No. _____

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether ammunition feeding devices with the capacity to hold more than ten rounds are "Arms" presumptively entitled to constitutional protection under the plain text of the Second Amendment.

PARTIES TO THE PROCEEDING

Gator's Custom Guns, Inc., and Walter Wentz are petitioners here and were defendants-appellees below.

The State of Washington is respondent here and was plaintiff-appellant below.

CORPORATE DISCLOSURE STATEMENT

Petitioner Walter Wentz is an individual. Petitioner Gator's Custom Guns, Inc., has no parent corporation, and no publicly held company owns 10% or more of its stock.

STATEMENT OF RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

State v. Gator's Custom Guns, Inc., No. 23-2-00897-0 (Cowlitz County Superior Court) (decision granting summary judgment issued April 8, 2024).

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PETITION FOR WRIT OF CERTIORARI

This Court has made clear repeatedly that "the Second Amendment protects the possession and use of weapons that are 'in common use at the time.'" *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 21 (2022) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 627 (2008)); *see also, e.g.*, *Heller*, 554 U.S. at 625 (states may not ban arms "law-abiding citizens" "typically possess[] … for lawful purposes"). Yet at the same time that *Bruen* was reaffirming that principle, Washington was actively working to undermine it. Washington Engrossed Substitute Senate Bill 5078 ("ESSB 5078"), which took effect just one week after *Bruen*, bans the manufacture, import, distribution, or sale of any firearm magazine capable of holding more than ten rounds of ammunition, even though tens of millions of law-abiding Americans have long lawfully owned hundreds of millions of these devices as integral components of constitutionally protected and legal firearms.

Given *Bruen*'s reaffirmation of the rule of decision that controlled *Heller*, it should have been easy to see that ESSB 5078 violates the Second Amendment. And, for the superior court below, it was. But after the superior court correctly concluded that Washington's ban violates the Second Amendment, the Washington Supreme Court reversed, holding that magazines capable of holding more than ten rounds are not "Arms" within the meaning of the plain text of the Second Amendment, and therefore are not even presumptively protected. Indeed, the court posited that magazines are *never* protected by the Second Amendment, no matter their size, which would mean

that states could effectively ban semiautomatic firearms entirely without ever having to reconcile such efforts with our Nation's historical tradition of firearms regulation.

That decision deepens an acknowledged division of authority among federal courts of appeals and state courts of last resort over whether these ubiquitous instruments are "Arms" that cries out for resolution. And it gets a profoundly important constitutional question profoundly wrong. This Court should grant certiorari and confirm that bans on the feeding devices needed to make constitutionally protected firearms work as intended of course implicate—and, in fact, violate—the Second Amendment.

OPINIONS BELOW

The Washington Supreme Court's opinion, as amended, is published at 568 P.3d 278 and reproduced at App.1-50. The unpublished opinion of the Cowlitz County Superior Court granting petitioners' motion for summary judgment is reproduced at App.53-122.

JURISDICTION

The Washington Supreme Court issued its decision in this case on May 8, 2025. App.1. This Court has jurisdiction under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, section 24, of the Washington Constitution provides as follows: "The right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain or employ an armed body of men." Wash. Const. art. I, §24.

The Second Amendment to the United States Constitution provides: "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 Fourteenth Amendment to the United States Constitution provides, *inter alia*, that "[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, §1.

STATUTORY PROVISIONS INVOLVED

Section 9.41.370 of the Revised Code of Washington provides as follows:

> (1) No person in this state may manufacture, import, distribute, sell, or offer for sale any large capacity magazine, except as authorized in this section.
>
> (2) Subsection (1) of this section does not apply to any of the following:
>
> > (a) The manufacture, importation, distribution, offer for sale, or sale of a large capacity magazine by a licensed firearms manufacturer for the purposes of sale to any branch of the armed forces of the United States or the state of Washington, or to a law enforcement agency in this state for use by that agency or its employees for law enforcement purposes;

> (b) The importation, distribution, offer for sale, or sale of a large capacity magazine by a dealer that is properly licensed under federal and state law for the purpose of sale to any branch of the armed forces of the United States or the state of Washington, or to a law enforcement agency in this state for use by that agency or its employees for law enforcement purposes;
>
> (c) The distribution, offer for sale, or sale of a large capacity magazine to or by a dealer that is properly licensed under federal and state law where the dealer acquires the large capacity magazine from a person legally authorized to possess or transfer the large capacity magazine for the purpose of selling or transferring the large capacity magazine to a person who does not reside in this state.
>
> (3) A person who violates this section is guilty of a gross misdemeanor punishable under chapter 9A.20 RCW.

RCW 9.41.370.

Section 9.41.375 of the Revised Code of Washington provides as follows:

> Distributing, selling, offering for sale, or facilitating the sale, distribution, or transfer of a large capacity magazine online is an unfair or deceptive act or practice or unfair method of competition in the conduct of trade

> or commerce for purposes of the consumer protection act, chapter 19.86 RCW.

RCW 9.41.375.

Section 9.41.010(25) of the Revised Code of Washington in turn defines "large capacity magazine" as follows:

> "Large capacity magazine" means an ammunition feeding device with the capacity to accept more than 10 rounds of ammunition, or any conversion kit, part, or combination of parts, from which such a device can be assembled if those parts are in possession of or under the control of the same person, but shall not be construed to include any of the following:
>
> (a) An ammunition feeding device that has been permanently altered so that it cannot accommodate more than 10 rounds of ammunition;
>
> (b) A 22 caliber tube ammunition feeding device; or
>
> (c) A tubular magazine that is contained in a lever-action firearm.

RCW 9.41.010(25).

STATEMENT OF THE CASE

A. Factual and Legal Background

1. "Firearms with greater than ten round capacities existed even before our nation's founding, and the common use of LCMs for self-defense is apparent in our shared national history." *Duncan v. Becerra*, 970 F.3d 1133, 1147 (9th Cir. 2020), *reh'g en*

banc granted, opinion vacated, 988 F.3d 1209 (9th Cir. 2021), *and on reh'g en banc sub nom. Duncan v. Bonta*, 19 F.4th 1087 (9th Cir. 2021), *cert. granted, judgment vacated*, 142 S.Ct. 2895 (2022), *and vacated and remanded*, 49 F.4th 1228 (9th Cir. 2022). Yet "[a]t the time the Second Amendment was adopted, there were no laws restricting ammunition capacity." David B. Kopel, *The History of Firearm Magazines and Magazine Prohibitions*, 78 Alb. L. Rev. 849, 864 (2015). And while feeding devices that could accept more than ten rounds of ammunition were common by at least the late nineteenth century, no state (or Congress) restricted the manufacture, sale, or possession of magazines of *any* size until the 1990s.

To be sure, a handful of states restricted the firing capacity of semiautomatic firearms during Prohibition in conjunction with the enactment of restrictions on fully automatic firearms that had just started making their way onto civilian markets in limited numbers. *See* 1927 Mich. Pub. Acts 887, 888; 1927 R.I. Acts & Resolves 256, 256-57; 1933 Minn. Laws ch. 190. But those laws were soon repealed or replaced with ones restricting fully automatic firearms alone, which were never widely adopted by law-abiding citizens for lawful purposes. *See* 1959 Mich. Pub. Acts 249, 250; 1959 R.I. Acts & Resolves 260, 260, 263; 1963 Minn. Sess. L. ch. 753, at 1229. And none of those laws—outliers even in the brief period they were on the books—was understood to apply to magazines or other feeding devices, regardless of capacity. Kopel, *supra*, at 864-66.

The first state law restricting magazine capacity did not come until 1990—two hundred years after the

Founding and over a century after the Fourteenth Amendment's ratification. *See* 1990 N.J. Laws 217, 221, 235 (codified at N.J. Stat. Ann. §2C:39-1(y), -3(j)).[1] The majority of states still allow law-abiding citizens to lawfully possess magazines capable of holding more than ten rounds of ammunition. As for the federal government, it did not regulate magazine capacity until 1994, when it temporarily banned ammunition feeding devices with a capacity of more than ten rounds. *See* Pub. L. No. 103-322, 108 Stat. 1796 (1994) (formerly codified at 18 U.S.C. §922(w)). And Congress let the law expire in 2004 after a study by the Department of Justice revealed that it had produced "no discernible reduction" in violence with firearms across the country. Christopher S. Koper et al., *An Updated Assessment of the Federal Assault Weapons Ban: Impacts on Gun Markets and Gun*

[1] Before 1990, only the District of Columbia restricted law-abiding citizens' ability to keep or bear feeding devices of a particular size. *Duncan v. Bonta*, 133 F.4th 852, 892 (9th Cir. 2025) (en banc) (Bumatay, J., dissenting). In 1932, Congress passed a local D.C. law prohibiting the possession of firearms that "shoot[] automatically or semiautomatically more than twelve shots without reloading." Pub. L. No. 72-275, §§1, 8, 14, 47 Stat. 650, 650, 652, 654 (1932) (codified as amended at 26 U.S.C. §§5801-72). That law was not understood to sweep up ammunition feeding devices as an original matter; indeed, when Congress enacted the National Firearms Act imposing stringent regulations on machineguns for the whole country just two years later, it chose not to impose any restrictions on magazines. *See* Pub. L. No. 73-474, 48 Stat. 1236 (1934). Nevertheless, after the District achieved home rule in 1975, the new D.C. government interpreted the 1932 law "so that it outlawed all detachable magazines and all semiautomatic handguns." Kopel, *supra*, at 866. (*Heller*, of course, invalidated the latter portion.)

Violence, 1994-2003, Rep. to the Nat'l Inst. of Just., U.S. Dep't of Just. 96 (2004), perma.cc/9MGA-XLRY.

2. In the decades since Congress allowed the short-lived federal ban to lapse, millions more law-abiding Americans have lawfully acquired, kept, and borne so-called LCMs for lawful purposes such as self-defense. Hundreds of millions of feeding devices that can hold more than ten rounds have been sold in the past few decades alone, making them far more common than the Ford F-150, the most popular vehicle in the country. *See* Nat'l Shooting Sports Found., *Detachable Magazine Report, 1990-2021* (2024), https://tinyurl.com/4p2j5xbz; Brett Foote, *There Are Currently 16.1 Million Ford F-Series Pickups on U.S. Roads*, Ford Auth. (Apr. 9, 2021), https://bit.ly/3GLUtaB. In fact, the average American gun owner owns *more* ten-plus round magazines than magazines that hold only ten rounds or fewer. *See* William English, Ph.D., *2021 National Firearms Survey: Updated Analysis Including Types of Firearms Owned* 24-25 (revised Sept. 28, 2022), https://bit.ly/3yPfoHw. The most common reasons cited for owning these arms are target shooting (64.3% of owners), home defense (62.4%), hunting (47%), and defense outside the home (41.7%). *Id.* at 23.

That should come as no surprise. The magazines that Washington bans are exceedingly—and increasingly—common. They have long been lawful in most of the country, and they remain lawful in most states today. *See Magazine Gun Laws by State*, XTech Tactical (updated Mar. 18, 2025), https://tinyurl.com/4yavf2j4. Tracking consumer preference, many modern handguns—the

"quintessential self-defense weapon," *Heller*, 554 U.S. at 629—come standard with such magazines, *see, e.g.*, *Gun Digest 2018* at 386-88, 408 (Jerry Lee & Chris Berens eds., 72d ed. 2017), as do all the best-selling semiautomatic rifles on the market, *see* Nat'l Shooting Sports Found., *Modern Sporting Rifle Comprehensive Consumer Report* 31 (July 14, 2022), https://bit.ly/3GLmErS. *Cf. Smith & Wesson Brands, Inc. v. Estados Unidos Mexicanos*, 605 U.S. 280, 297 (2025) ("The AR-15 is the most popular rifle in the country."); *Garland v. Cargill*, 602 U.S. 406, 429-30 (2024) (Sotomayor, J., dissenting) (noting that "semiautomatic rifles" like AR-15s are "commonly available").

What the D.C. Circuit said over a decade ago thus remains true today: "There may well be some capacity above which magazines are not in common use but … that capacity surely is not ten." *Heller v. District of Columbia*, 670 F.3d 1244, 1261 (D.C. Cir. 2011).

B. Procedural Background

1. Despite the clear tradition in this country of law-abiding citizens keeping and bearing feeding devices capable of accepting more than ten rounds, Washington decided a few years ago to newly prohibit law-abiding citizens from acquiring these exceedingly common arms. "In 2022, the Washington State Legislature enacted ESSB 5078, codified at RCW 9.41.010, .370, and .375." App.2. "'ESSB 5078 prohibits the manufacture, import, distribution, or [sale]' … in Washington" of any "ammunition feeding device[] with the capacity … to accept more than 10 rounds." App.2; *see* RCW 9.41.010(25), .370(1). "ESSB

5078 also creates a claim under the Washington Consumer Protection Act … for violations of the LCM ban." App.2; *see* RCW 9.41.375.[2]

2. Petitioner Gator's Custom Guns, Inc., ("Gator's") is a retail firearms dealer located in Kelso, Washington, and is owned by petitioner Walter Wentz. For more than two decades, Gator's sold firearms, ammunition, and related items, including firearms that came standard with aftermarket magazines capable of holding more than ten rounds.

"In July 2023, the Washington attorney general issued a civil investigative demand" alleging that Gator's had "continued to sell prohibited LCMs after ESSB 5078 went into effect." App.3. Gator's responded by "fil[ing] a petition to set aside the demand." App.3. Then, in September 2023, the Attorney General "separately filed a [Washington Consumer Protection Act] enforcement action against [petitioners]"; petitioners' answer "raised the unconstitutionality of ESSB 5078 under both [the United States and Washington] [C]onstitutions as an affirmative defense." App.3-4.

After the two cases were consolidated, the parties cross-moved for summary judgment. App.4. "The superior court granted summary judgment in favor of [petitioners], finding ESSB 5078 unconstitutional under both article I, section 24 and the Second Amendment." App.4. Starting with the question of whether the magazines Washington has outlawed are

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[2] In a modest nod to the Takings Clause, ESSB 5078 "does not dispossess individuals of LCMs they owned before the law went into effect." App.21 n.7 (McCloud, J., dissenting).

"arms," the superior court held that "[m]agazines have no other design purpose than as a weapon. No one is going to butter a sandwich or dice carrots with a magazine of any size. Magazines are only useful as weapons." App.64. The superior court further concluded that "magazines are commonly and lawfully possessed by law abiding citizens for lawful purposes." App.66. Thus, the superior court had no trouble holding that, under this Court's precedents, ESSB 5078's outright ban on the manufacture and sale of such common weapons violates the Second Amendment, which in turn means it violates Washington's Constitution too. App.53-122.

3. The Attorney General sought immediate review in the Washington Supreme Court, bypassing the intermediate appellate court. "Commissioner Michael Johnston," who is not a judge but is empowered under state law to act on certain interim applications, "issued an emergency order staying the superior court's ruling pending [the court's] review." App.4. The Washington Supreme Court then "granted direct review and maintained the stay." App.4.

C. The Decision Below

The Washington Supreme Court reversed in a divided, 7-2 opinion. App.1-50.

1. At the outset, the majority explained that it "interpret[s]" Article I, section 24, of the Washington Constitution *in pari materia* with the Second Amendment to the United States Constitution, such that "an 'arm' under article I, section 24 must be an 'arm' under the Second Amendment and vice versa." App.5-6. But it quickly abandoned any pretense of

following this Court's mandate about what the term "Arms" in the Second Amendment covers.

This Court has made crystal clear that "the Second Amendment's definition of 'arms'" extends to all bearable "instruments that facilitate armed self-defense." *Bruen*, 597 U.S. at 28. Yet the Washington Supreme Court did not ask whether the magazines ESSB 5078 outlaws satisfy that "definition." In fact, it explicitly rejected that definition. According to the Washington Supreme Court, "not all instruments that 'may plausibly be used for self-defense' are … 'arm[s].'" App.9. So despite having professed adherence to "the United States Supreme Court precedent that gives meaning to the plain text of the Second Amendment," App.6, the Washington Supreme Court forged its own path, asking *not* whether the magazines Washington has outlawed facilitate self-defense (as *Bruen* and *Heller* require), but whether they are "designed as weapons," App.10.

The majority answered that question in the negative. According to the majority, magazines themselves "are not weapons—they are attachments to weapons, or accessories." App.10. Nor, the majority held, are magazines "Arms" as this Court defined that term in *Heller*, *see Heller*, 554 U.S. at 581 (defining "arms" as "any thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another"), because a magazine "itself does not cast the round but feeds the round into the firearm," App.10. In the majority's view, "LCMs are not used 'to cast at … another' because they are merely attached to a firearm in order to modify the firearm's capacity 'to cast at … another' without reloading." App.10. The

court thus "h[e]ld that LCMs are not 'arms' in the constitutional sense because they are designed to be attached to a weapon in order to modify it by increasing that firearm's ammunition capacity, and they are not designed for use as a weapon themselves." App.11.

The majority also rejected the assertion that the magazines ESSB 5078 prohibits "are 'integral components' of firearms." App.10. The majority did not deny "that a semiautomatic weapon will not function as intended without" a magazine. App.10-11. Nor did it dispute that, because "certain types of firearms require the addition of a detachable magazine to function," a magazine *is* an "integral component[]" of such a firearm. App.10; *see also* App.15 (acknowledging that "some firearms may require a magazine to function as intended"). But because "no firearm requires a magazine of this particular capacity to function," the majority held that so-called "LCMs" are not arms at all. App.10, 11.

Although the majority could have ended there, it did not. Instead, it went on to opine that "LCMs also fall outside either protection of the right to bear arms because the provisions protect only those arms that are commonly used for self-defense." App.12. The majority did not deny that "LCMs are common," App.12, i.e., that they are "typically possessed by law-abiding citizens for lawful purposes," *Heller*, 554 U.S. at 625, 627, as opposed to "those that 'are highly unusual in society at large,'" *Bruen*, 597 U.S. at 47 (quoting *Heller*, 554 U.S. at 627). It just held that that made no difference. According to the majority, what matters is "what … LCMs are actually used *for*."

App.12. And because petitioners did not "prove" that citizens often fire more than ten rounds in self-defense situations or otherwise need the ability to fire more than ten rounds without reloading, the court held that they failed to meet their purported "burden" of proving that the exceedingly popular magazines Washington has banned are in common use for self-defense. App.12; *see* App.41 (McCloud, J., dissenting) ("The majority does not explain what kind of evidence it thinks would suffice to show that an arm is in common use for self-defense.").

Finally, the majority concluded that "the right to purchase LCMs is not among the ancillary rights necessary to the realization of the core right to bear arms in self-defense." App.9-10. The majority did not dispute that there is a "right to purchase arms" and a "right to acquire ammunition." App.14-15. But it concluded that "the ability to purchase LCMs is not necessary to the core right to possess a firearm in self-defense," and thus is not protected. App.14. In so holding, the majority suggested that as long as "a semiautomatic firearm is still capable of firing … 1 round at a time," "individuals are still able to exercise the core right to bear arms." App.15.

In sum, the Washington Supreme Court held that "LCMs are not 'arms' in the constitutional sense, and the right to purchase LCMs is not among the ancillary rights protected by the Second Amendment," and therefore "neither article I, section 24 nor the Second

Amendment offer[s] any protection against ESSB 5078's restriction on LCMs." App.15-16.[3]

2. Justice McCloud, joined by Justice Whitener, dissented. App.20-50. The dissenters applied this Court's framework for Second Amendment claims to ESSB 5078, "begin[ning] with the rule that the Second Amendment presumptively protects 'arms-bearing conduct.'" App.27 (quoting *United States v. Rahimi*, 602 U.S. 680, 691 (2024)). At the threshold, the dissenters concluded that "[m]agazines, including magazines capable of holding over 10 rounds, constitute Second Amendment 'arms' as defined in *Heller* and [*Bruen*]," App.50, because "[a] magazine is essential to a user's ability to use a repeating firearm 'to cast at or strike another' in the manner it was designed to do," App.30 (quoting *Heller*, 554 U.S. at 581). The dissenters rejected the majority's hyper-technical view of what it means for something to "cast" a bullet. "[T]he grip, trigger, and receiver don't 'cast' the round either (the force from the explosion of the primer and ignition of the propellant does)." App.33. "So examining individual components of a firearm[,] as the majority does[,] leads to the absurd result that

[3] "The result of this outcome is that the superior court is left to consider the State's consumer-protection enforcement action against Gator's for violation of the LCM ban." App.16. The Attorney General "requested reassignment" to a different superior court judge "on remand," App.16; the majority denied that request, App.17-18. "Although the record reflects Judge Bashor's strong feelings as to the constitutionality of ESSB 5078, … those feelings do not relate to the issues for which Judge Bashor maintains discretion after we order ESSB 5078 is constitutional," namely, "the remedies and penalties for Gator's alleged violation of ESSB 5078." App.18.

the government can ban triggers, grips, receivers, or firing pins because none of those integral components, in isolation, are capable of 'cast[ing]' ammunition at a target, either." App.33.

The dissenters rejected as "irrelevant" the fact that "no semiautomatic weapon specifically requires an LCM to function." App.30. Under *Bruen*, "a modern instrument[] that *facilitate*[*s*] armed self-defense is an arm entitled to the prima facie protection of the Second Amendment." App.30 (alterations in original) (footnote omitted) (quoting *Nat'l Ass'n for Gun Rts. v. Lamont*, 685 F.Supp.3d. 63, 94 (D. Conn. 2023)). And "like all magazines," a magazine capable of accepting 11 or more rounds "is incontrovertibly an instrument that 'facilitates armed self-defense' because it supplies ammunition to a repeating firearm so that the firearm functions as intended." App.30 (footnote omitted).

The dissenters also criticized the majority for applying the wrong standard. The Washington Supreme Court had previously held "that article I, section 24's right to bear arms was limited to 'instruments that are designed as weapons traditionally or commonly used by law-abiding citizens for the lawful purpose of self-defense.'" App.34 (quoting *City of Seattle v. Evans*, 366 P.3d 906, 913 (Wash. 2015)). "But this definition of protected 'arms' from *Evans* differs from the definition of protected 'arms' under the Second Amendment precedent discussed above." App.34.

The dissenters also deemed it "critical[]" that "the Second Amendment does not just protect 'arms'—it protects 'arms-bearing conduct.'" App.30. That

protection ensures that the people can "purchase arms and ammunition." App.30.

The dissenters next concluded that magazines capable of holding more than 10 rounds of ammunition are "in common use for lawful purposes, including self-defense." App.71. "As courts across the country have found, magazines with a capacity of more than 10 rounds are very commonly possessed by law-abiding Americans." App.36. The dissenters rejected the argument that being "commonly *possessed* by law-abiding Americans" is not enough to justify Second Amendment protection. App.37. The notion "that the average number of shots fired in self-defense determines whether LCMs are in common 'use' … contradicts *Heller*, which held that the Second Amendment protects arms that are 'typically possessed' for 'lawful purposes.'" App.39 (emphasis omitted) (quoting *Heller*, 554 U.S. at 625).

Finally, turning to historical tradition, the dissenters would have held that "[t]he State fails to meet its burden to show that this new law is consistent with our nation's history of firearms regulations, as [*Bruen*] requires." App.50; *see* App.43-47. "[M]ost of the laws cited by the State did not regulate arms possession the way ESSB 5078 does—by outlawing acquisition of a particular weapon in common use. Thus, such laws lack a shared 'how' with ESSB 5078." App.45. And the few that did were "Prohibition-era regulations of automatic … weapons," which were never in common use. App.46. The dissenters ended by criticizing the majority for adopting an approach to the Second Amendment under which courts "should pull back to the highest possible level of generality

about the specific historical limitations on keeping and bearing firearms, and sum[] up those historical limitations as 'society can ban dangerous things.'" App.46. That approach elides that "all firearms are dangerous, especially if they're equipped with magazines," and "allows legislatures to limit the reach of the United States Constitution based on balancing society's interest against the individual's right," flouting "the *Heller*-[*Bruen*] directive against interest-balancing in the Second Amendment context." App.46.[4]

REASONS FOR GRANTING THE PETITION

The decision below deepens an acknowledged conflict among federal courts of appeals and state courts of last resort over whether ammunition feeding devices capable of holding more than ten rounds—or, sometimes, of *any* size—are "Arms" within the meaning of the plain text of the Second Amendment. That threshold issue cries out for resolution, and this is an especially appropriate case in which to resolve it because the decision below got it patently wrong. Depriving arms of any constitutional protection at the threshold has absolute consequences at the crux of this case: It disarms the People and strips them of their inalienable rights, without even so much as examining the historical tradition that *Bruen* deemed so critical. By holding that bans on the magazines necessary to make semiautomatic firearms function as intended do not even implicate the Second Amendment, the decision below does just that. If this

[4] The dissenting Justices ended by briefly analyzing ESSB 5078 separately under the Washington Constitution. *See* App.48-50.

