

In the Supreme Court of the United States

GATOR'S CUSTOM GUNS, INC., AND WALTER WENTZ,

PETITIONERS,

v.

STATE OF WASHINGTON,

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI
TO THE WASHINGTON SUPREME COURT

BRIEF IN OPPOSITION

NICHOLAS W. BROWN
Attorney General

NOAH G. PURCELL
Solicitor General

ANDREW R.W. HUGHES
Assistant Attorney General
Counsel of Record

WILLIAM D. MCGINTY
Deputy Solicitor General

800 Fifth Avenue, Suite 2000
Seattle, WA 98104
206-464-7744
Andrew.Hughes@atg.wa.gov

QUESTION PRESENTED

After Washington State prohibited the sale of large capacity magazines in 2022, a number of plaintiffs challenged the law. Petitioners here chose not to do that, instead ignoring the law entirely and continuing to sell thousands of illegal magazines. When the State brought an enforcement action to stop Petitioners' illegal conduct, they belatedly and halfheartedly decided to challenge the law in court. The State submitted extensive expert testimony that large capacity magazines would not have been considered "arms" as that term is used in the Second Amendment, and that they are neither necessary for or commonly used for self-defense. Petitioners declined to submit any expert testimony and conceded that no firearm requires a large capacity magazine to operate exactly as intended. On the record before it, the Washington Supreme Court upheld Washington's law.

The question presented is:

Whether the Washington Supreme Court erred in finding, on the record before it, that Petitioners failed to show that large-capacity magazines are arms within the meaning of the Second Amendment, and failed to show that Washington's restrictions on large-capacity magazines hinder the right to keep and bear arms.

TABLE OF CONTENTS

INTRODUCTION	1
STATEMENT OF THE CASE	3
A. Washington Prohibits the Manufacture and Sale of LCMs	3
B. The Record in This Case Shows That LCMs Are Not Commonly Used in Self-Defense.....	4
C. The Record Shows LCMs Are Disproportionately Used in Mass Shootings.....	7
D. Superior Court Proceedings	9
E. Washington Supreme Court Proceedings.....	11
REASONS FOR DENYING THE PETITION.....	14
A. The Decision Below Faithfully Applies This Court’s Precedent.....	14
1. LCMs are accessories, not arms	15
2. LCMs are not in common use for self-defense	22
B. There Is No Meaningful Circuit Split Because Every Court of Appeals to Hear Challenges to LCM Restrictions has Upheld Them.....	30
C. This Case Is a Poor Vehicle for Addressing Whether Restrictions on Large Capacity Magazines Violate the Second Amendment.....	31
CONCLUSION	34

APPENDIX

CP 1007-12—Stipulation on Gator’s Proffered Expert Testimony on Summary Judgment <i>State of Washington v. Gator’s Custom Guns, Inc., and Walter Wentz</i> , Cowlitz County Superior Court, No. 23-2-00897-08.....	1a
CP 1190-99—Exhibit A, Declaration of R. July Simpson <i>State of Washington v. Gator’s Custom Guns, Inc., and Walter Wentz</i> Cowlitz County Superior Court, No. 23-2-00897-08.....	7a
CP 1265-98—Plaintiff State of Washington’s Opposition to Defendants’ Amended Motion for Summary Judgment <i>State of Washington v. Gator’s Custom Guns, Inc., and Walter Wentz</i> Cowlitz County Superior Court, No. 23-2-00897-08.....	20a

TABLE OF AUTHORITIES

Cases

<i>Antonyuk v. James</i> , 120 F.4th 941 (2d Cir. 2024), <i>cert. denied</i> , 145 S. Ct. 1900 (2025).....	24
<i>Ass’n of N.J. Rifle & Pistol Clubs, Inc. v.</i> <i>Att’y Gen. New Jersey (ANJRPC)</i> , 910 F.3d 106 (3d Cir. 2018), <i>abrogated by</i> <i>N.Y. State Rifle & Pistol Ass’n, Inc. v. Bruen</i> , 597 U.S. 1 (2022).....	31
<i>Bevis v. City of Naperville</i> , 85 F.4th 1175 (7th Cir. 2023), <i>cert. denied sub nom.</i> <i>Harrel v. Raoul</i> , 144 S. Ct. 2491 (2024).....	31, 33
<i>Bianchi v. Brown</i> , 111 F.4th 438 (4th Cir. 2024), <i>cert. denied sub nom.</i> <i>Snope v. Brown</i> , 145 S. Ct. 1534 (2025).....	25-26, 28-29
<i>Capen v. Campbell</i> , 708 F. Supp. 3d 65 (D. Mass. 2023), <i>aff’d</i> , 134 F.4th 660 (1st Cir. 2025).....	28
<i>Del. State Sportsmen’s Ass’n, Inc. v.</i> <i>Del. Dep’t of Safety & Homeland Sec.</i> , 108 F.4th 194 (3d Cir. 2024), <i>cert. denied sub nom.</i> <i>Gray v. Jennings</i> , 145 S. Ct. 1049 (2025).....	28, 31

<i>District of Columbia v. Heller</i> , 554 U.S. 570 (2008).....	11-12, 15, 21, 23-27
<i>Duncan v. Bonta</i> , 133 F.4th 852 (9th Cir. 2025) (en banc), <i>petition for cert. filed</i> , No. 25-198	7-8, 15, 17-18, 31-32
<i>Facebook, Inc. v. Duguid</i> , 592 U.S. 395 (2021).....	16
<i>Friedman v. City of Highland Park</i> , 784 F.3d 406 (7th Cir. 2015).....	23, 27, 29
<i>Gray v. Jennings</i> , 145 S. Ct. 1049 (2025).....	32
<i>Hanson v. District of Columbia</i> , 120 F.4th 223 (D.C. Cir. 2024), <i>cert. denied</i> , 145 S. Ct. 2778 (2025).....	30, 32-33
<i>Harrel v. Raoul</i> , 144 S. Ct. 2491 (2024).....	31
<i>Kennedy v. Bremerton Sch. Dist.</i> , 597 U.S. 507 (2022).....	23
<i>Kolbe v. Hogan</i> , 849 F.3d 114 (4th Cir. 2017), <i>abrogated on other grounds by</i> <i>N.Y. State Rifle & Pistol Ass’n, Inc. v. Bruen</i> , 597 U.S. 1 (2022).....	5, 24, 29
<i>McDonald v. Chicago</i> , 561 U.S. 742 (2010).....	16
<i>N.Y. State Rifle & Pistol Ass’n, Inc. v. Bruen</i> , 597 U.S. 1 (2022).....	2, 3, 11, 14, 16-17, 22-23, 25, 27, 30-33

<i>Nat’l Ass’n for Gun Rts. v. Lamont</i> , 685 F. Supp. 3d 63 (D. Conn. 2023), <i>aff’d</i> , No. 23-1162, 2025 WL 2423599 (2d Cir. Aug. 22, 2025).....	4, 19
<i>Nat’l Ass’n for Gun Rts. v. Lamont</i> , No. 23-1162, 2025 WL 2423599 (2d Cir. Aug. 22, 2025), <i>petition for cert. filed</i> , No. 25-421	28, 31
<i>Ocean State Tactical, LLC v. Rhode Island</i> , 145 S. Ct. 2771 (2025).....	32-33
<i>Ocean State Tactical, LLC v. Rhode Island</i> , 646 F. Supp. 3d 368 (D.R.I. 2022), <i>aff’d</i> , 95 F.4th 38 (1st Cir. 2024).....	8, 15
<i>Ocean State Tactical, LLC v. Rhode Island</i> , 95 F.4th 38 (1st Cir. 2024), <i>cert. denied</i> , 145 S. Ct. 2771 (2025).....	27-28, 31, 33
<i>Or. Firearms Fed’n v. Kotek</i> , 682 F. Supp. 3d 874 (D. Or. 2023).....	7-8, 28
<i>Precision Instrument Mfg. Co. v.</i> <i>Auto. Maint. Mach. Co.</i> , 324 U.S. 806 (1945).....	34
<i>Saenz v. Roe</i> , 526 U.S. 489 (1999).....	18
<i>United States v. Alaniz</i> , 69 F.4th 1124 (9th Cir. 2023)	24
<i>United States v. Miller</i> , 307 U.S. 174 (1939).....	21
<i>United States v. Rahimi</i> , 602 U.S. 680 (2024).....	22, 27

Constitutional Provisions

U.S. Const. amend. II	1-2, 11-15, 17, 21-23, 26, 30
-----------------------------	----------------------------------

Statutes

Violent Crime Control & Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1998.....	5, 9
Engrossed Substitute S.B. 5078 (SB 5078), 67th Leg., Reg. Sess. (Wash. 2022)	1, 3, 4, 7, 9-10, 13, 18, 33
Wash. Rev. Code § 9.41.370	33
Wash. Rev. Code § 9.41.375	33
Wash. Rev. Code § 19.86 (Consumer Protection Act)	33
11 R.I. Gen. Laws Ann. § 11-47.1-3	33
720 Ill. Comp. Stat. Ann. 5/24-1.10	33

Regulations

21 C.F.R. § 1040.10	19
---------------------------	----

Rules

Rule 12(7).....	6
-----------------	---

INTRODUCTION

Large capacity magazines (LCMs) are firearm accessories used in virtually every mass shooting in recent memory. To prevent the proliferation of these deadly accessories and address the epidemic of mass shootings, Washington's Legislature enacted Senate Bill 5078, restricting the manufacture and sale of LCMs in Washington. Gator's Custom Guns and Walter Wentz (collectively, Gator's) opted not to challenge this law. Instead, they simply flouted it, indiscriminately selling thousands of unlawful LCMs.

After they got caught, they argued for the first time that Washington's law violated the Second Amendment. They argued that SB 5078 is facially invalid and every one of its possible applications is unconstitutional. But they expressly declined to rely on expert testimony and failed to submit *any* admissible evidence. Ultimately, Gator's case went to Washington's Supreme Court, and that court did what every other appellate court has done: rejected the plaintiffs' Second Amendment challenge to LCM restrictions. And now, once again, they are doing what every other plaintiff has done: bringing a version of the same petition for certiorari that this Court has denied three times in the past two years. The Court should deny this petition as well.

