NO. 102940-3

**SUPREME COURT OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

Appellant,

v.

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

Respondents.

# APPELLANT'S RESPONSE TO AMICI CURIAE

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# I. INTRODUCTION

The amicus briefs filed in support of respondents Gator's Custom Guns and Walter Wentz (Gator's) largely repeat the flawed arguments already made by Respondents and already comprehensively refuted by the State's briefing. They ignore binding Washington precedent foreclosing their arguments; they never mention the near-unanimous federal caselaw rejecting their contentions; and they doggedly insist that military-style weapons of mass killing are immune from regulation if people buy enough of them. Their arguments are as dangerous as they are unsupported. This Court should reject their efforts to convert the Washington and federal constitutions into near-total bans on legislative efforts to protect public safety by restricting the proliferation of dangerous weapon accessories.

## II. ARGUMENT

### A. Article I, Section 24 of Washington's Constitution Does Not Guarantee an Unfettered Right to Sell LCMs

#### 1. Amici Largely Ignore Washington's Constitution

"Where feasible, [this Court] resolve[s] constitutional questions first under our own state constitution before turning to federal law." *State v. Jorgenson*, 179 Wn.2d 145, 152, 312 P.3d 960 (2013). As the State detailed in its opening and reply briefs, this case is easily resolved under Washington's constitution. *See* Op. Br. at 21-44; Reply Br. at 3-23. Because LCMs are accessories, not arms, nor are they "traditionally or commonly used by law abiding citizens for the lawful purpose of self-defense," *City of Seattle v. Evans*, 184 Wn.2d 856, 869, 366 P.3d 906 (2015), they are not covered by section 24 in the first instance. Even if they were, the unrebutted legislative findings and undisputed expert evidence show that SB 5078 is "reasonably necessary to protect public safety [and] welfare" and

does essentially nothing to "frustrate[] the purpose of" article I, section 24. *Jorgenson*, 179 Wn.2d at 156.

Generally speaking, Amici don't respond to the State's Washington constitutional arguments. While several Amici argue that LCMs are "arms" within the meaning of the Second Amendment—an argument which lacks merit, as discussed below—only the Goldwater Institute separately argues that LCMs are "arms" under Washington's constitution. *See* Goldwater Inst. Am. Br. at 7-12. And not a single amicus argues that SB 5078 is unconstitutional under this Court's binding precedent in *Jorgenson*. The reason is clear: SB 5078 comfortably complies with Washington's constitution.

### 2. This Court Should Reject the Goldwater Institute's Invitation to Scrap its Entire Article I, Section 24 Jurisprudence

One amicus, the Goldwater Institute, asks this Court to overturn its entire article I, section 24 jurisprudence in favor of an absolutist reading that would annul *any* arms restriction except for those limiting "private armed bodies of men."

Goldwater Inst. Am. Br. at 23; *see also id.* at 11-12 (arguing that *Evans* was wrongly decided), 24 n. 12 (identifying numerous opinions of this Court that the Goldwater Institute contends are wrongly decided).

The Goldwater Institute contends this reading is rooted in history. *Id.* at 7-8. But it offers no historical evidence whatsoever about the intent of Washington's constitutional drafters, how early Washingtonians would have understood the term "arms," what arms were even conceivable to early Washingtonians, what regulations have historically been considered permissible under article I, section 24, whether early Washingtonians would have considered LCMs (which didn't exist) "arms," or how Washingtonians have adapted to technological changes or new threats. More fundamentally, the Goldwater Institute never explains why this Court should adopt a standard that "trap[s]" the law "in amber," *United States v. Rahimi*, 602 U.S. 680, 691, 144 S. Ct. 1889 (2024), particularly in a time period before many Washingtonians were granted full citizenship rights and before

mass murderers routinely used military style arms to carry out acts of public terror. *See, e.g.*, Const. Amdt. 5 (1910) (granting women the right to vote 21 years after statehood, but continuing to deny the franchise to non-English speakers and "Indians not taxed"); *see also Rahimi*, 602 U.S. at 706 (Sotomayor, J., concurring) ("History has a role to play in Second Amendment analysis, but a rigid adherence to history, (particularly history predating the inclusion of women and people of color as full members of the polity), impoverishes constitutional interpretation and hamstrings our democracy."); *State v. Wilson*, 154 Hawai'i 8, 19-23, 543 P.3d 440 (2024), *cert. denied*, 23-7517, 2024 WL 5036306 (U.S. Dec. 9, 2024) (detailing how anti-gun-control activists have "misuse[d]" historical evidence to undermine legislatively enacted public safety measures).