Court does not step in and stop the piecemeal removal of integral firearm components from the scope of the Second Amendment's plain text, soon neither the piece nor the whole will be left with any constitutional protection at all. It is due time for this Court to weigh in and resolve this exceptionally important question.

I. The Decision Below Deepens A Circuit Split Over Whether Magazines Are "Arms."

1. The Washington Supreme Court held here that magazines capable of accepting more than ten rounds of ammunition are not "Arms" under the plain text of the Second Amendment, and thus that state laws banning them do not even implicate the fundamental right to keep and bear arms. App.1-19. Post-*Bruen*, the Seventh and Ninth Circuits have held the same.

The Ninth Circuit held in *Duncan v. Bonta*, 133 F.4th 852 (9th Cir. 2025) (en banc), that "large-capacity magazines are neither 'arms' nor protected accessories." *Id.* at 865 (capitalization omitted). The court accepted that "[t]he meaning of 'Arms'" for Second Amendment purposes "broadly includes nearly all weapons used for armed self-defense." *Id.* at 866. Yet, in its view, magazines are "accessories, or accoutrements, rather than arms," because "[w]ithout an accompanying firearm" a magazine is just a "harmless" "box," "useless in combat for either offense or defense." *Id.* at 867. The court thus deemed all magazines, regardless of capacity, outside "the category of … arms" presumptively protected by the Second Amendment. *Id.* Nevertheless, the Ninth Circuit recognized that many "firearms require the use of a magazine in order to operate," so it held that "the Second Amendment's text necessarily

encompasses the corollary right to possess a magazine for firearms that require one." *Id.* at 867-68. But because "a *large-capacity* magazine … is not necessary to operate any firearm," the Ninth Circuit held that "California's ban on large-capacity magazines does not fall within the plain text of the Second Amendment." *Id.*

The Seventh Circuit reached the same conclusion about Illinois' analogous ban in *Bevis v. City of Naperville*, 85 F.4th 1175 (7th Cir. 2023), *cert. denied sub nom. Harrel v. Raoul*, 144 S.Ct. 2491 (2024). Illinois bans "feeding devices that have in excess of 10 rounds for a rifle and 15 rounds for a handgun." *Id.* at 1197. The Seventh Circuit held that those ubiquitous magazines are not "Arms" because they are purportedly "more like … military-grade weaponry" than anything that, in the court's view, a law-abiding citizen should need for civilian self-defense. *Id.* at 1195, 1197.

2. The D.C. Circuit recently split from its sister circuits, holding in *Hanson v. District of Columbia*, 120 F.4th 223 (D.C. Cir. 2024), that ten-plus-round magazines "very likely are 'Arms' within the meaning of the plain text of the Second Amendment." *Id.* at 232. "To hold otherwise," the D.C. Circuit explained, "would allow the government to sidestep the Second Amendment with a regulation prohibiting possession at the component level, 'such as a firing pin.'" *Id.* (quoting *Kolbe v. Hogan*, 813 F.3d 160, 175 (4th Cir. 2016), *rev'd en banc*, 849 F.3d 114 (4th Cir. 2017)).

The Third Circuit has also held that "a magazine," regardless of capacity, is "an arm under the Second Amendment." *Ass'n of N.J. Rifle & Pistol Clubs, Inc.*

v. Att'y Gen. N.J., 910 F.3d 106, 116-17 (3d Cir. 2018). Finally, the First Circuit has "assume[d]," albeit without deciding, "that [magazines] are 'arms' within the scope of the Second Amendment." *Ocean State Tactical, LLC v. Rhode Island*, 95 F.4th 38, 43 (1st Cir. 2024).

* * *

In sum, the federal courts of appeals are divided over whether magazines that can hold more than ten rounds of ammunition are "Arms" presumptively entitled to protection under the Second Amendment. By joining the circuits that have held that bans on these exceptionally common magazines do not even implicate the Second Amendment, the Washington Supreme Court's decision below extends the conflict to state courts of last resort.

II. The Decision Below Cannot Be Reconciled With This Court's Precedents.

Under this Court's precedent (not to mention common sense), whether ammunition feeding devices fall within the plain text of the Second Amendment is not a difficult question; they plainly do. Indeed, it is hard to fathom how a device that serves no purpose other than making a constitutionally protected firearm operate as intended could be outside the scope of the Second Amendment entirely.

1. As *Heller* explained and *Bruen* and *Rahimi* both reiterated, "the Second Amendment extends, prima facie, to all instruments that constitute bearable arms." *Bruen*, 597 U.S. at 28 (quoting *Heller*, 554 U.S. at 582); *accord Rahimi*, 602 U.S. at 691; *Caetano v. Massachusetts*, 577 U.S. 411, 411 (2016) (per curiam). That presumptive protection covers "any thing that a

man … takes into his hands, or useth in wrath to cast at or strike another," *Heller*, 554 U.S. at 581—which an ammunition feeding device surely is. As their name suggests, feeding devices are not passive holders of ammunition, like a cardboard cartridge box of yore. They are integral to the design of semiautomatic firearms and the mechanism that makes them work, actively feeding ammunition into the firing chamber. *Duncan*, 970 F.3d at 1146.

A semiautomatic firearm equipped with a feeding device containing the ammunition necessary for it to function is thus indisputably a "thing that a man … takes into his hands," *Heller*, 554 U.S. at 581, and a "bearable" instrument that "facilitate[s] armed self-defense," *Bruen*, 597 U.S. at 28. Indeed, as the superior court here recognized, a magazine is not designed or possessed for any purpose *other* than to actively feed ammunition into a firearm during firing. App.63-64. And "without bullets, the right to bear arms would be meaningless." *Rhode v. Bonta*, --- F.4th ----, 2025 WL 2080445, at *7 (9th Cir. 2025) (quoting *Jackson v. City & Cnty. of San Francisco*, 746 F.3d 953, 967 (9th Cir. 2014)).

2. The state court's textual analysis therefore should have been straightforward. Instead, despite claiming to follow this Court's teachings on the Second Amendment, the court engaged in a threshold inquiry unmoored from the plain text of the Second Amendment and this Court's cases interpreting it.

At the outset, the Washington Supreme Court expressly rejected the "definition" of "arms" that this Court supplied in *Heller* and *Bruen*. In its telling, "not all instruments that 'may plausibly be used for self-

defense' are … 'arm[s].'" App.9. *Bruen*, however, was explicit: "[E]ven though the Second Amendment's definition of 'arms' is fixed according to its historical understanding, that general definition covers modern instruments that facilitate armed self-defense." *Bruen*, 597 U.S. at 28. And to "facilitate" means "[t]o make the occurrence of (something) easier; to render less difficult." *Black's Law Dictionary* (12th ed. 2024). So any bearable instrument that an individual can use to defend herself—i.e., "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 (quoting 1 Timothy Cunningham, *A New and Complete Law Dictionary* (2d ed. 1771))—is an "Arm" for purposes of the Second Amendment.

Instead of abiding by this Court's precedent, the court below began by asking whether magazines are "designed as weapons." App.10. Under this Court's cases, that is not the right question. A bearable instrument that a person "takes into his hands … to … strike another," *Heller*, 554 U.S. at 581, because it makes it easier for him to defend himself, *Bruen*, 597 U.S. at 28, is an "Arm" within the plain-text coverage of the Second Amendment regardless of whether the instrument was designed principally for a non-martial use. To be sure, the what-was-it-designed-for question is relevant *under Washington state law*. As the dissenting Justices explained, the Washington Supreme Court had previously held "that article I, section 24's right to bear arms was limited to 'instruments that are designed as weapons.'" App.34 (quoting *Evans*, 366 P.3d at 913). But while state courts are free to interpret state laws, they are not free to ignore this Court's interpretations of the United

States Constitution. "The [Washington] Supreme Court, like any other state or federal court, is bound by this Court's interpretation of federal law." *James v. City of Boise*, 577 U.S. 306, 307 (2016). "[I]f state courts were permitted to disregard this Court's rulings on federal law," the resulting "'public mischiefs … would be truly deplorable.'" *Id.* (quoting *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 348 (1816)).

In all events, the state court's conclusion about magazines' essential character is wrong on its own terms. *Of course* ammunition feeding devices are designed to be used as part and parcel of a weapon. Magazines do not just passively contain ammunition; they actively feed ammunition into the firing chamber of a semiautomatic firearm, allowing a semiautomatic firearm to operate as intended, i.e., as a weapon. App.10-11. That is why semiautomatic firearms are sold *with magazines*. Indeed, even the Washington Supreme Court acknowledged that magazines are "designed to be attached to a weapon in order to modify it by increasing that firearm's ammunition capacity." App.11. To say that an instrument that is designed solely to increase a firearm's capacity to function as a firearm does not facilitate armed self-defense is to strip those words of all meaning.

The court did not (and could not) deny that a magazine "feeds the round into the firearm." App.10. But because the magazine "itself does not cast the round," the court held that magazines do not satisfy the constitutional definition. App.10, 12. That is both factually wrong and legally unsound. A magazine *does* play a critical role in casting a round out of the barrel; if the magazine does not feed ammunition into the

firing chamber, then nothing will be cast at anyone. At any rate, the majority's hyper-technical view of what it means for an instrument to "cast" a bullet would effectively rip the Second Amendment out of the Constitution. As the dissenting Justices explained, "the grip, trigger, and receiver don't 'cast' the round either," "[s]o examining individual components of a firearm … leads to the absurd result that the government can ban triggers, grips, receivers, or firing pins because none of those integral components, in isolation, are capable of 'cast[ing]' ammunition at a target, either." App.33 (McCloud, J., dissenting); *accord Hanson*, 120 F.4th at 232. The Constitution draws no distinction between weapons on the one hand and firearm accessories on the other.

The majority's backup theory fared no better. In the majority's eyes, even if *some* magazines "are 'integral components' of firearms" (because "a semiautomatic weapon will not function as intended without" one), so-called "LCMs" are not because "no firearm requires a magazine of this particular capacity to function." App.10, 11. But that proves far too much, as a semiautomatic weapon does not need a magazine of *any* particular capacity to function; if there is a round in the chamber, then it can still fire. And to the extent the court meant to accept that the Second Amendment must protect *some* size magazine, it failed to explain why a firearm "needs" a ten-round magazine but not an eleven-round one. After all, a bearable instrument that facilitates self-defense in Size Small does not cease accomplishing that end in Size Large. If anything, having more rounds at the ready *better* facilitates a citizen's ability to defend herself in case of confrontation—regardless of whether

she ends up needing to expend every (or any) round. The decision below thus leaves no principled basis to protect any magazines at all. *See* App.42 n.22 (McCloud, J., dissenting).

At bottom, the Washington Supreme Court's theory was that a firearm does not *need* a magazine containing more than ten rounds to be useful. *See* App.14 (holding that "the ability to purchase LCMs is not necessary to the core right to possess a firearm in self-defense"). But that how-many-do-you-really-need view of the Second Amendment is fundamentally inconsistent with the notion that the Second Amendment protects a fundamental right. That is why, under this Court's cases, what (some judges think) is "necessary" for self-defense makes no difference. What matters at the threshold is whether a bearable instrument "facilitate[s] armed self-defense." *Bruen*, 597 U.S. at 28. Ammunition feeding devices undisputedly do—and that is true regardless of whether they hold six rounds or a dozen. Keeping and bearing them is thus presumptively protected, and can be banned only if the state meets its burden of proving that its law comports with historical tradition.

3. The Washington Supreme Court's analysis of common use was, if anything, even less consistent with this Court's cases and the fundamental right to keep and bear arms.

The majority accepted that "LCMs are common in circulation." App.12. That is quite the understatement. "Millions of people have chosen to feed ammunition into those commonly used firearms with magazines capable of holding more than 10

rounds." App.21 & n.6 (McCloud, J., dissenting). Indeed, "approximately half of [all] privately owned magazines" today "hold more than ten rounds," including magazines that come "standard" with many of the "most popular rifles" and handguns in America. *Duncan*, 133 F.4th at 862; *see also id.* at 892 (Bumatay, J., dissenting). Yet despite admitting the ubiquity of the magazines ESSB 5078 targets, the majority blanched at recognizing that they are entitled to constitutional protection. According to the majority, establishing common use requires evidence of what an instrument is "actually used *for*." App.12. And the only use the court would accept, moreover, is firing in an actual self-defense situation. So because petitioners had not come forward with evidence showing that people typically *fire* more than ten rounds in self-defense situations, the court held that petitioners failed to carry their purported "burden" to "prove" that ten-plus-round magazines "are commonly used for self-defense." App.12.

That was triply wrong. First and foremost, common use is not part of the threshold-textual inquiry on which the citizen bears the burden. Just as "[n]othing in the Second Amendment's text draws a home/public distinction with respect to the right to keep and bear arms," *Bruen*, 597 U.S. at 32, nothing in the Second Amendment's text draws a distinction between common and uncommon arms. *See* U.S. Const. amend. II. For purposes of *presumptive* protection, an arm is an arm is an arm. This Court can and should make that clear. *Cf. Hanson*, 120 F.4th at 232 n.3 ("There is no consensus on whether the common-use issue belongs at *Bruen* step one or *Bruen* step two." (quoting *Bevis*, 85 F.4th at 1198)).

Second and relatedly, because ESSB 5078 prohibits people from acquiring a class of arms, the only "burden" the Constitution tolerates is the state's burden to prove that ESSB 5078's restriction on "arms-bearing conduct" is consistent with historical tradition. *Rahimi*, 602 U.S. at 691. The Washington Supreme Court's contrary holding—that petitioners had the burden of demonstrating common use (despite its acceptance that so-called LCMs are common), App.12—cries out for this Court's correction.

Finally, common use focuses on the conduct the Second Amendment protects—i.e., what people typically *keep and bear* for self-defense and other lawful purposes—not on how they use their bearable instruments in the exceedingly uncommon scenario in which their life is in immediate danger. That much is clear from *Heller* and *Bruen*. *Heller* framed the common-use question as whether a particular bearable instrument is "typically possessed by law-abiding citizens for lawful purposes." 554 U.S. at 625; *accord Caetano*, 577 U.S. at 416 (Alito, J., concurring in the judgment). As for *Bruen*, the Court there juxtaposed the phrase "weapons that are those 'in common use at the time'" with the phrase "those that 'are highly unusual in society at large.'" 597 U.S. at 47. That juxtaposition makes sense only if the "uses" that matter include keeping and bearing, as the latter phrase ("are highly unusual") is nonsensical vis-à-vis a frequency-of-firing inquiry. Indeed, *Bruen* held that citizens have a fundamental right to carry handguns outside the home for self-defense *without ever asking how frequently people fire them in actual self-defense situations*. It sufficed in *Bruen*, just as it did in *Heller*, that "handguns are the most popular weapon chosen

by Americans for self-defense." *Heller*, 554 U.S. at 629; *see also Bruen*, 597 U.S. at 47.

That should have sufficed here too. To be sure, ammunition feeding devices are not handguns. But the only meaningful difference is that so-called "LCMs" are an *order of magnitude* more common than even the most common handgun. *See* pp.8-9, *supra*. If a ban on the magazines that make protected handguns function as intended does not even *implicate* the Second Amendment, then it is hard to see what protecting the handguns themselves accomplishes.

* * *

The state court's errant threshold-textual conclusion led it to pretermit the analysis and uphold ESSB 5078's prohibition on common arms without even so much as discussing this Nation's historical tradition of firearm regulation. But for purposes of this Court's review, that is a feature rather than a bug, as it provides this Court with an opportunity to grant certiorari and resolve only the "Arms" question on which there is an acknowledged split, leaving the issue of historical tradition for another day.

That said, the Court could also reaffirm what it has previously made clear (and what the two dissenting Justices below correctly recognized)—namely, that "arms" cannot be prohibited "consistent with this Nation's historical tradition" if they are in "common use today" for lawful purposes, as opposed to "dangerous and unusual." *Bruen*, 597 U.S. at 17, 27, 47; *accord Heller*, 554 U.S. at 625, 629; *see also* App.20-50 (McCloud, J., dissenting). That is the test that this Court announced and applied in *Heller*, and under a straightforward application of it, a flat ban on

the acquisition of exceedingly common ammunition feeding devices is flatly inconsistent with this Nation's historical tradition.

III. The Question Presented Is Important, And This Is A Good Vehicle To Resolve It.

Whether magazines capable of accepting more than ten rounds of ammunition are "Arms" within the plain text of the Second Amendment is a question of profound importance. Tens of millions of law-abiding Americans have long lawfully owned hundreds of millions of these instruments as core components of legal firearms. And the scope of the right to keep and bear arms depends, first and foremost, on what arms it presumptively covers. If keeping and bearing arms equipped with common magazines did not even implicate the Second Amendment, then the state could prohibit both the magazine and the act of keeping and bearing a firearm equipped with it without ever having to engage in the historical-tradition analysis this Court reiterated in *Rahimi* applies *whenever* the state "regulates arms-bearing conduct." 602 U.S. at 691. Surely this Court did not mean for the threshold-textual inquiry it identified in *Bruen* to be so demanding as to let states ban common arms with impunity. Yet that is what the decision below holds.

And its holding on that issue is final. While the Washington Supreme Court "remand[ed]" to the superior court to determine whether petitioners in fact violated ESSB 5078 (and, if so, what "the remedies and penalties" should be), App.18, there was nothing tentative or preliminary about its rejection of petitioners' Second Amendment defense. The court was explicit about this: Not only did it "hold" that

"ESSB 5078 is constitutional"; it underscored that the superior court "will be bound to our decision on that issue" on remand—where the only issues will be whether petitioners in fact sold one or more magazines that ESSB 5078 outlaws after it took effect, and if so, how much they must pay in penalties. The decision below is therefore "final" under 28 U.S.C. §1257(a). No "other federal questions" are left on remand "that might also require review by the Court"; the decision below is the state court's final word on the federal question at issue; and reversal by this Court "would be preclusive of any further litigation on the relevant cause of action." *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 477, 482-83 (1975); *see also id.* at 474-75 (granting certiorari of a decision reversing a summary judgment award and remanding for trial).

The federal question the decision below (errantly) resolved could hardly be more important. That is true for petitioners personally; the penalties petitioners face under Washington law could wind up nearing *$100 million*, all for conduct that is lawful in most of the country and that, under this Court's precedent, is (or at least ought to be) constitutionally protected. App.18, 19. The issue is also critical for the constitutional rights of all Americans. Indeed, what arms the Second Amendment protects is an issue that has taken on even greater significance since *Bruen*, as several states that expressed hostility to that decision responded to it by imposing even *greater* restrictions on which arms law-abiding citizens may keep and bear. Yet the same courts that *Bruen* reversed for refusing to take *Heller* seriously are now doing the same thing all over again with *Bruen*.

Take, for example, the First Circuit's decision in *Ocean State*. In upholding Rhode Island's ban on so-called LCMs, the First Circuit followed an analytical path disturbingly similar to its pre-*Bruen* precedent. Before *Bruen*, the First Circuit analyzed (and uniformly rejected) Second Amendment claims as follows: First, it would ask whether the law "burdens conduct that falls somewhere within the compass of the Second Amendment." *Worman v. Healey*, 922 F.3d 26, 36 (1st Cir. 2019), *abrogated by Bruen*, 597 U.S. 1. It would then "assume, albeit without deciding," that the answer was yes, and finally "train the lens of [its] inquiry on 'how heavily [the challenged law] burdens th[e] right" the Amendment protects. *Id.* (quoting *Gould v. Morgan*, 907 F.3d 659, 670-71 (1st Cir. 2018), *abrogated by Bruen*, 597 U.S. 1). This Court was unequivocal in abrogating *Worman* and holding that interest balancing has no place in Second Amendment analysis. *Bruen*, 597 U.S. at 19 & n.4. Yet *Ocean State* was just a redux of *Worman*. "To gauge how HB 6614 might burden the right of armed self-defense," the First Circuit "consider[ed] the extent to which LCMs are actually used by civilians in self-defense." 95 F.4th at 45. And rather than focus on the uses the Second Amendment protects—namely, "keep[ing] and bear[ing]"—the court whittled what it means to use an arm down to the nub, holding that the only "use" that counts would be a "self-defense fusillade of more than ten rounds." *See id.*; *accord Worman*, 922 F.3d at 37.

The Seventh Circuit's decision in *Bevis* was even less coy about its embrace of pre-*Bruen* precedent. *Bevis* reached the remarkable conclusion that the most common rifle in America is not even an "arm" within the meaning of the Second Amendment

because it looks like an M-16—and then rejected a challenge to a magazine ban without so much as mentioning text or historical tradition. 85 F.4th at 1197. The Ninth Circuit did a similar two-step in *Duncan*, concluding that so-called "large-capacity magazines" enjoy no presumptive protection because no firearm *needs* one to operate. *Duncan*, 133 F.4th at 868. The Third Circuit, meanwhile, recently refused to even consider the merits of a challenge to Delaware's equivalent ban, on the equally remarkable theory that individuals who wish to possess banned arms would not be entitled to relief *even if the ban is likely unconstitutional*, because "they already own" other arms that their state has not yet outlawed. *Del. State Sportsmen's Ass'n, Inc. v. Del. Dep't of Pub. Safety & Homeland Sec.*, 108 F.4th 194, 205 (3d Cir. 2024). *But see Heller*, 554 U.S. at 629 ("It is no answer to say … that it is permissible to ban … handguns so long as … other firearms … [are] allowed.").

All of that vividly "illustrates why this Court must provide more guidance" on which arms the Second Amendment protects and the relevant historical traditions that inform the scope of the right. *Harrel*, 144 S.Ct. at 2492 (Thomas, J., respecting the denial of certiorari). Absent the clearest of instructions, lower courts will continue "contorting" this Court's cases to uphold arms bans, producing ever-more opinions "unmoored from both text and history." *Id.* Unless this Court intervenes, law-abiding citizens in Washington will be forced to live under an abridged version of the Second Amendment that does not even allow them to possess magazines that are routinely chosen by tens of millions of Americans throughout the rest of the country as the best means of defending

themselves and their loved ones. The history of our nation is borne of private citizens who brought their own weapons to bear in order to shed the yoke of tyranny. The purpose of the enshrinement of the right was to preserve the ability of the people to do so again, if necessary. This Court should not allow rogue states or their courts to strip the people of that birthright.

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

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August 6, 2025

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APPENDIX A — OPINION OF THE SUPREME COURT OF THE STATE OF WASHINGTON, FILED MAY 8, 2025

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 102940-3

En Banc

STATE OF WASHINGTON,

Appellant,

v.

GATOR'S CUSTOM GUNS, INC., A WASHINGTON FOR-PROFIT CORPORATION, AND WALTER WENTZ, AN INDIVIDUAL,

Respondents.

Filed: May 8, 2025

JOHNSON, J.—This case involves a constitutional challenge to Engrossed Substitute Senate Bill 5078 (ESSB 5078),[1] which prohibits the manufacture, distribution, importation, and sale of firearm magazines with the capability of holding more than 10 rounds of ammunition. Gator's Custom Guns Inc. alleges ESSB

1. 67th Leg., Reg. Sess. (Wash. 2022).