Washington's Supreme Court faithfully applied this Court's precedent in concluding that LCMs are not "Arms" within the meaning of the Second Amendment. To begin, they do not qualify as "Arms" as that term is historically (or commonsensically) understood. The undisputed evidence showed that LCMs are not themselves weapons; rather, they are

containers for holding ammunition—like quivers hold arrows. Washington’s Supreme Court then faithfully applied this Court’s precedent to conclude that the Second Amendment protects only those weapons “that facilitate armed self-defense.” *N.Y. State Rifle & Pistol Ass’n, Inc. v. Bruen*, 597 U.S. 1, 28 (2022). Here again, the undisputed evidence showed that firing more than ten times without reloading is useful on a battlefield, but virtually never done in self-defense. Lastly, the court recognized that even if LCMs are not themselves “Arms,” they might still be protected if they were necessary to actualize the core right of armed self-defense. But the undisputed evidence showed they are not; Gator’s admitted that every weapon capable of accepting an LCM functions perfectly fine without one. While there may be a point at which magazine capacity restrictions become so strict as to violate the Second Amendment, Gator’s failed to introduce any evidence that Washington’s law approached—let alone crossed—the line.

Despite Gator’s scaremongering that the Washington Supreme Court published a blueprint to ban all semiautomatic weapons, the ruling was in fact a modest one. It held nothing more than that, on the record before it, Gator’s failed to carry its burden to prove that selling or manufacturing LCMs fell within the scope of the right ratified by our Founders.

Gator’s fares no better in arguing that this ruling “deepens a circuit split” on the scope of the Second Amendment. Every court of appeals to consider this issue has upheld restrictions on LCMs. While some have made this determination at *Bruen* step one and others at *Bruen* step two (usually

without deciding step one), the end result is the same. There is no material split in appellate authority calling out for this Court’s intervention.

Finally, even ignoring all of that, Gator’s has utterly failed to explain why this petition is different from other petitions this Court recently rejected. If anything, this case presents a worse vehicle than others, for multiple reasons: it only raises half the *Bruen* test; Gator’s’ bizarre refusal to rely on evidence leaves the record entirely one-sided in the State’s favor; Washington’s law, which does not restrict possession of LCMs, is much less restrictive than the possessory bans at issue in the prior, rejected petitions; and Gator’s comes to this Court with unclean hands.

The petition should be denied.

STATEMENT OF THE CASE

A. Washington Prohibits the Manufacture and Sale of LCMs

Washington’s Legislature passed Senate Bill 5078 to address the epidemic of gun violence and mass shootings that “threat[ens] . . . the public health and safety of Washingtonians.” Engrossed Substitute S.B. 5078 (SB 5078), 67th Leg., Reg. Sess., § 1 (Wash. 2022). The Legislature found that LCMs—ammunition feeding devices capable of holding more than ten rounds—contribute to “increase[d] casualties by allowing a shooter to keep firing for longer periods of time without reloading.” *Id.* Citing the use of LCMs in “all 10 of the deadliest mass shootings since 2009,” the Legislature noted that from 2009 to 2018 the use of LCMs in mass shooting events “caused twice

as many deaths and 14 times as many injuries,” whereas mass-shooting casualties declined while a federal LCM ban was in effect. *Id.* Accordingly, the Legislature found that “restricting the sale, manufacture, and distribution of [LCMs] is likely to reduce gun deaths and injuries[.]” without interfering with “responsible, lawful self-defense.” *Id.*

SB 5078 prohibits the manufacture, distribution, import, and sale of LCMs, with certain exemptions for the military and law enforcement. The law does this while “allowing existing legal owners to retain the large capacity magazines they currently own.” *Id.* No firearm is rendered inoperable due to SB 5078, because all guns capable of accepting LCMs—even AR-15s and the like—can fully function with magazines that hold ten rounds or fewer. Pet. App. 15a. Gator’s admitted this below. BIO. App. 12a (“**INTERROGATORY NO. 21:** Please identify each firearm you sell that accepts large capacity magazines but does not accept magazines holding ten or fewer rounds. **ANSWER:** None.”).

B. The Record in This Case Shows That LCMs Are Not Commonly Used in Self-Defense

“LCMs were originally designed for military use in World War I and did not become widely available for civilian use until the 1980s.” *Nat’l Ass’n for Gun Rts. v. Lamont*, 685 F. Supp. 3d 63, 101 (D. Conn. 2023), *aff’d*, No. 23-1162, 2025 WL 2423599 (2d Cir. Aug. 22, 2025); *see also* CP 1318 (“The lineage of LCM’s can be traced directly to a military heritage.”).

Consistent with their military origins, “large-capacity magazines ‘are particularly designed and most suitable for military and law enforcement applications.’” *Kolbe v. Hogan*, 849 F.3d 114, 137 (4th Cir. 2017), *abrogated on other grounds by Bruen*, 597 U.S. 1 (2022) (citation omitted); *see also* CP 1261. The federal Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) has made this determination repeatedly, over decades, in reports on the importability of certain weapons. *See, e.g.*, ATF, *Study on the Importability of Certain Shotguns* 5 (Jan. 2011), <https://www.atf.gov/resource-center/docs/january-2011-importability-certain-shotgunspdf/download> (“[L]arge capacity magazines are a military feature[.]” (discussing previous reports)). The military nature of LCMs was also a central concern of Congress when it banned them nationwide as part of the 1994 Assault Weapons Ban. As the House Report on the bill explained, “the expert evidence is that the features that characterize a semiautomatic weapon,” including use of LCMs, “are not merely cosmetic, but do serve specific, combat-functional ends.” H.R. Rep. No. 103-489 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1820. “High-capability magazine[s] . . . make it possible to fire a large number of rounds without re-loading, then to reload quickly when those rounds are spent.” *Id.* “Furthermore, expended magazines can be quickly replaced, so that a single person with a single assault weapon can easily fire literally hundreds of rounds within minutes.” *Id.*

LCMs are not commonly used for self-defense. The record in this case makes this clear. In an analysis of self-defense incidents collected by the National Rifle Association, expert Lucy Allen of

National Economic Research Associates has shown that “individuals almost never fire more than ten rounds in self-defense[.]” *See* Pet. App. 7a (quoting and citing expert report). Out of 736 incidents in the National Rifle Association (NRA) database analyzed by Ms. Allen, there were only two in which the defender fired more than ten bullets. Wash. Clerk’s Papers (CP) 1510.¹ “[I]nstead the average number of shots fired in self-defense is merely 2.2.” Pet. App. 7a. The only evidence Petitioners sought to introduce on summary judgment was ownership statistics published by the gun industry and a single, criticized, survey—but the trial court rejected this evidence under Washington’s Rules of Evidence. Pet. App. 7a-8a. Gator’s itself admits it is not aware of a *single instance* in which any civilian, anywhere, fired more than ten rounds in self-defense. BIO. App. 13a.

Ms. Allen has replicated these results through an analysis of self-defense stories archived by Factiva, “an online news reporting service and archive . . . that aggregates news content from nearly 33,000 sources.” CP 1512-16. That analysis—which is likely biased toward more sensational stories in which *more* shots are fired—similarly “find[s] that the average number of shots fired per [self-defense] incident covered is 2.34.” CP 1515. She found “no incidents where the defender was reported to have fired more than 10 bullets.” CP 1516. Ms. Allen found similar results analyzing a unique law-enforcement resource of

¹ Due to the volume of expert materials introduced below, this Brief in Opposition cites directly to the record before the Washington State Supreme Court. *See* Rule 12(7).

shooting data collected by the City of Portland, Oregon. CP 1517-21. She “found no incidents of self-defense with a firearm where the defender fired more than 10 shots” in the Portland police reports. CP 1517.

C. The Record Shows LCMs Are Disproportionately Used in Mass Shootings

While never needed for self-defense, large capacity magazines are routinely used and especially deadly in mass shootings, which is why the Washington Legislature regulated them in SB 5078. Pet. App. 2a-3a. “Since 2010, 86 percent of all high-fatality mass shootings have involved LCMs. Since 2020, 100 percent of all high-fatality mass shootings have involved LCMs.” *Or. Firearms Fed’n v. Kotek*, 682 F. Supp. 3d 874, 897 (D. Or. 2023); *see also* CP 1876-79 (explaining how “use of LCMs is a major factor in the rise of mass shootings” (capitalization omitted)).

Because weapons equipped with LCMs are so much deadlier than other weapons, their use in mass shootings leads to much higher casualty rates. “The average number of shots fired in a mass shooting where an LCM was not used was sixteen. By contrast, the average number of shots fired in a mass shooting where an LCM was used was *ninety-nine*.” *Or. Firearms Fed’n*, 682 F. Supp. 3d at 897-98 (emphasis added) (record citation omitted); *see also* CP 1527; *Duncan v. Bonta*, 133 F.4th 852, 862 (9th Cir. 2025) (en banc), *petition for cert. filed*, No. 25-198 (recounting similar statistics). The evidence likewise showed that all seven of the deadliest acts of

criminal violence in the United States since the September 11, 2001, terrorist attacks were mass shootings by perpetrators using LCMs. CP 1877-78.

Expert testimony below showed that LCMs contribute to mass shooting fatalities in at least two ways. First, “the more bullets a shooter can fire at a target within a finite amount of time, the more potential wounds they can inflict.” CP 1886-87; *see also Ocean State Tactical, LLC v. Rhode Island*, 646 F. Supp. 3d 368, 395 (D.R.I. 2022), *aff’d*, 95 F.4th 38 (1st Cir. 2024) (“The more shots fired, the greater the number of people wounded, the more bullets that hit a single person, the more serious the injuries, and the less able emergency rooms are to treat them or save lives.”). Second, LCMs make it more difficult for victims to “flee, hide, or fight back” when the shooter “pause[s] to reload.” CP 1887-88; *see also Duncan*, 133 F.4th at 862. CP 1887-89. The State’s expert testified that “[t]here are several examples of individuals fleeing or taking cover while active shooters paused to reload” and gave the specific example of the Sandy Hook massacre when six first-graders were able to escape a classroom to safety while the shooter paused to swap out a magazine. CP 1887; *see also Ocean State Tactical*, 646 F. Supp. 3d at 396-97; *see also id.* at 393-95 (“It is undisputed that requiring a pause in the shooting saves lives.” (collecting stories)). By enabling shooters to continue shooting without pause, LCMs reduce these critical windows and lead to more deaths. CP 1157; *see also Or. Firearms Fed’n*, 682 F. Supp. 3d at 898-99.