But even leaving all that aside, Goldwater Institute's request to wipe away decades of precedent suffers from a simpler—but no less fatal—defect: it fails to address the standard for overturning precedent. "This court 'will not abandon

precedent unless it is determined to be incorrect and harmful.'" *State v. Trey M.*, 186 Wn.2d 884, 893, 383 P.3d 474 (2016) (quoting *Rose v. Anderson Hay & Grain Co.*, 184 Wn.2d 268, 282, 358 P.3d 1139 (2015)); *see also In re Stranger Creek and Tributaries in Stevens County*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970) ("The doctrine [of stare decisis] requires a clear showing that an established rule is incorrect and harmful before it is abandoned."). Goldwater Institute makes no effort to argue that *Evans*, *Jorgenson*, *Montana*, or any other case is harmful. Absent any argument applying this binding standard, this Court can and should "decline [the Goldwater Institute's] invitation to reexamine or overrule" its well-established article I, section 24 jurisprudence. *State v. Butler*, 200 Wn.2d 695, 721, 521 P.3d 931 (2022).

### B. The Second Amendment Does Not Guarantee an Unfettered Right to Sell LCMs

Like Washington's article I, section 24, the Second Amendment does not protect weapon accessories that are rarely

used or useful for self-defense. And even if it did, SB 5078's restriction on the sale, importation, and manufacture of military-style weapon accessories fits comfortably within an unbroken American tradition of restricting weapons with an outsize role in horrific violence.[1] Consequently, courts that have analyzed LCM restrictions post-*Bruen* have all but unanimously upheld them against Second Amendment challenges. *See* Op. Br. at 18-20; Reply Br. at 1-2; *Hanson v. D.C.*, 120 F.4th 223, 242 (D.C. Cir. 2024). Gator's offers no good reason why this Court should reject the overwhelming weight of caselaw. Nor do amici.

### 1. None of Amici's Arguments Make Up for Gator's Failure to Carry its Burden to Show that LCMs Are Covered by the Second Amendment

Under *Bruen*, Gator's must first show that the Second Amendment covers LCMs in the first place. *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 24, 142 S. Ct. 2111

[1] Amicus Firearms Policy Coalition falsely asserts that SB 5078 "bans the sale and possession" of LCMs. FPC Am. Br. at 3. The statute does not restrict possession or use of existing LCMs in any way.

(2022). That is, they must show that LCMs are not just "arms," but the types of arms encompassed within the original meaning of the Second Amendment, namely, "weapons 'in common use' today for self-defense." *Id.* at 32 (quoting *D.C. v. Heller*, 554 U.S. 570, 627, 128 S. Ct. 2783 (2008)).

Despite the clear language of *Bruen*, the NRA tries to convince this Court that the State—not Gator's—bears the burden to show that LCMs are *not* arms and *not* commonly used for self-defense. NRA Am. Br. at 10-13. As a practical matter, it makes little difference who has the burden here because the undisputed evidence all points the same direction: LCMs are neither arms, nor are they commonly used (or useful) for self-defense. Op. Br. at 21-28. But leaving that aside, Gator's clearly bears the burden to make a prima facie showing that their proposed conduct comes within the Second Amendment in the first place, just like any other party bringing a constitutional challenge. *Cf. Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 524, 142 S. Ct. 2407 (2022) ("[A] plaintiff bears certain burdens

to demonstrate an infringement of his rights under the Free Exercise and Free Speech Clauses. If the plaintiff carries these burdens, the focus then shifts to the defendant to show that its actions were nonetheless justified and tailored consistent with the demands of our case law.").

Thus, it is Gator's burden to show that LCMs are (1) arms and (2) in common use for self-defense. *Heller* and *Bruen* make this clear in explaining that the plain text of the Second Amendment, as understood by the Founders, only covers "weapons 'in common use' today for self-defense." *Bruen*, 597 U.S. at 32 (quoting *Heller*, 554 U.S. at 627); *see also Heller*, 554 U.S. at 624 (explaining that the Second Amendment only covers "arms in common use at the time for lawful purposes like self-defense") (quotation omitted); 627 ("recogniz[ing] another important limitation on the right to keep and carry arms," namely, "that the sorts of weapons protected were those in common use at the time") (quotation omitted). Thus, in *Bruen*, the Court confirmed that "handguns are weapons 'in common

use' today for self-defense" *before* shifting the burden to New York to show that the challenged restriction was "consistent with the Nation's historical tradition of firearm regulation." *Bruen*, 142 S. Ct. at 2119, 2130. Following *Bruen* and *Heller*, the Ninth Circuit recently confirmed that "*Bruen* step one involves a threshold inquiry. In alignment with *Heller*, it requires a textual analysis, determining," among other things, "whether the weapon at issue is 'in common use' today for self-defense." *United States v. Alaniz*, 69 F.4th 1124, 1128 (9th Cir. 2023) (quoting *Bruen*, 142 S. Ct. at 2134-35). If, but only if, a plaintiff can satisfy this burden, does a court "proceed to *Bruen* step two, at which the 'government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation.'" *Id.* (quoting *Bruen*, 142 S. Ct. at 2130).

Under Amici's contrary view, anything that qualifies as an "arm" at all, i.e., "any thing that a man . . . takes into his hands, or useth in wrath to cast at or strike another"—i.e., anything from

baseball bats to beer bottles to toxic poisons—would automatically be protected by the Second Amendment, and the State would need to show a historical analogue to justify any regulation of such items. That has never been the law.