5078 violates the right to bear arms protected by article I, section 24 of the Washington Constitution and the Second Amendment to the United States Constitution. In addition to defending the constitutionality of ESSB 5078, the State has requested reassignment to another superior court in the event that we find in its favor. We hold that ESSB 5078 does not violate either the Washington or United States constitutional protection of the right to bear arms because large capacity magazines (LCMs) are not "arms" within the meaning of either constitutional provision, nor is the right to purchase LCMs an ancillary right necessary to the realization of the core right to possess a firearm in self-defense. However, we deny the State's request for reassignment.

FACTS AND PROCEDURAL HISTORY

In 2022, the Washington State Legislature enacted ESSB 5078, codified at RCW 9.41.010, .370, and .375. ESSB 5078 prohibits the "manufacture, import, distribution, or [sale]" of any "large capacity magazine" in Washington. RCW 9.41.370(1). LCMs are defined as "ammunition feeding device[s] with the capacity [capable] to accept more than 10 rounds of ammunition." RCW 9.41.010(25). ESSB 5078 also creates a claim under the Washington Consumer Protection Act (CPA), ch. 19.86 RCW, for violations of the LCM ban. RCW 9.41.375. When enacting ESSB 5078, the Washington State Legislature found:

> Firearms equipped with large capacity magazines increase casualties by allowing a shooter to keep firing for longer periods

> of time without reloading. Large capacity magazines have been used in all 10 of the deadliest mass shootings since 2009, and [in] mass shooting events from 2009 to 2018 . . . the use of large capacity magazines caused twice as many deaths and 14 times as many injuries. Documentary evidence following gun rampages, including the 2014 shooting at Seattle Pacific University, reveals many instances where victims were able to escape or disarm the shooter during a pause to reload, and such opportunities are necessarily reduced when large capacity magazines are used. . . . Based on this evidence, . . . the legislature finds that restricting the sale, manufacture, and distribution of large capacity magazines is likely to reduce gun deaths and injuries.

Laws of 2022, ch. 104, § 1.

Gator's, a Kelso-based gun store, allegedly continued to sell prohibited LCMs after ESSB 5078 went into effect. In July 2023, the Washington attorney general issued a civil investigative demand, and in August, Gator's filed a petition to set aside the demand as invalid and unenforceable, alleging that ESSB 5078 violates the right to bear arms as protected by article I, section 24 of the Washington Constitution.[2] In September, the State

2. The State alleges that Gator's made the intentional choice not to plead a Second Amendment challenge in its petition to set aside the civil investigative demand to avoid removal to federal court. Regardless, the Second Amendment issue was pleaded as

separately filed a CPA enforcement action against Gator's and its owner, Walter Wentz, and Gator's answer raised the unconstitutionality of ESSB 5078 under both constitutions as an affirmative defense. The Cowlitz County Superior Court ordered the two cases consolidated.

The parties cross motioned for summary judgment. The superior court granted summary judgment in favor of Gator's, finding ESSB 5078 unconstitutional under both article I, section 24 and the Second Amendment and enjoined its enforcement. The State sought review directly in this court, and Commissioner Michael Johnston issued an emergency order staying the superior court's ruling pending our review. This court granted direct review and maintained the stay.[3]

ANALYSIS

I. LCMs Are Not Protected "Arms"

Review of the constitutionality of a statute is de novo. *Bennett v. United States*, 2 Wn.3d 430, 441, 539 P.3d 361

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an affirmative defense in Gator's answer to the State's CPA action, which was consolidated with Gator's petition, and thus the superior court's order addresses the Second Amendment claim.

3. We have accepted amici briefs from the National Rifle Association of America, the Firearms Policy Coalition, the Gunowners of America Inc. et al., the National Shooting Sports Foundation Inc., the Goldwater Institute, the Alliance for Gun Responsibility and Brady Center to Prevent Gun Violence, the NAACP Alaska/Oregon/Washington State Area Conference, and the Second Amendment Foundation.

(2023). Article I, section 24 of the Washington Constitution provides that "[t]he right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain or employ an armed body of men." The Second Amendment to the United States Constitution provides 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." The United States Supreme Court has held that this provision protects the right to keep and bear arms as a means of self-defense. *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 17, 142 S. Ct. 2111, 213 L. Ed. 2d 387 (2022) (hereinafter *Bruen*). That right is fully applicable to the states through the Fourteenth Amendment. *McDonald v. City of Chicago*, 561 U.S. 742, 771-76, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010) (partial plurality opinion).

Although we "interpret the state right separately and independently of its federal counterpart," *State v. Jorgenson*, 179 Wn.2d 145, 155, 312 P.3d 960 (2013), we have interpreted the meaning of the word "arms" using Second Amendment precedent. *See City of Seattle v. Evans*, 184 Wn.2d 856, 869, 366 P.3d 906 (2015) ("[T]his approach [to the parameters of the right to bear arms] . . . is rooted in the United States Supreme Court's decision in *Heller*."[4]). Thus, our interpretation of the scope of the two protections—that is, the meaning of "arms" under

4. *District of Columbia v. Heller*, 554 U.S. 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008).

article I, section 24 and the Second Amendment, is not inconsistent. In other words, an "arm" under article I, section 24 must be an "arm" under the Second Amendment and vice versa. Accordingly, we begin by ascertaining whether ESSB 5078 regulates "arms" within the meaning of these provisions, guided by both the United States Supreme Court precedent that gives meaning to the plain text of the Second Amendment and our own cases that apply those precedents.

The State argues ESSB 5078 falls outside both protections of the right to bear arms because LCMs are neither "arms" nor commonly used for self-defense. The State argues that the plain text of the two provisions applies only to "arms," and that LCMs cannot be construed as "arms" because they are not weapons but merely a subclass of containers for ammunition cartridges that are added to weapons to make them "more capable of mass murder." Appellant's Br. at 24. The State's expert witness, Professor Dennis Baron, testified that English speakers during the Founding and Reconstruction eras would have understood the term "arms" to refer to weapons, not ammunition or cartridge boxes (the historical analog to magazines). 4 Clerk's Papers (CP) at 1405-06. Further, the State argues that LCMs are not "traditionally or commonly used for self-defense" because they are "military-style weapons" equipped to serve "combat functions, not self-defense functions." Appellant's Br. at 28-29 (boldface omitted).[5] The State argues that

5. Citing *Nat'l Ass'n for Gun Rights v. Lamont*, 685 F. Supp. 3d 63, 101 (D. Conn. 2023) ("LCMs were originally designed for military use in World War I and did not become widely available

LCMs have "virtually no utility for self-defense" because "individuals almost never fire more than ten rounds in self-defense," and instead the average number of shots fired in self-defense is merely 2.2. Appellant's Br. at 30, 31; 5 CP at 1510 (expert report of Lucy P. Allen).

The superior court held that LCMs are "arms" because LCMs are magazines. It reasoned that the purpose of a magazine is to facilitate the function of a semiautomatic weapon, and thus magazines are a "critical functional component" of a firearm or, in Gator's words, an "integral component" of a firearm. 6 CP at 2109-63; Resp'ts' Br. at 10. Accordingly, the superior court "infer[red] from the record . . . that magazines are commonly and lawfully possessed by law abiding citizens for lawful purposes." 6 CP at 2121. Further, Gator's argues that because there are between "30 million to 159.8 million" LCMs in circulation, "[t]hey are common and therefore protected." Resp'ts' Br. at 51 (citing CP at 1029), 52. To assert that these LCMs are used for self-defense, Gator's relies on William English's *2021 National Firearms Survey: Analysis of Magazine Ownership and Use*, asserting that 48 percent of gun owners have owned LCMs, and 71 percent of those

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for civilian use until the 1980s."); *Kolbe v. Hogan*, 849 F.3d 114, 125 (4th Cir. 2017) (LCMs "'are particularly designed and most suitable for military and law enforcement applications.'" (quoting court papers)), *abrogated on other grounds by Bruen*, 597 U.S. 1; Bureau of Alcohol, Tobacco, Firearms & Explosives, U.S. Dep't of Just., Study on the Importability of Certain Shotguns 5 (Jan. 2011) ("[L]arge capacity magazines are a military feature."), https://www.atf.gov/resource-center/docs/january-2011-importability-certain-shotgunspdf/download [https://perma.cc/C756-3L69].

individuals reported that they owned them for "defensive purposes." William English, *2021 National Firearms Survey: Analysis of Magazine Ownership and Use* 4 (Georgetown McDonough Sch. of Bus., Research Paper No. 4444288, 2023), https://ssrn.com/abstract=4444288.[6] Gator's also argues that the State's assertion that LCMs are designed for military use is actually evidence *in favor* of a weapon's classification as a protected "arm" because certain knives have been found to be "arms" due to their military origins and purpose. Resp'ts' Br. at 39 (citing *Evans*, 184 Wn.2d at 867-68, 870).

In *Heller*, the United States Supreme Court held that "the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding," and the Court interpreted "arms" to include "'any thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another.'" 554 U.S. at 582, 581 (quoting 1 Timothy Cunningham, A New and Complete Law Dictionary (1771)). In *Evans*, this court evaluated whether a small, fixed-blade "paring" knife, carried for self-defense, was covered by the Washington

6. *But see* Deborah Azrael et al., *A Critique of Findings on Gun Ownership, Use, and Imagined Use from the 2021 National Firearms Survey: Response to William English*, 78 SMU L. Rev. (forthcoming 2025), https://ssrn.com/abstract=4894282 (discussing various methodological concerns with the English study, including inaccuracies associated with the format of the study and the survey's small sample size, ambiguous questions, significant disparity with other reputable surveys, and failure to disclose the survey's source of funding).

Constitution by surveying the scope of "arms" under the Second Amendment, and in particular in light of the United States Supreme Court's interpretation of the term in *Heller*. 184 Wn.2d 856. We held that

> the right to bear arms protects *instruments that are designed as weapons traditionally or commonly used by law abiding citizens for the lawful purpose of self-defense*. In considering whether a weapon is an arm, we look to the *historical origins and use* of that weapon, noting that a weapon does not need to be designed for military use to be traditionally or commonly used for self-defense. We will also consider the weapon's *purpose and intended function*.

Evans, 184 Wn.2d at 869 (emphasis added). We determined that although some fixed-blade knives could be considered "arms," the origins, use, purpose, and function of paring knives were culinary, in contrast to other knives that were "designed for and historically used in battle." *Evans*, 184 Wn.2d at 872. We concluded that although paring knives *could* be used as a weapon for self-defense, not all instruments that "may plausibly be used for self-defense" are protected, and the paring knife was not an "arm" under section 24. *Evans*, 184 Wn.2d at 873.

We conclude that LCMs are not protected by article I, section 24 because (1) LCMs are not instruments designed as weapons, (2) LCMs are not traditionally or commonly used for self-defense, and (3) the right to purchase

LCMs is not among the ancillary rights necessary to the realization of the core right to bear arms in self-defense.

In order to determine whether LCMs are "instruments that are designed as weapons traditionally or commonly used by law abiding citizens for the lawful purpose of self-defense," it is first logically necessary to determine whether they are even instruments designed as *weapons*. *Evans*, 184 Wn.2d at 869. First, LCMs are not weapons—they are attachments to weapons, or accessories. Or, in the words of *Heller*'s historical definition of "arms," LCMs are not used "to cast at . . . another" because they are merely attached to a firearm in order to modify the firearm's capacity "to cast at . . . another" without reloading—the LCM itself does not cast the round but feeds the round into the firearm. Further, it is not factually accurate to say that LCMs are "integral components" of firearms. Although the parties agree that certain types of firearms require the addition of a detachable magazine to function, ESSB 5078 does not regulate detachable magazines. ESSB 5078 regulates only LCMs—magazines that are capable of accepting more than 10 rounds of ammunition—and Gator's admits that no firearm requires a magazine of this particular capacity to function. Thus, LCMs are not required for a firearm to function. The superior court's conclusion that LCMs are required for the firearm to work and therefore they are "designed as weapons" is incorrect.

Further, the trial court's logic that magazines are arms, and thus large capacity magazines are necessarily also arms is problematic. First, we have never held that magazines are arms, and the fact that a semiautomatic

weapon will not function as intended without one does not conclusively establish that they are. More importantly, the constitutional protection of some instruments in a category does not require the protection of all instruments belonging to the same category. We expressly rejected that logic in *Evans*, when we held that the constitutional protection of some knives did not require the protection of knives that did not have a self-defense purpose. *See Evans*, 184 Wn.2d at 871-72. That precedent establishes that the proper inquiry is whether the *instrument that is being regulated* is protected by the state constitution, not whether the instrument belongs to a *class* that could not be banned as a whole. And the argument that magazines are protected because they are an "integral component" of a certain type of firearm (i.e., semiautomatics) is further troubling because, logically, the fact that the government could not ban an entire class of firearm component without impairing the right to bear arms does not mean that the government is not permitted to restrict a specific subclass of that component. If we were to adopt Gator's analysis on this point, the constitutional right would protect not only firearms, but it would protect all subtypes of components for all types of firearms.

In sum, we hold that LCMs are not "arms" in the constitutional sense because they are designed to be attached to a weapon in order to modify it by increasing that firearm's ammunition capacity, and they are not designed for use as a weapon themselves.[7]

7. It is also worth noting that federal firearm regulation does not treat magazines as firearms, as magazines do not fall within the definition codified in the Gun Control Act of 1968, 18 U.S.C. § 921(a)

Accordingly, we hold that LCMs do not fit the constitutional definition of "arms" before even reaching whether they are "commonly used for self-defense." However, LCMs also fall outside either protection of the right to bear arms because the provisions protect only those arms that are commonly used for self-defense, and we have been presented with no credible and persuasive evidence or argument that LCMs are commonly used for such a purpose. Although Gator's offers ownership statistics, whether LCMs are common in circulation does not inform this court whether they are "commonly used for self-defense," as how many LCMs are owned has no bearing on what those LCMs are actually used *for*. To that point, there is only minimal and highly contested evidence, which we do not find sufficient to bear Gator's burden to prove LCMs fall within constitutional protection.

Further, although in *Evans* the military origins or use of certain knives was useful for determining whether those knives were arms and protected, that evidence was informative because it was not clear whether the purpose of the knives was for combat or utility. 184 Wn.2d at 871-72. Here, it is clear that LCMs are attached to firearms in order to increase their ammunition capacity above

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(3) (defining a "firearm" as "(A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device"). For example, because magazines also do not fit the statute's definition of "ammunition," persons not permitted to possess firearms or ammunition under 18 U.S.C. § 922(g) may still possess magazines.

10 rounds, and there is undoubtedly a combat purpose behind the use of firearms. But our holding that "a weapon *does not need to be* designed for military use to be traditionally or commonly used for self-defense" does not establish whether such a purpose is generally evidence *for or against* the weapon's qualification under the *Evans* test. 184 Wn.2d at 869. Rather, it is better understood as a negation of the argument that a weapon can be protected *only* if it is designed for military use—a point that was relevant in the context of analyzing whether a paring knife was disqualified from protection given that it was unlike knives that had a clearer combat purpose, but is not relevant when analyzing an instrument that is indisputably intended for combat. No showing has been made that the origins, use, purpose, or intended function of LCMs support the conclusion that they are commonly used for self-defense, and thus we hold that they are not within the scope of the rights to bear arms under the Washington and United States Constitutions.

The United States Supreme Court has interpreted the "central component" of the Second Amendment to be the "inherent right of self-defense." *Heller*, 554 U.S. at 599 (emphasis omitted), 628. Accordingly, federal courts of appeals have found the Second Amendment also "protects ancillary rights necessary to the realization of the core right to possess a firearm for self-defense." *Teixeira v. County of Alameda*, 873 F.3d 670, 677 (9th Cir. 2017) (recognizing right to purchase arms, but no corresponding right to sell them); *Jackson v. City & County of San Francisco*, 746 F.3d 953, 967 (9th Cir. 2014) (recognizing right to purchase ammunition), *cert.*

denied, 576 U.S. 1013 (2015), *abrogation on other grounds recognized by Baird v. Bonta*, 81 F.4th 1036, 1043 (9th Cir. 2023); *Ezell v. City of Chicago*, 651 F.3d 684, 704 (7th Cir. 2011) (recognizing right to access gun ranges in order to acquire and maintain proficiency in firearm use). These rights implicate the Second Amendment because the constitutional protection is broader than simply protecting "arms"—it protects individual conduct that falls within the scope of the right to bear arms in self-defense, and that implies protection of corresponding rights that are necessary to give the right to possess a firearm for self-defense meaning. *See Bruen*, 597 U.S. at 17 ("[W]hen the Second Amendment's plain text covers an *individual's conduct*, the Constitution presumptively protects that conduct." (emphasis added)). For example, in *Jackson*, the Ninth Circuit Court of Appeals found a prohibition on the sale of hollow-point ammunition regulated conduct within the scope of the Second Amendment, reasoning that although the Second Amendment does not explicitly protect ammunition, "without bullets, the right to bear arms would be meaningless. A regulation eliminating a person's ability to obtain or use ammunition could thereby make it impossible to use firearms for their core purpose." 746 F.3d at 967.

The right to purchase LCMs does not belong among the "ancillary rights" recognized in *Teixeira*, *Jackson*, and *Ezell*. Unlike the right to purchase arms, the right to acquire ammunition, or the right to access gun ranges, the ability to purchase LCMs is not necessary to the core right to possess a firearm in self-defense. Here, without the right to purchase LCMs, an individual may still own,

possess, operate, repair, and maintain proficiency with firearms, as LCMs are not an "integral component" of firearms. As noted above, some firearms may require a magazine to function as intended, but there are no firearms that require an LCM to function. This is unlike ammunition, which is an integral component of a firearm because ammunition is necessary for a firearm to function as intended: a lack of ammunition would render the firearm a paperweight—or, at best, a scarcely effective bludgeoning tool—and it no longer serves its function for the core purpose of self-defense. In contrast, without an LCM, a semiautomatic firearm is still capable of firing (up to 10 rounds, if it is equipped with a magazine falling outside ESSB 5078's restriction, or 1 round at a time, if it is equipped with none at all) until the operator must simply reload to continue operating the firearm as desired. This fulfills the firearm's purpose as a tool for realizing the core right of self-defense. This regulation does not limit the number of bullets or magazines that may be purchased or possessed. By restricting only magazines of a capacity greater than 10, the statute effectively regulates the maximum capacity of magazines, leaving the weapon fully functional for its intended purpose. Thus, we are not convinced that the restriction here renders the right to bear arms in self-defense meaningless. Indeed, we can safely say that individuals are still able to exercise the core right to bear arms when they are limited to purchasing magazines with a capacity of 10 or fewer.

Because LCMs are not "arms" in the constitutional sense, and the right to purchase LCMs is not among the ancillary rights protected by the Second Amendment,

neither article I, section 24 nor the Second Amendment offer any protection to against ESSB 5078's restriction on LCMs. Thus, the superior court's holding that ESSB 5078 is unconstitutional under those provisions was incorrect. Accordingly, we reverse the trial court's order and remand for further proceedings consistent with this opinion.

II. Reassignment

For the aforementioned reasons, we find that ESSB 5078 complies with the constitutional safeguards of the Second Amendment as well as article I, section 24 of the Washington Constitution. Accordingly, we reverse the superior court's order granting Gator's motion for summary judgement and denying that of the State, and remand for further proceedings consistent with our holding. The result of this outcome is that the superior court is left to consider the State's consumer-protection enforcement action against Gator's for violation of the LCM ban. In such a circumstance, the State has requested reassignment on remand.

Parties generally seek reassignment to another judge through a motion for recusal in the trial court, but a party may also seek reassignment for the first time on appeal where, "for example, the trial judge will exercise discretion on remand regarding the very issue that triggered the appeal and has already been exposed to prohibited information, expressed an opinion as to the merits, or otherwise prejudged the issue." *State v. McEnroe*, 181 Wn.2d 375, 387, 333 P.3d 402 (2014) (footnotes omitted). Additionally, "where review of facts in the record shows

the judge's impartiality might reasonably be questioned, the appellate court should remand the matter to another judge." *State v. Solis-Diaz*, 187 Wn.2d 535, 540, 387 P.3d 703 (2017).

In *McEnroe*, we declined to reassign a case on the basis that the trial judge allegedly "'ignored binding precedent'" because "legal errors alone do not warrant reassignment" and our decision limited the trial court's discretion as to the issue that was appealed. 181 Wn.2d at 388-89 (quoting court papers) ("Even if [the trial judge] holds 'strongly held views' about the contents of charging documents, he is bound on remand by this court's decision."). In *Solis-Diaz*, we granted reassignment where the same judge that originally sentenced the defendant was assigned to resentence the defendant after an appeal, the judge imposed the same sentence at resentencing, and then a subsequent appeal required the same judge to resentence that same defendant a third time, because we found the record reflected the sentencing judge's "frustration and unhappiness at the Court of Appeals requiring him to address anew [the defendant's sentence]." 187 Wn.2d at 541, 538 ("[The trial judge] opined that the sentence he had previously imposed was 'precisely what the Legislature intended' in the circumstances of this case." (quoting court papers)).

Here, Judge Bashor's legal errors in determining that ESSB 5078 was unconstitutional are insufficient to warrant reassignment because our order that the statute is constitutional removes Judge Bashor's discretion as to the validity of ESSB 5078 for the remainder of the

case, which will then relate only to consumer-protection enforcement. Although Judge Bashor will have discretion as to the remedies and penalties for Gator's alleged violation of ESSB 5078, the "issue that triggered the appeal" was limited to the validity of the statute Gator's is alleged to have violated. Given an order that the statute is constitutional and therefore valid, Judge Bashor will be bound to our decision on that issue. Although the record reflects Judge Bashor's strong feelings as to the constitutionality of ESSB 5078, this does not rise to the level of partiality present in *Soliz-Diaz*, because those feelings do not relate to the issues for which Judge Bashor maintains discretion after we order ESSB 5078 is constitutional, unlike the sentencing judge in *Soliz-Diaz*, whose feelings related to an issue for which he maintained significant discretion. Thus, we deny the State's request to reassign the case on remand.

Appendix A

CONCLUSION

We hold ESSB 5078 is constitutional under both the Washington and United States Constitutions. We reverse the superior court and remand for proceedings consistent with that order but deny the State's request for reassignment.

/s/ Johnson, J.
Johnson, J.

WE CONCUR:

/s/ Stephens, C.J.
Stephens, C.J.

/s/ Yu, J.
Yu, J.

/s/ Madsen, J.
Madsen, J.

/s/ Montoya-Lewis, J.
Montoya-Lewis, J.

/s/ González, J.
González, J.

/s/ Mungia, J.
Mungia, J.

Appendix A

GORDON McCLOUD, J. (dissenting)—The Second Amendment protects the individual right to keep and bear arms. *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 28, 142 S. Ct. 2111, 213 L. Ed. 2d 387 (2022); *District of Columbia v. Heller*, 554 U.S. 570, 592, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008); *McDonald v. City of Chicago*, 561 U.S. 742, 780, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010) (plurality portion); U.S. CONST. amends. II, XIV (incorporating amend. II). More specifically, it protects the right of law-abiding people[1] to keep and bear arms "'in common use'"—not just arms that the government approves of.[2] And it protects that conduct when it is done "for lawful purposes" including, but not limited to, "self-defense"[3]—not just when it involves returning fire, as the State seems to contend. Finally, the Second Amendment's protection of that conduct is the highest in "the home, where the need for defense of self, family, and property is most acute." *Heller*, 554 U.S. at 628, 128 S.Ct. 2783; *McDonald*, 561 U.S. at 780, 130 S.Ct. 3020 (plurality portion).

Engrossed Substitute Senate Bill 5078 (ESSB 5078),[4] which bans the manufacture, import, distribution, or sale

1. *United States v. Rahimi*, 602 U.S. 680, 699, 144 S. Ct. 1889, 219 L. Ed. 2d 351 (2024) (laws restricting possession of arms by "'felons or the mentally ill'" are "'presumptively lawful'" (quoting *Heller*, 554 U.S. at 626, 627 n.26)).