Expert testimony submitted by the State also established that this violence is both modern and increasing. CP 1874-83. The first mass shooting

incident in American history that resulted in ten or more deaths happened in 1949, the next in 1966, then in 1975. CP 1879-80. But after the 1994 Assault Weapons Ban expired in 2004, the average rate of these incidents increased “over six-fold” when compared to the time period of 1949 to 2004. CP 1883. “[T]he problem of high-fatality mass shooting violence is on the rise.” CP 1874-75. This testimony proved, and Petitioners effectively conceded, that high-fatality mass shootings are a distinctly modern phenomenon getting worse every year.

D. Superior Court Proceedings

Washington’s Governor signed SB 5078 into law in March 2022, and the law became effective July 1, 2022. Engrossed Substitute S.B. 5078, 67th Leg., Reg. Sess. (Wash. 2022). Around this time, two groups of plaintiffs filed lawsuits challenging its constitutionality, one of which is represented by the same counsel as Petitioners here. *Sullivan v. Ferguson*, No.3:22-cv-05403-DGE (W.D. Wash.); *Brumback v. Ferguson*, No. 1:22-cv-03093-MKD (E.D. Wash.). Gator’s chose not to.

Gator’s opted to ignore the law. They continued to sell LCMs illegally in massive quantities, knowing full well they were violating the law. Gator’s illegally sold LCMs to two undercover state investigators. CP 117-18. One investigator “observed barrels and boxes of LCMs in Defendants’ retail store advertised for public sale[,]” and obtained records showing that Gator’s ordered well over *11,000* LCMs for sale in Washington after SB 5078 went into effect. CP 119-20.

In September 2023, the State filed suit against Gator’s and its owner, Walter Wentz, alleging numerous violations of Washington’s Consumer Protection Act in connection with Gator’s illegal sales of LCMs. CP 111-23.

In the superior court, the State submitted expert reports from three historians, a firearms expert, a social scientist who has studied mass shootings, an economist who has researched self-defense, and an expert in corpus linguistics who opined on how early Americans would have understood the term “Arms.” Pet. App. 56a (listing evidence submitted on cross-motions for summary judgment); CP 220-785, 1300-2006. Gator’s, meanwhile, explicitly declined, in a binding stipulation, to rely on any expert testimony. BIO App. 1a-4a. Gator’s instead sought to rely solely on an unpublished survey and purported industry data related to the supposed popularity of LCMs. Pet. App. 7a-8a, 12a; CP 1277-81. But, applying Washington’s Rules of Evidence, the superior court excluded this proffered evidence in a ruling Gator’s declined to appeal. Pet. App. 56a (“objections raised regarding hearsay have been honored”); *see also* BIO App. 12a-26a (objecting to Gator’s evidence as hearsay under Washington law).

Thus, when the parties cross-moved for summary judgment, all of the admissible evidence supported the State’s position. Nonetheless, in April 2024, the superior court issued an order finding SB 5078 facially unconstitutional under both the Washington Constitution and the Second Amendment. Pet. App. 53a-122a.

E. Washington Supreme Court Proceedings

Washington’s Supreme Court granted review of the superior court’s summary judgment ruling and reversed. Pet. App. 1a-19a. Based on its review of the record, the state supreme court concluded that Gator’s failed to carry its burden at the first step of the *Bruen* analysis because it had not introduced any evidence showing that purchasing LCMs came within the Second Amendment in the first instance. Pet. App. 15a-16a; *see also Bruen*, 597 U.S. at 24 (holding that in evaluating a Second Amendment challenge, a court must first evaluate whether “the Second Amendment’s plain text covers an individual’s conduct”).

The court’s reasoning proceeded in three steps. *First*, applying the definition supplied by this Court in *Heller*—in which arms are “‘any thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another,’” *District of Columbia v. Heller*, 554 U.S. 570, 581 (2008) (quoting 1 Timothy Cunningham, *A New and Complete Law Dictionary* (1771))—the court concluded that LCMs are accessories, not arms. That is, 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.” Pet. App. 10a (alterations in original) (citation omitted). This conclusion was buttressed by unrebutted expert evidence “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).” Pet. App. 6a.

Responding to Gator’s argument that LCMs are “integral components” of firearms, the court explained this “is not factually accurate[.]” Pet. App. 10a. While a magazine may be necessary for semiautomatic weapons to work as intended, SB 5078 merely limited magazine capacity, and “Gator’s admit[ted] that no firearm requires a magazine of” eleven or more rounds “to function.” Pet. App. 10a. Thus, because LCMs are optional accessories that merely “modify” the function of firearms “by increasing that firearm’s ammunition capacity,” they are not themselves arms. Pet. App. 11a.

Second, applying *Heller*’s holding that the Second Amendment protects arms that are in “‘common use’ . . . for lawful purposes like self-defense,” *Heller*, 554 U.S. at 624 (quoting *United States v. Miller*, 307 U.S. 174, 179 (1939)), the Washington Supreme Court concluded that the record contained “no credible and persuasive evidence or argument that LCMs are commonly used for such a purpose.” Pet. App. 12a. The court pointed to un rebutted evidence that weapons equipped with LCMs “are ‘military-style weapons’ equipped to serve ‘combat functions, not self-defense functions,’” and “that LCMs have ‘virtually no utility for self-defense[.]” Pet. App. 6a-7a (citations omitted). On the other side of the ledger, “[n]o showing ha[d] been made that the origins, use, purpose, or intended function of LCMs support the conclusion that they are commonly used for self-defense.” Pet. App. 13a; *see also* Pet. App. 12a (concluding Gator’s provided “only

minimal and highly contested evidence, which we do not find sufficient to bear Gator’s burden to prove LCMs fall within constitutional protection”). Thus, the court held, LCMs are “not within the scope of the right[] to bear arms under the . . . United States Constitution[.]” Pet. App. 13a.

Third, the court acknowledged that the protection afforded by the Second Amendment “is broader than simply protecting ‘arms’—it protects individual conduct that falls within the scope of the right to bear arms in self-defense[.]” Pet. App. 14a. This, the court explained, “implies protection of corresponding rights that are necessary to give the right to possess a firearm for self-defense meaning,” such as the right to purchase (not merely keep and bear) arms and ammunition or the right to access gun ranges. Pet. App. 14a. (citing *Bruen*, 597 U.S. at 17). But here again, the court found Gator’s evidence was entirely lacking. The record disclosed “no firearms that require an LCM to function” and likewise showed that “without an LCM, a semiautomatic firearm is still capable of firing [.]up to 10 rounds[.]” Pet. App. 15a. This “fulfills the firearm’s purpose as a tool for realizing the core right of self-defense.” Pet. App. 15a.

The Washington Supreme Court accordingly found that Gator’s failed to carry its burden of proving that SB 5078 implicated—let alone violated—the Second Amendment.

Gator’s now petitions for certiorari.

REASONS FOR DENYING THE PETITION

A. The Decision Below Faithfully Applies This Court's Precedent

In *Bruen*, this Court clarified the test for Second Amendment claims: “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.” *Bruen*, 597 U.S. at 24. Thus, a plaintiff initially bears the burden to show that whatever law they are challenging burdens their Second Amendment right to keep and bear arms. If they can make that showing, the burden shifts to the government to show that the restriction comes within America’s historical tradition of arms regulations.

Gator’s’ Second Amendment claim failed at both steps of the analysis. Not only is the sale, importation, and manufacture of tactical accessories like LCMs not arms-bearing conduct protected by the Second Amendment, but as the undisputed record evidence shows, Washington’s law is consistent with an unbroken tradition of weapons restrictions stretching back to our nation’s pre-history. Nonetheless, because Gator’s failed to carry its burden at *Bruen* step one, the Washington Supreme Court stopped there. On the record before it, this holding faithfully applied this Court’s precedent.

1. LCMs are accessories, not arms

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.” U.S. Const. amend. II. In *Heller*, this Court defined “arms” as “[w]eapons of offence, or armour of defence” or “‘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 581 (quoting Founding-era sources).

Applying this definition, LCMs are plainly not “Arms.” An LCM, by itself, is not used to “cast at or strike another.” See *Duncan*, 133 F.4th at 867 (“A large-capacity magazine is a box that, by itself, is harmless.”). Instead, as the State’s firearms expert put it in unrebutted testimony, LCMs are merely a subclass of “container[s] for ammunition cartridges”—accessories that, when added to weapons, increase their capacity without fundamentally changing their operation. CP 1305; see also Pet. App. 10a (“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.” (citation omitted)). Accordingly, LCMs are not “Arms” and are not within the plain text of the Second Amendment.

Looking to history, *Heller* cites a bow and arrow as an example of an “arm,” 554 U.S. at 581, but an LCM is not analogous to either. Instead, it is more akin to a quiver used for holding arrows. See, e.g., *Ocean State Tactical*, 646 F. Supp. 3d at 387 (“[M]agazines themselves are neither firearms nor

ammunition. They are *holders* of ammunition, as a quiver holds arrows[.]”). And certainly no one would argue that quivers themselves are “arms.”

This distinction between arms and accessories reflects how the Second Amendment would have been understood at the time of the Founding and the Fourteenth Amendment. *See Bruen*, 597 U.S. at 37-38; *McDonald v. Chicago*, 561 U.S. 742, 778 (2010) (plurality op.) (focusing on how “the *Framers and ratifiers of the Fourteenth Amendment*” understood the right to bear arms (emphasis added)); *see also* CP 1409-12. In his expert report in this case, Professor Dennis Baron applied a corpus linguistics analysis—essentially, “[a]nalyzing the usage of [a] word or phrase in as many sources as possible [to] permit[] language scholars to understand how the word or phrase was used to convey meaning”—to determine whether English speakers during the Founding and Reconstruction Eras would have understood the term “arms” to include magazines or related instruments like cartridge boxes. CP 1406, 1414-20; *cf. Facebook, Inc. v. Duguid*, 592 U.S. 395, 412 (2021) (Alito, J., concurring) (approving of the use of corpus linguistics to analyze “empirical” textual questions). As Professor Baron explains, “in the vast majority of [historical] examples, arms referred to weapons. Arms generally did not include ammunition or other weapon accessories, including the cartridge box, the historical analogue to the magazine[.]” CP 1417. Put another way, magazines do not come within the definition of the word “arms,” as the Framers and ratifiers of the

Second Amendment would have understood it. *See Duncan*, 133 F.4th at 867 (“By choosing to protect the right to bear ‘arms,’ not ‘arms and accoutrements,’ the Founders constrained the scope of the Second Amendment” to protect “most weapons used in armed self-defense” but not “accoutrements.”).

