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 STATE OF WASHINGTON'S ANSWER TO RESPONDENT'S MOTION TO MODIFY COMMISSIONER'S RULING

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I. INTRODUCTION

The Commissioner of this Court correctly stayed the Cowlitz County Superior Court's order invalidating Senate Bill 5078 (SB 5078), Washington's restriction on large capacity magazines (LCMs). The Legislature passed SB 5078 to address the epidemic of gun violence that "threat[ens] . . . the public health and safety of Washingtonians." Engrossed Substitute S.B. 5078, 67th Leg., Reg. Sess., § 1 (Wash. 2022). As the Legislature found, LCMs—accessories that enable firearms to shoot more than ten rounds without reloading—contribute to increased fatalities in mass shootings, but have no utility for "responsible, lawful self-defense." *Id.*

Having flouted this law for nearly 18 months by illegally selling thousands of LCMs, Gator's Custom Guns and Walter Wentz (collectively, Gator's) belatedly sued, arguing SB 5078 is facially unconstitutional. On appeal, the Commissioner correctly concluded that the factors governing issuance of a stay—whether there are debatable legal issues, and what harms would occur

with or without a stay—strongly support a stay. *See* RAP 8.1(b)(3). The issues are more than debatable because the superior court's ruling is an extreme outlier: prior to the ruling below, *every court* to consider a post-*Bruen* challenge to a large-capacity magazine restriction under the Second Amendment and/or article I, section 24 of Washington's Constitution has *rejected* that challenge—or been overruled. LCMs are military-style accessories, not arms protected by the state or federal constitutions. And even if LCMs were protected arms, restricting their sale is a reasonable regulation consistent with our nation's history, satisfying both the state and federal standards.

The balance of equities also overwhelmingly favors a stay. Laws like SB 5078 are proven to save lives. And even a temporary pause in the law's effect will likely unleash a flood of LCMs in Washington, sharply undercutting the law's effectiveness—as demonstrated by the deluge of LCMs sold in just the two hours the superior court's ruling was in effect. By contrast, Gator's is not harmed by the stay because there is no

constitutional right to buy or sell military-style LCMs; because unrebutted expert analysis proves LCMs are not useful or used for lawful self-defense; and because nothing prevents Mr. Wentz as an individual from using LCMs he already lawfully owns. Further, having waited over a year to bring suit—during which Gator's flagrantly violated the law rather than seeking relief in court—Gator's cannot claim harm from a brief stay that preserves the status quo.

The stay should be maintained.

II. STATEMENT OF RELIEF SOUGHT

The State of Washington requests that this Court maintain the stay entered by Commissioner Michael Johnston on April 25, 2024.

III. STATEMENT OF THE CASE

SB 5078 became effective July 1, 2022. The Legislature adopted SB 5078 after "find[ing] that restricting the sale, manufacture, and distribution of large capacity magazines is likely to reduce gun deaths and injuries" without "interfer[ing]

with responsible, lawful self-defense." Laws of 2022, ch. 104, § 1. Shortly after the law went into effect, two groups of plaintiffs sued, challenging its constitutionality. *Sullivan. v. Ferguson*, Case No. 3:22-cv-05403-DGE (W.D. Wash.); *Brumback v. Ferguson*, Case No. 1:22-cv-03093-MKD (E.D. Wash.).

Gator's did not. Instead, it continued to sell LCMs illegally in massive quantities, knowingly violating the law. *See* App. 67-68. More than once, Gator's illegally sold LCMs to undercover investigators. App. 72-73. 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. App. 74-75. The Washington Attorney General's Office issued a civil investigative demand to Gator's in July 2023. App. 15.

In response, on August 21, 2023, Gator's filed a petition to set aside the CID (Petition). App. 1. In Gator's words, the Petition "challenge[d] the constitutionality of ESSB 5078 under

Wash. Const. art. I § 24." App. 6. On September 12, 2023, the State filed suit against Gator's, alleging violations of Washington's Consumer Protection Act in connection with Gator's illegal sales of LCMs. *See* App. 66. Gator's answered the State's complaint by, in part, raising the affirmative defense that enforcing the Consumer Protection Act against them was unconstitutional. App. 86.

