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 STATEMENT OF GROUNDS FOR DIRECT REVIEW

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. NATURE OF CASE AND DECISION.....4

III. ISSUE PRESENTED FOR REVIEW 7

IV. GROUNDS FOR DIRECT REVIEW 8

A. The Court Struck Down a Washington Statute under the Federal and State Constitutions and Enjoined State Officials from Enforcing the Law, Warranting Direct Review under RAP 4.2(a)(2) and (5) 9

B. The Court Invented a Conflict Between Two Washington Supreme Court Opinions and Purported to Essentially Overrule the Latter Decision, Warranting Direct Review under RAP 4.2(a)(3).....10

C. The Court Invalidated a Law the Legislature Determined Was "Likely to Reduce Gun Deaths," Warranting Direct Review under RAP 4.2(a)(4).....16

V. CONCLUSION.....21

TABLE OF AUTHORITIES

Cases

Bevis v. City of Naperville, Illinois,
657 F. Supp. 3d 1052 (N.D. Ill. 2023),
aff'd 85 F.4th 1175 (7th Cir. 2023) 2

Bevis v. City of Naperville, Illinois,
85 F.4th 1175 (7th Cir. 2023) 2, 13

Brumback v. Ferguson,
Case No. 1:22-cv-03093-MKD (E.D. Wash.) 2, 4, 12

Capen v. Campbell,
--- F. Supp. 3d ---, 2023 WL 8851005 (D. Mass. Dec.
21, 2023) 3

City of Seattle v. Evans,
182 Wn. App. 188, 327 P.3d 1303 (2014) 11

Del. State Sportsmen's Ass'n, Inc. v. Del. Dep't of Safety & Homeland Sec.,
664 F. Supp. 3d 584 (D. Del. 2023) 3

D.C. v. Heller,
554 U.S. 570, 128 S. Ct. 2783 (2008) 13

Duncan v. Bonta,
83 F.4th 803 (9th Cir. 2023) 2

Hanson v. D.C.,
671 F. Supp. 3d 1 (D.D.C. 2023) 3

Herrera v. Raoul,
670 F. Supp. 3d 665 (N.D. Ill. 2023),
aff'd 85 F.4th 1175 (7th Cir. 2023) 3

Lunsford v. Saberhagen Holdings, Inc.,
166 Wn. 2d 264, 208 P.3d 1092 (2009) 16

Nat'l Ass'n for Gun Rights v. Lamont,
--- F. Supp. 3d ---, 2023 WL 4975979
(D. Conn. Aug. 3, 2023) 3

Ocean State Tactical, LLC v. Rhode Island,
646 F. Supp. 3d 368, 390 (D.R.I. 2022),
aff'd, 95 F.4th 38 (1st Cir. 2024)..... 2

Ocean State Tactical, LLC v. Rhode Island,
95 F.4th 38 (1st Cir. 2024).....2, 13

Oregon Firearms Fed'n v. Kotek Oregon All. for Gun Safety,
--- F. Supp. 3d ---, 2023 WL 4541027
(D. Or. July 14, 2023).....3, 19

State of Washington v. Federal Way Discount Guns,
Case No. 22-2-20064-2 SEA
(Jan. 6, 2023, King Cnty Sup. Ct.)..... 2

State v. Griepsma,
25 Wn. App 2d 814, 525 P.3d 623 (2023),
review denied, 532 P.3d 163 (2023).....12

State v. Jones,
159 Wn.2d 231, 149 P.3d 636 (2006) 12

State v. Jorgenson,
179 Wn.2d 145, 312 P.3d 960 (2013) .....passim

State v. McCuistion,
174 Wn.2d 369, 275 P.3d 1092 (2012) 18

State v. Sieyes,
168 Wn.2d 276, 225 P.3d 995 (2010) 11, 14, 15

Sullivan v. Ferguson,
Case No. 3:22-cv-05403-DGE (W.D. Wash.)..... 4

Washington Off Highway Vehicle All. v. State,
176 Wn.2d 225, 290 P.3d 954 (2012) 17

Statutes

Laws of 2022, ch. 104, § 1 4

S.B. 5078, 67th Leg., Reg. Sess., § 1..... 16, 17

Rules

CR 56 6

RAP 4.2(a)(2) 8, 9, 21

RAP 4.2(a)(3) 8, 21

RAP 4.2(a)(4) 9, 17, 20, 21

RAP 4.2(a)(5) 8, 9, 21

Other Authorities

Archie Bleyer, Stuart E. Siegel, and Charles R. Thomas, "Retrospective Evidence for Pediatric Benefit of U.S. Assault Weapons Ban as Rationale for Implementing an Even More Effective Ban," 115 *Journal of the National Medical Association* 528 (2023) 19

Christopher Koper et al., "Gunshot Victimisations Resulting from High-Volume Gunfire Incidents in Minneapolis: Findings and Policy Implications," 25 *Injury Prevention* i9 (2019) 19

Christopher S. Koper, "Assessing the Potential To Reduce Deaths and Injuries from Mass Shootings Through Restrictions on Assault Weapons and Other High-Capacity Semiautomatic Firearms," 19 *Criminology and Public Policy* 147, 148 (2020) 20

Daniel Webster et al., "Evidence Concerning the Regulation of Firearms Design, Sale, and Carrying on Fatal Mass Shootings in the United States," 19 *Criminology and Public Policy* 171 (2020).....20

Dih Dih Huang et al., "The Sustained Effect of a Temporary Measure: Urban Firearm Mortality Following Expiration of the Federal Assault Weapons Ban," 224 *American Journal of Surgery* 111 (2022).....19