Against Professor Baron’s analysis, Gator’s submitted no contrary historical evidence. Without any historical basis to construe “arms” to include LCMs, a contrary ruling by the Washington Supreme Court would have flown in the face of this Court’s direction that “the Second Amendment’s definition of ‘arms’ is fixed according to its historical understanding[.]” *Bruen*, 597 U.S. at 28. *See also* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849, 856-57, 861 (1989) (explaining that “plumb[ing] the original understanding of an ancient text . . . requires the consideration of an enormous mass of material” from contemporaneous sources, “an evaluation of the reliability of that material,” and “immersing oneself in the political and intellectual atmosphere of the time”). Gator’s bore the burden to prove that LCMs are “arms” as that term was historically understood, and Gator’s failed to carry that burden.

To be sure, as the Washington Supreme Court acknowledged, a conclusion that LCMs are not themselves “arms” does not end the analysis. This is because the protection afforded by the Second Amendment “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.” Pet. App. 14a (citing *Bruen*, 597 U.S. at 17). So, for example, a complete ban on magazines might effectively ban the use of semiautomatic firearms and could therefore violate the Second Amendment. But SB 5078 does no such thing.

SB 5078 only prohibits the manufacture and sale of *one subclass* of magazines commonly associated with mass shootings and other violent crime. It leaves untouched individuals’ ability to buy and sell countless varieties of magazines holding ten rounds or fewer and leaves untouched Washingtonians’ right to possess and use the LCMs they already own. See Pet. App. 15a (“This regulation does not limit the number of bullets or magazines that may be purchased or possessed.”); see also CP 1321-27 (expert testimony discussing widespread availability of lawful magazines). Nor does it meaningfully limit anyone’s ability to use any type of firearm for any lawful purpose. Indeed, as Gator’s itself admits, although *some type* of magazine may be required for some firearms to operate, a *large capacity* magazine never is. Pet. App. 10a; BIO App. 12a; CP 1306; *Duncan*, 133 F.4th at 867-68. Thus, while SB 5078 may make it harder for mass murderers to garner double-digit body counts, its modest restriction on magazine capacity does not infringe on anyone’s right to use their firearms for self-defense. Simply put, a law restricting magazine capacity no more infringes the right to bear arms than a law restricting vehicle speed or emissions infringes the right to travel. Cf. *Saenz v. Roe*, 526 U.S. 489 (1999) (upholding fundamental right to travel).

Gator's resists this conclusion, arguing that because some type of magazine is necessary to use some types of firearms, any restriction on any type of magazine presumptively violates the Second Amendment. Pet. 24-26. In other words, Gator's asks this Court to indulge in the "logical fallacy" of assuming "that if a broader category of something is constitutional, then the smaller parts within it must also be constitutional." *Nat'l Ass'n for Gun Rts. v. Lamont*, 685 F. Supp. 3d 63, 91 (D. Conn. 2023). Washington's Supreme Court correctly rejected this argument. As it explained, "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." Pet. App. 11a.

To understand why Gator's argument is a fallacy, look at gun barrels: certainly a barrel is necessary for a gun to fire. But this Court in *Heller* nonetheless expressly approved of restrictions on short-barreled shotguns. 554 U.S. at 625. This same exercise applies to literally any gun component. For example, armor-piercing rounds have been banned for almost forty years under the Law Enforcement Officers Protection Act, 18 U.S.C. § 922(a)(7), (8); is that restriction presumptively unconstitutional just because some type of ammunition is necessary for a firearm to function? Of course not. Similarly, while firearms need some way to aim them, that does not mean that any and all laser sights are constitutionally protected arms, see 21 C.F.R. § 1040.10 (imposing power limits on lasers). Gator's argument that every

component of an arm is itself an arm is just nonsense. It's like saying steering wheels or fan belts or even vinyl are "cars" merely because they are components of many cars. Whatever abstruse and lawyerly arguments Gator's might now advance that an optional component of a gun is a gun itself, it strains credulity to suppose—and there is no evidence to suggest—that's how an ordinary person ratifying the Second Amendment would have understood things.

Gator's presses a slippery slope argument to assert that, under the Washington Supreme Court's holding, "the government can ban" any firearm component and thus "effectively rip the Second Amendment out of the Constitution." Pet. 25 (quoting Pet. App. 33a (McCloud, J., dissenting)). Not even close. To start, Washington's Supreme Court explicitly recognized that "the Second Amendment . . . 'protects ancillary rights necessary to the realization of the core right to possess a firearm for self-defense.'" Pet. App. 13a (quoting *Teixeira v. County of Alameda*, 873 F.3d 670, 677 (9th Cir. 2017)). Banning all triggers, all barrels, all ammunition, or, yes, all magazines, would run afoul of the Second Amendment, whether those components were individually protected as arms or not. But here, Gator's failed to put forward *any* admissible evidence whatsoever that restricting new magazines to ten bullets or fewer would have any effect whatsoever on the right to armed self-defense.

Moreover, if ever there were a case in which the slippery slope goes both ways, it's this one. As Washington's Supreme Court explained, "[i]f 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.” Pet App. 11a. What would this mean? It would mean restrictions on barrel length are presumptively unconstitutional, notwithstanding this Court’s holding in *United States v. Miller*. 307 U.S. at 178 (“In the absence of any evidence tending to show that possession or use of a ‘shotgun having a barrel of less than eighteen inches in length’ . . . has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument.”). It would mean that all restrictions on machinegun conversion devices like bump stocks, auto-sears, and forced reset triggers—which are, after all, replacement components—would be presumptively unconstitutional, notwithstanding that such a conclusion would be “startling.” *Heller*, 554 U.S. at 624. And, of course, it would mean that any restriction on magazine size—whether 30, 100, or 1,000 would be prohibited. Contrary to Gator’s’ argument, nothing in the Second Amendment guarantees the right to unlimited firepower. *See id.* at 626.

At best, Gator’s’ argument suggests there might be line-drawing problems in determining whether particular capacity restrictions implicate the right to bear arms by materially infringing on the core right to self-defense. But this is a problem for another case. Because although the State readily concedes there may be a point at which a magazine capacity restriction is so strict as to infringe the Second Amendment’s core right of self-defense—just as unduly burdensome restrictions on types of

ammunition or barrel lengths might—Gator’s has utterly failed to raise a material issue of fact that a ten-round limit on magazines affects the right of armed self-defense *at all*. *Infra* pp. 24-26.

2. LCMs are not in common use for self-defense

The Washington Supreme Court correctly concluded that Gator’s failed to carry its burden at *Bruen*’s first step for a second, independent reason: they failed to introduce any evidence—let alone sufficient evidence—to show that LCMs are in common use for self-defense.

The Second Amendment “secures for Americans a means of self-defense.” *United States v. Rahimi*, 602 U.S. 680, 690 (2024). Like any right, the Second Amendment right “‘is not unlimited.’” *Bruen*, 597 U.S. at 21 (quoting *Heller*, 554 U.S. at 626). In particular, it is “‘not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.’” *Id.* (quoting *Heller*, 554 U.S. at 626); *see also id.* at 72 (Alito, J., concurring) (*Bruen* does not call into question restrictions on “the kinds of weapons that people may possess”).

No one would seriously argue, for example, that MQ-1 Predator drones or FIM-43 Redeye shoulder-mounted surface-to-air missile launchers are protected by the Second Amendment, notwithstanding that they are literally bearable arms. Rather, as the prefatory clause makes clear, the pre-existing right codified in the Amendment is rooted in the historic practices of state militias. And at the time of the Founding, “[t]he traditional militia was formed from a pool of men bringing arms ‘in common

use at the time’ for lawful purposes like self-defense.” *Heller*, 554 U.S. at 624. It is “these kinds of weapons (which have changed over the years) [that] are protected by the Second Amendment in private hands, while military-grade weapons (the sort that would be in a militia’s armory), such as machineguns, and weapons especially attractive to criminals, such as short-barreled shotguns, are not.” *Friedman v. City of Highland Park*, 784 F.3d 406, 408 (7th Cir. 2015) (citing *Heller*, 554 U.S. at 624-25). In short, “the Second Amendment protects only the carrying of weapons that are those ‘in common use at the time[.]’” *Bruen*, 597 U.S. at 47 (quoting *Heller*, 554 U.S. at 627).

Heller thus acknowledges that “weapons that are most useful in military service—M-16 rifles and the like—may be banned” 554 U.S. at 627. So too, *Bruen* embraced the “historical tradition of prohibiting the carrying of ‘dangerous and unusual weapons.’” 597 U.S. at 21 (quoting *Heller*, 554 U.S. at 627). These “‘important limitation[s] on the right to keep and carry arms’” remain critical to understanding the Second Amendment. *Id.* at 81 (Kavanaugh, J., concurring) (quoting *Heller*, 554 U.S. at 626-27). And they proved fatal to Gator’s claim here, as the Washington Supreme Court correctly held. Pet. App. 12a.

Like any plaintiff, Gator’s bore the burden to show that their rights were implicated by the law they challenged. See *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 524 (2022). Thus, it was their burden to show that LCMs are in common use for self-defense. See *Bruen*, 597 U.S. at 32 (explaining that the plain text of the Second Amendment, as understood by the

Founders, only covers “weapons ‘in common use’ today for self-defense” (quoting *Heller*, 554 U.S. at 627)); *see also United States v. Alaniz*, 69 F.4th 1124, 1128 (9th Cir. 2023) (“In alignment with *Heller*, [*Bruen* step one] requires a textual analysis, determining,” among other things, “whether the weapon at issue is “‘in common use’ today for self-defense.”” (quoting *Bruen*, 597 U.S. at 32)); *Antonyuk v. James*, 120 F.4th 941, 981 (2d Cir. 2024), *cert. denied*, 145 S. Ct. 1900 (2025) (*Bruen*’s “threshold inquiry requires courts to consider . . . whether the weapon concerned is ‘in common use[.]’” (quoting *Bruen*, 597 U.S. 31-32)).

As Washington’s Supreme Court found, Gator’s comprehensively failed to carry its burden. The undisputed record evidence, including testimony from the State’s expert witnesses, shows that LCMs are not commonly used or useful for self-defense. *Supra* pp. 4-7; *see also* Pet. App. 6a-7a (noting evidence “that LCMs have ‘virtually no utility for self-defense’” (citation omitted)). Rather, consistent with their purpose of “‘enhanc[ing] a shooter’s ‘capacity to shoot multiple human targets very rapidly,’” *Kolbe*, 849 F.3d at 125 (citation omitted), the evidence showed that LCMs are unusually dangerous accessories “that are most useful in military service[.]” *Heller*, 554 U.S. at 627; *see also* Pet. App. 6a (noting evidence that weapons equipped with LCMs “are ‘military-style weapons’ equipped to serve ‘combat functions, not self-defense functions’” (citation omitted)).