Neither Gator's nor its amici can carry their burden here, in two respects: they cannot show (1) that LCMs are arms or otherwise necessary to use arms; or (2) that arms equipped with LCMs are commonly used for self-defense. Op. Br. at 45-53; Reply Br. at. 23-25.

#### a. LCMs Are Not Constitutionally Protected Arms

In their effort to boost Gator's fortunes, *amici* do little more than repeat the same meritless arguments as Gator's. For example, on the subject of whether LCMs are "arms" within the meaning of the Second Amendment, amici insist that because magazines are supposedly integral components of many firearms, they are *ipso facto* arms. *See, e.g.*, NSSF Am. Br. at 8; NRA Am. Br. at 9; FPC Am. Br. at 15-17. But that's just wrong,

as the State already explained in detail. Op. Br. at 24-25, 45-48. It's like saying steering wheels or fan belts or even vinyl are "cars" merely because they are components of many cars. *Cf. VanDerStok v. Garland*, 86 F.4th 179, 191 (5th Cir. 2023), *cert. granted*, 144 S. Ct. 1390, 218 L. Ed. 2d 679 (2024) (holding that ATF authority to regulate "firearms" granted ATF "no authority whatsoever to regulate parts that might be incorporated into a 'firearm'").

Large-capacity magazines are not themselves "'[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." *Heller*, 554 U.S. at 581 (quoting Founding-era sources). Thus, Gator's can only succeed by showing that the State's restriction on LCMs has the effect of infringing their right to bear *actual* arms. But as (again) already explained in detail, they cannot. Op. Br. at 25-27, 48-49. Simply put, no firearm—not one—*requires* a magazine holding more than ten bullets to fire exactly as intended. The State's restriction on capacity of

magazines sold in Washington does not limit anyone's right to use any arm whatsoever. *Contra* FPC Am. Br. at 17. Thus, just as a legislature may constitutionally restrict certain types of gun stocks, certain types of barrels, and certain types of ammunition, triggers, or auto sears to protect the public safety, *see, e.g.*, RCW 9.41.220, so too may the legislature restrict a particular type of magazine with a disproportionate and deadly role in mass violence.[2]

**b. LCMs Are Not Commonly Used for Self-Defense**

Even if LCMs were arms, Gator's would still need to show they are the types of arms protected by the Second Amendment—i.e., "weapons 'in common use' today for self-

[2] Amicus FPC bewails supposed line-drawing problems inherent in restricting subsets of firearm components. FPC Am. Br. at 16, 18-19. The State readily concedes that there may be a point at which a restriction on a firearm component might infringe the Second Amendment's core right of self-defense—just as unduly burdensome restrictions on types of ammunition or barrel lengths might. But on this record, it is beyond clear that a 10-round limit on magazines does not affect the right of armed self-defense at all.

defense." *Bruen*, 597 U.S. at 32 (quoting *Heller*, 554 U.S. at 627). Gator's fell far short of making this showing. *See* Reply Br. at 7-17, 23-25. None of *amici's* arguments move the needle.

Amici primarily advance a tortured interpretation of *Heller* in which the Supreme Court supposedly ruled that the Second Amendment only permits restrictions on uncommon weapons. *See, e.g.*, FPC Am. Br. at 6-8, 23; NRA Am. Br. at 3-9; NSSF Am. Br. at 11-14. This argument relies on partial quotations taken out of context. It is wrong on multiple levels and has been routinely rejected by courts. *See, e.g.*, *Ocean State Tactical, LLC v. Rhode Island*, 95 F.4th 38, 50 (1st Cir. 2024) (rejecting argument that "LCMs can only be banned if they are 'highly unusual in society at large'" as a "distort[ed] … characterization" of *Heller*) (quoting *Heller*, 554 U.S. at 625; emphasis in original); *Bianchi v. Brown*, 111 F.4th 438, 460 (4th Cir. 2024).

Whether an arm (or, in this case, an accessory) is commonly owned is not the alpha and omega of the Second

Amendment analysis. Rather, under *Heller* and *Bruen* whether an arm is commonly used for lawful purposes like self-defense is a *threshold* showing that plaintiffs must make to show that the Second Amendment applies in the first instance; only if they can make that showing does the burden then shift to the State to show that the regulation nonetheless comports with the Second Amendment. *Supra* at 8-10. As Judge Bryan put it in a case challenging Washington's assault weapons restriction, HB 1240, this argument "misread[s] *Heller* and *Bruen*":

> *Heller* noted that the right to keep and bear arms protected under the Second Amendment is limited to the sorts of weapons "in common use at the time." *Heller* at 627, 128 S.Ct. 2783. It found that this limitation is "supported by the historical tradition of prohibiting 'dangerous and unusual weapons.' " *Id. Heller* does not hold that access to all weapons "in common use" are automatically entitled to Second Amendment protection without limitation. Further, under *Bruen,* if Plaintiffs demonstrate that their proposed conduct, that of buying and selling weapons regulated by HB 1240, is covered by the Second Amendment, the "Constitution **presumptively** protects that conduct." *Bruen* at 2126, 2129-2130 (*emphasis added*). This presumption can be overcome. *Id.*