2. *See Heller*, 554 U.S. at 624 (quoting *U.S. v. Miller*, 307 U.S. 174, 179, 59 S. Ct. 816, 83 L. Ed. 1206 (1939)), 628, 636.

3. *Heller*, 554 U.S. at 582; *McDonald*, 561 U.S. at 780, 130 S.Ct. 3020 (plurality portion).

4. 67th Leg., Reg. Sess. (Wash. 2022).

of any firearm magazine capable of holding more than 10 rounds of ammunition,[5] even for self-defense inside the home, violates these constitutional protections.

Millions of law-abiding people have chosen semiautomatic firearms as the primary tool for lawful purposes such as self-defense in the home. *Heller*, 554 U.S. at 628-29; *McDonald*, 561 U.S. at 767-78. Millions of people have chosen to feed ammunition into those commonly used firearms with magazines capable of holding more than 10 rounds.[6] It necessarily follows that the Second Amendment protects the arms-bearing conduct at issue here, that is, keeping and bearing operable semiautomatic firearms with commonly used magazines for self-defense and other lawful purposes—including in the home.[7]

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5. RCW 9.41.370(1), .010(25).

6. "Although data are imprecise, experts estimate that approximately half of privately owned magazines hold more than ten rounds." *Duncan v. Bonta*, __ F.4th __ (9th Cir. 2025). "'Most pistols are manufactured with magazines holding ten to seventeen rounds, and many popular rifles are manufactured with magazines holding twenty or thirty rounds.'" *Id.* (quoting *Kolbe v. Hogan*, 849 F.3d 114, 129 (4th Cir. 2017)).

7. The State argues that ESSB 5078 is not a "total ban" on large capacity magazines (LCMs) because it does not dispossess individuals of LCMs they owned before the law went into effect. But the law prevents any new LCMs from lawfully entering Washington. People who lawfully own LCMs now cannot replace them if they break. And no one can legally obtain a new LCM in the state. That certainly appears to effectively ban the purchase and use of LCMs in Washington.

The State argues—and the majority agrees—that ESSB 5078 does not implicate "arms-bearing conduct" at all. They are incorrect. First, the State argues that magazines are not firearms because they're accessories or components, and accessories or components don't count for Second Amendment purposes. But the Second Amendment protects the conduct of bearing arms for self-defense and other lawful "purposes"—it does not just protect inanimate objects like firearms or magazines in isolation—and it is hard to imagine a semiautomatic firearm fulfilling its key purposes, including the purpose of self-defense, without a magazine. (The majority's suggestion that loading cartridges individually by hand "leav[es] the weapon fully functional for its intended purpose," majority at 286, __ A.3d at __, betrays a misunderstanding of both "semiautomatic" and "self-defense.") Next, the State argues that magazines holding more than 10 cartridges might be in common use, but they are not in common use "for self-defense" because one limited, non-peer-reviewed study concluded that people fired an average of only 2.2 rounds in self-defense. 5 Clerk's Papers (CP) at 1510. But we don't measure whether an arm is in "common use" for "self-defense" or "other lawful purposes" by counting the number of rounds an "average" desperate victim is able to discharge when forced to return fire.

The only way for the State to avoid the conclusion that ESSB 5078 violates the Second Amendment is to show that similar laws from our nation's early history limited the right to bear arms in a similar way and for a similar reason—as the United States Supreme Court says, for a similar "how and why." *N.Y. State Rifle*, 597 U.S. at 29.

The State fails to make this showing. Most of the laws it cites as supposedly similar regulate carrying, rather than banning a common arm completely (as ESSB 5078 does). Other laws the State cites as historical analogs are from the 1930s and later, well outside the time periods the United States Supreme Court has identified as relevant to this inquiry.

Finally, the State argues that we should view our nation's early limits on the right to keep and bear arms at an extremely high level of generality—so high that we characterize those old laws as barring weapons once society weighs their utility against their danger and decides that they are too dangerous. But that is precisely the sort of policy-laden interest-balancing that the United States Supreme Court has explicitly barred under the Second Amendment. *Id.* at 22-23 (quoting *Heller*, 554 U.S. at 634; *McDonald*, 561 U.S. at 790-91 (plurality portion)). And it is the sort of interest-balancing that repressive governments have historically used to suppress opposition.[8]

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8. The repressive governmental practice of depriving disfavored groups of the ability to act in self-defense has a long and sordid history. The *Heller* Court summarized the long history of English rulers disarming dissidents and disfavored religious groups, including George III's attempts to disarm his political opponents in the American colonies. 554 U.S. at 594. And many early United States' laws restricted enslaved people from possessing firearms. Robert J. Cottrol and Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 Geo. L.J. 309, 336 n.129 (1991) (citing Act of Feb. 25, 1840, no. 20, § 1, 1840 Acts of Fla. 22-23; Act of Dec. 19, 1860, no. 64, § 1, 1860 Acts of Ga. 56; Act of Apr. 8, 1811, ch.

It necessarily follows that the Second Amendment protects the right of law-abiding individuals to keep and

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14, 1811 Laws of La. 50, 53-54; Act of Jan. 1, 1845, ch. 87, §§ 1, 2, 1845 Acts of N.C. 124). After the Civil War, "[m]any legislatures amended their laws prohibiting slaves from carrying firearms to apply the prohibition to free blacks as well." *McDonald*, 561 U.S. at 845-46 (Thomas, J., concurring in part) (footnote omitted) (citing Act of Dec. 23, 1833, § 7, 1833 Ga. Acts 226, 228; HERBERT APTHEKER, NAT TURNER'S SLAVE REBELLION 74-76, 83-94 (1966); Act of Mar. 15, 1852, ch. 206, 1852 Miss. Laws 328; Act of Jan. 31, 1831, 1831 Fla. Acts 30). American history is also filled with similarly racist gun control laws aimed at keeping arms out of the hands of Native Americans. *See, e.g.*, 1633 VA. CODE ACT X; 1798 KY. ACTS § 106; 1850 UTAH LAWS 96, § 1; 1827 FLA. ACTS 46, § 1; 1835 MO. REV. STAT § 2; *see also* Ann E. Tweedy, "*Hostile Indian Tribes . . . Outlaws, Wolves, . . . Bears . . . Grizzlies and Things Like That?" How the Second Amendment and Supreme Court Precedent Target Tribal Self-Defense*, 13 U. PA. J. CONST. L. 687, 730 (2011) (discussing President Lincoln's 1865 Proclamation that "'all persons detected in that nefarious traffic [of furnishing hostile Indians with arms and munitions of war] shall be arrested and tried by court-martial at the nearest military post'" (alteration in original) (quoting Proclamation No. 28, 13 Stat. 753 (Mar. 17, 1865))). As late as 1925, Congress enacted a law barring the sale of arms or ammunition "'within any district or country occupied by uncivilized or hostile Indians,'" and it remained in force until 1953. *Id.* at 731 (citing 25 U.S.C. § 266 (1925-1926), *repealed by* 67 Stat. 590 (1953)). And in the 1930s, Nazis seized guns from Jews as part of their path to power. *See, e.g.*, Stephen P. Halbrook, *How the Nazis Used Gun Control*, NAT'L REV. (Dec. 2, 2013, 9:00 AM), https://www.nationalreview.com/2013/12/how-nazis-used-gun-control-stephen-p-halbrook/; Jon Greenberg, *Florida Lawmaker Mangles Nazi Gun Control History*, POLITIFACT (Mar. 6, 2018), https://www.politifact.com/factchecks/2018/mar/06/-immons/florida-lawmaker-mangles-nazis-gun-control-history/ [https://perma.cc/AQ4YFC44].

bear semiautomatic weapons equipped with magazines in common use for lawful purposes, especially in the home. The new state statute violates that Bill of Rights protection because it effectively bans all law-abiding individuals from acquiring and possessing an arm that is in common use for lawful purposes.

In a contest between a state statute and the United States Constitution, the judicial branch has the duty to uphold the Constitution. This is true even when the portion of the Constitution at issue is the Second Amendment.[9]

I therefore respectfully dissent.

I. The Second Amendment Protects the Conduct of Keeping and Bearing Arms in Common Use for "Lawful Purposes Like Self Defense"

The Second Amendment provides, "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." The Second Amendment codified a preexisting fundamental right held by "the people" that is "exercised individually and belongs to all Americans." *Heller*, 554 U.S. at 581. That right is fully incorporated against the states through the Fourteenth Amendment. *McDonald*, 561 U.S. at 779-80, 790 (plurality portion).

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9. ESSB 5078 also violates article I, section 24, as discussed in Part II *infra*.

Appendix A

The specific right that the Second Amendment protects is the right of law-abiding individuals to keep and carry "all instruments that constitute bearable arms, even those that were not in existence at the time of the founding," as long as the arm is "'in common use at the time' for lawful purposes like self-defense." *Heller*, 554 U.S. at 582, 624 (quoting *Miller*, 307 U.S. at 179); *see also McDonald*, 561 U.S. at 780 (plurality portion) (the Second Amendment protects the "personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home"). "Thus, even though the Second Amendment's definition of 'arms' is fixed according to its historical understanding, that general definition covers modern instruments that facilitate armed self-defense." *N.Y. State Rifle*, 597 U.S. at 28 (citing *Caetano v. Massachusetts*, 577 U.S. 411, 136 S. Ct. 1027, 194 L. Ed. 2d 99 (2016) (per curiam) (Second Amendment protects right to keep and bear stun guns)).

Like most fundamental rights, "the right secured by the Second Amendment is not unlimited." *Heller*, 554 U.S. at 626. It is "not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Id.* For example, the Second Amendment does not protect the right to keep and bear arms that are "'dangerous *and* unusual.'" *Id.* at 627 (emphasis added) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *148). And it does not bar the government from restricting dangerous individuals from possessing arms. *United States v. Rahimi*, 602 U.S. 680, 699, 144 S. Ct. 1889, 219 L. Ed. 2d 351 (2024) (quoting *Heller*, 554 U.S. at 626, 627 n.26). But, to reiterate, it *does* protect law-abiding individuals'

right to keep and carry "all instruments that constitute bearable arms" that are "'in common use at the time' for lawful purposes like self-defense." *Heller* 554 U.S. at 582, 624 (quoting *Miller*, 307 U.S. at 179).

The United States Supreme Court recently reaffirmed these principles in *N.Y. State Rifle*, laying out the test that controls this case:

> When the Second Amendment's plain text covers an individual's *conduct*, the Constitution presumptively protects that *conduct*. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation.

597 U.S. at 24 (emphasis added).

We therefore begin with the rule that the Second Amendment presumptively protects "arms-bearing conduct," *Rahimi*, 602 U.S. at 691—that is, conduct relating to "bearable arms" that are "in common use" for lawful purposes including, but not limited to, self-defense. As discussed below, magazines that hold more than 10 rounds—what ESSB 5078 calls "large capacity magazines" (LCMs)—are bearable arms that are in common use for lawful purposes. Acquiring and using such arms therefore constitutes arms-bearing conduct presumptively protected by the Second Amendment. Because ESSB 5078 severely restricts this arms-bearing conduct, I would hold that the State has the burden to show

that the regulation is consistent with the nation's history of firearms regulation—a burden that in this case, the State fails to meet.

A. Magazines, including LCMs, are "bearable arms"

ESSB 5078, enacted in 2022, provides, "No person in this state may manufacture, import, distribute, sell, or offer for sale any [LCM]," with certain exceptions for law enforcement and military purposes. RCW 9.41.370(1). According to that law, an LCM is "an ammunition feeding device with the capacity to accept more than 10 rounds of ammunition." RCW 9.41.010(25).

A "repeating firearm" is a firearm that is capable of firing multiple rounds of ammunition without manual reloading.[10] In order to fire multiple rounds without reloading, a repeating firearm uses a "magazine," which is "a device that automatically feeds ammunition into a firearm whenever the shooter fires a bullet." *Duncan v. Bonta*, 133 F.4th 852, 861 (9th Cir. 2025). Thus, a magazine is not an optional accessory for a repeating firearm. It is a defining characteristic of a repeating firearm. As Gator's

10. Repeating firearms include weapons like manually operated repeating rifles or shotguns, in which the user must perform a manual operation like pulling back a bolt to eject spent shells and reload, as well as semiautomatic weapons, which are capable of reloading the weapon automatically after each pull of the trigger. *See, e.g.*, Firearms: An Illustrated History (D.K. Publ'g 2014).

Custom Guns[11] explains, "Without a magazine inserted, a semiautomatic weapon will not function properly" and is "essentially a single shot breechloader" like an old-fashioned musket. Resp'ts' Br. at 51, 54. And because the magazine functions as an ammunition *feeding* device, it is not just a passive receptacle for storing ammunition like a cartridge box.[12]

Thus, magazines, including what ESSB 5078 defines as "LCMs," fall squarely within *Heller*'s definition of "arms" as "'anything that a man wears for his defense, or takes into his hands, or useth in wrath to cast at or strike another.'" *Heller*, 554 U.S. at 581 (quoting 1 TIMOTHY

11. Respondents Gator's Custom Guns Inc. and its owner, Walter Wentz.

12. The State argues that a magazine is analogous to a Revolutionary-War-era "cartridge box," which was a container worn on the body that held individual rounds of ammunition that the user would manually load into a firearm. Appellant's Br. at 46-47 (citing 4 CP at 1412 (expert report of Dennis Baron, PhD)); *see also* David B. Kopel & Joseph G.S. Greenlee, *The History of Bans on Types of Arms Before 1900*, 50 J. Legis. 223, 254 (2024). According to the State, cartridge boxes were historically considered accessories, not arms, so at the time of the nation's founding, a magazine would have been considered an accessory, not an arm. Appellant's Br. at 46-47. This argument relies on a fundamental misunderstanding of a magazine's function. Like a cartridge box, a magazine stores ammunition. But unlike a cartridge box, a magazine is not just an inert container for ammunition: as described above, it uses a spring or other mechanism to feed rounds of ammunition into the gun's firing chamber. It is an integral part of the firearm, like a trigger or a grip. Thus, a cartridge box is not a persuasive "historical analogue" to a magazine. 4 CP at 1417.

CUNNINGHAM, A NEW AND COMPLETE LAW DICTIONARY (1771)). A magazine is essential to a user's ability to use a repeating firearm "to cast at or strike another" in the manner it was designed to do.

The State argues that LCMs are not "bearable arms" because, while semiautomatic weapons require some kind of magazine to function as intended, no semiautomatic weapon specifically requires an LCM to function. Appellant's Br. at 49. But that is irrelevant: "under [*N.Y. State Rifle*], a 'modern instrument[] that *facilitate*[*s*][13] armed self-defense' is an arm entitled to the 'prima facie' protection of the Second Amendment." *Nat'l Ass'n for Gun Rts. v. Lamont*, 685 F. Supp. 3d 63, 94 (D. Conn. 2023) (most alterations in original) (emphasis added) (quoting *N.Y. State Rifle*, 597 U.S. at 28 (citing *Caetano*, 577 U.S. at 411-12)). An LCM—like all magazines—is incontrovertibly an instrument[14] that "facilitates armed self-defense" because it supplies ammunition to a repeating firearm so that the firearm functions as intended.

And, critically, the Second Amendment does not just protect "arms"—it protects "arms-bearing conduct." So it protects the right to purchase arms and ammunition and the right to access gun ranges to maintain proficiency in firearm use. *Teixeira v. County of Alameda*, 873 F.3d 670,

13. "Facilitate" means "to make easier or less difficult : free from difficulty or impediment." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 812 (1993).

14. "Instrument" means "**1 a :** a means whereby something is achieved, performed, or furthered. . . . **2 :** UTENSIL, IMPLEMENT." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1172 (1993).

678 (9th Cir. 2017) (citing *Ill. Ass'n of Firearms Retailers v. City of Chicago*, 961 F. Supp. 2d 928, 930 (N.D. Ill. 2014)); *Jackson v. City & County of San Francisco*, 746 F.3d 953, 967 (9th Cir. 2014) (right to purchase ammunition); *Ezell v. City of Chicago*, 651 F.3d 684, 704 (7th Cir. 2011) (right to access gun ranges); *see also Miller*, 307 U.S. at 179-80 (recognizing that "'[t]he possession of arms also implied the possession of ammunition'" (quoting 1 HERBERT L. OSGOOD, THE AMERICAN COLONIES IN THE SEVENTEENTH CENTURY (1904))).

The reason is that if law-abiding people cannot obtain a firearm, an integral component of a firearm, or ammunition, or practice with firearms, then "the core Second Amendment right to keep and bear arms for self-defense 'wouldn't mean much.'" *Teixeira*, 873 F.3d at 677 (quoting *Ezell*, 651 F.3d at 704). Thus, as numerous courts have found, the Second Amendment also protects acquisition and possession of magazines, including LCMs. *Nat'l Ass'n for Gun Rts.*, 685 F. Supp. 3d at 94 ("LCMs are 'arms' for purposes of the Second Amendment as defined in [*N.Y. State Rifle*] and *Heller*."). For example, in a case like this, which also involved a bar on LCMs, the Third Circuit Court of Appeals reasoned that 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 N.J. Rifle & Pistol Clubs, Inc. v. Att'y Gen. N.J.*, 910 F.3d 106, 116 (3d Cir. 2018) (citing *Jackson*, 746 F.3d 953).[15]

15. Some of the federal cases cited above applied a pre-*N.Y. State Rifle* analysis that first asked if the regulation infringed

And, as the United States Court of Appeals for the District of Columbia explained in another LCM ban case, "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, 'such as a firing pin.'" *Hanson v. District of Columbia*, 120 F.4th 223, 232 (D.C. Cir. 2024) (reviewing injunction and affirming district court's ruling that party challenging LCM ban would very likely succeed at showing that LCMs are Second Amendment arms) (quoting *Kolbe v. Hogan*, 813 F.3d 160, 175 (4th Cir. 2016), *rev'd en banc*, 849 F.3d 114 (4th Cir. 2017)). ESSB 5078 is just such an attempt at sidestepping the Second Amendment with "a regulation prohibiting possession at the component level."

The State concedes that "it is possible that a restriction on *all* magazines would infringe on the right to bear arms because it would make the weapons that rely on them unusable." Appellant's Br. at 49. But it continues that a restriction on LCMs does not regulate conduct within the scope of the Second Amendment because such magazines "are not necessary for *any* weapon to fire exactly as intended." *Id.*

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on the right to keep and bear arms, then applied an interest-balancing test to determine if the regulation was constitutional. *N.Y. State Rifle* forbade the use of such interest-balancing tests when evaluating Second Amendment rights. Thus, those portions of the opinions are no longer good law. But *N.Y. State Rifle* did not disturb the portions of those opinions determining whether a regulation implicated the Second Amendment in the first instance.

The State's reasoning conflicts with controlling United States Supreme Court precedent. *Heller* holds, "It is no answer to say, as petitioners do, that it is permissible to ban the possession of handguns so long as the possession of other firearms (*i.e.*, long guns) is allowed. It is enough to note, as we have observed, that the American people have considered the handgun to be the quintessential self-defense weapon." 554 U.S. at 629. Following *Heller*'s logic, the State cannot place an arbitrary ban on magazines with a certain capacity just because magazines with lesser capacities are still allowed. *See also Jackson*, 746 F.3d at 967 (law banning one *type* of bullet regulated conduct within the scope of the Second Amendment because bullets *in general* are necessary to "use firearms for their core purpose," even though law did not affect legality of other types of bullets).

The majority adds that an LCM falls outside the definition of "arm" because it "does not cast the round, but feeds the round into the firearm." Majority at 10. Well, the grip, trigger, and receiver don't "cast" the round either (the force from the explosion of the primer and ignition of the propellant does). So examining individual components of a firearm as the majority does leads to the absurd result that the government can ban triggers, grips, receivers, or firing pins because none of those integral components, in isolation, are capable of "cast[ing]" ammunition at a target, either.[16] That can't be right. It conflicts with the logic of

16. The majority notes that Congress did not include magazines in its definition of "firearms" in the Gun Control Act of 1968, 18 U.S.C. § 921(a)(3). Majority at 284 n.7, ___ A.3d at ___ n.7. But an act of Congress can't change the meaning of the

Heller because it ignores the fact that a firearm requires each of its core component parts to function as intended. And it conflicts with the logic of *N.Y. State Rifle*, because that decision made clear that the Second Amendment protects anything that "facilitate[s] armed self-defense," 597 U.S. at 28, and magazines of all sorts, standard as well as what ESSB 5078 calls "large," certainly do that. (The majority does not even mention this definition of "arms" from *N.Y. State Rifle*.)

The majority also confuses the definitions of "arm" under state and federal law. It is true that in *City of Seattle v. Evans*, we held that article I, section 24's right to bear arms was limited to "instruments that are designed as weapons traditionally or commonly used by law-abiding citizens for the lawful purpose of self-defense." 184 Wn.2d 856, 869, 366 P.3d 906 (2015). But this definition of protected "arms" from *Evans* differs from the definition of protected "arms" under the Second Amendment precedent discussed above. Most notably, the United States Supreme Court has never held that an instrument must be "designed as a weapon" to enjoy Second Amendment protection. But the majority appears to hold that the fact that so-called LCMs "are not designed for use as a weapon themselves" means that they can't be considered weapons by the United

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Constitution. And even if it could, that act of Congress recognizes that certain components of firearms can themselves be considered firearms: if an optional silencer can be considered a firearm, then certainly a necessary magazine can too. *See* 18 U.S.C. § 921(a)(3)(C).

States Supreme Court. Majority at 11.[17] That's not logical. This court can look to Second Amendment precedent to interpret our state constitutional right to bear arms; but United States Supreme Court precedent—not our *Evans* decision—controls the meaning of arms under the Second Amendment.[18]

The result, under controlling Supreme Court precedent, is that magazines, including LCMs, are "bearable arms."

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17. Further, the *Evans* definition seems broader than the Second Amendment definition to the extent that it protects weapons that are either "traditionally *or* commonly" used in self-defense. 184 Wn.2d at 869 (emphasis added). *Heller* and *N.Y. State Rifle* seem to require that an arm be "in common use" at the present time—in other words, not "dangerous and unusual" at the present time—to qualify for Second Amendment protection. *E.g.*, *N.Y. State Rifle*, 597 U.S. at 47 ("Whatever the likelihood that handguns were considered 'dangerous and unusual' during the colonial period, they are indisputably in 'common use' for self-defense today.").

18. The majority states that because this court has interpreted our state constitutional right to bear arms using United States Supreme Court Second Amendment precedent as guidance, it follows that "an 'arm' under article I, section 24 must be an 'arm' under the Second Amendment *and vice versa*." Majority at 5 (emphasis added). This is a logical fallacy akin to saying that because all squares are rectangles, all rectangles must also be squares. *See* Ruggero J. Aldisert, Logic for Lawyers: A Guide to Clear Legal Thinking 220 (2012) (ebook). While this court is free to model our state constitutional analysis on Second Amendment precedent, as a matter of logic and the supremacy clause, it does not follow that Second Amendment precedent must follow our court's analysis. U.S. Const. art. VI, cl. 2.

B. LCMs are commonly used for lawful purposes including self-defense

As stated, "the Second Amendment protects the possession and use of weapons that are "'in common use at the time'"" for lawful purposes including, but not limited to, self-defense. *N.Y. State Rifle*, 597 U.S. at 21 (quoting *Heller*, 554 U.S. at 627 (quoting *Miller*, 307 U.S. at 179)).[19] As courts across the country have found, magazines with a capacity of more than 10 rounds are very commonly possessed by law-abiding Americans. "Although data are imprecise, experts estimate that approximately half of privately owned magazines hold more than ten rounds." *Duncan*, 133 F.4th at 862. "'Most pistols are manufactured with magazines holding ten to seventeen rounds, and many popular rifles are manufactured with magazines holding twenty or thirty rounds.'" *Id.* (quoting *Kolbe*, 849 F.3d at 129).