By contrast, Gator’s offered “no credible and persuasive evidence . . . that LCMs are commonly used for” self-defense. Pet. App. 12a (emphasis added). Instead, all Gator’s offered was some statistics showing the number of LCMs purportedly owned by

Americans, but this evidence was *excluded* by the superior court in a ruling Gator’s did not appeal. Pet. App. 56a (excluded evidence objected to on hearsay grounds). Gator’s record is thus entirely bereft of evidence supporting their position.² Moreover, even were this evidence admissible, Washington’s Supreme Court correctly noted that “how many LCMs are owned has no bearing on what those LCMs are actually used *for*”—which is the thing Gator’s actually had to prove. Pet. App. 12a. All told, the court found “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.” Pet. App. 12a.³

Accordingly, on the record before it, the court concluded that “[n]o showing has been made that the origins, use, purpose, or intended function of LCMs support the conclusion that they are commonly used

² Gator’s assertion that the Washington Supreme Court “admit[ed] the ubiquity” of LCMs, Pet. 27, is wishful thinking. There was no competent evidence in the record on this point either way.

³ Gator’s faults the Washington Supreme Court for putting Gator’s to its burden of proving common use. Pet. 27. But this is entirely consistent with this Court’s holdings in *Bruen* and *Heller*, as Judge Wilkinson’s opinion for the en banc Fourth Circuit in *Bianchi* cogently explains. See *Bianchi v. Brown*, 111 F.4th 438, 447-52 (4th Cir. 2024), *cert. denied sub nom. Snope v. Brown*, 145 S. Ct. 1534 (2025). And perhaps more importantly for present purposes, it doesn’t actually matter who bore the burden here because only one side—the State—presented any evidence *at all*. Thus, regardless of who initially bore the burden, the undisputed evidence all pointed to the conclusion that LCMs are not in common use for self-defense.

for self-defense, and thus,” the court held, “they are not within the scope of the rights to bear arms under the . . . United States Constitution[.]” Pet. App. 13a.

Given the complete lack of evidence, Gator’s cannot argue in its Petition that LCMs are in fact commonly used for self-defense. Instead, they argue it doesn’t matter whether weapons equipped with LCMs are “‘in common use.’” *Heller*, 554 U.S. at 624 (quoting *Miller*, 307 U.S. at 179). All that matters to Gator’s is how many people own them—in other words, how popular they are. Pet. 28-29.

As an initial matter, because Gator’s introduced exactly zero competent evidence in the record, this argument doesn’t do anything for them; even if they were right, they have failed to offer any admissible evidence that LCMs are common.

But even leaving that aside, courts have repeatedly rejected this argument. An argument that hinges constitutional protection on whether something is popular lacks any footing in the law or common sense.

As a legal matter, whether LCMs are commonly *possessed* is not the relevant question. Instead, this Court has been careful to ask whether an arm is “common *use*” for lawful purposes like self-defense. *Heller*, 554 U.S. at 627 (emphasis added). “[T]he Court’s choice of the phrase common *use* instead of common *possession* suggests that only instances of ‘active employment’ of the weapon should count, and perhaps only active employment in self-defense.” *Bianchi*, 111 F.4th at 460 (citing *Bailey v. United States*, 516 U.S. 137, 143-45 (1995)). Similarly, this Court has emphasized that the Second Amendment

covers instruments that “facilitate armed self-defense,” *Bruen*, 597 U.S. at 28, but does not cover “weapons that are most useful in military service,” *Heller*, 554 U.S. at 627, making clear that the analysis has a functional component as well. Taken together, then, the relevant question is whether a particular instrument is used or useful for self-defense. *Ocean State Tactical, LLC v. Rhode Island*, 95 F.4th 38, 50 (1st Cir. 2024), *cert. denied*, 145 S. Ct. 2771 (2025) (“*Bruen* . . . directs us in no uncertain terms to assess the burden imposed by modern gun regulations ‘on the right of armed self-defense.’” (quoting *Bruen*, 597 U.S. at 29)). Ownership statistics—even if they were admissible—answer a question this Court never asked.

Moreover, Gator’s misguided popularity-contest approach flouts common sense. See *Rahimi*, 602 U.S. at 698 (emphasizing importance of “common sense” in evaluating arms regulations). Under Gator’s test, a legislature could regulate only rare weapons, even though rare weapons are not the ones causing problems. This “‘use it or lose it’ view of legislative authority” has no place in the Constitution. See *Rahimi*, 602 U.S. at 740 (Barrett, J., concurring). As the Seventh Circuit pointed out, Tommy guns were “all too common” during the Prohibition era, but this “popularity d[oes]n’t give” dangerous military-style weapons “constitutional immunity[.]” *Friedman*, 784 F.3d at 408. Indeed, it is precisely because machineguns—and now LCMs—became increasingly prevalent and increasingly associated with horrific crimes that governments stepped in to regulate them. “It defies reason to say that legislatures can only ban

a weapon if they ban it at (or around) the time of its introduction, before its danger becomes manifest.” *Ocean State Tactical*, 95 F.4th at 50.

Gator’s’ reasoning also leads to the absurd conclusion that a firearm accessory’s constitutionality waxes and wanes based on whether the gun industry chooses to engage in mass campaigns to flood the market. *See Or. Firearms Fed’n*, 682 F. Supp. 3d at 915 (explaining how “firearm manufacturers and dealers make decisions that both limit consumer choice and magnify the commonality of LCMs”). “A law’s constitutionality cannot be contingent on the results of a popularity contest.” *Del. State Sportsmen’s Ass’n, Inc. v. Del. Dep’t of Safety & Homeland Sec.*, 108 F.4th 194, 213 (3d Cir. 2024), *cert. denied sub nom. Gray v. Jennings*, 145 S. Ct. 1049 (2025) (Roth, J., concurring); *see also Bianchi*, 111 F.4th at 460 (“[U]nder appellants’ common use inquiry, [the M16, the short-barreled shotgun, the ricin pellet-firing umbrella gun, and the W54 nuclear warhead] or similarly dangerous weapons could gain constitutional protection merely because it becomes popular before the government can sufficiently regulate it.”); *Nat’l Ass’n for Gun Rts. v. Lamont*, No. 23-1162, 2025 WL 2423599, at *11 (2d Cir. Aug. 22, 2025), *petition for cert. filed*, No. 25-421 (similar); *Capen v. Campbell*, 708 F. Supp. 3d 65, 78 (D. Mass. 2023), *aff’d*, 134 F.4th 660 (1st Cir. 2025) (noting “absurd[ity]” of argument by which “the constitutionality of the regulation of different firearms would ebb and flow with their sales receipts”).

Finally, “relying on how common a weapon is at the time of litigation would be circular[,]” because a weapon’s popularity often depends on whether it is banned or not. *Friedman*, 784 F.3d at 409; *see also Kolbe*, 849 F.3d at 141. It defies logic “to hold that arms manufacturers can secure constitutional immunity for their products so long as they distribute a sufficient quantity before legislatures can react[,]” because constitutional rights “cannot be read to expand or contract based on nothing more than contemporary market trends.” *Bianchi*, 111 F.4th at 461. By focusing on an objective analysis of whether a particular weapon or accessory is commonly used for self-defense, this Court’s analysis largely avoids these obvious pitfalls. And by focusing its inquiry on whether LCMs are commonly used for self-defense, the Washington Supreme Court faithfully applied this Court’s precedent.⁴

⁴ Gator’s implicitly criticizes Washington’s Supreme Court for focusing “only” on whether people “typically *fire* more than ten rounds in self-defense situations.” Pet. 27. That’s not right. Although Gator’s certainly failed to introduce any evidence that defenders *ever* fire more than ten rounds—and thus that the defining feature of an LCM is ever used for self-defense—the Court looked broadly at “origins, use, purpose, [and] intended function of LCMs,” and concluded that Gator’s failed to present evidence on any score. Pet. App. 13a. This was in marked contrast to the State’s evidence that LCMs “serve ‘combat functions, not self-defense functions’” and “have ‘virtually no utility for self-defense[.]’” Pet. App. 6a-7a. Finally, if Gator’s position is that mere possession of a gun is “use” insofar as gun possession has a deterrent effect, this argument is self-defeating; there is not a jot of evidence that a seventeen-round magazine has any deterrent effect above and beyond a ten-round magazine.

Here the evidence was overwhelming and undisputed that LCMs serve primarily combat functions, that LCMs are not used or useful in self-defense, and thus that LCMs do essentially nothing to “facilitate armed self-defense.” *Bruen*, 597 U.S. at 28. Under these facts, Gator’s cannot show the Washington Supreme Court misapplied this Court’s precedent.

B. There Is No Meaningful Circuit Split Because Every Court of Appeals to Hear Challenges to LCM Restrictions has Upheld Them

There is no meaningful split among courts that have considered the constitutionality of LCM regulations. While their reasoning has differed, every circuit court to address this issue has come out the same way as Washington’s Supreme Court, concluding that LCM restrictions pass muster under the Second Amendment.

Washington’s Supreme Court reached this conclusion by holding that selling LCMs is not covered by the Second Amendment in the first instance. *See* Pet. App. 15a-16a. The D.C. Circuit held that LCMs are presumptively covered by the Second Amendment but may nonetheless be restricted consistent with America’s long history of regulating weapons disproportionately used in criminal violence. *Hanson v. District of Columbia*, 120 F.4th 223, 242-43 (D.C. Cir. 2024), *cert. denied*, 145 S. Ct. 2778 (2025).⁵ The

⁵ Petitioners’ contention that the Third Circuit has also concluded LCMs are arms for Second Amendment purposes is not quite right. *Contra* Pet. 20 (citing *Ass’n of N.J. Rifle & Pistol Clubs, Inc. v. Att’y Gen. New Jersey (ANJRPC)*, 910 F.3d 106 (3d

First and Second Circuits assumed without deciding that LCMs were arms, but nonetheless upheld Rhode Island and Connecticut’s LCM restrictions as consistent with history and tradition. *Ocean State Tactical*, 95 F.4th at 43; *Nat’l Ass’n for Gun Rts.*, 2025 WL 2423599, at *13, *22. And the Seventh and en banc Ninth Circuits concluded that plaintiffs’ challenges failed under *both* steps of the *Bruen* analysis. *Bevis v. City of Naperville*, 85 F.4th 1175, 1197, 1202 (7th Cir. 2023), *cert. denied sub nom. Harrel v. Raoul*, 144 S. Ct. 2491 (2024); *Duncan*, 133 F.4th at 869, 883-84. But ultimately all roads lead to Rome; the alleged circuit split is inconsequential because Petitioners lose either way.