*Hartford v. Ferguson*, 676 F. Supp. 3d 897, 903 (W.D. Wash. 2023) (ECF citations omitted; emphasis in original); *see also, e.g.*, *Bianchi*, 111 F.4th at 460 ("[T]his argument misreads *Heller* and *Bruen*. In those cases the Supreme Court did not posit that a weapon's common use is conclusive evidence that it cannot be banned."); *Or. Firearms Fed'n v. Kotek*, 682 F. Supp. 3d 874, 923 n. 27 (D. Or. 2023) ("[E]ven when a firearm is commonly used for self-defense, and is therefore covered by the plain text of the Second Amendment, the government may still rebut the presumption that the firearm is protected."). In other words, even if Plaintiffs could establish that LCMs are in "common use" for self-defense—which they have not—this does not end the analysis, because under *Bruen*, weapons that are in "common use" can still be regulated in a manner consistent with our nation's history and tradition.

Amici point to language from *Heller* and *Bruen* which they contend holds that states may only restrict weapons that are "highly unusual in society at large." *See, e.g.*, NSSF Am. Br. at

11 (quoting *Bruen*, 597 U.S. at 47. Here again, Amici badly misread the cases:

> "[T]he [*Bruen*] Court instructed that 'the Second Amendment protects *only* the carrying of weapons that are those "in common use at the time," as opposed to those that 'are highly unusual in society at large." ' *Bruen*, 597 U.S. at 47, 142 S.Ct. 2111 (quoting *Heller*, 554 U.S. at 627, 128 S.Ct. 2783) (emphasis added). In other words, weapons that are *not* in common use can safely be said to be *outside* the ambit of the Second Amendment. But the logic does not work in reverse. Just because a weapon happens to be in common use does not guarantee that it falls within the scope of the right to keep and bear arms."

*Bianchi*, 111 F.4th at 460; *Ocean State Tactical*, 95 F.4th at 50 ("[T]he Supreme Court … has not held that states may permissibly regulate only unusual weapons.").[3] Amici's attempt to buttress their argument by citing a two-justice concurrence in

[3] In *Heller*, the "highly unusual" language appears only when the Court addresses the awkward fit between its holding regarding the meaning of the Second Amendment and the Amendment's "well-regulated militia" prefatory clause. 554 U.S. at 627 ("It may well be true today that a militia, to be as effective as militias in the 18th century, would require sophisticated arms that are highly unusual in society at large.").

*Caetano* and a dissent from denial of certiorari in *Friedman* are likewise no help, as those views failed to command a majority of the Court. *Contra, e.g.*, NSSF Am. Br. at 11-12; NRA Am. Br, at 6-8. Simply put, neither *Heller* nor *Bruen* even remotely stand for the proposition that a weapon (or weapon accessory), no matter how dangerous, is immune from restriction merely because it is supposedly commonly owned. And indeed, as the State already explained, interpreting the scope of a constitutional right based purely on sales receipts would be absurd. *See* Op. Br. at 35-36.[4]

Amici's argument is wrong for yet another reason: under *Heller* and *Bruen*, the threshold questions is not whether LCMs are commonly *possessed*, but whether they are "in common *use*

[4] Moreover, Amici don't even point to competent evidence showing the alleged popularity of LCMs. Instead, they rely on the same hearsay that the superior court correctly rejected (in a ruling Gator's did not appeal). *See, e.g.*, NRA Am. Br. at 8 (citing William English, *2021 National Firearms Survey: Updated Analysis Including Types of Firearms Owned*, at 20 (May 13, 2022)); NSSF Am. Br. at 13 (citing English and its own, litigation-focused work product).

. . . for lawful purposes like self-defense." *Heller*, 554 U.S. at 624 (emphasis added); *see also Bruen*, 142 S. Ct. at 2134; *Or. Firearms Fed'n*, 682 F. Supp. 3d at 916) ("[T]he standard requires consideration of not only the commonality of the firearm or firearm accessory in question, but also the *use* of that firearm or firearm accessory.") (emphasis in original); *Ocean State Tactical*, 95 F.4th at 51 ("Despite plaintiffs' fixation on the ownership rates of LCMs, such statistics are ancillary to the inquiry the Supreme Court has directed us to undertake.").

Here, every scrap of evidence shows that LCMs are not commonly used for self-defense. Op. Br. at 28-32. Like Gator's, Amici do not offer *any* evidence to rebut this. Instead, the NRA urges this Court to ignore the evidence and focus exclusively on what "the people" supposedly choose to protect themselves. NRA Am. Br. at 17-19. But this is just a restatement of their meritless popularity-contest argument with a scantily applied democratic gloss. Simply put, the scope of constitutional rights

does not depend on how many LCMs gun sellers manage to sell before legislators step in and regulate.