In October 2023, the superior court ordered the two cases consolidated, and further ordered that the consolidated case would be phased, with Gator's facial challenge heard before the State's enforcement action. App. 122. The court heard oral argument on the parties' cross-motions for summary judgment on March 11, 2024. As the Commissioner noted, in advance of that hearing, the State wrote to Gator's and the Court Clerk, giving notice that it would be seeking an emergency stay of any adverse decision. *See* April 25, 2024 Ruling Granting Emergency Motion for Stay (Commissioner Order) at 1-2. On April 8, the superior court issued an order invalidating SB 5078

under article 1, section 24 of the Washington Constitution and the Second Amendment and enjoining its enforcement. App. 904. That afternoon, the State filed a notice of appeal seeking direct review by this Court and sought an emergency stay from this Court. Commissioner Order at 3. Shortly thereafter, the Commissioner granted a temporary emergency stay, pending full briefing and argument from the parties. *Id.* at 3-4. As explained below, in just the two hours in which SB 5078 was enjoined, gun dealers like Gator's engaged in a sales blitz to sell hundreds of LCMs in Washington. *Infra* at 21-22.

Following briefing by the parties, the Commissioner held oral argument on April 17. Commissioner Order at 5. The next week, the Commissioner issued a detailed, extensively researched opinion staying the superior court's order pending appellate review. *Id.* at 1.

As the Commissioner explained, the State's motion raised numerous debatable and dispositive issues, including: whether LCMs are "arms" within the meaning of article I, section 24 and

the Second Amendment (*id.* at 24-25); whether, even if they are, SB 5078 is nonetheless a constitutionally reasonable restriction on arms under article I, section 24 (*id.* at 25-27); and whether, even if Gator's had properly raised a Second Amendment claim, SB 5078 passes muster under the U.S. Supreme Court's new *Bruen* test for Second Amendment claims (*id.* at 29-30). As to the balance of harms, the Commissioner's ruling is worth quoting at length. As he explained, in response to the very arguments Gator's raises here:

> Gator's Guns asserts that lifting the current stay . . . will cause no harm because the State's concerns are speculative only. Gator's Guns further contends a stay will harm a great number of lawful firearms owners who wish to equip themselves with LCMs and thus perpetrate a violation of their state and federal constitutional rights.
>
> . . . However, the historical record shows that LCMs greatly increase the number of fatalities and injuries inflicted in a mass shooting and that the frequency of such incidents has grown in recent years. The historical record shows also that potential victims can flee and that shooters can be overcome when pausing their rampage to swap out magazines. It is all but certain mass shootings will occur in Washington. This legislation will not necessarily prevent them from happening but it will increase

> potential victims' chances of survival. By declaring the statute unconstitutional and enjoining its enforcement, the superior court deprives Washington's citizens of needed protection enacted by their elected representatives.

Id. at 32.

Furthermore, the Commissioner rejected Gator's argument that any harms were speculative because most mass shootings occur outside of Washington, explaining:

> Washington is not protected by a 'force field.' . . . And there is no magical screening mechanism for identifying a potential mass shooter when they walk into Gator's Guns or another shop to buy a multi-pack of 30-round magazines or one or two 100-round magazines. Once an outwardly law-abiding customer harboring homicidal thoughts obtains LCMs if a stay is not imposed, the fruits of the State's appeal truly will be lost.

Id.

By contrast, the Commissioner correctly noted that Washingtonians still "can buy as many 10-round magazines as they can load into their cars or trucks while this appeal plays out." *Id.* at 33. And, "important[ly], . . . affected firearms owners are not the nonmoving parties in this litigation." *Id.* Gator's

interest is merely in "sell[ing] magazines." *Id.* Notwithstanding SB 5078, Gator's remains able to "sell as many 10-round magazines as it can fit into its store," and, should it ultimately prevail on appeal, "it will be free to sell" its current inventory of LCMs "and any new ones [it] acquire[s]." *Id.*

The Commissioner thus maintained the stay. A month later, Gator's now moves to dissolve the stay.

IV. GROUNDS FOR RELIEF

A. Standards for Granting a Stay

RAP 8.1(b)(3) and 8.3 give this Court "discretion to stay the enforcement of trial court decisions." *Moreman v. Butcher*, 126 Wn.2d 36, 42 n.6, 891 P.2d 725 (1995). This Court may stay enforcement of a trial court's order "before . . . acceptance of review." RAP 8.1(b)(3); RAP 8.3.