In other words, "[t]here may well be some capacity above which magazines are not in common use but . . . that capacity surely is not ten." *Heller v. District of Columbia*, 399 U. S. App. D.C. 314, 670 F.3d 1244, 1261

19. The majority errs by stating that the Second Amendment "protect[s] only those arms that are commonly used for self-defense." Majority at 12. While "self-defense is 'the *central component* of the [Second Amendment] right,'" it is not the only component. *N.Y. State Rifle*, 597 U.S. at 32-33 (alteration in original) (quoting *Heller*, 554 U.S. at 599, and citing *McDonald*, 561 U.S. at 767, 130 S.Ct. 3020). *Heller* refers to the right to keep and bear arms for "traditionally lawful purposes, *such as* self-defense within the home." 554 U.S. at 577 (emphasis added).

(2011) (*Heller* II); *see also N.Y. State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 255 (2d Cir. 2015) ("Even accepting the most conservative estimates cited by the parties and by amici, the . . . [LCMs] at issue are 'in common use' as that term was used in *Heller*.");[20] David B. Kopel, *The History of Firearm Magazines and Magazine Prohibitions*, 78 ALB. L. REV. 849, 859 (2015) ("The most popular rifle in American history is the AR-15 platform, a semiautomatic rifle with standard magazines of twenty or thirty rounds.").

It necessarily follows that the Second Amendment protects the conduct at issue here: keeping and bearing semiautomatic firearms equipped with a commonly used magazine. A firearm with an LCM is in the same category as a firearm with a smaller capacity magazine because it is in common use for self-defense or other lawful purposes.

C. The State's arguments to the contrary flout precedent and logic

The State argues that even if LCMs are commonly *possessed* by law-abiding Americans, they are not widely "used" for self-defense. This argument fails for several reasons.

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20. While the superior court appeared to sustain the State's hearsay objection to Gator's evidence about the number of LCMs in circulation, the superior court also found that "the many cases related to LCMs cited by counsel and this Court's case law review yields [the conclusion that LCMs] are extremely widespread in civilian hands." 6 CP at 2111, 2137. As cited above, my review of the same case law produces the same conclusion.

The first problem with the State's argument is that as mentioned, the Second Amendment does not exclusively protect the right to keep and bear arms in self-defense. *Heller*, 554 U.S. at 599. It covers the right to keep and bear arms "in common use" for other "lawful purposes" including hunting, target practice, and the like. *Id.*

The second problem with the State's argument is that its definition of the word "use" defies common sense. The State acknowledges that "guns can be used in self-defense without any shots being fired." Appellant's Br. at 32. The State undermines this acknowledgment by going on to assert that LCMs are not commonly "used" for self-defense because, it alleges, individuals are rarely forced to fire more than 10 rounds in self-defense. *Id.* at 32, 52. The State contends that the average number of shots that an individual fires in self-defense is 2.2. *Id.* at 31 (citing 5 CP at 1510 (expert report of Lucy P. Allen)).

Under the State's argument, unless a user fires 10 or more rounds, she has not "used" a firearm equipped with an LCM for self-defense. But as discussed above, keeping and bearing a firearm for self-defense covers a lot more than returning fire (even if the State's 2.2 shots statistic were trustworthy, which is debatable).[21] It covers

21. Even if the average number of shots fired were relevant to the determination of whether a firearm is in common use for self-defense, the study the State relies on has some significant shortcomings. First, it is not peer-reviewed research. Second, to determine "average number of shots fired in self-defense," the report relies on a small sample of about 1,000 national news stories from the limited time period of 2011-2017. It is unclear why that

storing, training, teaching, practicing, and keeping a home prepared. The State's argument—that the average number of shots fired in self-defense determines whether LCMs are in common "use" for self-defense—contradicts *Heller*, which held that the Second Amendment protects arms that are "typically *possessed*" for "lawful purposes." 554 U.S. at 625, 128 S.Ct. 2783 (emphasis added); *see also id.* at 629, 128 S. Ct. 2783 ("point[ing]" a gun at a burglar is one way that handguns can be used in self-defense). And when describing the historical understanding of the right to keep and bear arms, *McDonald* said "the right was also valued because the *possession* of firearms was thought to be *essential* for self-defense." 561 U.S. at 787, 130 S.Ct. 3020 (plurality portion) (emphasis added); *see also N.Y. State Rifle*, 597 U.S. at 32, 142 S.Ct. 2111 ("[I] ndividuals often 'keep' firearms in their home, *at the ready* for self-defense." (emphasis added)). Similarly, in *Caetano*, the Court reversed, on Second Amendment grounds, the petitioner's conviction for violating a state law forbidding possession of stun guns. 577 U.S. 411, 136 S.Ct. 1027. The *Caetano* Court's decision did not depend on how frequently stun gun owners fire in a self-defense scenario—no such statistic was even mentioned. Rather, as the concurrence

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time period was selected, as the report itself makes clear that more recent data about self-defense incidents is publicly available. 5 CP at 1510 nn.4, 5. Where a news story did not specify number of shots fired, the researcher "used the average for the most relevant incidents with known number of shots"; it is unclear what metric was used to determine "relevant incidents." *Id.* at 1510 n.7. (The study also examines shooting-related police reports from Portland, Oregon between 2019-2022, but it apparently did not use that data to perform its "average shots fired in self-defense" calculation. *Id.* at 1521.)

explained, the petitioner in *Caetano* had done no more than "display[]" her stun gun to ward off an attacker. *Id.* at 413, 136 S. Ct. 1027 (Alito, J., concurring); *accord Or. Firearms Fed'n v. Kotek*, 682 F. Supp. 3d 874, 921 (D. Or. 2023) ("[T]his Court agrees, that an individual need not fire a gun to use it for self-defense.").

The State continues that firearms equipped with LCMs "have virtually no utility for self-defense" *because* they are capable of firing more than 10 rounds. Appellant's Br. at 30 (citing *Duncan v. Bonta*, 19 F.4th 1087, 1104-05 (9th Cir. 2021)). It even asserts that such a weapon is "disadvantageous for self-defense." *Id.* at 9 (emphasis omitted). It is hard to understand why having additional ammunition at the ready would make it harder for a frightened victim to act in self-defense.

But even if the State's assertion were true, it is irrelevant. It amounts to an argument that the State alone gets to select the arms that individuals can use for self-defense and other lawful purposes. But the Second Amendment doesn't protect the right of the State to choose the best arm for self-defense; it protects the right of the individual to make that choice. So despite what the State prefers, under *Heller*'s "in common use" test, the popularity of an arm among the law-abiding public actually determines whether that arm enjoys Second Amendment protection. *Cf.* Appellant's Br. at 35 (decrying the superior court's application of the "in common use" test as "a misguided popularity-contest approach"). As the Supreme Court explained in *McDonald*, *Heller* held that the Second Amendment applies to handguns "because they are 'the most preferred firearm in the nation to "keep" and use

for protection of one's home and family.'" 561 U.S. at 767-68 (quoting *Heller*, 554 U.S. at 628-29). Even the *Heller* dissent agreed that this was *Heller*'s holding—as Justice Stevens acknowledged, "The [*Heller*] Court struck down the District of Columbia's handgun ban not because of the *utility* of handguns for lawful self-defense, but rather because of their *popularity* for that purpose." *McDonald*, 561 U.S. at 890 n.33 (Stevens, J., dissenting).

The majority does not adopt the State's argument that a gun equipped with an LCM must actually be fired more than 10 times to be "used" for self-defense. However, it rejects Gator's evidence about the large number of LCMs that Americans lawfully own as irrelevant to the question of whether such magazines are in common use for self-defense. Majority at 12. It does not mention that according to one survey cited by Gator's, "approximately 48% of gun owners (39 million individuals) have owned magazines that hold more than 10 rounds, and 71% of such owners indicate that they have owned such magazines for defensive purposes (Home Defense or Defense Outside the Home)." William English, *2021 National Firearms Survey: Analysis of Magazine Ownership and Use*, abstract (Georgetown McDonough Sch. of Bus., Research Paper No. 4444288, 2023); Resp'ts' Br. at 56. The majority does not explain what kind of evidence it thinks would suffice to show that an arm is in common use for self-defense. (And again, like the State, the majority erroneously states that self-defense is the only conduct protected by the Second Amendment.) Given the indisputable fact that LCMs are lawfully owned in the millions, it is more reasonable to conclude that they are in common use for one of the many lawful purposes protected by the Second Amendment—

purposes including self-defense, training, hunting, and sports. Under *Heller*, such widespread lawful possession of an arm supports the conclusion that the arm is in common use for lawful purposes. *See* 554 U.S. at 629.

The State and majority's approach is backward—instead of starting with the presumption that arms-bearing conduct is protected, *N.Y. State Rifle*, 597 U.S. at 24, they seem to start with the presumption that the State can regulate anything relating to arms at all and that the burden is on the challenger to show why the State can't do that. Under that logic, if the Second Amendment permits the State to select the right magazine capacity for users, despite the fact that magazines of greater capacity are "in common use" in the millions, the State would not have to stop at a 10 round limit. It could adopt magazine capacity limits of 9, or 5, or even 2 rounds.[22] In fact, if the State can classify firearm components as unprotected accessories, then the State could completely bar modern weapons and force the people to use outdated, poor-performing, less accurate versions of those components.

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22. Under the majority's logic, the State could probably adopt a total ban on magazines. According to the majority, a magazine is not an integral component of a semiautomatic firearm because "a semiautomatic firearm is still capable of firing" without one—if only by loading manually and shooting one round at a time. Majority at 15. In the majority's view, using a semiautomatic weapon as a single-shot weapon would still "fulfill[ ] the firearm's purpose as a tool for realizing the core right of self-defense" and would "leav[e] the weapon fully functional for its intended purpose." *Id.* As mentioned, this position shows a fundamental misunderstanding of both "semiautomatic" and "self-defense."

The Second Amendment does not allow that result. Controlling precedent makes clear that the fundamental right protected by the Second Amendment is the individual's right to keep and bear arms of one's choosing, including magazines, as long as those arms are in common use for self-defense or other lawful purposes. This precedent compels the conclusion that a regulation on firearm magazines that are capable of holding over 10 rounds constitutes a regulation on common, lawful, "arms-bearing conduct." That means that the State must prove that ESSB 5078 has a sufficiently similar historical analog to survive.

II. The State Fails To Identify a Historical Analog To Banning Magazines Capable of Holding over Ten Rounds

If a regulation covers conduct protected by the Second Amendment, then the State bears the burden of showing that the regulation is "consistent with the Nation's historical tradition of firearm regulation." *N.Y. State Rifle*, 597 U.S. at 24. A historical analog need not be a "historical *twin*." *Id.* at 30. To determine if a historical law and a modern law are analogous, we must compare "how and why the regulations burden a law-abiding citizen's right to armed self-defense." *Id.* at 29. If the "how" or the "why" are different, then the old law is not a historical analog of the new restriction.

"'Constitutional rights are enshrined with the scope they were understood to have when the people adopted them.'" *Id.* at 34 (emphasis omitted) (quoting *Heller*, 554

U.S. at 634-35). Thus, the laws that are most relevant for deciding whether ESSB 5078 has an historical analog are the laws from around the time that the Second and Fourteenth Amendments were ratified. *Id.* at 34-35. Laws that long pre- or postdate those time periods are not particularly relevant to this historical analog inquiry. *Id.*

The State fails to meet its burden of identifying such a relevant historical analog. This is because there is no relevant historical analog for regulating the ammunition capacity of firearms. As Gator's points out, the only founding-era laws addressing the quantity of ammunition the people could possess were laws requiring *minimum* quantities of ammunition that "able-bodied men" had to own for use in militia service. Resp'ts' Br. at 64 (citing *Miller*, 307 U.S. at 179-82).

And undisputed evidence shows that the first laws restricting magazine capacity were enacted in the Prohibition era—about 150 years after the founding period. Appellant's Br. at 67-68; Resp'ts' Br. at 74; Kopel, *supra*, at 864; *accord Heller* II, 670 F.3d at 1260 ("We are not aware of evidence that prohibitions on either semi-automatic rifles or large-capacity magazines are longstanding and thereby deserving of a presumption of validity.").

The State instead falls back to the argument that ESSB 5078 fits within "a well-established tradition of regulating dangerous weapons when their proliferation leads to widespread societal problems." Appellant's Br. at 59. It cites various laws regulating trap guns and

bludgeoning instruments dating from the time of the nation's founding and laws banning Bowie knives and concealed carry of pistols beginning in the 1830s. It also cites the Prohibition-era laws regulating semiautomatic and automatic firearms. The State argues that these laws are historical analogs for ESSB 5078 because legislatures justified them for the same reason: limiting dangerous weapons.

To be sure, the State does not have to find an identical historical law to prove that the current law is consistent with the nation's history of firearms regulation. *N.Y. State Rifle*, 597 U.S. at 24; *Rahimi*, 602 U.S. at 691-92. But most of the laws cited by the State did not regulate arms possession the way ESSB 5078 does—by outlawing acquisition of a particular weapon in common use. Thus, such laws lack a shared "how" with ESSB 5078.

For example, the State cites founding-era laws that barred people from setting trap guns. But those laws regulated one particular use of a gun—they did not ban the gun itself. *See* 5 CP at 1609-10 (trap guns were created "by rigging the firearm to be fired with a string or wire which then discharged when tripped" (expert report of Robert J. Spitzer, PhD)). The State cites pistol regulations from the mid- to late 1800s. But most of those regulations imposed a tax or banned concealed carry—they did not ban acquisition or possession. Appellant's Br. at 66. And the State cites laws relating to Bowie knives. But most of those laws created carrying restrictions or taxes, too. *Id.* at 63.

The State cites only two state laws that "entirely banned the sale or possession" of an arm, and that arm was the Bowie knife. *Id.* But *N.Y. State Rifle* "doubt[ed] that *three* . . . regulations could suffice to show a tradition" of arms regulation. 597 U.S. at 46. So two probably can't, either.

And as for the State's citations to Prohibition-era regulations of automatic and semiautomatic weapons, those regulations occurred far beyond the relevant time period for *N.Y. State Rifle*'s historical inquiry.

The State essentially argues that we should pull back to the highest possible level of generality about the specific historical limitations on keeping and bearing firearms, and sums up those historical limitations as "society can ban dangerous things." There are several problems with using the abstract concept of "danger" to justify limitations on people's access to weapons for self-defense and other lawful purposes: (1) all firearms are dangerous, especially if they're equipped with magazines—that's their purpose, (2) that level of generality allows legislatures to limit the reach of the United States Constitution based on balancing society's interest against the individual's right, and that violates the *Heller-N.Y. State Rifle* directive against interest-balancing in the Second Amendment context, and (3) it is the process that repressive governments have historically used to suppress dissent. *See supra* n.8. Indeed, the *Heller* Court identified the founders' fear of such repression as one of the reasons for the adoption of the Second Amendment. 554 U.S. at 594.

In sum, magazines, including LCMs, are "bearable arms" in common use, so they are presumptively protected by the Second Amendment. And in this case, the State fails to show that ESSB 5078's restriction on magazine capacity comports with our nation's historical tradition of firearm restriction. I would therefore affirm the superior court's decision holding that ESSB 5078 violates the Second Amendment.

III. The State Constitution Was Always Considered More Protective of the Individual Right To Bear Arms Than the Federal Constitution; *Jorgensen* Replaced That Historical Understanding with Judicial Interest-Balancing; Under *Jorgensen*'s Interest Balancing Test, the Challenged Law Probably Survives; But *Jorgensen* Erred in Overruling Prior Case Law on This Topic

Article I, section 24 of the Washington Constitution provides:

> The right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain or employ an armed body of men.

The firearm rights protected by article I, section 24 are "fundamental." *State v. Sieyes*, 168 Wn.2d 276, 287, 225 P.3d 995 (2010). The rights are "distinct from those guaranteed by the United States Constitution," *State*

v. Jorgenson, 179 Wn.2d 145, 153, 312 P.3d 960 (2013), because article I, section 24's language is "facially broader than the Second Amendment" in several ways. *State v. Rupe*, 101 Wn.2d 664, 706, 683 P.2d 571 (1984). First, article I, section 24 specifies that the right to bear arms is an individual right. Second, article I, section 24 explicitly protects the right to bear arms for two specific purposes: self-defense and defense of the state. "We are not at liberty to disregard this text" because the provisions of our constitution "'are mandatory, unless by express words they are declared to be otherwise.'" *Sieyes*, 168 Wn.2d at 293, 225 P.3d 995 (quoting WASH. CONST. art. I, § 29).

The majority erroneously characterizes article I, section 24 as protecting only the right to bear arms in self-defense. Majority at 12 ("LCMs also fall outside either protection of the right to bear arms because the provisions protect only those arms that are commonly used for self-defense. . . ."), 13 (holding that LCMs are "not within the scope of the rights to bear arms under the Washington and United States Constitutions" because there is no evidence that LCMs are "commonly used for self-defense"). But that contradicts the plain text of article I, section 24—it renders section 24's words "or the state" meaningless. That's not how we interpret the constitution. *State ex rel. Heavey v. Murphy*, 138 Wn.2d 800, 811, 982 P.2d 611 (1999) ("[C]onstitutional provisions should be construed so that no portion is rendered superfluous.").

Despite *Sieye*'s recognition that article I, section 24 protects a fundamental right, just a few years later this court held that a freestanding interest-balancing

test applies to determine whether a law violates that constitutional right. In *Jorgenson*, we said that when analyzing a law implicating article I, section 24, courts must apply a form of intermediate scrutiny and "'balanc[e] the public benefit from the regulation against the degree to which it frustrates the purpose of the constitutional provision.'" 179 Wn.2d at 156 (alteration in original) (quoting *City of Seattle v. Montana*, 129 Wn.2d 583, 594, 919 P.2d 1218 (1996), *overruled in part on other grounds by Chong Yim v. City of Seattle*, 194 Wn.2d 682, 451 P.3d 694 (2019)). Under *Jorgenson*'s weak intermediate scrutiny test, ESSB 5078 probably survives.

But in my view, *Jorgenson* erred on this point. "State interference with a fundamental right is subject to strict scrutiny." *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 220, 143 P.3d 571 (2006) (citing *In re Parentage of C.A.M.A.*, 154 Wn.2d 52, 57, 109 P.3d 405 (2005)), *overruled in part on other grounds by Yim*, 194 Wn.2d 682; *Sieyes*, 168 Wn.2d at 303 n.32 (J.M. Johnson, J., concurring and dissenting in part) (strict scrutiny applies to the rights to marry and parent) (citing *State v. Warren*, 165 Wn.2d 17, 34, 195 P.3d 940 (2008)); *First United Methodist Church v. Hearing Exam'r*, 129 Wn.2d 238, 249, 916 P.2d 374 (1996) (same with respect to the free exercise of religion); *In re Juveniles A, B, C, D, E*, 121 Wn.2d 80, 97-98, 847 P.2d 455 (1993) (same with respect to the right to privacy)).

Just like the fundamental rights protected by the Bill of Rights, our state constitution does "not recognize a hierarchy of constitutional rights; the fact that a right is enumerated renders it fundamental and elevates it above

all nonfundamental interests." *Jorgenson*, 179 Wn.2d at 171 (Wiggins, J., dissenting) (citing *Heller*, 554 U.S. at 634; *Washington v. Glucksberg*, 521 U.S. 702, 719-20, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997)). The State identifies no other fundamental right that is subject to a standard as lax as the standard *Jorgenson* applies to article I, section 24. Had any party argued that we should overrule *Jorgenson* as incorrect and harmful, I would agree. But no party did so, and we remain bound by that decision.

CONCLUSION

Magazines, including magazines capable of holding over 10 rounds, constitute Second Amendment "arms" as defined in *Heller* and *N.Y. State Rifle*. They are also arms in common use for lawful purposes, including self-defense. ESSB 5078 regulates the "arms-bearing conduct" of possessing and using such arms; it therefore regulates conduct that is presumptively protected by the Second Amendment. The State fails to meet its burden to show that this new law is consistent with our nation's history of firearms regulations, as *N.Y. State Rifle* requires. ESSB 5078 therefore violates the Second Amendment, as the trial court held. Unlike the majority, I would affirm that trial court decision.

I therefore respectfully dissent.

/s/ Gordon McCloud, J.
Gordon McCloud, J.

/s/ Whitener, J.
Whitener, J.

APPENDIX B — ORDER OF THE SUPREME COURT OF THE STATE OF WASHINGTON, FILED MAY 14, 2025

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

No. 102940-3

STATE OF WASHINGTON,

Appellant,

v.

GATOR'S CUSTOM GUNS, INC., A WASHINGTON FOR-PROFIT CORPORATION, AND WALTER WENTZ, AN INDIVIDUAL,

Respondents.

Filed May 14, 2025

ORDER AMENDING OPINION

It is hereby ordered that the dissenting opinion of Gordon McCloud, J., filed May 8, 2025, in the above entitled case is amended as indicated below. All references are to the slip opinion.

On page 11, beginning with "Thus, magazines," on line 1, delete all text down to and including "another" on line 4 and insert "Thus, magazines, including what ESSB 5078 defines as "LCMs," fall squarely within *Heller*'s

definition of "arms" as "'anything that a man[13] wears for his defense, or takes into his hands, or useth in wrath to cast at or strike another.'"'"

On page 11, after the last line of footnote 12, insert a new footnote 13 with the following text: "[13] Sic.". Renumber former footnote 13 as footnote 14 and correct succeeding footnote numbers.

DATED this 14th day of May, 2025.

/s/ [Illigible], C.J.
CHIEF JUSTICE

APPROVED:

/s/ Gordon McCloud, J.
Gordon McCloud, J.

APPENDIX C — RULING AND ORDER OF THE SUPERIOR COURT OF WASHINGTON FOR COWLITZ COUNTY, FILED APRIL 8, 2024

SUPERIOR COURT OF WASHINGTON
FOR COWLITZ COUNTY

No. 23-2-00897-08

STATE OF WASHINGTON,

Plaintiff,

v.

GATOR'S CUSTOM GUNS, INC., AND
WALTER L. WENTZ, AN INDIVIDUAL,

Defendants.

Filed April 8, 2024

RULING AND ORDER ON MOTIONS FOR SUMMARY JUDGMENT

Factual and Procedural History

Defendant Gator's Custom Guns, Inc., [hereinafter "Gator's Guns" or "Gator's"] is a retail firearms business located in Kelso, Washington, owned by Defendant Walter L. Wentz. This business has operated for several years in Cowlitz County supplying firearms, ammunition, and related items including semi-automatic handguns and magazines. In addition, Gator's historically sold

aftermarket magazines with capacities larger than ten rounds. On July 1, 2022, Engrossed Substitute Senate Bill 5078 [hereinafter ESSB 5078] went into effect making it illegal to sell or possess magazines with more than ten round capacities in the State of Washington and included sections creating claims under the Washington Consumer Protection Act [hereinafter "CPA"]. Following the effective date of ESSB 5078, Gator's Guns filed a declaratory judgment action against the State of Washington [hereinafter "the State"] in Cowlitz County Superior Court seeking a declaration that, to the extent ESSB 5078 prohibits the sale, acquisition, or possession of magazines with more than ten round capacities, it violates Washington Constitution, Article 1, Sec. 24.

The State subsequently filed its CPA enforcement action against Gator's Guns, alleging that (1) after the effective date of ESSB 5078, Gator's sold magazines prohibited by the statute, and (2) that under ESSB 5078, this action constituted a violation of the Washington CPA. Gator's Guns responded that to the extent ESSB 5078 makes the sale or possession of magazines with over ten round capacities a violation of the CPA, ESSB 5078 violates Washington Constitution, Article 1, Art. 1, § 24, as well as the United States Constitution, Second Amendment.

At the state's suggestion, this court consolidated both Gator's and the State's lawsuits under a finding of judicial economy and overlapping constitutional claims.