C. This Case Is a Poor Vehicle for Addressing Whether Restrictions on Large Capacity Magazines Violate the Second Amendment

This Court has denied petitions for certiorari in cases challenging LCM restrictions at least three times in the last two years. *Harrel v. Raoul*, 144 S. Ct. 2491 (2024); *Hanson v. District of Columbia*, 145 S.

Cir. 2018), *abrogated by N.Y. State Rifle & Pistol Ass’n, Inc. v. Bruen*, 597 U.S. 1 (2022)). In *ANJRPC*, the Third Circuit merely “assume[d] without deciding that LCMs are typically possessed by law-abiding citizens for lawful purposes and that they are entitled to Second Amendment protection.” 910 F.3d at 117. *ANJRPC* “does not stand for the proposition that *all* magazines are categorically protected Arms under the Second Amendment.” *Del. State Sportsmen’s Ass’n*, 108 F.4th at 216 (Roth, J., concurring). Indeed, Judge Roth, concurring in the denial of a motion for preliminary injunction in *Delaware State Sportsmen’s Association*, concluded that LCMs “are most useful as military weapons and thus are not ‘Arms’ protected by the Second Amendment.” *Id.*

Ct. 2778 (2025); *Ocean State Tactical, LLC v. Rhode Island*, 145 S. Ct. 2771 (2025); *see also Gray v. Jennings*, 145 S. Ct. 1049 (2025). There is no reason to alter course with this case, especially when it presents such a poor vehicle for assessing the constitutionality of LCM restrictions.

Tellingly, Gator’s hardly even addresses the suitability of this case for certiorari, instead spending the bulk of their argument complaining about other cases in which this Court *already denied certiorari*. Pet. 32-33 (criticizing *Ocean State Tactical*, *Bevis*, and *Del. State Sportsmen’s Ass’n*).⁶ This omission is telling, and elides the many ways this case presents a poor vehicle.

Most notably, Gator’s utterly failed to build an evidentiary record in this case. It has *foresworn* any reliance on expert testimony. It would be bizarre and misguided for this Court to decide whether LCMs satisfy the historic definition of “arms” when Gator’s presented absolutely no evidence on that point.

Relatedly, even if this Court granted certiorari in this case and ruled in Gator’s favor on the question presented, Gator’s would inevitably lose on remand because it presented absolutely no evidence to rebut the State’s prima facie case as to *Bruen* step two. “[T]he historical record compiled by the parties” is so

⁶ Petitioners also criticize the en banc decision *Duncan*, in which a separate *certiorari* petition is currently pending. *See* No. 25-198.

starkly one-sided that Gator’s would still ultimately lose on the merits. *Bruen*, 597 U.S. at 25 n.6. There is little point in granting certiorari in a case where reversal would not change the ultimate outcome.

Moreover, this case concerns a far less burdensome restriction than cases in which this Court already declined *certiorari*. In *Hanson*, D.C.’s statute made it a felony to possess LCMs. *Hanson*, 120 F.4th at 230. Same with the Rhode Island statute in *Ocean State Tactical*. 11 R.I. Gen. Laws Ann. § 11-47.1-3. The statute in *Bevis* likewise banned possession of LCMs, although violation was only a petty offense. 720 Ill. Comp. Stat. Ann. 5/24-1.10. Washington’s law, by contrast, does not restrict possession at all. It merely restricts commercial activity—“manufactur[ing], import[ing], distribut[ing], sell[ing], or offer[ing] for sale” LCMs. Wash. Rev. Code §§ 9.41.370, .375. Moreover, while violation of the law *can* carry misdemeanor punishments, here Gator’s is facing only civil fines under Washington’s Consumer Protection Act. CP 122-23. All to say, if the criminal, possessory bans in *Hanson*, *Ocean State Tactical*, and *Bevis* didn’t merit this Court’s intervention, it is hard to see why this one does.

Finally, the equities. After SB 5078 passed, two sets of plaintiffs immediately sued, seeking declaratory and injunctive relief to protect their asserted rights. Not Gator’s. They simply violated the law. They continued to sell LCMs in staggering quantities, in flagrant and knowing violation of Washington law. Having openly disdained the judicial process, they do not present a compelling case for this

Court's intervention. *Cf. Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 814 (1945) (“[H]e who comes into equity must come with clean hands.”).

CONCLUSION

The Court should deny the petition.

RESPECTFULLY SUBMITTED.

NICHOLAS W. BROWN
Attorney General

NOAH G. PURCELL
Solicitor General

ANDREW R.W. HUGHES
Assistant Attorney General
Counsel of Record

WILLIAM D. MCGINTY
Deputy Solicitor General

800 Fifth Avenue, Ste. 2000
Seattle, WA 98104
206-464-7744

October 31, 2025

APPENDIX

Hon. Gary Bashor

**STATE OF WASHINGTON
COWLITZ COUNTY SUPERIOR COURT**

STATE OF WASHINGTON,

Plaintiff,

v.

GATOR'S CUSTOM GUNS,
INC., a Washington for
profit corporation; and
WALTER WENTZ, an
individual,

Defendants.

NO. 23-2-00897-08

STIPULATION ON
GATOR'S
PROFERRED
EXPERT
TESTIMONY ON
SUMMARY
JUDGMENT

I. INTRODUCTION

The Parties, seeking to cooperate on the staging of discovery to avoid unnecessary litigation costs, enter into the stipulation below.

II. RECITALS

1. In these consolidated actions, the State of Washington (State) alleges that Gator's Custom Guns, Inc. and Walter Wentz (collectively, Gator's) violated the Consumer Protection Act (CPA), RCW chapter 19.86, and Engrossed Substitute

Senate Bill (SB) 5078, codified in relevant part at RCW 9.41.370, by unlawfully selling large-capacity magazines (LCMs). Gator's alleges that SB 5078 is unconstitutional on its face. The Court bifurcated the consolidated proceedings, such that Gator's facial challenge to SB 5078 is proceeding first and the State's CPA enforcement action will follow.

CP 1008

2. On December 1, 2023, in accordance with the Court's expert-disclosure deadline, Gator's disclosed to the State and filed with the Court the declarations of Ashley Hlebinksy, Massad Ayoob, Wesley A. Turner, John R. Lott, Jr., and Carl Richard Jessen. On December 8, 2023, Gator's filed a second declaration of Ashley Hlebinksy with a fuller explication of her proffered expert testimony.

3. Also on December 1, 2023, in accordance with the Court's expert disclosure deadline, the State disclosed to Gator's expert reports authored by Dennis Baron, Saul Cornell, Louis Klarevas, Robert Spitzer, Brennan Rivas, Lucy Allen, and James Yurgealitis. As requested by the Court, these expert reports were filed with the Court attached to the declaration of Andrew Hughes on December 5, 2023.

3. On December 18, 2023, Gator's timely filed a motion for summary judgment in accordance with the deadline set by the Court on December 4, 2023. Gator's did not cite to or rely on the expert declarations it had previously filed, but did rely on the December 18, 2023, Declaration of Austin F. Hatcher and two exhibits thereto. On January 5, 2024, the State timely filed a response and cross-motion

for summary judgment supported by the State's previously disclosed and filed expert witnesses' testimony and by the January 5, 2024, Declaration of R. July Simpson and two exhibits thereto.

4. On January 8, 2024, the Court continued the summary judgment hearing from January 22, 2024, to March 11, 2024, and permitted each party to file an amended motion for summary judgment according to the deadlines in CR 56 if they wished to do so.

5. On January 12, 2024, the State served upon Gator's counsel notices of deposition for Massad Ayoob, Carl Richard Jessen, and Wesley A. Turner.

The Parties wish to cooperate in the staging of discovery and reduce costs without prejudicing their respective rights and positions. To that end they enter into the following Stipulation.

CP 1009

III. STIPULATION

1. Gator's hereby AGREES that it will not cite to or rely upon the declarations of Ashley Hlebinksy, Massad Ayoob, Wesley A. Turner, John R. Lott, Jr., and Carl Richard Jessen filed with this Court on December 1, 2023 for its motion for summary judgment. Gator's also AGREES that it will not cite to or rely upon the declaration of Ashley Hlebinksy filed with this Court on December 8, 2023.

2. The State reserves the right to cite to, rely on, and submit attached to declarations or affidavits any of the expert reports it served on Gator's

on December 1, 2023, and filed with the Court on December 5, 2023.

3. Gator's hereby affirms that its responses to the State's discovery requests propounded on November 16, 2023, are complete and will not require further supplementation. If additional evidence is identified, Gator's will supplement the responses as necessary.

4. The depositions noted for Massad Ayoob, Carl Richard Jessen, and Wesley A. Turner are accordingly continued indefinitely. Further, in reliance on Gator's representation that its responses to the State's November 16, 2023, discovery requests are complete, the State will take no further discovery from Gator's in connection with the facial-challenge summary-judgment phase of these consolidated cases. The Parties reserve the right to take discovery on any relevant matters after the summary judgment phase of Gator's facial challenge is complete.

SO STIPULATED to this 26th day of January 2024.

CP 1010

ROBERT W. FERGUSON
Attorney General

/s/ William McGinty
WILLIAM MCGINTY, WSBA #41868
ANDREW R.W. HUGHES, WSBA #49515
BEN CARR, WSBA #40778
BOB HYDE, WSBA #33593
JOHN NELSON, WBSA #45724
Assistant Attorneys General

William.McGinty@atg.wa.gov
Andrew.Hughes@atg.wa.gov
Ben.Carr@atg.wa.gov
Bob.Hyde@atg.wa.gov
John.Nelson@atg.wa.gov
Counsel for State of Washington

SILENT MAJORITY FOUNDATION

/s/ Austin F. Hatcher

AUSTIN F. HATCHER, WSBA #57449
S. PETER SERRANO, WSBA #54769
Attorneys at Law
Austin@smfjb.org
Pete@smfjb.org
Counsel for Gator's Guns and Walter Wentz

CP 1011

DECLARATION OF SERVICE

I hereby declare that on this day I caused the foregoing document to be served, via electronic mail, on the following:

S. Peter Serrano
Austin Hatcher
Silent Majority Foundation
5238 Outlet Dr.
Pasco, WA 99301
pete@smfjb.org
austin@smfjb.org
Counsel for Gator's Guns and Walter Wentz

I declare, under penalty of perjury under the laws of the State of Washington, that the foregoing is true and correct.