When evaluating a stay request under RAP 8.1(b)(3), this Court must "(i) consider whether the moving party can demonstrate that debatable issues are presented on appeal and (ii) compare the injury that would be suffered by the moving

party if a stay were not imposed with the injury that would be suffered by the nonmoving party if a stay were imposed." RAP 8.1(b)(3); *see Purser v. Rahm*, 104 Wn.2d 159, 177, 702 P.2d 1196 (1985).

B. The Issues Are More Than Debatable

Here, Gator's apparently concedes debatable issues, arguing only that "[t]he Commissioner erred by failing to adequately compare the injuries suffered by the parties." *See* Respt's Mot. Modify (Mot.) at 5. However, because Gator's claims of harm rest entirely on alleged constitutional injuries, the State briefly addresses the merits of Gator's claims to show that maintaining the stay will not cause any constitutional injury at all.

Not only are the issues in this case debatable, but the State has a very strong likelihood of prevailing on appeal. *Every other court* to address the constitutionality of LCM restrictions under the Second Amendment and/or article I, section 24 has reached

the opposite conclusion as the superior court here, or been overruled:

- *Duncan v. Bonta*, 83 F.4th 803, 805–06 (9th Cir. 2023) ("[W]e conclude that the Attorney General is likely to succeed on the merits" that California's LCM restriction "comports with the Second Amendment under *Bruen.*");
- *Bevis v. City of Naperville, Illinois*, 85 F.4th 1175, 1197 (7th Cir. 2023) ("[L]arge-capacity magazines . . . can lawfully be reserved for military use.");
- *Ocean State Tactical, LLC v. Rhode Island*, 95 F.4th 38, 50 (1st Cir. 2024) ("LCMs [are] well within the realm of devices that have historically been prohibited once their danger became manifest.");
- *Brumback v. Ferguson*, 1:22-CV-03093-MKD, 2023 WL 6221425, at *8 (E.D. Wash. Sept. 25, 2023) ("Plaintiffs have offered insufficient evidence suggesting that the text of the Second Amendment was meant to include large capacity magazines.");
- *State v. Federal Way Discount Guns*, Case No. 22-2-20064-2 SEA (Jan. 6, 2023, King Cnty Sup. Ct.) ("The State has shown a likelihood of success that RCW 9.41.370 and RCW 9.41.375 are constitutional under the Second Amendment of the U.S. Constitution … and article I, section 24 of the Washington Constitution.");
- *Ocean State Tactical, LLC v. Rhode Island*, 646 F. Supp. 3d 368, 388, 390 (D.R.I. 2022), *aff'd*, 95 F.4th 38 (1st Cir. 2024) (["P]laintiffs have failed to meet their burden of establishing that LCMs are 'Arms'

within the textual meaning of the Second Amendment" and "failed to establish . . . that LCMs are weapons of self-defense, such that they would enjoy Second Amendment protection.");

- *Bevis v. City of Naperville, Illinois*, 657 F. Supp. 3d 1052, 1075 (N.D. Ill. 2023), *aff'd*, 85 F.4th 1175 (7th Cir. 2023) ("Because . . . high-capacity magazines are particularly dangerous weapon accessories, their regulation accords with history and tradition.");
- *Del. State Sportsmen's Ass'n, Inc. v. Del. Dep't of Safety & Homeland Sec.*, 664 F. Supp. 3d 584, 603 (D. Del. 2023) (concluding that Delaware's prohibition on LCMs is "consistent with the Nation's historical tradition of firearm regulation");
- *Hanson v. D.C.*, 671 F. Supp. 3d 1, 16 (D.D.C. 2023) ("[Large capacity magazines] fall outside of the Second Amendment's scope because they are most useful in military service and because they are not in fact commonly used for self-defense.");
- *Herrera v. Raoul*, 670 F. Supp. 3d 665, 672 (N.D. Ill. 2023), *aff'd* 85 F.4th 1175 (7th Cir. 2023) (concluding that Illinois' prohibition on LCMs is "consistent with 'the Nation's historical tradition of firearm regulation,'" (quoting *Bruen*));
- *Oregon Firearms Fed'n v. Kotek Oregon All. for Gun Safety*, 682 F. Supp. 3d 874, 884 (D. Or. July 14, 2023) ("Plaintiffs have not shown that the Second Amendment protects large-capacity magazines . . . And even if the Second Amendment were to protect large-capacity magazines, . . . restrictions on the use and possession of large-

capacity magazines are consistent with the Nation's history and tradition of firearm regulation.");