Gator's Guns did not oppose this consolidation.[1] The State continues to assert Gator's Second Amendment claim is not properly before the court as it was not clearly pled in Gator's initial Declaratory complaint. The State fails to mention that this Court previously addressed this issue in its ruling of January 9, 2024 (cp42). Neither party requested the court reconsider that order nor has the State appealed that ruling. The State neglects to mention that the case consolidation was done at the State's suggestion. (State's response, consolidated case)

Thus, the current issue before this court is as follows: To the extent that ESSB 5078 prohibits the sale and/or possession of magazines with capacities in excess of ten rounds[2] and seeks to punish this action both criminally and civilly, does it violate either Washington Constitution, Article 1, Art. 1, § 24 or the United State Constitution, Second Amendment. The following addresses these issues.

In addressing these questions, the Court considered both parties' numerous memoranda and oral arguments, and the Court has considered the following declarations filed by the parties:

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1. This order of consolidation effectively discontinues the separate actions and creates a single new and distinct action. The fact that separate judgments are entered does not overcome the effect of the consolidation. *Jeffery v. Weintraub*, 32 Wash.App. 536, 547, 648 P.2d 914, 921 (1982)

2. The Statute defines magazines which hold more than ten rounds as Large Capacity Magazines, which is a legislative, not an industry, definition. The Court uses "LCM", "Large Capacity Magazine", or "magazines with a capacity in excess of ten" interchangeably.

Appendix C

1. Declaration of James Yurgealitis
2. Declaration of Lucy Allen
3. Declaration of Dennis Baron
4. Declaration of R. July Simpson with exhibits
5. Declaration of Saul Cornell
6. Declaration of Louis Klarevas
7. Declaration of Brennan Rivas
8. Declaration of Robert Spitzer
9. Declaration of Austin Hatcher

For consideration of the declarations and exhibits, objections raised regarding hearsay have been honored, and the Court has considered all admissible and relevant evidence filed by the parties in support of the motions. This decision does not cite to each declaration, exhibit or opinion reviewed; however, the court has considered all proper evidence presented.[3]

This motion is a facial challenge to the constitutionality of the Statute, and this Court has examined and considered

3. The Court has reviewed more than 2,600 pages of pleadings filed in this matter leading up to the hearing on the competing Summary Judgement motions subject of this decision.

significant State and Federal case law to determine if it can conceive of situations where the law could be constitutional. The court has reviewed the cases cited by counsel, together with the Court's own legal research. This Court has also reviewed many of the appellate briefs and oral arguments before the United States Supreme Court to better understand the decisions issued by that Court.

[Tables Omitted Intentionally]

Constitutional Analysis - Washington

When analyzing a case under both Washington and Federal Constitutional questions, the Court first examines the Washington constitutional question. Defense argues that Washington Article 1, Art. 1, § 24 provides greater protection than the Federal Constitution. However, to reach a ruling in this matter does not require this court to address that issue. The Court therefore does not undertake a *Gunwall* analysis.

Washington Constitution, Article 1, § 24 states:

> The right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain or employ an armed body of men.

This Court begins its analysis under the presumption that ESSB 5078 is Constitutional.

> . . . This court will presume a legislative enactment constitutional and, if possible, construe an enactment so as to render it constitutional.

Jorgenson, 179 Wash. 2d at 150

The Washington State Supreme Court does not appear to have issued a final decision addressing the interpretation of Art. 1, § 24 since the United States Supreme Court issued its decision in *Bruen*. The Supreme Court has previously found that the Art. 1, § 24 right to bear arms is an individual right in the same vein as the Second Amendment as interpreted by *Heller*.

> . . . *Heller* confirms the right to bear arms is an individual right. While textually different from the Second Amendment, many state analogs nonetheless reveal a similar sentiment—as ours certainly does.

Sieyes, 168 Wash. 2d at 287

The Washington Supreme Court continues:

> Article I, § 24 plainly guarantees an individual right to bear arms. "[T]here is quite explicit language about the 'right of the individual citizen to bear arms in defense of himself.' This means what it says. From time to time, people in the West had to use their weapons to defend themselves and were

> not interested in being disarmed." Hugh Spitzer, *Bearing Arms in Washington State* 9 (Proceedings of the Spring Conference, Washington State Association of Municipal Attorneys (Apr. 24, 1997)).

Sieyes, 168 Wash. 2d at 292

Sieyes was decided *post-Heller* in 2010, but just prior to the formal incorporation of the Second Amendment by the US Supreme Court in 2010 against the States in *McDonald*. The *Sieyes* Court was aware of *McDonald's* pendency before the US Supreme Court. The Washington Supreme Court appeared to presume the Second Amendment would be incorporated against the states.

> In the same vein recent trends and popular views among state attorneys general favor incorporation. At least 34 state attorneys general have signed amicus briefs in *McDonald v. City of Chicago* supporting incorporation. *See* _ U.S. _, 130 S.Ct. 48, 174 L.Ed.2d 632 (2009).

Sieyes, 168 Wash. 2d at 290 (footnote 14)

The Washington Supreme Court noted Art. 1, § 24 provides, at a minimum, at least as much protection of an individual right as the Second Amendment. The Washington Supreme Court clearly noted the US Constitution creates a "floor" of protection the State provision cannot drop below. The State can provide more protection of the right, but not less.

> . . . Supreme Court application of the United States Constitution establishes a floor below which state courts cannot go to protect individual rights. But states of course can raise the ceiling to afford greater protections under their own constitutions. Washington retains the "'sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution.'"

Sieyes, 168 Wash. 2d at 292

The Washington Supreme Court found that Art. 1, § 24 is "absolute" outside of its two textual exceptions. The use of the word "absolute" when describing a constitutional right is unambiguous and powerful. The only conditions on the right to bear arms under Art. 1, § 24 are (1) the protected right is one of defense of self or the state, and (2) the prohibition on creating a private militia. Failing to mention other limitations when two are specified implies there are no other limitations.

> . . . Moreover, the mandatory provision in article I, section 24 is strengthened by its two textual exceptions to the otherwise textually ***absolute*** right to keep and bear arms. Robert F. Utter, *Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights*, 7 U. PUGET SOUND L.REV. 491, 509–10 (1984) (explaining "the express mention of one thing

> in a constitution implies the exclusion of things not mentioned"). (emphasis added)

Sieyes, 168 Wash. 2d at 293

The only applicable exception to Art. 1, § 24 in this case is that the right to bear arms must be in the defense of self or the state.

First, the State argues that magazines[4] are not arms at all under Art. 1, § 24. The State only partially quotes the holding in *Evans*, leaving out the critically important operative words from the case holding.

> We hold that the right to bear arms protects *instruments that are designed as weapons* traditionally or commonly used by law abiding citizens for the lawful purpose of self-defense, (*italics emphasis added*)

Evans, 184 Wash. 2d at 869

The rational for the *Evans* holding was based on *what the arm was designed for.*[5] By leaving out this critical passage the State incorrectly characterizes the holding in a significantly misleading way.

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4. If a magazine is an arm, an LCM is an arm. The only difference between them is the capacity, not the function.

5. The defendant in Evans merely had the paring knife on his person for self-defense and did not actually use the paring knife otherwise.

Appendix C

The pivotal questions before this Court under Art. 1, § 24 are, (1) whether or not magazines and LCMs are *designed as weapons*, and (2) whether or not they are traditionally or commonly used for self-defense.

The defendant in *Evans* was detained on non-weapons grounds and when arrested he had a kitchen paring knife in his pocket. The trial court found the paring knife was a violation of an ordinance which prohibited carrying certain dangerous fixed-blade knives. The defendant claimed the knife was an arm protected under the United States Second Amendment under the rationale of *Heller*.

The *Evans* Court discussed the test for determining whether an arm was covered by Art. 1, § 24 and focused on whether an item is *designed to be a weapon*.

> We hold that the right to bear arms protects instruments that are designed as weapons traditionally or commonly used by law abiding citizens for the lawful purpose of self-defense. In considering whether a weapon is an arm, we look to the historical origins and use of that weapon, noting that a weapon does not need to be designed for military use to be traditionally or commonly used for self-defense. We will also consider the weapon's purpose and intended function.

Evans, 184 Wash. 2d at 869

The Washington Supreme Court in a five to four decision determined that a knife designed primarily to be

a kitchen utensil was not designed to be used as a weapon, even if it could conceivably be used as a weapon. The Court did not rule that knives in general were not weapons.

> . . . we hold that not all knives are constitutionally protected arms and that Evans does not demonstrate that his paring knife is an "arm" as defined under our state or federal constitution.

Evans, 184 Wash. 2d at 861

The Washington Supreme Court refers in both *Sieyes* and *Evans* to the prohibition on interest balancing from those cases, and that the prohibition constrains Washington where it applies. *Evans* determined a paring knife was not "designed as a weapon", therefore it was not an "arm" entitled to constitutional protection.

Determination that the paring knife was not designed as a weapon removed it from the protected class of weapons. The Washington Supreme Court's approach avoided the application of tiers of scrutiny or interest balancing which the Court was aware was prohibited under *Heller*.

The purpose of a magazine of any size is to facilitate the function of a semi-automatic weapon.[6] Magazines (which includes LCMs) are designed as critical functional components of the operational mechanism of semi-automatic

6. This Court agrees with the State's expert that a semi-automatic firearm will function the same with a magazine with more than ten rounds or one with less than ten rounds.

weapons. Absence of a magazine completely defeats the function of a semi-automatic firearm, even in those guns where a single shell may be fired without the magazine in place. Handguns sold in California manufactured after 2002 will not fire at all without a magazine in place due to the California requirement for magazine safety locks.[7] Without a magazine a semi-automatic firearm is either a single shot weapon, *or it functions not at all.*

Magazines have no other design purpose than as a weapon. No one is going to butter a sandwich or dice carrots with a magazine of any size. Magazines are only useful as weapons.

Heller[8] protects modern handguns as a class under the Second Amendment as the "most commonly chosen" weapon for self-defense in America.

> . . . Whatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid.

Heller, 554 U.S. at 629

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7. New firearms sold in California must have a magazine disconnect, which disables the ability to fire a round in the chamber without a magazine inserted in the firearm. California Unsafe Handgun Act (2022)

8. A specific arm protected under a Supreme Court ruling necessarily must be protected under Article 1, § 24 under the "constitutional floor" citation from *Heller* above. This court relies on points from *Heller* as relied on by the Washington Supreme Court.

Appendix C

Heller further protects the various instruments or parts that constitute a weapon.

> . . . Just as the First Amendment protects modern forms of communications, *e.g., Reno v. American Civil Liberties Union*, 521 U.S. 844, 849, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997), and the Fourth Amendment applies to modern forms of search, *e.g., Kyllo v. United States*, 533 U.S. 27, 35–36, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001), the Second Amendment extends, prima facie, to all *instruments that constitute bearable arms*, even those that were not in existence at the time of the founding, (*italics emphasis added*)

Heller, 554 U.S. at 582

The Washington Supreme Court differentiates between "instruments" and "weapons", which coincides with the language of *Heller*. Neither Court limits weapons only to "firearms". The *Heller* Court did not constrain its holding to a particular mechanical design, magazine capacity, caliber, or other design parameter of modern handguns which it held were protected. The limitation in Evans was only that the right applied to instruments *designed* as weapons. The handguns in *Heller* in 2008 would include semi-automatic handguns.[9]

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9. Heller was decided the year after the highly publicized 2007 Virginia Tech Shooting where the shooter employed semi-automatic weapons and large capacity magazines. The Virginia Tech incident was briefed for the Court there.

This Court can infer from the record here, as well as the numerous cases reviewed by this Court preparing for this decision, that magazines are commonly and lawfully possessed by law abiding citizens for lawful purposes.[10] The Court can also infer from the same sources, as well as common knowledge, that a significant number of modern handguns are designed to hold, and are commonly sold with, magazines with capacities larger than ten. The State, through the challenged law, has now prohibited the sale and acquisition of such arms. As a critical functional component of a semi-automatic weapon, this Court finds magazines, including LCMs, are arms for purposes of Art. 1, § 24.

The State's expert witness, Seattle Police Chief Adrian Diaz posits why his own officers carry LCMs:

> "*. . . Nevertheless, SPD patrol officers routinely carry 17-round magazines because* ***they need to be prepared for every scenario they might encounter***."

Adrian Diaz declaration, p.3, State's exhibits. (emphasis added)

Being prepared for conflict aligns with the Supreme Court's definition of keep and bear from *Heller*, noted in the Federal analysis below. The State argues it is

10. The State has cited to *Oregon Firearms Fed'n v. Kotek Oregon All For Gun Safety*, __ F. Supp. 3d __, 2023 WL 4541027 (2023) where the parties stipulated that millions of large capacity magazines were in the hands of the public.

acceptable for a Law Enforcement Officer to be prepared for all scenarios, but not appropriate for a member of the public to be prepared for all scenarios they might encounter.

A compelling argument regarding what "use" means under Art. 1, § 24 is the reference in *Evans* to the jury instruction used by the trial court there:

> Jury Instruction 3: A person commits the crime of Unlawful Use of Weapons when he or she knowingly **carries** a dangerous knife on his or her person (emphasis added)

Evans, 184 Wash. 2d at 860

This Court finds that under Art. 1, § 24, using a weapon for self-defense is clearly encompassed by mere possession or carry in anticipation of such need. A different requirement would provide lesser protection of the right than the Second Amendment. The right to bear arms under Art 1, § 24 is the right to own, possess, or to carry, in anticipation of a confrontation, the same as under the Second Amendment.

The State argues the novel theory that an LCM is not used for self-defense unless it is actually fired in self-defense. The State further argues that an LCM must be fired more than ten rounds[11] to be counted as "used" for

11. The argument goes: If you didn't need to use the extra capacity, then even if you fired the gun and the LCM fed additional ammunition into the weapon, it was not "used".

self-defense. The argument goes: If you didn't need the extra capacity, then even if you fired the gun with an LCM installed in the weapon, the magazine would not have been "used". This is not a logical or rational definition for the words "to bear". The plain language of both the State and Federal Supreme Court decisions discussing keep and carry focus on *possession*. The firing test has no rational basis in law or logic. It would require *any* weapon to be fired, or in the case of a knife—to stab someone, before the arm could be considered "kept, borne, or carried" in self-defense.

Most individuals who acquire firearms for self-defense never have occasion to fire them in a confrontation. However mere possession or carrying in case of confrontation is the right protected. Simple possession of an arm for the intended purpose of defending oneself or others is "use of the arm for self-defense" whether that need arises or not. This Court rejects the State's argument.

The *Evans* Court relied on *Heller* for its understanding the right applied to items that were *designed as weapons* and was to be prepared for confrontation.:

> . . . This definition is designed to protect *an individual's right to carry a weapon for the particular purpose of confrontation*. Id. at 592. However, this definition of "arms" still contemplates that an arm is a weapon. (*emphasis added*)

Evans, 184 Wash. 2d at 865

Evans further includes military weapons within the definition or arm, relying on *Heller*.

> . . . He is correct that the Second Amendment protects the right to possess weapons designed for personal protection as well as for use in a militia.

Evans, 184 Wash. 2d at 871

The State's argument that an arm "more suited to military use" falls outside of Art. 1, § 24 protection is contrary to the plain language of *Evans*.

> In considering whether a weapon is an arm, we look to the historical origins and use of that weapon, noting that a weapon does not need to be designed for military use to be traditionally or commonly used for self-defense.

Evans, 184 Wash. 2d at 869

To the extent the historical design purpose of LCMs *may* have been for military applications, *Evans* bolsters this Court's finding that LCM design purpose is as weapons. The fact an arm may have been originally designed as an offensive weapon does not erase its utility as a defensive weapon. Even in a military confrontation the use of any weapon may be offensive or defensive at any moment.

There appears to be no post-*Bruen*, final Washington appellate court decision determining whether or not

magazines that facilitate the exercise of the right of self-defense are arms under Art. 1, § 24. Several similar cases are awaiting full trial.[12] The Court here is guided by *Bruen (citing Caetano*), as Art. 1, § 24 can provide no lesser protection. The *Bruen* decision includes anything that facilitates armed self-defense and Art, 1, § 24 cannot protect less.

> . . . Thus, even though the Second Amendment's definition of "arms" is fixed according to its historical understanding, that general definition covers modern instruments that facilitate armed self-defense. Cf. *Caetano v. Massachusetts*, 577 U.S. 411, 411–412, 136 S.Ct. 1027, 194 L.Ed.2d 99 (2016) (*per curiam*) (stun guns).

Bruen, 597 U.S. at 28

The *Evans* court determined a paring knife was not designed as a weapon. The holding can be distinguished by its facts. An item designed to facilitate culinary endeavors would not necessarily fall into a protected category. A *critical functional part* of a semi-automatic firearm most certainly does.

The Washington Supreme Court has not directly endorsed the "in common use" constitutional rule of

12. The State asserts a stipulated settlement agreement related to magazines which has no precedential value. It would be inappropriate for a Court to base a decision on such an agreement, not knowing what the reasons for such a settlement might be.

decision[13] from *Heller*. As previously noted, Art. 1, § 24 can provide no less protection than the Second Amendment. *Evans* defines protected arms as "designed as a weapon and *used commonly for self-defense*". The test is much like the *Heller* constitutional principle but adds the design requirement. As Heller seems to require an item to be a weapon, the two principles are fairly similar. The Second Amendment only requires an arm to be in common use for lawful purposes, including self-defense.

The State further urges to this Court that there must be evidence of actual firing of an arm in a self-defense incident before the arm can be considered commonly used. As previously noted, this argument is not logical or legally sound and this Court rejects the argument. The US Supreme Court adopted "in common use" as a commonality test. (*i.e.* if the public had widely and lawfully ***chosen*** an arm for lawful purposes, including self-defense, it was protected.)

The State argues that commonality could not possibly be the test as it is a form of "circular" reasoning. The US Supreme Court addressed this argument in Heller, when the Court did NOT adopt the reasoning of the dissent of Justice Breyer.

> . . . On the majority's reasoning, if tomorrow someone invents a particularly useful, highly dangerous self-defense weapon, Congress and the States had better ban it immediately,

13. See in common use analysis in the Federal Section below.

> for once it becomes popular Congress will no longer possess the constitutional authority to do so. In essence, the majority determines what regulations are permissible by looking to see what existing regulations permit. There is no basis for believing that the Framers intended such circular reasoning.

Heller, 554 U.S. at 721

Justice Breyer was not able to convince the majority to adopt his "circularity" reasoning, and likewise, this court is not persuaded. *Generally, citing a dissent is not the most convincing authority on how to interpret a majority opinion.*

This Court interprets "use" to mean what it appears to mean in *Evans*[14] and clearly means under *Heller*. In the context of Art. 1, § 24, it means, to own, possess, or to carry, in anticipation of a confrontation.

The State next argues that firearm rights guaranteed by the Washington Constitution are subject to "reasonable regulation" pursuant to the State's police power under *Jorgenson*.

In *Jorgenson*, the defendant was released on bond after probable cause for having shot someone. He was prohibited by law from possession of a firearm while on

14. In *Evans*, the person did not stab anyone. It was a case of the defendant simply carrying a paring knife in his pocket.

bond for a serious offense. He was later arrested with a firearm in his possession and convicted of violating the firearms restriction of his release conditions.

The *Jorgenson* Court applied intermediate scrutiny based on the limited time of loss of the right, and a judicial finding of dangerousness of the person. *Jorgenson* was not a general prohibition like ESSB 5078. *Jorgenson* relied on a comparable federal statute, and similar facts, as discussed in *Laurent* where the US District Court for the Second District determined intermediate scrutiny was the appropriate test. The *Laurent* Court discussed various levels of scrutiny to be applied in Second Amendment cases to reach its conclusion. The District Court settled on intermediate scrutiny, noting a restriction on the core right of self-defense would require strict scrutiny.

> Intermediate scrutiny is the appropriate level of review for the statute at issue in the present case. *But see Masciandaro*, 638 F.3d at 471 ("[W]e assume that any *law that would burden the "fundamental," core right of self-defense in the home by a law-abiding citizen would be subject to strict scrutiny.*").

Laurent, 861 F. Supp. 2d at 104 (emphasis added)

The *Jorgenson* Court relied on *dicta* from *Heller* that certain dangerous individuals (*i.e.* felons) could be relieved of their right to bear arms. The Washington Supreme Court grouped Mr. Jorgenson in the dangerous class of individuals and applied the same intermediate scrutiny the District Court had applied in *Laurent*.

Jorgenson's reliance on the analysis in *Laurent* after *Bruen* is likely misplaced, though some other lawful justification may be applicable. *Bruen* would most likely prohibit *Laurent's* reliance on intermediate scrutiny as a decisional rationale if decided today.

The Washington Supreme Court clearly stated levels of scrutiny and interest balancing were no longer to be used in Art. 1, § 24 cases.

> . . . Moreover the Court specifically rejected a "rational basis scrutiny" as too low a standard to protect the right to bear arms.[19] *Id.* at 2818 n. 27. The Court also rejected any "interest-balancing" approach, reasoning by way of analogy: "The First Amendment contains the freedom-of-speech guarantee that the people ratified, which included exceptions for obscenity, libel, and disclosure of state secrets, but not for the expression of extremely unpopular and wrong-headed views. The Second Amendment is no different." *Id.* at 2821. Instead *Heller* held "[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad." *Id.*
>
> We follow *Heller* in declining to analyze RCW 9.41.040(2)(a)(iii) under any level of scrutiny. . .

Sieyes, 168 Wash. 2d at 294–95

Timing is important as *Jorgenson* and *Laurent* were both decided during the 14 years when courts nationally were applying the now prohibited "second step" of balancing state interests with individual rights. The prohibition in the case at bar is not a limited-in-time, or limited person, restriction. It is a complete ban. The rational of *Jorgenson* is not applicable here.

To maintain Art. 1, § 24 constitutional protection to be at least equivalent to the protection provided by the Second Amendment under *Bruen*, this Court is not permitted to apply interest balancing tests in this case and will not do so. The remainder of the State's arguments not directly applicable here are more fully discussed in the Second Amendment analysis below.

This Court analyzes ESSB 5078 in under the Washington State Constitution, Art. 1, § 24. *Heller* and *Bruen* impact the analysis to the degree the Washington State Constitutional provision cannot provide less protection than the minimum protection provided under the US Second Amendment. The Washington Supreme Court decisions in *Sieyes* and *Evans* are consistent with that proposition.

This Court has not done a *Gunwall* analysis as to whether or not the Washington Constitution, Art. 1, § 24 provides greater protection than the US Second Amendment as this Court sees no need to do so to affect this ruling. This Court will leave that determination to other cases or to the appellate courts. The Washington Supreme Court, through *Evans* and *Sieyes*, has adopted

the US Supreme Court approach which prohibits balancing tests when analyzing general laws limiting rights under Art. 1, § 24. The Washington Constitution, Art. 1 § 24 is "absolute" outside of its textual limitations. The application of interest balancing, or tiers of scrutiny, is prohibited.

This Court finds that magazines, and by extension LCMs, are arms under *Evans* and the Washington Constitution, Art. 1, § 24 and infers from the reports filed herein, and court cases reviewed, that LCMs are commonly owned by the public for lawful purposes, which includes self-defense. This Court finds that an arm designed as a weapon and traditionally or commonly possessed in anticipation of self-defense is presumptively a protected arm in Washington State. The State must provide some history of regulation in line with the requirements of Bruen (detailed below) in order for Art. 1, § 24 to provide at least the protection of the right the Second Amendment does. The State has the burden to show otherwise. The State has failed to do so.

This Court performs its analysis as a facial challenge, with the presumption that a statute is constitutional. This Court must find there exists no set of facts where the Court can find such a generalized ban or restriction on an arm (or an instrument that facilitates self-defense) as constitutional under the Washington Constitution, Art. 1, § 24.

> . . . "In contrast, a successful facial challenge is one where no set of circumstances exists in

> which the statute, as currently written, can be constitutionally applied." Moore, 151 Wn.2d at 669.

Evans, 184 Wash. 2d at 862

Absent application of the now-prohibited interest balancing approach, this Court cannot conceive of a set of circumstances where the complete ban of magazines with a capacity greater than ten under ESSB 5078 can be constitutionally valid under Art. 1, § 24. This Court finds ESSB 5078 as codified under RCW 9.41.300 and 9.41.375 is facially unconstitutional.