The NRA's comparison to the handguns at issue in *Heller* and *Bruen* gets them nowhere. *Contra* NRA Am. Br. at 17-18. In those cases, it was undisputed that handguns were the primary weapon used by Americans for self-defense. *See Heller*, 554 U.S. at 628; *Bruen*, 597 U.S. at 32 ("Nor does any party dispute that handguns are weapons 'in common use' today for self-defense."). Here, by contrast, the undisputed evidence shows exactly the opposite: the ability to fire more than eleven rounds without reloading is essentially never used for self-defense. Accordingly, LCMs are indisputably not used or useful for self-defense.[5]

[5] The NRA also criticizes the State for its focus on self-defense. NRA Am. Br. at 14-16. But "[a]s [the Supreme Court] stated in *Heller* and repeated in *McDonald*, 'individual self-defense is "the *central component*" of the Second Amendment right.' *McDonald v. City of Chicago*, 561 U.S. 742, 767, 130 S.Ct. 3020 (2010) (quoting *Heller*, 554 U.S. at 599); see also *Heller*, 554 U.S. at 628 ("the inherent right of self-defense has been central to the Second Amendment right")." *Bruen*, 597 U.S.

Finally, several amici attack a straw man by contending that the State argues a firearm is only "used"—and thus potentially protected—when it is actually fired. NRA Am. Br. at 20-21; Gun Owners Am. Br. at 4-5; FPC Am. Br. at 26-28. The State addressed this argument in both its opening and reply briefs. Op. Br. at 32; Reply Br. at 9-10. Suffice it to say: the sole function of LCMs (as compared to ordinary magazines) is to enable guns to fire more than 11 times without reloading. So it is only that feature that is relevant to whether they are used for self-defense. Here, the undisputed evidence shows that feature is not

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at 29. Thus, in *Bruen*, the Supreme Court explicitly directed courts interpreting the Second Amendment to focus on the extent to which "modern … regulations impose a … burden on the right of armed self-defense." *Id.*; *see also City of Seattle v. Montana*, 129 Wn.2d 583, 594, 919 P.2d 1218, 1224 (1996), *abrogated on other grounds by Yim v. City of Seattle*, 194 Wn.2d 682, 451 P.3d 694 (2019) ("The constitutional text [of article I, section 24] indicates the right is secured not because arms are valued per se, but only to ensure self-defense or defense of state."). Moreover, this argument fails on its own terms because the NRA neglects to provide any evidence or explanation to show that LCMs are used or useful for hunting or target shooting. *Contra* NRA Am. Br. at 16.

used for self-defense. LCMs thus do not receive constitutional protection under the Second Amendment.

#### c. LCMs Are Military-Style Weapon Accessories, and thus Outside the Scope of the Second Amendment

Amici's arguments that LCMs come within the scope of the Second Amendment fail for yet another reason: the Second Amendment does not protect "weapons"—let alone weapon accessories—"that are most useful in military service." *Heller*, 554 U.S. at 627; *see also Bevis v. City of Naperville, Illinois*, 85 F.4th 1175, 1194 (7th Cir. 2023) ("[T]he Arms protected by the Second Amendment do not include weapons that may be reserved for military use."); *Kolbe v. Hogan*, 849 F.3d 114, 131 (4th Cir. 2017); *Ocean State Tactical*, 95 F.4th at 48; *Nat'l Ass'n for Gun Rights v. Lamont*, 685 F. Supp. 3d 63, 102-03 (D. Conn. 2023). The NRA and Gun Owners amici disagree, contending that the Supreme Court's Second Amendment caselaw supports broad protections for military-style weapons. Gun Owner Am. Br. at 11-18; NRA Am. Br. at 21-25.

But their "cherry-picked quotations of *Heller* disregard the portion of the opinion stating that … '[i]t may well be true today that a militia, to be as effective as militias in the 18th century, would require sophisticated arms that are highly unusual in society at large,' but that nevertheless, 'weapons of war' such as M-16 rifles 'and the like' may be banned." *Nat'l Ass'n for Gun Rights*, 685 F. Supp. 3d at 102-03 (quoting *Heller*, 554 U.S. at 627-28); *see also* Reply Br. at 16-17.

*Heller's* distinction between ordinary self-defense weapons and weapons of war tracks how the Second Amendment was understood at the time of its enactment. *See Bevis*, 85 F.4th at 1193. As one court explained:

> During the time of the Founding, there *was* a distinction between the guns people typically owned at home and those that were most useful in fighting the Revolutionary War. "Killing pests and hunting birds were the main concern of farmers, and their choice of firearm reflected these basic facts of life. Nobody bayoneted turkeys, and a pair of polished dueling pistols were of limited utility for anyone outside of a small elite group of wealthy, powerful, and influential men." Instead, "the guns most Americans owned and desired were those

> most useful for life in an agrarian society: fowling pieces and light hunting muskets." … Thus, the Second Amendment's meaning cannot be read to equate the weapons people had at home with weapons useful for fighting war, because weapons useful for fighting war were not those that men were likely to have lying around the house.

*Nat'l Ass'n for Gun Rights*, 685 F. Supp. 3d at 102 (quoting expert report of Prof. Saul Cornell; footnote omitted; emphasis in original). And as the Seventh Circuit has detailed, this "distinction between weapons and accessories designed for military or law-enforcement use, and weapons designed for personal use" is reflected in "a long tradition" of historical regulations, "unchanged from the time when the Second Amendment was added to the Constitution." *Bevis*, 85 F.4th at 1202 (analyzing historical laws). From its inception, the Second Amendment has never been understood to guarantee individuals the right to carry military-style weapons unconnected with militia service.