- *Nat'l Ass'n for Gun Rights v. Lamont*, 685 F. Supp. 3d 63, 71 (D. Conn. Aug. 3, 2023) ("Plaintiffs' proposed ownership of . . . LCMs is not protected by the Second Amendment because they have not demonstrated that . . . LCMs . . . are commonly sought out, purchased, and used for self-defense," and because LCM restrictions are "consistent with" the Nation's "longstanding history and tradition");
- *Capen v. Campbell*, --- F. Supp. 3d ---, 2023 WL 8851005 at *18, *20 (D. Mass. Dec. 21, 2023) ("[P]laintiffs have not demonstrated that all magazines, regardless of capacity, fall within the protection of the Second Amendment," and "the historical record demonstrates that [Massachusetts' LCM] restrictions pose a minimal burden on the right to self-defense and are comparably justified to historical regulation").

As the unanimous case law makes clear, Gator's facial challenges entirely lack merit.

First, article I, section 24 of the Washington Constitution only covers "weapons 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). LCMs are not themselves weapons, nor are they necessary for any weapon to function—as Gator's admits. App. 863; *see also*

App. 653. As a result, they are not subject to article I, section 24 at all.

But even if they were, LCMs are neither designed nor commonly used for self-defense. Rather, they are military-style accessories, designed to kill more enemies more rapidly on the battlefield. And befitting their role as tools of war, LCMs have virtually no utility for self-defense. *See Duncan v. Bonta*, 19 F.4th 1087, 1104–05 (9th Cir. 2021), *cert. granted*, *judgment vacated on other grounds*, 142 S. Ct. 2895 (2022), and *vacated and remanded*, 49 F.4th 1228 (9th Cir. 2022); Commissioner Order at 22-23. Here, unrebutted testimony from State expert Lucy Allen shows that individuals virtually never fire more than ten rounds in self-defense. App. 690-99; *see also, e.g.*, *Oregon Firearms Fed'n*, 682 F. Supp. 3d at 897 ("[I]t is exceedingly rare (far less than 1 percent) for an individual to fire more than ten shots in self-defense."). Thus, an LCM's defining feature—the ability to *shoot* more than ten times without reloading—is essentially never used in self-defense. Gator's failed to show that

LCMs are covered by section 24, and the superior court erred in concluding otherwise.

Second, even if section 24 applied to LCMs, "the firearm rights guaranteed by the Washington Constitution are subject to reasonable regulation pursuant to the State's police power." *State v. Jorgenson*, 179 Wn.2d 145, 155, 312 P.3d 960 (2013).[1] Here, the Legislature made specific factual findings that "large capacity magazines increase casualties by allowing a shooter to keep firing for longer periods of time without reloading," and

[1] *Jorgenson* established the test applicable to claims brought under article I, section 24, holding that the provision is "distinct and should be interpreted separately from the Second Amendment to the federal constitution." 179 Wn.2d at 153. Yet both Gator's and the superior court have argued that *Jorgenson* is irrelevant because it is inconsistent with the U.S. Supreme Court's *Bruen* test for Second Amendment claims, and because *Jorgensen* involved a different type of firearms regulation than SB 5078. Mot. at 15-19; App. 923. The State addressed these arguments in detail in its Statement of Grounds for Direct Review, and will further address them in its Opening Brief. Statement of Grounds at 10-16. For now, suffice it to say that *Jorgenson*'s holding regarding the standard governing article I, section 24 claims remains the law unless and until this Court says otherwise.

