State can muster for lifetime disarmament for vehicular homicide is a generic reference to "manslaughter" from English common law from an

unspecified date, claiming it was "one of the traditional common law felonies punishable by death." Supp. Br. Resp't. at 29. The State's support for this assertion comes from *Zherka v. Bondi,* 140 F.4th 68 (2d Cir. 2025), which cites to a law review article describing *English* common law that predated the American revolution. *Id.* at 81 (citing Will Tress, *Unintended Collateral Consequences: Defining Felony in the Early American Republic,* 57 Clev. St. L. Rev. 461, 464 (2009)).

As *Bruen* cautioned, "as with historical evidence generally, courts must be careful when assessing evidence concerning English common-law rights." 597 U.S. at 35. This is because "English common-law practices and understandings at any given time in history cannot be indiscriminately attributed to the Framers of our own Constitution." *Id. Bruen* provides that a "long, unbroken line of common-law precedent stretching from Bracton to Blackstone is far more likely to be part of our law than a short-lived, 14th-century English practice." *Id.* But here the State fails to establish any specific time period for its purported

historical analogue, much less an unbroken line of English common law that would have shaped the framers' understanding.

The State also claims that felonies were punishable by death when the Second Amendment was ratified, and that this punishment subsumes disarmament. Supp. Br. Resp't. at 22. But what was punished as a felony in early America, and why, is not so simple. The law review article relied on in *Zherka* cites to an 1823 comprehensive treatise on American law that stated:

> The word *felony*, in the process of many centuries, has derived so many meanings from so many parts of the common law, and so many statutes in England, and has got to be used in such a vast number of different senses, that it is impossible to know precisely in what sense we are to understand this word.

Tress, *supra,* at 465.

The State provides no adequate historic analogue that can justify Washington's lifetime restriction on firearm possession for vehicular homicide. More broadly, the fact that felonies were at one time punished by death tells us nothing about historical analogues to modern day conduct that is classified as a felony.

That "the dead enjoy no rights does not tell us what the founding-era generation would have understood about the rights of felons who lived, discharged their sentences, and returned to society." *Kanter v. Barr*, 919 F.3d 437, 461 (7th Cir. 2019) (Barrett, J., dissenting), *abrogated by Bruen*, 597 U.S. 1.

The State fails to meet its burden under *Heller's* "text and-history" standard because it fails to establish the similarity of the "why" and "how" of Washington's felony disarmament statute in the historically undefined English common law it cites. *Bruen*, 597 U.S. at 29, 39.

VI. CONCLUSION

The United States Supreme Court's "text and history" test has been used to strike down gun regulations that would keep communities of color safe while replicating the racialized inequalities of the Second Amendment's historic exclusion of people of color who are disproportionately labeled "felons" in our criminal legal system.

The fact that Mr. Hamilton is convicted of a driving offense punishable as a felony does not give the government the right to permanently disarm him for life, absent a showing that doing so would be consistent with the history and tradition of firearm regulation in the United States. The State does not establish such a history and tradition, and the lifetime restriction on Mr. Hamilton's right to possess firearms is unconstitutional as applied to him.

RESPECTFULLY SUBMITTED this 15th day of December 2025.

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VI. CERTIFICATE OF COMPLIANCE WITH RAP 18.17

I certify that the word count for this brief, as determined by the word count function of Microsoft Word, and pursuant to Rule of Appellate Procedure 18.17, excluding title page, tables, certificates, appendices, signature blocks and pictorial images is 4,947.

RESPECTFULLY SUBMITTED this 15th day of December 2025.

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CERTIFICATE OF SERVICE

I hereby certify that on December 15, 2025, I filed the foregoing brief via the Washington Court Appellate Portal, which will serve one copy of the foregoing document by email on all attorneys of record.

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