The Gun Owners amici in particular take this argument to the extreme, suggesting that the Second Amendment forbids the

State from restricting weaponry in any way that might leave Washingtonians at a "disparity of force with the government." Gun Owner Am. Br. at 18. Thus, the Gun Owner amici appear to argue that the Second Amendment provides free rein for civilians to acquire machineguns, weaponized drones, nuclear weapons, and anything else they might want to use to take on the most powerful military the world has ever seen. This frightening prospect goes miles beyond what *Heller*, *Bruen*, or any other opinion has ever held the Second Amendment to protect. Contrary to amici's radical view, "the Second Amendment … secures for Americans a means of self-defense." *Rahimi*, 602 U.S. at 690. Not civil war.

### 2. SB 5078 Is Consistent with an Unbroken Historical Tradition of Restricting Arms Associated with Criminal Violence

Because Gator's—even with the help of several amici—cannot meet their burden to show that LCMs are "arms" within the meaning of the Second Amendment, this Court can end its Second Amendment analysis at *Bruen* step one. If, however, this

Court is inclined to go further, it should join the near-unanimous consensus of courts holding that LCM restrictions fit comfortably within America's historical tradition of regulating dangerous weaponry associated with lawless violence. *See, e.g.*, *Ocean State Tactical*, 95 F.4th at 46; *Bianchi*, 111 F. 4th at 464; *Bevis*, 85 F.4th at 1200; *Hanson*, 120 F.4th at 242-43; *Or. Firearms Fed'n*, 682 F. Supp. 3d at 935; *Nat'l Ass'n for Gun Rights*, 685 F. Supp. 3d at 112; *Capen v. Campbell*, 708 F. Supp. 3d 65, 92 (D. Mass. 2023); *Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Platkin*, --- F.Supp.3d. ---, 2024 WL 3585580, at *21 (D.N.J. July 30, 2024); *Vt. Fed'n of Sportsmen's Clubs v. Birmingham*, 2:23-CV-710, 2024 WL 3466482, at *22 (D. Vt. July 18, 2024). As the State detailed in its prior briefing, SB 5078 fits comfortably within more than two centuries of historical regulations of weapons associated with criminal violence, from trap guns, to slungshots, to Bowie knives, to dirks, to pocket pistols, to machineguns, to assault weapons. Op. Br. at 53-77. As court after court has concluded, America's history reveals "a

strong tradition of regulating those weapons that were invented for offensive purposes and were ultimately proven to pose exceptional dangers to innocent civilians." *Bianchi*, 111 F. 4th at 471.

Amici make no effort to address this broad consensus. Instead, they pretend it doesn't exist and offer up the same arguments that these courts have already rejected.

First, Amici argue that *Heller* held that all arm bans are unconstitutional. *See, e.g.*, NRA Am. Br. at 25-27; NSSF Am. Br. at 17-18. But as already explained above, it didn't. What the Supreme Court said was: "[f]ew laws in the history of our Nation have come close to the severe restriction of the District[ of Columbia]'s handgun ban." *Heller*, 554 U.S. at 629. The Court's specific findings regarding DC's total handgun ban say nothing about Washington's very different LCM restriction. *Cf. id.* at 626 ("[W]e do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment[.]"); *Bianchi*, 111 F.4th at 462 (our "understanding [of history] deepens as new

sources become available and new insights are advanced"). Here, unlike DC's handgun ban, SB 5078 is relevantly similar to many, many historical laws.

Next Amici argue that SB 5078 violates the Second Amendment because there is allegedly no historical tradition of regulating "firing or ammunition capacity." NSSF Am. Br. at 18; *see also* NRA Am. Br. at 28-29; SAF Am. Br. at 3.

This argument is doubly wrong. First, restrictions on firing capacity in fact followed closely after large-capacity semi-automatic weapons began to spread in civil society and contribute to criminal violence. Op. Br. at 67-68 (detailing how the spread of machineguns in the early 20th century spurred 23 states to restrict magazine capacity). Thus, just like trap guns, pocket pistols, Bowie knives, slung shots, and many other weapons, legislatures began to restrict magazine capacity after it became clear that high-capacity semiautomatic weaponry posed an outsized threat to public safety.