that in recent "mass shooting events . . . the use of large capacity magazines caused twice as many deaths and 14 times as many injuries." Engrossed Substitute S.B. 5078, 67th Leg., Reg. Sess., § 1 (Wash. 2022). "[T]he legislature f[ound] that restricting the sale, manufacture, and distribution of large capacity magazines is likely to reduce gun deaths and injuries." *Id*. These legislative findings are owed "great deference." *Washington Off Highway Vehicle All. v. State*, 176 Wn.2d 225, 236, 290 P.3d 954 (2012). Moreover, these findings are corroborated by unrebutted evidence. App. 294-304 (concluding that "epidemiological calculations lead to the . . . conclusion" that "when bans on LCMs are in effect, per capita, fewer high-fatality mass shootings occur and fewer people die in such shootings"). Gator's offered *nothing* to meaningfully rebut the Legislature's conclusion. App. 879. There is nothing unreasonable about restricting the sale of deadly LCMs when the unrebutted evidence shows they make mass shootings and other horrific crimes more frequent and more deadly, and that they are not used

for self-defense. The record shows that SB 5078's limitation on the sale and manufacture of LCMs is "reasonably necessary to protect public safety or welfare" and is "substantially related" to the "legitimate ends" of reducing mass shootings in Washington. *Id.* at 156.

Gator's Second Amendment theory fares no better. The Second Amendment does not guarantee civilians the "right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 21 (2022) (quoting *D.C. v. Heller*, 554 U.S. 570 (2008)). In *Bruen*, the U.S. Supreme Court announced a new two-step test for applying the Second Amendment: "[1] When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. [2] The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." 597 U.S. at 24. Gator's claim fails at both steps.

First, LCMs are not covered by the Second Amendment for the same reasons they are not covered by article I, section 24. They are force-multiplying accessories, not "arms," nor are they necessary for any firearms to function exactly as intended. *See, e.g.*, *Oregon Firearms Fed'n*, 682 F. Supp. 3d at 913. And they are not "in common use today for self-defense." *Bruen*, 597 U.S. at 32.

Second, even if these accessories were within the scope of the Second Amendment, Washington's regulation of LCMs fits comfortably within the long historical tradition of regulating dangerous and unusual weapons to promote public safety. The State identified numerous historical analogues and presented expert testimony from professional historians showing that SB 5078 fits well within the history and tradition of the United States. App. 335-648, 840-50 (identifying analogous laws restricting trap guns, knives, clubs, pistols, machineguns, and magazine capacity from all periods of American history). Gator's offered nothing to rebut the State's extensive historical evidence.

In short, not only are the issues debatable, but Gator's is unlikely to succeed on the merits of its constitutional claims.

C. The Balance of Harms Weighs in Favor of Maintaining the Stay

There is no comparison between the parties' respective harms. The harm that would be suffered by the State and the people if the stay is dissolved far outweighs any speculative harm to Gator's from maintaining the stay. *See* RAP 8.1(b)(3).

1. Dissolving the stay will significantly injure the State and the public interest

The Legislature made specific findings that SB 5078 would likely save lives. Laws of 2022, ch. 104, § 1. The record evidence submitted in this case likewise shows that LCMs make mass shootings more common and more deadly. App. 289, 822 ("LCMs were used in 94% of all mass shootings resulting in more than 10 deaths and 100% of all mass shootings resulting in more than 15 deaths"), 301, 892 ("[S]tates subject to [LCM] bans experienced a 51% decrease in high-fatality mass shooting incidence rates."), 704 ("[C]asualties were higher in the mass

shootings that involved weapons with large-capacity magazines than in other mass shootings.").

Gator's failed to rebut any of this evidence, but nevertheless attempts to minimize the devastating violence caused by mass shootings, simultaneously arguing that mass shootings in Washington are not common enough to be a real problem and that mass shootings are perpetrated with guns without LCMs, and so SB 5078 is pointless. Mot. at 25-27. The Commissioner correctly rejected these arguments. Commissioner Order at 32-33. The Legislature is not required to wait until some threshold number of Washingtonians are massacred with LCMs to act. There is no dispute that mass shootings are a serious public safety issue, that they are made both more frequent and more deadly by LCMs (App. 287-290), and that laws restricting the proliferation of LCMs have been proven to save lives (App. 294-303). Gator's objection that the harms of mass shootings are "speculative" flies in the face of specific Legislative findings and the record evidence.