DATED this 26th day of January 2024, at Olympia, Washington.

/s/ William McGinty
WILLIAM MCGINTY, WSBA #41868
Assistant Attorney General

CP 1012

EXHIBIT A

**STATE OF WASHINGTON
COWLITZ COUNTY SUPERIOR COURT**

STATE OF
WASHINGTON,

Plaintiff,

v.

GATOR'S CUSTOM
GUNS, INC., a
Washington for-profit
corporation; WALTER
WENTZ, individually;

Defendants.

NO. 23-2-00897-08

ERRATA TO
DEFENDANTS'
ANSWERS TO
PLAINTIFF STATE
OF WASHINGTON'S
SECOND
INTERROGATORIES
AND REQUESTS
FOR PRODUCTION
OF DOCUMENTS
TO DEFENDANT
GATOR'S CUSTOM
GUNS, INC.

TO: State of Washington, Office of the Attorney
General, Consumer Protection and Complex
Litigation Divisions

GENERAL OBJECTIONS

Defendants object to these discovery requests as they are propounded contrary to an agreed stay of discovery which was initiated by the State of Washington. Specifically, counsel for the State of Washington agreed to a mutual stay of discovery pending the Court's ruling on the facial challenge, including suspending enforcement of pending subpoena duces tecum issued to three different

entities. In return, Defendants withdrew their motion to quash, and agreed to not sell so-called large capacity magazines during the pendency of the facial challenge.

CP 1191

Defendants' Answers and objections, timely provided to Plaintiff on December 18, 2023, contained inadvertent scrivener's errors that do not impact the substance or validity of the answers or stated objections: these include the title of Answers, and inadvertent omissions of two responses, namely to Interrogatory No. 23, and Request for Production No. 13, and the Certification provided by the Office of the Attorney General of Washington incorrectly identified Secretary of State Hobbs as the Defendant. Responses to Interrogatory No. 23 and Request for Production No. 13 are included here.

INTERROGATORIES

INTERROGATORY NO. 17: Identify each witness with factual knowledge regarding the claims made in Your Petition.

ANSWER:

None.

INTERROGATORY NO. 18: Identify each person you intend to use as a testifying expert witness in support of the claims made in Your Petition, and, for each such person, identify the following:

CP 1192

- (a) The subject matter on which the expert is expected to testify;
- (b) The substance of the facts and opinions to which the expert is expected to testify;
- (c) A summary of the grounds for each opinion;
- (d) The sources of information the expert considered in forming their opinion;
- (e) Any exhibits to be used as a summary of, or as a support for, the expert's opinions;
- (f) The qualifications of the expert;
- (g) All published books, papers, or articles the expert has written, alone or jointly, within the last ten years;
- (h) All legal matters in which the expert has offered opinions within the last ten years; and
- (i) The compensation to be paid to the expert.

CP 1192

ANSWER:

Under CR 26(b) and (c), “a trial court has authority to limit discovery to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. In exercising this authority, the court has broad discretion to manage the discovery process so as to implement full disclosure of relevant information while protecting against harmful side effects.” *Kramer v. J.I. Case Mfg. Co.*, 62 Wn. App. 544, 556, 815 P.2d 789 (1991) (citing *Penberthy Electromelt Int’l, Inc. v. United States Gypsum Co.*, 38 Wn. App. 514, 521, 686 P.2d 1138 (1984)). At this point, the Court has not ruled whether expert

testimony is relevant or necessary to Defendants' facial challenge. Accordingly, Defendants object to providing any additional material regarding potential expert testimony other than the expert reports already filed in this matter.

Notwithstanding the objection, Defendants have provided expert reports pursuant to the Court's direction by filing those reports on December 1, 2023.

INTERROGATORY NO. 19: Has the Governor of Gator's Custom Guns, Inc., Walter Wentz, ever used a weapon to defend himself? If so, please list every incident in which he has used a weapon for self-defense. For each listed incident, specify:

- (a) The date of the incident;
- (b) The weapon that was used;
- (c) The number of rounds that were fired in self-defense (if the weapon was a firearm);
- (d) Whether the firearm was an assault weapon as defined by HB 1240;
- (e) The law enforcement officer or agency involved in responding to the incident; and
- (f) A detailed description of the incident, including an explanation of why the use of a weapon in self-defense was necessary or justified under the circumstances.

ANSWER:

No.

INTERROGATORY NO. 20: Identify each piece of evidence that you intend to rely on at trial and/or that you intend to submit in support of any dispositive motion in this matter.

ANSWER:

Defendants' Motion for Summary Judgment was filed with this court concurrently with these answers being provided to the State. At this point, evidence intended to be submitted in support of any dispositive motion in this matter has been submitted.

INTERROGATORY NO. 21: Please identify each firearm you sell that accepts large-capacity magazines but does not accept magazines holding ten or fewer rounds.

ANSWER:

None.

INTERROGATORY NO. 22: If you contend that large-capacity magazines are commonly used for self-defense, please describe the basis for your contention, including all facts supporting your contention.

ANSWER:

They are the most commonly owned type of magazine.

INTERROGATORY NO. 23: Please identify each instance of which you are aware in which any individual has fired more than ten rounds in self-defense.

ANSWER:

None.

INTERROGATORY NO. 24: Please identify each study, survey, article, or any other source on which you rely to determine the number of large-capacity magazines owned by Washingtonians and/or Americans.

CP 1194

ANSWER:

Personal experience informs my opinion that so-called large capacity magazines are commonly owned.

REQUESTS FOR PRODUCTION OF DOCUMENTS

REQUEST FOR PRODUCTION NO. 8: For each witness identified in response to Interrogatory No. 17, produce all correspondence between you and the witness.

RESPONSE:

None.

REQUEST FOR PRODUCTION NO. 9: For each testifying expert witness identified in response to Interrogatory No. 18, produce:

- (a) Each expert's retainer agreement;
- (b) Each expert's resume;
- (c) Reports produced for Defendant;
- (d) Documents, records, and reference materials which will be utilized by the expert in formulating opinions to support the claims in the Petition;
- (e) All correspondence between you and the expert;
- (f) All billing statements, invoices, and other documents evidencing the hours worked and the amounts billed by the expert;
- (g) Copies of reports, deposition transcripts, and trial testimony transcripts concerning the expert's opinions in any case in the last ten years in which the expert gave opinions supporting the position of any party alleging that a law, regulation, policy, or practice was unconstitutional under the Second Amendment to the United States Constitution or Article I, section 24 of the Washington State Constitution;

CP 1195

- (h) Copies of any amicus briefs authored in whole or in part by the expert arguing that a law, regulation, policy, or practice was unconstitutional under the Second Amendment to the United States Constitution or Article I, section 24 of the Washington State Constitution.

RESPONSE:

Under CR 26(b) and (c), "a trial court has authority to limit discovery to protect a party or person from annoyance, embarrassment, oppression, or undue

burden or expense. In exercising this authority, the court has broad discretion to manage the discovery process so as to implement full disclosure of relevant information while protecting against harmful side effects.” *Kramer v. J.I. Case Mfg. Co.*, 62 Wn. App. 544, 556, 815 P.2d 789 (1991) (citing *Penberthy Electromelt Int’l, Inc. v. United States Gypsum Co.*, 38 Wn. App. 514, 521, 686 P.2d 1138 (1984)). At this point, the Court has not ruled whether expert testimony is relevant or necessary to Defendants’ facial challenge. Accordingly, Defendants object to providing any additional material regarding potential expert testimony other than the expert reports already filed in this matter.

Notwithstanding the objection, Defendants have provided expert reports pursuant to the Court’s direction by filing those reports on December 1, 2023.

REQUEST FOR PRODUCTION NO. 10: Produce all marketing materials, advertisements, commercials, social media posts, or other documents promoting large capacity magazines or weapons capable of accepting large capacity magazines you published or caused to be published from 2005 to the present.

RESPONSE:

See attached screenshots from Gator’s Facebook page.

REQUEST FOR PRODUCTION NO. 11: Produce all training materials developed and/or used in connection with any firearms courses you have offered.

RESPONSE:

CP 1196

None.

REQUEST FOR PRODUCTION NO. 12: Produce all documents and other evidence that you intend to rely on at trial and/or that you intend to submit in support of any dispositive motion in this matter.

RESPONSE:

Defendants' Motion for Summary Judgment was filed with this court concurrently with these answers being provided to the State. At this point, evidence intended to be submitted in support of any dispositive motion in this matter has been submitted.

REQUEST FOR PRODUCTION NO. 13: Produce all documents you relied on to answer Interrogatories 17 to 24 or related to your answers to those Interrogatories.

RESPONSE:

None.

CP 1197

CERTIFICATION

The undersigned attorney for Defendants has read the foregoing responses to Plaintiff State of Washington's Second Set of Interrogatories and Requests for Production of Documents to Defendants, and they are in compliance with Civil Rule 26(g).

DATED this 20th day of December, 2023.

/s/ Austin F. Hatcher

Signed

Austin F. Hatcher, WSBA No. 57449

Printed

CP 1198

CERTIFICATE OF SERVICE

I certify that I filed with the Court and electronically served a copy of this document on all parties on the date below as follows:

Office of the Attorney General:

Andrew Hughes, Assistant Attorney General
andrew.hughes@atg.wa.gov

William McGinty, Assistant Attorney General
william.mcginity@atg.wa.gov

Kristin Beneski, First Assistant Attorney General
kristin.beneski@atg.wa.gov

R. July Simpson, Assistant Attorney General
july.simpson@atg.wa.gov

Ben Carr, Assistant Attorney General
ben.carr@atg.wa.gov

Bob Hyde, Assistant Attorney General
bob.hyde@atg.wa.gov

John Nelson, Assistant Attorney General
john.nelson@atg.wa.gov

Vick Walker, Paralegal
vick.walker@atg.wa.gov

Amy Hand, Paralegal
amy.hand@atg.wa.gov

Serina Clark, Legal Assistant
serina.clark@atg.wa.gov

Ashley Totten, Legal Assistant
ashley.totten@atg.wa.gov

Christine Truong, Legal Assistant
christine.truong@atg.wa.gov

CPR Reader Mailbox
cprreader@atg.wa.gov

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 20th day of December, 2023, at
Spokane, WA.