For completeness of the record, and for any reviewing Court, this Court now addresses the Federal Constitutional Challenge under the Second Amendment.

Constitutional Analysis – Federal

The United States Constitution, Bill of Rights, 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.*"

The United States Supreme Court has issued four decisions regarding the Second Amendment since 2008 which are particularly relevant to the decision before this Court. Those cases are:

1) *District of Columbia v. Heller*, which held that the US Second Amendment protected an Individual right to keep and bear handguns in one's home for lawful purposes, including self-defense.

2) *McDonald*, which held the US Second Amendment as analyzed in *Heller* applied equally to the Federal Government and to the States.

3) *Caetano*, which vacated and remanded a Massachusetts case involving the prohibited the possession of Stun Guns for the State of Massachusetts' failure to faithfully apply *Heller*.

4) *Bruen* applied Heller's "text, then history" analysis to a non-arm-ban case and held that New York's concealed carry special need licensing scheme was unconstitutional.

When the US Supreme Court issued *Bruen*, it followed 14 years of inferior courts around the Country mis-applying the "text, then history" test of *Heller*, by creating a new two-step analysis which was rejected by the United States Supreme Court.

> Since *Heller* and *McDonald*, the Courts of Appeals have developed a "two-step" framework for analyzing Second Amendment challenges that combines history with means-

> end scrutiny. The Court rejects that two-part approach as having one step too many. . .

Bruen, 597 U.S. at 2

Heller first described the text then history methodology Courts are mandated to follow when analyzing Second Amendment cases. *Heller* also rejected interest balancing in Second Amendment Cases over a decade before the prohibition was reiterated in *Bruen*.

> We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding "interest-balancing" approach. The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all.

D.C. v. Heller, 554 U.S. 570, 634, 128 S. Ct. 2783, 2821, 171 L. Ed. 2d 637 (2008)

Banning an arm implicates the Second Amendment because a ban of an arm limits the choice of arms the public is allowed to keep and carry. Once the Supreme Court determined that the DC handgun ban implicated the text of the Second Amendment, the *Heller* Court performed an exhaustive review of historical firearm regulations to determine which types of weapons the government may ban.

Appendix C

In Common Use

Heller established a constitutional principle, or rule of decision, to apply to arm ban cases. Using the historical analysis in *Heller*, the US Supreme Court determined that only weapons that were both "dangerous" *and* "unusual" could be banned. The test is conjunctive, requiring the weapon to be *both* "dangerous" *and* "unusual". Unusual was defined by the US Supreme Court as commonly possessed by civilians for lawful purposes, including self-defense. The US Supreme Court did not articulate a test of a weapon being "unusually dangerous" in any of the aforementioned decisions.

The methodology is known as the in common use constitutional principle. More importantly, the in common use principle arose from the US Supreme Court's *historical analysis*, not the Court's textual analysis.

There is no need to re-do the historical analysis in an arm ban case. The Supreme Court has already done the historical analysis to establish the constitutional principle controlling which arms can be banned[15]. The Court needs

15. For an arms-ban case under the "In Common Use" test, there would be no need to re-do the historical analysis done by the Supreme Court. This principle appears to be supported in the oral arguments by the US Department of Justice Solicitor General in the recent oral arguments in U.S. v. Rahimi:

> GENERAL PRELOGAR: No I think that Bruen requires a close look at history and tradition and analogue to the extent they exist and are relevant for purposes of articulating the principle. But, **once you**

only apply the in common use constitutional principle *(i.e.* rule of decision) and determine if an arm is commonly and lawfully owned by civilians for lawful purposes, including self-defense[16], then the arm is in common use and cannot be banned.

Notably, the US Supreme Court did NOT abrogate or reverse *Heller* in any respect, and cited *Heller* favorably as the source of the analytical methodology the Court applied in *Bruen*.

> The test that the Court set forth in *Heller* and applies today requires courts to assess whether modern firearms regulations are consistent with the Second Amendment's text and historical understanding. . .

Bruen, 597 U.S. at 3

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have the principle locked in – and, here, the principle would be you can disarm those who are not responsible or dangerous, however the Court wants to phrase it – ***then I don't think it's necessary to effectively repeat that same historical analogical analysis for purposes of determining whether a modern-day legislature's disarmament provision fits within the category. US v Rahimi, No 22-915, oral arguments, page 55-56 (7 Nov. 2023) (emphasis added)***

16. The Supreme Court did not indicate other lawful uses would not be protected, but focused on the right of self-defense as that was the focus of the case before it. Other lawful uses such as hunting were not addressed.

Appendix C

The in common use principle was developed as the result of the US Supreme Court's *historical* analysis, not the textual analysis. As in the analysis under Bruen for regulation cases, discussed later, once a court finds the law implicates the text of the Second Amendment, it becomes the burden of the State to show the banned arm is not commonly and lawfully owned by citizens for self-defense.

If the law is a mere regulation of use or carry, then the State has the burden to show there exists a historical analogue law that justifies the regulation. The application of the historical analogue principle will be discussed in the next section.

The issue before this Court for a ban is whether restricting or banning a magazine of any size implicates the Second Amendment text by limiting the civilian right to make choices as to their self-defense.

> As the quotations earlier in this opinion demonstrate, the inherent right of self-defense has been central to the Second Amendment right. The handgun ban amounts to a prohibition of an entire class of "arms" that is *overwhelmingly chosen* by American society for that lawful purpose. (*emphasis added*)

Heller, 554 U.S. at 628

As in *Heller*, the present case limits the choice of arms the public is allowed to keep and carry by prohibiting particular magazines. The ban has the effect of prohibiting

the sale or acquisition of any new firearm with an ammunition capacity of more than ten.

The State incorrectly argues for a different trigger to shift the burden of proof to the Plaintiffs. The State asserts the Defendants must first, as part of the textual analysis, establish that magazines, particularly magazines holding more than ten rounds, are in fact arms, commonly *fired* in self-defense, and for LCMs the State asserts they must fire more than ten rounds in a self-defense incident before they can be considered as having been used for self-defense. The State asserts this must all be shown by Defendants before ESSB 5078 can possibly implicate the text of the Second Amendment.

The State's argument is a tortured and incorrect reading of both *Heller* and *Bruen*. The State conflates the word "text" with the word "test". The relevant "text" of the Second Amendment reads:

> *"The right of the people to keep and bear arms shall not be infringed".*

The "test" is whether or not the State can demonstrate that the banned arm is NOT commonly possessed or owned for lawful purposes, including self-defense under *Heller*.

The State employs a rhetorical device in its argument to over-describe the asserted constitutional wrong, then the State over-defines the right that is protected. Finally, the State argues this new overly defined right is not

covered by the plain text of the Constitution. This focus on the overly defined right incorrectly expands the plain text of the Constitution.

The *text* of the Second Amendment is NOT: "*the right of the people to keep and bear arms that are actually fired lawfully during a self-defense incident shall not be infringed.*" Rather, the relevant text of the Second Amendment is: "*the right of the people to keep and bear arms shall not be infringed.*"

The addition by the US Supreme Court of the words "for lawful purposes, one of which is for self-defense" is not part of the "text" of the amendment, but rather an explanation of the *right*.

The US Supreme Court in *Heller* noted that handguns were the overwhelmingly "chosen" arm of the people for self-defense.

> As the quotations earlier in this opinion demonstrate, the inherent right of self-defense has been central to the Second Amendment right. The handgun ban amounts to a prohibition of an entire class of "arms" that is overwhelmingly chosen by American society for that lawful purpose.

Heller, 554 U.S. at 628

This Court finds that ESSB 5078 implicates the text of the Second Amendment as it limits the choice of civilians as to what arms they can choose for self-defense.

Appendix C

The State asserts ESSB 5078 is not a ban due to its "grandfather clause". Individuals who legally possessed LCMs in the State of Washington prior to the effective date of ESSB 5078 get to keep their magazines after the effective date, albeit with some strong prohibitions on transfer[17]. The States's argument is not convincing.

"Ban" means "to prohibit especially by legal means, or to prohibit the use, performance or distribution of".[18] *Little more needs to be said.* ESSB 5078 prohibits by legal means the distribution or acquisition of LCMs. ESSB 5078 prohibits any new LCMs after its effective date and limits the transfer of existing LCMs[19]. A person cannot acquire a new LCM after the effective date outside of exemptions (military or law enforcement) not relevant here.

This Court presumes the law prohibiting importation of magazines would disallow a person who lawfully owns an LCM pre-ban yet has always stored it in a vacation home in another state to "import" that otherwise legally owned magazine into Washington. Likewise, a non-resident

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17. Though not at issue in this case, the grandfather clause of ESSB 5078 may implicate the equal protection clause post *Heller* pursuant to the reference to fundamental rights in *Nordlinger*, 505 U.S. at 10.

18. https://www.merriam-webster.com/dictionary/ban

19. Viewed in a different light, ESSB 5078 effectively prohibits the acquisition of a Glock 17 handgun as designed, or any firearm with an ammunition capacity of more than ten, which is a ban of an entire class of arms – firearms with a capacity of more than ten rounds – a ban by a feature.

individual who legally owns an LCM in a state with no such prohibition and owned the LCM prior to ESSB 5078's effective date, would not be able to move to Washington and "import" their otherwise legally owned magazine[20].

More importantly, any person who does not already own an LCM in Washington State as of the effective date of ESSB 5078 is prohibited from acquiring one in the State of Washington. Under the penumbra of rights of the Second Amendment, the right to acquire arms is necessary to exercise the core purpose of the right. Included is the right to acquire a fully functional weapon. Were this court to hold individuals have no legal right way to acquire protected arms, such a ruling would eviscerate the core purpose of the right.

This Court concludes and finds that ESSB 5078 is a ban of an arm under the Second Amendment; therefore, the burden of proof shifts to the State to demonstrate that magazines with a greater a than ten round capacities are NOT owned lawfully by a significant number of civilians for lawful purposes, including self-defense.

As noted in the Washington analysis above, *Heller* defined what keep and bear meant, and it had nothing to do with shooting. *Heller* focused on lawful possession. If a significant number of people lawfully own magazines with a capacity over ten nationally, and their intent is to

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20. Failure to recognize another state resident who lawfully possessed an LCM in the other state prior to the effective date of the law and then prohibit them from bringing it to Washington when they move here, seemingly implicates a possible full faith and credit issue.

use them lawfully for self-defense, that is sufficient. The Court did not address other possible lawful purposes as being protected, as only the right of self-defense was at issue in *Heller*.

The US Supreme Court's focus is on possession of an arm for the purpose of being prepared for a possible conflict.

> . . . in the course of analyzing the meaning of "carries a firearm" in a federal criminal statute, Justice GINSBURG wrote that "[s]urely a most familiar meaning is, as the Constitution's Second Amendment . . . indicate[s]: 'wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person.'"

Heller, 554 U.S. at 584

This definition quite nicely lines up with the Washington jury instruction that was referenced from the *Evans* case in the Washington Analysis above.

The US Supreme Court found the right to bear arms under the Second Amendment is not limited to handguns.

> . . . Thus, even though the Second Amendment's definition of "arms" is fixed according to its historical understanding, that general definition covers modern instruments that

> facilitate armed self-defense. Cf. *Caetano v. Massachusetts*, 577 U.S. 411, 411–412, 136 S.Ct. 1027, 194 L.Ed.2d 99 (2016) (*per curiam*) (stun guns).

Bruen, 597 U.S. at 28

Handguns sold with magazines with capacities over ten have been widely available for many years. Magazine capacity was restricted for ten years under the National Assault Weapons Act of 1994[21][21], which expired in 2004. It is common knowledge that the public has been purchasing LCMs since 2004 in large numbers. The Court's review of the many cases related to LCMs cited by counsel and this Court's case law review yields these are extremely widespread in civilian hands.

Oregon Firearms Fed'n is a recent cases cited by the State as rejecting a Second Amendment challenge to a magazine ban. The parties to that case stipulated, and the Court apparently agreed, that millions of LCMs are owned by the public:

> Nevertheless, based on the parties' pretrial stipulation, this Court finds that millions of Americans today own LCMs . . .

Oregon Firearms Fed'n, No. 2:22-CV-01815-IM, 2023 WL 4541027, at *11 (D. Or. July 14, 2023)

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21. Violent Crime Control and Law Enforcement Act of 1994, H.R. 3355 (1994). As discussed in this decision, this restriction falls outside of the period the Court can consider for analogue laws.

Appendix C

The *Oregon Firearms Fed'n* Court rejected the commonality rational of *Heller* described previously in the Washington analysis above. The *Oregon Firearms Fed'n* Court determined the plaintiffs needed to demonstrate actual self-defense incidents relying on the rejection of the test of mere possession which appears clear from *Heller*.

No one seriously disputes that there are millions of LCMs in the possession of the public As in *Heller* handguns were the overwhelming choice of weapon chosen for self-defense, here, millions of Americans have chosen LCMs as the format of their weapon. The relevant metric is possession in anticipation of need. Though some LCMs are clearly used unlawfully, the State has not presented evidence before this Court that the millions of LCMs lawfully owned by the public are used unlawfully. The conclusion is that most of those millions of LCMs are lawfully owned for lawful purposes, including self-defense. This Court finds the approach in *Oregon Firearms Fed'n* unconvincing.

More importantly, *Heller* was decided by the US Supreme Court on a motion to dismiss. There was no trial. The Court was able to analyze and render its ruling without the benefit of knowing exactly how many handguns were in circulation, or how many self-defense incidents there were, or how many shots were fired. The US Supreme Court was able to do so because those metrics are not part of the test and are inapplicable here. The US Supreme Court found that the millions of handguns owned lawfully by citizens were their chosen arm for self-defense. The Court can easily find the same here as it relates to magazines with a capacity of more than ten.

Appendix C

This Court cannot determine the genesis of the "used for self-defense" test as argued by the State. It is not a derivative of any Supreme Court decision or *dicta* this Court has found. To the contrary, the used-for-self-defense analysis does not have a logical or rational basis and the test conflicts with the Supreme Court definitions noted above and below. This Court cannot square such a test with the plain language of *Heller*.

The State has not provided evidence that LCMs are NOT commonly and lawfully owned or possessed by civilians for lawful purposes, including self-defense. The State instead chose to provide expert *opinions* concluding only that LCMs are not commonly "fired for self-defense purposes", or are not the best choice for self-defense, neither of which are relevant metrics. The opinions submitted regarding firing or number of rounds fired are likewise not relevant to the decision of this Court.

The State has not met its burden for the purposes of applying the in common use rule of decision. The State has not demonstrated that LCMs in the hands of the civilian population in the United States are NOT held primarily for lawful purposes, including self-defense. This Court finds that ESSB 5078 is unconstitutional under the *Heller* in common use constitutional principle.

For completeness, and for any reviewing court, this Court will include the analysis of this case as if it were simply a regulation of use under *Bruen*.

Appendix C

Bruen Regulation analysis

A non-ban case focuses on laws regulating the use or acquisition of arms, *i.e.* where arms can be used, when they can be used, licensing, concealed carry, waiting periods, etc. The in common use rule of decision is not applicable to a regulation of use case unless the law includes the ban of a weapon. Though this Court finds this case is a ban case, the *Bruen* analysis is included for completeness.

Bruen reiterated, and more explicitly explained, the methodology used by the US Supreme Court in *Heller*. *Bruen* did not establish a new test than that previously articulated by the US Supreme Court in *Heller* and *McDonald*[22]. The only real difference[23] between *Heller* and *Bruen* is the US Supreme Court in *Heller* already completed the historical analysis to establish the constitutional principle of in common use for Courts to apply in arm ban cases.

The textual analysis does not change under a firearms regulation case. The relevant "text" of the Second Amendment still reads: "*The right of the people to keep and bear arms shall not be infringed*". A law which regulates, limits, or hinders an individual's right

22. *Bruen* did clarify that numerous inferior courts were improperly applying *Heller* and were fashioning new tests which were not compatible with the US Supreme Court's mandate in *Heller*.

23. *Heller* was an arm ban case, subject to the in common use principle, while *Bruen* was a regulation of carry, where in common use would have not application.

to keep and bear arms necessarily implicates the text of the Second Amendment. This Court here has already found that ESSB 5078 implicates the text of the Second Amendment by limiting the choices civilians can make regarding their weapons for self-defense.

The State has the burden to demonstrate its law does not improperly infringe on the fundamental rights of the Second Amendment. To do so, the State must provide relevantly similar historical analogue laws to justify the regulation. As in other fundamental rights cases the State has the burden of proof. As in Fourth Amendment search cases, the State would have the burden of proving a warrantless search complied with an exception to the Fourth amendment warrant requirement.[24] Similarly, in a Second Amendment case, the State has the burden of proof to show a relevantly similar historical analogue law to justify ESSB 5078.

> . . . Like all analogical reasoning, determining whether a historical regulation is a proper analogue for a distinctly modern firearm regulation requires a determination of whether the two regulations are "relevantly similar." . . .

Bruen, 597 U.S. at 28–29

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24. Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest. When these justifications are absent, a search of an arrestee's vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies. *Gant*, 556 U.S. at 351

Appendix C

The Proper Historical Analogue Period

The State argues this Court should look to the "enduring American tradition of firearms regulation" when searching for analogues. This is not the directive of *Bruen* nor did that approach originate from US Supreme Court Decisions. *Bruen* was not an invitation to take a stroll through the forest of historical firearms regulation throughout American history to find a historical analogue from any random time period.

The US Supreme Court looks primarily to 1791 when trying to understand the constitutional right as it is applied to the United States, and similarly, the US Supreme Court looks to 1791, the time of the founding when analyzing the understanding of the right and incorporating those rights against the states. In *Heller, McDonald* and *Bruen*, the US Supreme Court reviewed and considered both earlier and later laws, and generally up to the time of the Reconstruction of 1868 and some even later. *The laws outside of the founding period of 1791 were all rejected by the US Supreme Court*. The focus of the US Supreme Court has generally been 1791 for the historical understanding of other constitutional rights incorporated against the various states.

Pre-dating *Heller*, in the Washington State case of *Crawford*, the US Supreme Court looked to 1791 when analyzing the application of the confrontation clause to a criminal matter in the State of Washington.

> . . . As the English authorities above reveal, the common law in 1791 conditioned admissibility

> of an absent witness's examination on unavailability and a prior opportunity to cross-examine. The Sixth Amendment therefore incorporates those limitations. The numerous early state decisions applying the same test confirm that these principles were received as part of the common law in this country.

Crawford, 541 U.S. at 54

When *Heller* was incorporated against the States by *McDonald*, The Court made a clear statement that the application of the Second Amendment as it is incorporated against the States is the same Second Amendment which applies to the Federal Government.

> Finally, the Court abandoned "the notion that the Fourteenth Amendment applies to the States only a watered-down, subjective version of the individual guarantees of the Bill of Rights," stating that it would be "incongruous" to apply different standards "depending on whether the claim was asserted in a state or federal court." *Malloy*, 378 U.S., at 10–11, 84 S.Ct. 1489 (internal quotation marks omitted). Instead, the Court decisively held that incorporated Bill of Rights protections "are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment."

McDonald, 561 U.S. at 765

Appendix C

Outside of the Second Amendment, the US Supreme Court's 2020 decision in *Espinoza*, regarding state funding of religious schools in Montana, relied on 1791 as the critical time for comparison in a First Amendment case. The *Espinoza* Court clarified that laws later than 1791 can only be used to reinforce an earlier practice or law but cannot create a new one.

> The Department argues that a tradition *against* state support for religious schools arose in the second half of the 19th century, as more than 30 States—including Montana—adopted no-aid provisions. See Brief for Respondents 40-42 and App. D. Such a development, of course, cannot by itself establish an early American tradition. Justice SOTOMAYOR questions our reliance on aid provided during the same era by the Freedmen's Bureau, *post*, at 2297 (dissenting opinion), but we see no inconsistency in recognizing that such evidence may reinforce an early practice but cannot create one. . .

Espinoza, 140 S. Ct. at 2258–59

Espinoza reviewed 30 late 19th century state laws without 1791 precursor laws and determined the laws were insufficient to establish a compelling historical tradition of regulation and the US Supreme Court found the Montana law unconstitutional.

Bruen focused its analysis on laws in the period between 1791 and 1868 when the 14th amendment was adopted.

> The burden then falls on respondents to show that New York's proper-cause requirement is consistent with this Nation's historical tradition of firearm regulation. To do so, respondents appeal to a variety of historical sources from the late 1200s to the early 1900s. But when it comes to interpreting the Constitution, not all history is created equal. "Constitutional rights are enshrined with the scope they were understood to have when the people adopted them.".

Bruen, 597 U.S. at 4

However, the *Bruen* Court explained the limits of using later laws as analogues when determining the constitutionality of Second Amendment Cases.

> Finally, respondents point to the slight uptick in gun regulation during the late-19th century—principally in the Western Territories. As we suggested in *Heller*, however, late-19th-century evidence cannot provide much insight into the meaning of the Second Amendment when it contradicts earlier evidence. See *id.*, at 614, 128 S.Ct. 2783; *supra*, at 2137.[28] Here, moreover, respondents' reliance on late-19th-century laws has several serious flaws even beyond their temporal distance from the founding.

Bruen, 597 U.S. at 66

Bruen finally identifies 1791 as the proper period of laws for this Court to consider unless later laws confirm an earlier tradition.

> A final word on historical method: Strictly speaking, New York is bound to respect the right to keep and bear arms because of the Fourteenth Amendment, not the Second. See, *e.g., Barron ex rel. Tiernan v. Mayor of Baltimore*, 7 Pet. 243, 250–251, 8 L.Ed. 672 *(1833)Barron ex rel. Tiernan v. Mayor of Baltimore*, 7 Pet. 243, 250–251, 8 L.Ed. 672 (1833) (Bill of Rights applies only to the Federal Government). Nonetheless, we have made clear that individual rights enumerated in the Bill of Rights and made applicable against the States through the Fourteenth Amendment have the same scope as against the Federal Government. See, *e.g., Ramos v. Louisiana*, 590 U.S. _, _, 140 S.Ct. 1390, 1397, 206 L.Ed.2d 583 (2020); *Timbs v. Indiana*, 586 U.S. _, _-_, 139 S.Ct. 682, 686–687, 203 L.Ed.2d 11 (2019); *Malloy v. Hogan*, 378 U.S. 1, 10–11, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964). And we have generally assumed that the scope of the protection applicable to the Federal Government and States is pegged to the public understanding of the right when the Bill of Rights was adopted in 1791. . . .

Bruen, 597 U.S. at 37

More recently, last month the Third Circuit in *Lara* denied a request for an *en banc* hearing to reconsider the

appellate panel's choice of 1791 as the applicable period for a Second Amendment Challenge.

Given the clear direction from the Supreme Court, this Court looks to the time around 1791 when reviewing historical analogue laws. If a later law *confirms an earlier law* as late as 1868 exists, that can be considered.

This Court has strong reservations in relying on any of the reconstruction era firearms laws to the extent they were part of the "Black Codes". With the unspoken *purpose* of such laws, they would not be relevantly similar to the purpose of a legitimate later or modern firearm regulation. Until the Supreme Court expands their analogical focus beyond 1791, this Court as an inferior court must follow the Supreme Court founding era mandate.

A More Nuanced Approach

The State argues *Bruen* requires a Court to apply a more nuanced approach when addressing Second Amendment cases. The general "nuanced" argument comes from a sentence of *dicta* in *Bruen*.

> While the historical analogies here and in *Heller* are relatively simple to draw, other cases implicating unprecedented societal concerns or dramatic technological changes may require a more nuanced approach. . .

Bruen, 597 U.S. at 27

The State reads far too much into this comment. *First*, the language is *dicta* and not part of the *Bruen* holding. *Second*, by its plain language, it is permissive, not mandatory. *Third*, and most importantly, the comment *applies only to the choice of historical analogue laws*, not the Second Amendment generally, the "in common use" test, or interest balancing. *Fourth*, before this court could consider laws that are less relevantly similar, the State would need to establish the existence of either a "dramatic technological change" or "an unprecedented societal concern". The comment merely gives an inferior court some latitude in considering historical analogue laws in the proper case.