The evidence is equally clear that invalidating SB 5078 even temporarily will undermine the Legislature's goals and put Washingtonians at increased risk of shooting violence. To quote the Ninth Circuit's recent stay order in *Duncan v. Bonta*, with minimal modification: "If a stay is denied, [Washington] indisputably will face an influx of large-capacity magazines like those used in mass shootings" nationwide. *Duncan*, 83 F.4th at 806. In fact, in just the two hours between the superior court entering an injunction and the Commissioner issuing an emergency stay, Gator's sold "hundreds" of LCMs. *See* Evan Watson, *Kelso gun store owner sold hundreds of high-capacity magazines in 90 minutes that ban was overturned*, KGW8 (Apr. 9, 2024), https://www.kgw.com/article/news/regional/southwest-washington/washington-high-capacity-gun-magazine-ban-overturned-stay-kelso-store/283-98bff6b9-12a7-4a64-b0b3-e83640d5fc04; *see also* Commissioner Order at 4. Gator's even planned to extend its business hours to sell as many LCMs as possible, anticipating that the superior court's order

would be stayed. Declaration of Victoria Johnson, Ex. A ("Store hours adjusted 8AM-8PM OPEN 7 DAYS AWEEK UNTIL WE GET TOLD WE CANT SELL MAGS AGAIN"). And Gator's was not the only retailer that sought to profit from the momentary lapse in the law's enforceability. The gun industry and its advocates undertook a concerted effort to publicize the superior court's order—and the possibility of a stay—to maximize LCM sales. *See* William Kirk, "How to Legally Purchase Magazines if an Injunction Happens," https://www.youtube.com/watch?v=pw_D-Drmwns, March 20, 2024 (advising Washingtonians how to "stock[] up" on LCMs in any time period between an injunction and a stay in this case); *see also* Johnson Decl. Ex. B (collecting social media posts). If the stay is not maintained pending the ultimate determination of this appeal, it is virtually guaranteed that retailers will continue to sell LCMs as fast as they can, anticipating that the superior court may ultimately be reversed. Plainly, then, a stay is necessary to preserve "the fruits of a successful appeal." *See Washington Fed.*

of State Employees, Council 28, AFL-CIO v. State, 99 Wn.2d 878, 883, 665 P.2d 1337 (1983).

Gator's suggests that the Commissioner's finding of harm to the State—a flood of LCMs into Washington, increasing the risk of mass shootings and gun deaths—is overblown because the Legislature did not outlaw the possession of existing LCMs or include an emergency clause in SB 5078. Mot. at 29. But the fact that the Legislature did not go as far as it could have in restricting LCMs does not undermine the critical importance of SB 5078. The Legislature's decision to take a significant step toward limiting the availability of LCMs, without banning them entirely, does not delegitimize its efforts to protect the safety of Washingtonians through reasonable regulation. *See Katzenbach v. Morgan*, 384 U.S. 641, 657 (1966) ("[W]e are guided by the familiar principles that a statute is not invalid under the Constitution because it might have gone farther than it did, that a legislature need not strike at all evils at the same time, and that reform may take one step at a time, addressing itself to the phase

of the problem which seems most acute to the legislative mind[.]") (quotations omitted).

Gator's argument that the State is not harmed because SB 5078 did not contain an emergency clause similarly lacks merit. By default, "[n]o act, law, or bill subject to referendum shall take effect until 90 days after the adjournment of the session at which it was enacted." Const. art. II, § 41. But under Gator's reasoning, the State would not be able to show harm from an injunction against a statute unless the Legislature departed from this default rule and included an emergency clause in the statute. This is not the law. S*ee Maryland v. King*, 567 U.S. 1301, 1303 (2012) ("Any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.") (Roberts, J., in chambers) (quotation omitted).

2. Gator's will not be harmed by maintaining a stay

By contrast, Gator's has not identified any comparable harm caused by maintaining the stay of the trial court's order—

i.e., preserving the status quo that has been in place for nearly two years—nor could it.