/s/ Austin F. Hatcher

Austin F. Hatcher, WSBA #57449
Attorney for Defendants

CP 1199

Hearing Date: March 11, 2024
Hearing Time: 9:00 A.M.
Hon. Gary Bashor

**STATE OF WASHINGTON
COWLITZ COUNTY SUPERIOR COURT**

STATE OF WASHINGTON,
Plaintiff,

v.

GATOR'S CUSTOM GUNS,
INC., a Washington for
profit corporation; and
WALTER WENTZ, an
individual,

Defendants.

NO. 23-2-00897-08

PLAINTIFF
STATE OF
WASHINGTON'S
OPPOSITION TO
DEFENDANTS'
AMENDED
MOTION FOR
SUMMARY
JUDGMENT

GATOR'S CUSTOM GUNS
INC.,

Petitioner,

v.

WASHINGTON STATE
ATTORNEY GENERAL'S
OFFICE, a Washington
state agency; and STATE
OF WASHINGTON,

Respondents.

* * * * *

Gator’s argument also fails as an evidentiary matter. Gator’s asserts there are around 160 million LCMs in the United States. Am. MSJ at 17. But Gator’s relies entirely on inadmissible hearsay, namely an unauthenticated report from National Shooting Sports Foundation (NSSF), which cannot form the basis of any factual contention on summary judgment.⁵ See CR 56(e)

CP 1277

(requiring evidence submitted on summary judgment to be in such a form “as would be admissible in evidence”); see also *SentinelC3, Inc. v. Hunt*, 181 Wn.2d 127, 331 P.3d 127 (2014) (“Unauthenticated or

⁵ Gator’s also cites a student law review note for the proposition that “[l]ower-range estimates place the number of magazines with a capacity of 30 rounds at around 30 million.” Am. MSJ at 17 (citing Lindsay Colvin,

CP 1277

“History, Heller, and High-Capacity Magazines: What Is the Proper Standard of Review for Second Amendment Challenges?,” 41 Fordham Urb. L.J. 1041, 1069 (2014)). But that note relies on an NSSF estimate, which NSSF has since apparently removed from its website. See *Colvin* at 1069 n. 201 (citing National Shooting Sports Foundation, *Another Ban on “High-Capacity” Magazines?* (2013), available at <http://www.nssf.org/factsheets/PDF/HighCapMag.pdf>). The note—and Gator’s Motion—also purports to rely on another law review article. Am. MSJ at 17 (citing Nicholas J. Johnson, “Administering the Second Amendment: Law, Politics, and Taxonomy,” 50 Santa Clara L. Rev. 1263, 1273–74 (2010). But that article says nothing whatsoever about the number of LCMs owned by Americans. See generally Johnson, 50 Santa Clara L. Rev. 1263 (2010).

CP 1278

hearsay evidence does not suffice” for purposes of summary judgment). The NSSF study is inadmissible because it not properly authenticated. Instead, it is merely attached to a declaration of counsel, with no testimony about how Gator’s counsel has personal knowledge that the document is what it purports to be. *See* Hatcher Decl. This is insufficient to authenticate a record for the purposes of summary judgment. *Intn’l Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co.*, 122 Wn. App. 736, 749, 87 P.3d 774 (2004) (excluding documents on summary judgment because they were “not properly authenticated by someone with knowledge of the documents.”).

Even if properly authenticated, the reports are inadmissible because they are hearsay: they are offered to prove the truth of the matters asserted therein, yet they are authored by a nonparty who is not under oath. *See* ER 801 (defining “hearsay”); ER 802 (hearsay is generally not admissible in evidence). Gator’s does not even acknowledge that the reports constitute hearsay or attempt to establish that it is eligible for any exception from the hearsay rule. Nor could Gator’s do so. For example, the reports are not covered by the business-records exception to the hearsay rule. This exception only applies “if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify

its admission.” RCW 5.45.020; *see* ER 803(6). No such testimony was offered here; as noted above, the reports

CP 1278

are merely attached to counsel’s declaration. Moreover, NSSF is a trade group with “a significant financial interest in the outcome of” LCM litigation, *Oregon Firearms Fed’n*, 2023 WL 4541027, at *10 n.18, and the author of at least one of the reports, James Curcuruto, was unable to recall in a deposition whether the report was conducted for any non-litigation purpose. Simpson Decl., Ex. B (Deposition of James Curcuruto from *Wiese v. Bonta*, 2:17-cv-00903-WBS-KJN (E.D. Cal.) (Curcuruto Dep.)) at 82:3–83:2; 108:20–109:22. *See Blevins v. Gaming Ent. (Indiana) LLC*, No. 4:17-cv-00083-TWP-DML, 2019 WL 2754405, at *3 (S.D. Ind. July 1, 2019) (“[R]eports created in anticipation of litigation are not covered by the 803(6) hearsay exception.”) (collecting cases). Nor do the reports qualify as “market reports” or “commercial publications” under ER 803(17). They are reports, not “[m]arket quotations, tabulations, lists, directories, or other published compilations” of data, and furthermore, Gator’s provides no evidence that the reports are “generally used and relied upon by the public or by persons in particular occupations.” ER 803(17). And, given the strong basis to doubt the neutrality of the information presented in the narrative reports, they would not be eligible for that exception in any event. *See Bianco v. Globus Medical, Inc.*, 2014 WL 119285 at *1 (E.D. Tex. Jan. 12, 2014) (“The courts have generally taken a . . . narrow view

of the scope of Rule 803(17), applying it to compilations of data, not to narrative and potentially subjective assessments in either general or specialized publications.”).

Moreover, even were they admissible, the NSSF reports do not even purport to show how many magazines are actually possessed by private individuals. Curcuruto Dep. at 126:5–8. Rather, as the author of at least one of the report, James Curcuruto, explained under oath, the estimates are based primarily on what *firearms*—not what *magazines*—were *manufactured* and *imported*—not *possessed*. *Id.* at 124:15–125:25; 127:23–25 (“Q: [ATF manufacturing] data does not track numbers of magazines at all; correct? A: Correct.”); 128:1–5; 129:10–11 (“Q: And ITC doesn’t track [imports of] magazines, does it? A: I don’t believe so.”). And because the report only purports to show which firearms were manufactured and imported, not what was actually

CP 1279

possessed by individuals, it includes firearms that are never sold, firearms that were sold to law enforcement or private security organizations, and the huge number of firearms that were manufactured or imported in the United States and then illegally trafficked to other countries.⁶ *Id.*

⁶ See, e.g., United States Government Accountability Office, *Firearms Trafficking: U.S. Efforts to Disrupt Gun Smuggling into Mexico Would Benefit from Additional Data and Analysis* (Feb. 2021), <https://www.gao.gov/assets/gao-21-322.pdf> (“Trafficking of U.S.-sourced firearms into Mexico is a national security threat, as it facilitates the illegal drug trade and has

at 126:9–129:17. And to the extent the NSSF report purported to rely on “industry estimates,” Hatcher Decl. Ex. 1 at 7, Mr. Curcuruto admitted under oath that the only industry source he consulted was his boss, NSSF’s then-president. Curcuruto Dep., 133:3–134:19; 136:5–137:9. Once Mr. Curcuruto and his boss arrived at their unsubstantiated “estimate” of the number of guns in America, their method for estimating magazines was to simply “determine[]”—i.e., to assume without any basis—that there were probably about twice as many magazines as firearms. *Id.* at 146:16–148:11. As a result, NSSF’s numbers are unsupported assumptions based on unsupported

been linked to organized crime. The Department of Justice’s Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) found that 70 percent of firearms reported to have been recovered in Mexico from 2014 through 2018 and submitted for tracing were U.S. sourced.”); Violence Policy Center, *Gun Trafficking in Mexico*, <https://vpc.org/regulating-the-gun-industry/gun-trafficking/> (last accessed Aug. 31, 2023) (“New semiautomatic assault weapons are trafficked across the border from the United States because it is the easiest and cheapest place in the world to purchase them, thanks to weak gun laws and a deliberate strategy by the U.S. gun industry to design and sell military-style weapons to civilians.”); United Nations Office on Drugs and Crime, *Haiti’s Criminal Markets: Mapping Trends in Firearms and Drug Trafficking*, at 1–2 (Feb. 2023), https://www.unodc.org/documents/data-and-analysis/toc/Haiti_assessment_UNODC.pdf (“[I]llegal firearms and drug trafficking [are] fueling Haiti’s deepening security dilemmas. . . . Most weapons are sourced in the US and make their way to gang members and private residents”); Bryan Passifiume, *Most of the Crime Guns Seized in Toronto Are Smuggled into Canada from U.S.: Police*, National Post (Sept. 2, 2022), <https://nationalpost.com/news/canada/most-of-the-crime-guns-in-toronto-this-summer-were-smuggled-into-canada-from-u-s>.

guesses at the number of firearms produced or imported. *Id.* at 137:10–15 (“Q: So to be clear on the process, you essentially told [then-NSSF President] Mr. Sanetti ‘There is X number of pistols out there. How many do you think come with a magazine holding more than 10 rounds’ Is that a fair assessment? A: Yeah.”); *see also* Fed. R. Evid. 803(6) (providing that business records are admissible hearsay only when they are “kept in the course of a regularly conducted activity” and “the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness”). Thus, even if

CP 1280

Gator’s cited “statistics” were relevant to the question whether LCMs are in common use for self-defense—which they are not—those data are inadmissible and, moreover, they are simply not credible.

CP 1281

* * * * *

DATED this 29th day of February 2024.

ROBERT W. FERGUSON
Attorney General

/s/ Andrew R.W. Hughes
ANDREW R.W. HUGHES, WSBA #49515
WILLIAM MCGINTY, WSBA #41868
R. JULY SIMPSON, WSBA #45869
BEN CARR, WSBA #40778
BOB HYDE, WSBA #33593
JOHN NELSON, WSBA #45724

Assistant Attorneys General
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
(206) 464-7744

Andrew.Hughes@atg.wa.gov
William.McGinty@atg.wa.gov
July.Simpson@atg.wa.gov
Ben.Carr@atg.wa.gov
Bob.Hyde@atg.wa.gov
John.Nelson@atg.wa.gov

Counsel for Plaintiff State of Washington

CP 1298