The State posits gun violence and mass shootings as an unprecedented societal concern and large capacity magazines as a dramatic technology change. Neither argument is convincing. The "nuanced" comment references "other cases" than *Heller* and *Bruen*, the conclusion being the technological change or societal concerns considered in those cases had already been considered as part of those decisions.

Gun Violence is not Unprecedented.

Critical to this analysis, *Heller* was decided in 2008, the year after the mass shooting at Virginia Tech in 2007, where a handgun with an LCM was employed killing more than 30 innocent individuals. The incident is referenced in the States expert materials herein. The shooting was also widely publicized and was included in the briefing to the *Heller* Court. Gun violence was on the table when the

U.S. Supreme Court decided *Heller*. The result was the in common use constitutional principle.

Public safety was also vigorously argued in *McDonald* and clearly rejected by the Supreme Court.

> Municipal respondents maintain that the Second Amendment differs from all of the other provisions of the Bill of Rights because it concerns the right to possess a deadly implement and thus has implications for public safety. Brief for Municipal Respondents 11. And they note that there is intense disagreement on the question whether the private possession of guns in the home increases or decreases gun deaths and injuries. *Id.*, at 11, 13–17.
>
> The right to keep and bear arms, however, is not the only constitutional right that has controversial public safety implications. All of the constitutional provisions that impose restrictions on law enforcement and on the prosecution of crimes fall into the same category.

McDonald, 561 U.S. at 782–83

The Court continued:

> Municipal respondents cite no case in which we have refrained from holding that a provision of the Bill of Rights is binding on the States on

> the ground that the right at issue has disputed public safety implications.

McDonald, 561 U.S. at 783

The Washington legislature has found that gun violence and mass shootings are on the increase and defendants do not realistically dispute this assertion. The problem, however, is not an *unprecedented* societal concern. The U.S. Supreme Court considered gun violence and general dangerousness in both *Heller* and *McDonald* rejected the argument a decade ago for fundamental rights cases involving the Second Amendment.

LCM Technology Not New

Large capacity magazines are functionally identical to standard capacity magazines which have been publicly available for over one-half century or more. This fact is common knowledge as well as documented in the State's expert reports.

The U.S. Supreme Court had LCMs, semi-automatic handguns, and mass shootings on the table in *Heller* and did not carve out an exception for LCMs or magazine capacity in general, or semi-automatic handguns. The U.S. Supreme Court simply held that *handguns as a class* were protected in 2008, 14 years before *Bruen*. LCMs and smaller magazines both utilize *identical technology*, and do not represent "dramatic technological change" not already encompassed in the Supreme Court decisions.

Though the nuance comment is not in reference to the in common use principle, where in common use applies (in a ban case) the principle determines which arms are in common use *today*, which necessarily accounts for the modern technology those arms employ today.

Even if this Court were to find either the technology or the societal concerns were new, it would only *permit* the Court to take a more nuanced approach in considering analogue laws. This Court finds neither argument to be "new" and now considers the proposed analogue laws presented.

Analogue Laws Considered

The State has provided a litany of laws to justify its regulation in this case. Most of the laws provided are post-1868 and are not relevant to the analysis. This Court has reviewed the extensive arms law charts and report provided by State's expert Robert Spitzer. This Court finds there are no relevantly similar analogue laws related to hardware restrictions near 1791 cited in those materials.

The 1771 New Jersey law prohibiting trap guns predates the Declaration of Independence and the creation of the Second Amendment. The New Jersey law was a hunting regulation[25] so its purpose was not firearms

25. The New Jersey law was designed for the preservation of deer and other game and to prevent trespassing, and was categorized under dangerous or unusual weapons, contrary to the conjunctive test in Heller. https://firearmslaw.duke.edu/laws/1763-1775-nfj-laws-

regulation. No other State enacted a trap gun law until two around Reconstruction and all others were much later. A total of 16 states apparently enacted trap gun laws, with the majority after the Reconstruction era. Trap guns don't have an operator and would not be considered "bearable". Trap guns were not possessed or carried for self-defense. As the New Jersey law was not a firearm regulation, the later trap gun laws do not represent a historical arm regulation or law near the founding (see *Espinoza* above). The Court further finds the trap gun laws not relevantly similar to ESSB 5078.

The Bowie knife laws from Mr. Spitzer's Exhibit H are primarily no earlier than 1837 and most congregating between 1860-1900, far after the target historical period, and none are close to the founding. None of these laws appear to have completely prohibited ownership. Most of these restrictions are from the Reconstruction era and later. *Bruen* requires relevantly similar historical *firearms* regulations. The knife laws were not firearms regulations and are not relevantly similar analogues.

Prior to the Reconstruction Period there were some concealed carry restrictions in the early 1800's up through Reconstruction with no laws restricting ammunition capacity whatsoever. Magazine laws did not come into effect at all until at least 1917 (one state) and most others were post-1925. *None* of the laws outside of the trap gun laws appear to be outright bans. Semi-automatic weapons

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346-an-act-for-the-preservation-of-deer-and-other-game-and-to-prevent-trespassing-with-guns-ch-539-c2a7-10

and magazine capacity laws were not in place until 1927 and later even though some forms of semi-automatic weapons were available on a limited basis at the time of the founding.

Laws that were introduced after the Reconstruction era are simply too late in time for this Court to consider absent a precursor law from the founding period as noted in the section preceding. Mr. Spitzer's declaration does not cite any relevantly similar historical analogues to ESSB 5078 from the proper time period. His post-1868 data is not relevant for the case.

The Supreme Court already examined the Common Law Offenses, Statutory Prohibitions and Surety laws none are relevantly similar to a prohibition or limitation on the amount of ammunition a person may carry or what type of ammunition feeding device used.

> *Common-Law Offenses.* As during the colonial and founding periods, the common-law offenses of "affray" or going armed "to the terror of the people" continued to impose some limits on firearm carry in the antebellum period. But there is no evidence indicating that these common-law limitations impaired the right of the general population to peaceable public carry.
>
> *Statutory Prohibitions.* In the early to mid-19th century, some States began enacting laws that proscribed the concealed carry of pistols

> and other small weapons. But the antebellum state-court decisions upholding them evince a consensus view that States could not altogether prohibit the public carry of arms protected by the Second Amendment or state analogues.
>
> *Surety Statutes*. In the mid-19th century, many jurisdictions began adopting laws that required certain individuals to post bond before carrying weapons in public. Contrary to respondents' position, these surety statutes in no way represented direct precursors to New York's proper-cause requirement. While New York resumes that individuals have no public carry right without a showing of heightened need, the surety statutes presumed that individuals had a right to public carry that could be burdened only if another could make out a specific showing of "reasonable cause to fear an injury, or breach of the peace." Mass. Rev. Stat., ch. 134, § 16 (1836). Thus, unlike New York's regime, a showing of special need was required only *after* an individual was reasonably accused of intending to injure another or breach the peace. And, even then, proving special need simply avoided a fee.

Bruen, 597 U.S. at 5

The gunpowder storage laws often cited as firearms regulations were for the purpose of fire control, not firearms regulation, and are not relevantly similar analogues.

Appendix C

The State has provided numerous modern laws from 1868 to the present. None of these laws are logical outgrowths of earlier laws, nor do they confirm any 1791 laws. Most of the laws are simply modern laws not relevant to this Court's decision. None of the laws proposed by the State from the proper period to be considered are relevantly similar historical analogues to ESSB 5078.

Washington has held Art. 1, § 24 is near absolute. The U.S. Supreme Court has classed the Second Amendment as fundamental. The U.S. Supreme Court recognized there are extremely few limits on the federal right, by recognizing there was no appetite to limit gun rights by the Founders. Though the specific technology available today may not have been envisioned, the Founders expected technological advancements. Many were inventors. The Founders included Article 1, Section 8, Clause – the Patent and Copyright Clause, to promote technological progress. The result is few, if any, historical analogue laws by which a state can justify a modern firearms regulation.

The U.S. Supreme Court did not endorse the existence of a "rich historical tradition" of gun regulation. Just the opposite. The U.S. Supreme Court mandate requires the State to provide a relevantly similar historical analogue law from the founding period around 1791.

This Court, in reviewing the historical analogues provided, cannot identify a 1791 era relevantly similar firearms law which could conceivably justify ESSB 5078 today. The State has not met its burden of proof. ESSB 5078 is unconstitutional under *Bruen*'s historical analogue analysis.

Appendix C

Other Considerations before the Court

Having completed the review of historical analogue laws, and again for completeness, the Court will address a few unaddressed points raised, and remaining arguments.

Definition of Infringe

The U.S. Supreme Court did not specifically define the term "infringed". To determine the meaning of the word requires this court to consult the same founding period dictionaries.

Samuel Johnson's dictionary[26] at the time of the founding, the term Infringe meant "to destroy" or "to hinder". Noah Webster's dictionary[27] defined infringe the same. The term "to hinder" meant to obstruct, to stop, to impede[28].

A law which hinders, limits, or decreases the right to keep and bear arms implicates the text of the Second Amendment.

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26. https://johnsonsdictionaryonline.com/views/search.php?term=infringe

27. https://webstersdictionary1828.com/Dictionary/Infringe

28. https://johnsonsdictianaryonline.com/views/search.php?term=hinder

Appendix C

Definition of Arms

To better understand this court's characterization of LCMs as arms, a more complete analysis is included. The term *Arms* is defined in several paragraphs from *Heller*, which must be read together to understand the meaning of the term within the Second Amendment.

> Before addressing the verbs "keep" and "bear," we interpret their object: "Arms." The 18th-century meaning is no different from the meaning today. The 1773 edition of Samuel Johnson's dictionary defined "arms" as "[w]eapons of offence, or armour of defence." 1 Dictionary of the English Language 106 (4th ed.) (reprinted 1978) (hereinafter Johnson). Timothy Cunningham's important 1771 legal dictionary defined "arms" as "any thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another." 1 A New and Complete Law Dictionary; see also N. Webster, American Dictionary of the English Language (1828) (reprinted 1989) (hereinafter Webster) (similar).

Heller, 554 U.S. at 581

The Court continued:

> . . . the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.

Heller, 554 U.S. at 582

Anything that constitutes a bearable arm that could be worn for self-defense or employed for either offense[29] or defense against another person would fall under the historical definition of Arm.

The definition of arm is not limited to founding era arms. The *Heller* Court protected modern handguns a class at a minimum as they were understood in 2008[30]. Modern handguns in 2008 included semi-automatic handguns equipped with magazines greater than ten.

The comment in *Heller* that M16's can be banned was certainly not the issue presented in Heller to the U.S. Supreme Court, but even so, the simple fact an M16 is generally accepted as a military arm, does not remove the weapon from the class of items that fit the definition of "arm".

Bruen did not alter the definition of an arm, as no definition of arm was necessary. *Bruen* was purely about obtaining a license to carry handguns, not banning them. *Bruen* was a "use regulation case" where the in common use rule of decision would not be applicable. Under the

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29. There is no functional difference between offensive use and defensive use other than the role played in a confrontation. Every defensive weapon can be used offensively and vice versa.

30. *Heller* was issued in 2008 in the shadow of the 2007 Virginia Tech Mass Shooting referenced in the States expert reports, and of common knowledge. That shooting included semi-automatic pistols and large capacity magazines.

Heller definition, most any weapon a person owns would fit the definition of arm[31].

Corpus Linguistics

Attempting to re-define the term arm, the State provides a report from Dennis Baron, a linguist. Mr. Baron employed a research methodology called *Corpus Linguistics* to help understand the historical definition of "arm" and "magazine", and to compare them to "accoutrement". Mr. Baron's report relies on the founding-era corpora as well as post-1861 texts. He indicates the word "magazine" first appeared around 1860.

Importantly, Mr. Baron points to his work being quoted in the majority opinion of *Heller*, though fails to mention the Supreme Court essentially rejected his methodology to determine the meaning of "to bear arms".

> Of course, as we have said, the fact that the phrase was commonly used in a particular context does not show that it is limited to that context, and, in any event, we have given many sources where the phrase was used in nonmilitary contexts. Moreover, the study's collection appears to include (who knows how many times) the idiomatic phrase "bear arms against," which is irrelevant. The *amici* also

31. Washington case law is more focused definition of arms from *Evans*, 184 Wash.2d at 864 which required an "arm" to have been designed to be an arm as opposed to a culinary tool.

> dismiss examples such as "'bear arms . . . for the purpose of killing game'" because those uses are "expressly qualified."

Heller, 554 U.S. at 588–89

Mr. Baron opines a magazine is most analogous to a cartridge box and therefore not an arm. The analogy is misplaced. A cartridge box was used to carry or store cartridges. It would be like the box of shells one purchases from a retailer today. A cartridge box is not a part of a firearm, never connects to it, and doesn't enable the arm to fire in a semi-automatic fashion[32].

A magazine is a functional device which is designed to do one job—to feed the semi-automatic function[33] of the arm. Magazines are critical to the core function of a semi-automatic weapon. The right to keep and bear arms presumes a functional weapon. Ten round magazines and LCMs function identically[34].

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32. As a person would have carried their cartridge box along with their weapon, and the weapon would needed ammunition to function, a cartridge box could likely be seen as an instrument that facilitates armed defense historically.

33. Whether a magazine is internal or detachable, without one, a semi-automatic weapon is, at best, a single shot firearm.

34. The observations by the Court are common knowledge to anyone with a basic understanding of the operation of a semi-automatic firearm and are not contradicted by any of the experts' reports reviewed herein.

Mr. Baron argues that magazines are "accoutrements" not "arms". His report (at page 20) also indicates armor is an accoutrement and not an arm. Notably, Samuel Johnson's founding era dictionary used by the U.S. Supreme Court quoted earlier includes armor within the definition of "arm".

The Court cannot find the Corpus Linguistics methodology presents with a basic modicum of reliability necessary for the Court to consider it, nor is it any more reliable than what was already rejected by the Supreme Court in *Heller*. The study cannot redefine the U.S. Supreme Court's definitions. This Court places no weight or relevance on Mr. Baron's opinion for this case.

Interest Balancing

The State continues to assert interest balancing is allowed under the more nuanced approach under *Bruen*. This ignores the nuanced comment is related only to *the choice of analogue laws*, and not to interest balancing. This Court rejects the argument.

People just don't need that many shots.

The State posits the average number of shots fired in a self-defense incident is approximately three. This figure comes from the report of economist Lucy Allen[35]. MS

35. This court is no more convinced of the reliability of MS Allen's report than other Courts that have rejected it. Adding the Portland Police data is somewhat helpful, but doesn't address the questionable other data.

Allen's declaration is based primarily on data she sourced from anecdotal news story data, supplemented with data from Portland, Oregon police shell casing data. The latter data appears to be also based partly on news stories. MS Allen's professional background appears mostly in asbestos research, not firearm research. This Court is challenged to find her methodology reliable enough to be admissible.

Looking at the report in the light most favorable to the State, and even were this Court to give 100% credence to the data and her conclusions, they are not relevant to the issues this Court must decide. The definition of keep and bear is possession and carry, not how many shots are fired in an incident. The argument is just another version of interest balancing—*you only need three shots*- which is not allowed in fundamental rights cases. The idea that civilians have an alternative the Government approves of was rejected in *Heller*.

> It is no answer to say, as petitioners do, that it is permissible to ban the possession of handguns so long as the possession of other firearms (*i.e.*, long guns) is allowed. It is enough to note, as we have observed, that the American people have considered the handgun to be the quintessential self-defense weapon.

Heller, 554 U.S. at 629

No other right is conditioned on a person's "need". If a person could attain salvation by going to Church only on

Sundays, could the State then prohibit attendance on other days under the First Amendment? The answer is obvious.

This Court rejects the shots fired argument as both an impermissible interest balancing test and irrelevant to the decision before the Court.

Other magazines are allowed

The State asserts that since ten-round magazines are not restricted or banned, the State can therefore restrict or ban LCMs. This is essentially the identical argument as the foregoing which the Supreme Court rejected in in *Heller*. For the same reasons, this Court rejects the argument.

Not Suitable for Self Defense—
More suitable for Military

The State argues there are better choices of arms for self-defense purposes and that LCMs are more suited for military use. Oddly, the State expert arguing this point asserts his own officers carry 17-round magazines *to be prepared for whatever contingency might occur*. This is the exact preparedness the Second Amendment protects for citizens.

As stated earlier, Police do not carry for assaultive purposes, they carry for defensive purposes. The *Heller* cite above regarding choice of arms is applicable here. It is not that a weapon must be the best choice for self-defense to be protected, *it just must be one commonly chosen by*

the public for that lawful purpose. The actual purpose of firing a weapon can only be determined after it has been fired. Thankfully we may never know how many firearms truly were purchased for the purpose of self-defense.

Also noted earlier in this decision, being a military arm does not disqualify an arm from being either an arm or being protected.

This Court rejects this argument.

Common Sense Legislation

The State finally argues the Legislature has determined the law will have a beneficial effect on gun violence in the State of Washington and that ESSB 5078 is an important law. The Court recognizes that violence in general and gun violence specifically are public safety issues. These are not new issues and have been previously addressed by the U.S. Supreme Court.

> We are aware of the problem of handgun violence in this country, and we take seriously the concerns raised by the many *amici* who believe that prohibition of handgun ownership is a solution. The Constitution leaves the District of Columbia a variety of tools for combating that problem, including some measures regulating handguns, see *supra*, at 2816–2817, and n. 26. But the enshrinement of constitutional rights necessarily takes certain policy choices off the table. These include the absolute prohibition of

> handguns held and used for self-defense in the home. Undoubtedly some think that the Second Amendment is outmoded in a society where our standing army is the pride of our Nation, where well-trained police forces provide personal security, and where gun violence is a serious problem. That is perhaps debatable, but what is not debatable is that it is not the role of this Court to pronounce the Second Amendment extinct.

Heller, 554 U.S. at 636

The State filed a declaration from Louis Klarevas, a political scientist discussing generally the dangerousness of LCMs and detailing the history of mass shootings. The dangerousness concern was previously addressed in *McDonald*.

> The right to keep and bear arms, however, is not the only constitutional right that has controversial public safety implications. . . Municipal respondents cite no case in which we have refrained from holding that a provision of the Bill of Rights is binding on the States on the ground that the right at issue has disputed public safety implications.

McDonald, 561 U.S. at 783

As originally announced in *Heller*, reiterated in *McDonald*, and heavily re-stressed in *Bruen*, consideration

of and balancing of the state's interest is outside of the scope the what the court may consider:

> If the last decade of Second Amendment litigation has taught this Court anything, it is that federal courts tasked with making such difficult empirical judgments regarding firearm regulations under the banner of "intermediate scrutiny" often defer to the determinations of legislatures. But while that judicial deference to legislative interest balancing is understandable—and, elsewhere, appropriate—it is not deference that the Constitution demands here. The Second Amendment "is the very *product* of an interest balancing by the people" and it "surely elevates above all other interests the right of law-abiding, responsible citizens to use arms" for self-defense. *Heller*, 554 U.S. at 635, 128 S.Ct. 2783. It is this balance—struck by the traditions of the American people—that demands our unqualified deference.

Bruen, 597 U.S. at 26

If *Bruen* was a landmark case, it was for chastising inferior courts for over a decade of continuing to apply tiers of scrutiny and interest balancing to Second Amendment cases after the U.S. Supreme Court had rejected that approach in *Heller* and *McDonald*. This Court is mandated to apply Supreme Court precedent when addressing second amendment cases, regardless

of well-meaning implorations of the parties, or incorrect applications of the U.S. Supreme Court tests by other courts.

In fundamental rights cases such as this, it is presumed that civilians exercising the right to bear arms intend to do so lawfully. Therefore, it is offensive to prospectively limit or hinder the right. We do not prohibit speech generally with the expectation offensive words will be spoken. Such action would be chilling and unconstitutional.

Conclusion

The United States Constitution and the Bill of Rights exist to define the outer limits of what Legislatures and Courts are allowed to do. Amending the Constitution and Bill of Rights cannot be done simply by enacting a law, or by a pronouncement from a Court. To move beyond the defined limits requires the Constitution to be amended. Amending the documents is intended to be difficult to assure transitory governments or societal mores cannot easily overstep the constitutional limitations.

This Court finds there are no relevant facts in dispute in this case and all issues raised in this motion are legal issues. The legal issues are proper for disposition under Summary Judgment standards. The Court has reviewed each motion independently, taking the undisputed facts of the case and in each motion considering the evidence most favorably for the non-moving party. The Court has determined the relevance and weight of the various opinions and reports submitted for consideration. The Court makes its findings beyond a reasonable doubt.

Appendix C

Washington Ruling

Pursuant to the reasoning set out in the Washington Analysis above, This Court finds there are no factual circumstances this Court can conceive under which ESSB 5078 as written and codified could be constitutional under the Washington Constitution, Article 1, Section 24. The Court finds ESSB 5078 is facially unconstitutional under the Washington Constitution.

Federal Ruling

Pursuant to the reasoning set out in the Federal Analysis above, this Court finds ESSB 5078 implicates the text of the Second Amendment of the U.S. constitution.

The State has not demonstrated that LCMs are not in common use[36] under the *Heller* in common use test.

The State has failed to provide a relevantly similar historical analogue from the proper period, and therefore the State has failed to meet its burden under the *Bruen* historical analogue test.

The Court finds there are no factual circumstances this Court can conceive under which ESSB 5078 as written and codified could be constitutional under the United States Constitution, Second Amendment. The Court finds, ESSB 5078 is facially unconstitutional under the United States Constitution.

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36. "In common use", meaning commonly owned by citizens lawfully for self defense

Appendix C

Consumer Protection Action

This case is brought under a Consumer Protection Enforcement Action claim by the State of Washington against Defendants. The violations alleged are the sale of what this Court finds are protected arms under Washington Constitution Article 1, § 24, as well as United States Constitution, Bill of Rights, Second Amendment.

The CPA does not regulate "how" an LCM is sold; it prohibits the sales and importation of magazines with a capacity greater than ten. It is logically inconceivable that an item that is constitutionally protected to possess could be prohibited from sale to the very people who have the protected right to possess it.

As such there is no set of facts this Court can conceive of which would allow the Consumer protection sections of ESSB 5078 as written to pass constitutional muster and this Court specifically finds those sections unconstitutional.

Order

1. The Court Grants the Defense Motion for Summary Judgement on both its Article 1, Section 24 claim, and on their Second Amendment Claim.

2. The Court Denies the States Motion for Summary Judgement on both its Article 1, Section 24 claim, and their Second Amendment Claim.

Appendix C

Injunction

This Court hereby immediately enjoins the State of Washington, or its officers and agents, or the enforcement personnel of any state, county, or local political subdivisions from enforcing any of the provisions of ESSB 5078 as codified at RCW 9.42.300 and 9.41.375 against any individual, or entity which it would otherwise apply. The Attorney General's Office is ordered to immediately inform affected enforcement entities of this injunction.

In compliance with RCW 7.40.080, defendants are hereby required to post a bond in the amount of $500 (cash or secured bond) with the Clerk of this Court, pending further proceedings herein and entry of final orders. Said bond shall be posted within 5 court days of entry of this order, however the effectiveness of the injunction is not contingent on the filing of the bond in the interim.

Attorney's Fees

Both parties have requested and award of Attorney fees in this matter. The Court does not address fees in this decision but will consider those claims upon motion before Court to allow for separate briefing and proof of fees and costs incurred.

Stay of Injunction

At the conclusion of the summary judgment oral argument, the State first orally mentioned that if the Court were to enjoin ESSB 5078 the State requested any

such injunction stayed pending appeal. Defendants orally objected to this request. No motion has been filed with this Court regarding the issue of a possible stay.

The State has no interest in enforcing an unconstitutional law. The Court will address the question of a stay if a proper motion is filed with notice.

It is so ordered.

Dated this 8th day of April 2024.

/s/ Judge Gary B. Bashor
Judge Gary B. Bashor
Cowlitz County Superior Court