To begin with, Gator's primarily asserts a constitutional injury. Mot. at 8–21. But because Gator's constitutional claims lack merit, it will not suffer any constitutional injury from the maintenance of a stay. Relatedly, although Gator's has much to say about the importance of self-defense (e.g., *Id.* at 9, 11), the undisputed evidence shows that LCMs are not used and are not useful for self-defense (App. 496-97, 689-701). Meaning: nobody's ability to defend themselves is dependent on an LCM. As the Ninth Circuit put it, "although the public has an interest in possessing firearms and ammunition for self-defense, that interest is hardly affected by this stay." *Duncan*, 83 F.4th at 807; *see also Capen*, 2023 WL 8851005 at *2 ("If there is a reason why an eleven-round magazine, rather than a ten-round magazine, is reasonably necessary for purposes of self-defense, it is not apparent from the record.").

Gator's suggests that the Court should *presume* harm to it because "[t]he violation of a fundamental constitutional right, even if temporary, constitutes irreparable harm." Mot. at 20. But not only is Gator's unable to show any violation of a constitutional right, the language they rely on is from a dissent. *Id.* (quoting *Stevens Cnty. v. Stevens Cnty. Sheriff's Dep't*, 20 Wn. App. 2d 34, 94, 499 P.3d 917 (2021) (Fearing, J., dissenting), *review denied*, 199 Wn.2d 1008, 506 P.3d 639 (2022)). That dissent is not the law. Indeed, outside the First Amendment context, courts "require[] more than a constitutional claim to find irreparable harm." *Great N. Res. v. Coba*, 3:20-CV-01866-IM, 2020 WL 6820793, at *2 (D. Or. Nov. 20, 2020) (collecting cases). Gator's has not demonstrated any harm.[2]

Further, any (*de minimis* at best) injury to would-be LCM purchasers is beside the point, since only "the injury that would

[2] Gator's also criticizes the Commissioner for "not even [saying] the word 'fundamental'" in his order, Mot. at 21, but no rule of law requires the Commissioner to recite a magic word on pain of reversal.

be suffered by the nonmoving party if a stay were imposed" is relevant under RAP 8.1(b)(3). Gator's itself is not injured here: even if Gator's is correct (and nearly every court is wrong) that purchasing an LCM is constitutionally protected, Gator's has no independent constitutional interest in *selling* LCMs. *See Teixeira v. Cnty. of Alameda*, 873 F.3d 670, 690 (9th Cir. 2017) (en banc) ("[T]he Second Amendment does not independently protect a proprietor's right to sell firearms."). Moreover, Gator's raised the constitutionality of SB 5078 only as a defense to the State's Consumer Protection Act case against it. App. 86. That Consumer Protection Act case is stayed pending this appeal (RAP 7.2(a)), and if Gator's were to succeed in defending the superior court's order below, the State's enforcement action would ultimately be dismissed and Gator's constitutional defense would be vindicated.

Finally, Gator's conduct undermines their request to dissolve the stay. SB 5078 went into law on July 1, 2022, and rather than suing then to protect their asserted rights, Gator's

openly flouted the law. Having opted to violate the law rather than take action to protect its rights, Gator's cannot claim an immediate injury any more than it can claim to have the equities on its side. *See Wise v. Inslee*, 2:21-CV-0288-TOR, 2021 WL 4951571, at *6 (E.D. Wash. Oct. 25, 2021) (concluding plaintiffs' delay of two months in filing suit "implies a lack of urgency and irreparable harm") (quotation omitted); *Income Inv'rs v. Shelton*, 3 Wn.2d 599, 602, 101 P.2d 973 (1940) ("Equity will not interfere on behalf of a party whose conduct . . . has been unconscientious, unjust, or marked by the want of good faith[.]").

Preserving the Commissioner's stay pending review will protect the State and its citizens from serious risk of harm, without meaningfully harming Gator's. The stay should be maintained.

V. CONCLUSION

For the foregoing reasons, the State of Washington respectfully requests this Court decline to dissolve the stay pending appeal entered by the Commissioner on April 25, 2024.

This document contains 4,950 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 11th day of June 2024.

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DECLARATION OF SERVICE

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

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

DATED this 11th day of June 2024, at Seattle, Washington.

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WA STATE ATTORNEY GENERAL'S OFFICE, COMPLEX LITIGATION DIVISION

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Comments:

Appellant State of Washington's Answer to Respondent's Motion to Modify Commissioner's Ruling

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