Second, this argument is contrary to the Supreme Court's direction that "analogical reasoning" does not require "a historical twin," *Bruen*, 597 U.S. at 30; *see also Rahimi*, 602 U.S. at 692 ("The law must comport with the principles underlying the Second Amendment, but it need not be a 'dead ringer' or a 'historical twin.'") (quoting *Bruen*, 597 U.S. at 30). This is especially true here, where lawmakers are responding to recently developed technology contributing to a distinctly modern problem. In a case like this, "implicating unprecedented societal concerns or dramatic technological changes," courts must apply "a more nuanced approach," in which direct historical precedent is not required. *Bruen*, 597 U.S. at 27; *Ocean State Tactical*, 95 F.4th at 44 (applying *Bruen's* "nuanced approach" to LCM restriction "since the record contains no evidence that American society previously confronted—much less settled on a resolution of" the problem of "the increasing frequency of LCM-aided mass shootings"); *Bianchi*, 111 F.4th at 463 ("The ripples of fear reverberating throughout our nation in the wake of the horrific

mass shootings in, for example, Las Vegas, Orlando, Blacksburg, Sandy Hook, Sutherland Springs, El Paso, Uvalde, Lewiston, Parkland, San Bernardino, Binghamton, Fort Hood, Thousand Oaks, Virginia Beach, Washington, D.C., Aurora, Monterey Park, Pittsburgh, Geneva County, Boulder, Buffalo, Covina, Dayton, Red Lake, Roseburg, San Jose, Santa Fe, Allen, Charleston, Indianapolis, Manchester, Omaha, and Plano—each of which occurred in the 21st century and resulted in at least nine fatalities—stem from a crisis unheard of and likely unimaginable at the founding.").

To state the obvious, there are no 18th- or 19th-century restrictions on magazine capacity because LCM-aided mass-violence was nonexistent at the time. *See, e.g.*, *Vt. Fed'n of Sportsmen's Clubs*, 2024 WL 3466482, at *18-20. LCMs did not began to gain popularity until the mid-1980s. *Or. Firearms Fed'n*, 682 F. Supp. 3d at 893. Then, within just a decade, a spate of LCM-aided mass shootings spurred Congress to act, banning LCMs nationwide in 1994. Violent Crime Control and Law

Enforcement Act of 1994, Pub. L. No. 103-322, § 1101103, 108 Stat. 1998. That law followed in the footsteps of earlier, Prohibition Era legislation, limiting magazine capacity once fully automatic firearms became a technological and commercial reality. *See* CP 1633. And these laws followed in the footsteps of yet earlier restrictions of Bowie knives, pockets pistols, and on and on.

As the Supreme Court has made clear, the scope of permissible regulations in 2024 is not constrained by the imagination or concerns of long-dead legislators. *Rahimi*, 602 U.S. at 680 ("The reach of the Second Amendment is not limited only to those arms that were in existence at the Founding. … By that same logic, the Second Amendment permits more than just regulations identical to those existing in 1791."); *id.* at 705-06 (Sotomayor, J., concurring) (rejecting approach under which "the legislatures of today would be limited not by a distant generation's determination that such a law was unconstitutional, but by a distant generation's failure to consider that such a law

might be necessary"); *id.* at 739-40 (Barrett, J., concurring) ("[I]mposing a test that demands overly specific analogues … assumes that founding-era legislatures maximally exercised their power to regulate, thereby adopting a 'use it or lose it' view of legislative authority.").

Amici try to get ahead of this obvious problem by pointing to certain curio multi-shot weapons that pre-dated the 20th century. *See, e.g.*, NRA Am. Br. at 28-29; NSSF Am. Br. at 22-23; Gun Owners Am. Br. at 31-32. But the undisputed evidence is that these weapons never proliferated widely, and certainly never led to widespread violence. *See* Op. Br. at 55-56, 72-73. Amici fare no better in pointing to repeating rifles, because here again there is no historical evidence suggesting they were commonly associated with criminal violence.[6] *Contra* NSSF

[6] To be sure, some repeating rifles came to be associated with westward expansion and the genocide of Indigenous Americans. While we can certainly recognize this today as lawless violence, it was largely promoted and supported by 19th century governments.

Am. Br. at 23-25; NRA Am. Br. at 28. Contrast this with, for example, revolvers, which *were* associated with criminal violence, leading to restrictions on their sales, carrying, and other features—restrictions that were upheld by contemporary courts. *See* Op. Br. at 65-66; Reply Br. at 30-34.[7]

Simply put, there were no 19th-century restrictions on magazine capacity for the same reason there are no 21st century regulations on jet packs (despite the first patent being issued over 100 years ago)[8] or lightsabers (despite recent advances in lightsaber technology).[9] There is no need for legislatures to

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[7] Because SB 5078 focuses on the threat of criminal violence, and because criminal firearm violence did not become a serious societal problem until the mid-19th century, the Second Amendment Foundation's focus on gun powder storage laws is largely beside the point. *See generally* SAF Am. Br.

[8] Jet pack, https://en.wikipedia.org/w/index.php?title=Jet_pack&oldid=1262699194 (last visited Dec. 26, 2024); *see also* U.S. Patent No. 3,021,095 (issued Feb. 13, 1962); USSR Patent No. 4818 (filed Feb. 18, 1921).

[9] Hacksmith Industries, *4000° PLASMA PROTO-LIGHTSABER BUILD (RETRACTABLE BLADE!)*, YouTube (Oct. 8, 2020), (https://www.youtube.com/watch?v=xC6J4T_hUKg).

regulate technologies that are barely used. But if either technology started to cause widespread harm, the lack of prior regulation would not render 22nd century legislatures powerless to regulate them.

Amici next try to nitpick the plethora of historical regulations cited by the State, arguing that minor differences in the way some—but not all—of these regulations operated compared to SB 5078 render them irrelevant. *See, e.g.*, NRA Am. Br. at 29-31; Gun Owners Am. Br. at 27-30.

Here again, Amici are doubly wrong. First, as new threats have emerged, states and the federal government have in fact imposed restrictions on arms that either severely restricted sales or—going far beyond SB 5078—effectively banned the weapons in question. *See, e.g.*, Op. Br. at 59-60 (trap guns), 61 (slungshots), 63-64 (Bowie knives), 66 (pocket pistols), 67-68 (machineguns), 69 (assault weapons and LCMs). These regulations are directly analogous to SB 5078.

More fundamentally, Amici's effort to highlight the small differences between historical and contemporary statutes again ignores the Supreme Court's holding that courts look to historical laws to discern historical "principles," not "dead ringer[s]" or "historical twin[s]." *Rahimi*, 602 U.S. at 692.

Reading the *Rahimi* majority alongside Justice Thomas' dissent lays bare the error in Amici's approach. As Justice Thomas pointed out, the surety laws relied on by the *Rahimi* majority "imposed a materially different burden" than the total possessory ban at issue in *Rahimi*, backed by felony penalties:

> Critically, a surety demand did not alter an individual's right to keep and bear arms. After providing sureties, a person kept possession of all his firearms; could purchase additional firearms; and could carry firearms in public and private. Even if he breached the peace, the only penalty was that he and his sureties had to pay a sum of money. To disarm him, the Government would have to take some other action, such as imprisoning him for a crime.

*Id.* at 764 (Thomas, J., dissenting); *see also id.* at 768 ("Because surety laws are not equivalent to an effective ban on public carry,

they do not impose a burden equivalent to a complete ban on carrying *and* possessing firearms."); *id.* at 768-71 (distinguishing the affray laws relied on by the *Rahimi* majority).

Yet despite these undeniable differences, Justice Thomas' analysis was rejected by every one of his colleagues. That's because "the appropriate analysis involves considering whether the challenged regulation is consistent with the *principles* that underpin our regulatory tradition," not whether the challenged regulation matches some historical precedent one-to-one. *Id.* at 692. Accordingly, it was sufficient that the government identified a historical principle of "disarmament of individuals who pose a credible threat to the physical safety of others," even though the modern regime of total disarmament was "by no means identical to the[] founding era regimes" encompassed by surety and affray laws. *Id.* at 693, 698.

Here, the principle underlying the dozens of laws cited by the State is clear: the Second Amendment allows legislatures to restrict the use of dangerous weapons associated with criminal

violence. *See, e.g.*, *Bianchi*, 111 F. 4th at 464 ("[L]egislatures, since the time of our founding, have responded to the most urgent and visible threats posed by excessively harmful arms with responsive and proportional legislation."); *Bevis*, 85 F.4th at 1200 ("Historical regulations show that at least since the Founding there has been an unbroken tradition of regulating weapons to advance … purposes" like "[p]rotect[ing] … [c]ommunities[.]"); *Ocean State Tactical*, 95 F.4th at 49 ("[O]ur nation's historical tradition recognizes the need to protect against the greater dangers posed by some weapons … as a sufficient justification for firearm regulation.").

It may be true that 18th- and 19th-century legislatures often elected to restrict the carrying of weapons instead of the sale, but Amici fail to answer a key question: so what? The goal—the principle—underlying the historical regulations is the same as SB 5078's: addressing "the horrors wrought by excessively dangerous weapons, while preserving the core right of armed self-defense." *Bianchi*, 111 F. 4th at 471. Indeed, even

as Amici grouse that (some) historical regulations operate differently than SB 5078, they cannot show that these historical regulations burden the right to self-defense any less than SB 5078. *See Rahimi*, 602 U.S. at 699 ("[I]f imprisonment was permissible to respond to the use of guns to threaten the physical safety of others, then the lesser restriction of temporary disarmament that Section 922(g)(8) imposes is also permissible.") (citation omitted). Not only is there no record evidence whatsoever that LCMs are actually useful in self-defense, but SB 5078 does *not* restrict anyone's ability to carry or use their existing LCMs, nor to purchase and carry multiple 10-round magazines. Thus, like Gator's, Amici cannot show that SB 5078 is any more burdensome than the hundreds of historical analogues identified by the State.

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"[T]he arc of weapons regulation in our nation has mimicked a call and response composition, in which society laments the harm certain excessively dangerous weapons are

wreaking, and the state, pursuant to its police power, legislates in kind." *Bianchi*, 111 F.4th at 462. Because SB 5078 fits squarely within this "indispensable" tradition, *id.*, it is consistent with the Second Amendment.

## III. CONCLUSION

For the foregoing reasons, and the reasons detailed in its opening and reply briefs, the State of Washington respectfully requests that this Court reverse the superior court's grant of summary judgment to Gator's and its denial of summary judgment to the State, and remand to a new superior court judge for further proceedings.

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RESPECTFULLY SUBMITTED this 27th day of December 2024.

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Appellant's Response to Amici Curiae

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