Ibraheem M. Karaye, Gaia Knight, and Corinne Kyriacou, "Association Between the New York SAFE Act and Firearm Suicide and Homicide: An Analysis of Synthetic Controls, New York State, 1999-2019," 113 *American Journal of Public Health* 1309 (2023) 19

John J. Donohue, "The Effect of Permissive Gun Laws on Crime," 704 *ANNALS of the American Academy of Political and Social Science* 92 (2022) 19

Lori Post et al., "Impact of Firearm Surveillance on Gun Control Policy: Regression Discontinuity Analysis," 7 *JMIR Public Health and Surveillance* e26042 (2021).....20

Michael Siegel et al., "The Relation Between State Gun Laws and the Incidence and Severity of Mass Public Shootings in the United States, 1976-2018," 44 *Law and Human Behavior* 347 (2020) 20

I. INTRODUCTION

This is as clear of a case for direct review as this Court is likely to face. The Cowlitz County Superior Court order on appeal qualifies for direct review on multiple grounds: it declared unconstitutional (RAP 4.2(a)(2)) and enjoined state officials from enforcing (RAP 4.2(a)(5)) a critical public safety law (RAP 4.2(a)(4)), by reading a phantom conflict into decisions of this Court (RAP 4.2(a)(3)). For any and all of these reasons, this Court should grant direct review.

Washington's Legislature passed Senate Bill (SB) 5078 in response to an epidemic of gun violence and the uniquely modern crisis of mass shootings that terrorize Americans in schools and public places across the country. SB 5078 restricts the manufacture, import, and sale of one particular firearm accessory with a disproportionate role in mass shootings and no role in self-defense: large capacity magazines (LCMs).

Gator's Custom Guns, Inc. and its owner, Walter Wentz (collectively, Gator's), flouted this law for nearly 18 months,

illegally selling thousands of LCMs. When the Attorney General's Office began investigating Gator's illegal conduct, Gator's belatedly sued, arguing that SB 5078 is facially invalid. Gator's challenge lacks merit. Indeed, before this case, *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. *See Duncan v. Bonta*, 83 F.4th 803, 805–06 (9th Cir. 2023); *Bevis v. City of Naperville, Illinois*, 85 F.4th 1175, 1197 (7th Cir. 2023); *Ocean State Tactical, LLC v. Rhode Island*, 95 F.4th 38, 50 (1st Cir. 2024); *Brumback v. Ferguson*, 1:22-CV-03093-MKD, 2023 WL 6221425, at *8 (E.D. Wash. Sept. 25, 2023); *State of Washington v. Federal Way Discount Guns*, Case No. 22-2-20064-2 SEA (Jan. 6, 2023, King Cnty Sup. Ct.); *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); *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);

Del. State Sportsmen's Ass'n, Inc. v. Del. Dep't of Safety & Homeland Sec., 664 F. Supp. 3d 584, 603 (D. Del. 2023); *Hanson v. D.C.*, 671 F. Supp. 3d 1, 16 (D.D.C. 2023); *Herrera v. Raoul*, 670 F. Supp. 3d 665, 672 (N.D. Ill. 2023), *aff'd* 85 F.4th 1175 (7th Cir. 2023); *Oregon Firearms Fed'n v. Kotek Oregon All. for Gun Safety*, --- F. Supp. 3d ---, 2023 WL 4541027, at *1 (D. Or. July 14, 2023); *Nat'l Ass'n for Gun Rights v. Lamont*, --- F. Supp. 3d ---, 2023 WL 4975979, at *2 (D. Conn. Aug. 3, 2023); *Capen v. Campbell*, --- F. Supp. 3d ---, 2023 WL 8851005 at *18, *20 (D. Mass. Dec. 21, 2023). But the superior court rejected this unanimous precedent, declaring SB 5078 unconstitutional based on its deeply mistaken understanding of federal and state constitutional law, including this Court's binding precedent.

Because the superior court's order meets nearly every standard under RAP 4.2(a) and because of the urgent public safety issues presented by this case, this Court should accept

direct review promptly, schedule argument expeditiously, and ultimately reverse the superior court's order.[1]

II. NATURE OF CASE AND DECISION

SB 5078 took effect 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 "interfere[ing] with responsible, lawful self-defense." Laws of 2022, ch. 104, § 1. Shortly after the law took effect, two groups of plaintiffs challenged 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.[2] More than once, Gator's illegally sold LCMs to an

[1] Gator's agrees that this case is appropriate for direct review, but only under RAP 4.2(a)(2) and (4).

[2] "App." cites are to the Appendix filed with the State's Emergency Motion for Stay.

undercover investigator. 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.

On August 21, 2023, Gator's petitioned 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 numerous 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. At the same hearing, the court *sua sponte* questioned whether SB 5078 complied with the Second Amendment, and explained that it wanted to decide the threshold legal question of SB 5078's constitutionality under both federal and state law. App. 102.[3]

Following consolidation, the State sought to take discovery regarding Gator's claims and defenses. App. 132-35, 144-52.The superior court largely forbade the State from doing so. App. 772-74. It ultimately ordered rushed summary judgment briefing. App. 781; *see also* CR 56.

On March 11, 2024, the court heard oral argument on the parties' cross-motions for summary judgment. On April 8, the

[3] The superior court erred by *sua sponte* raising a Second Amendment claim on Gator's behalf. The State will address this error in its opening brief.

Court issued an order invalidating SB 5078 under article 1, section 24 of the Washington Constitution and the Second Amendment. App. 904. That same day, the State filed its Notice of Appeal. App. 959. and a Commissioner of this Court issued a temporary stay of the superior court's injunction, Apr. 8, 2024 Ruling, Case No. 102940-3.

III. ISSUE PRESENTED FOR REVIEW

1) Whether Washington's restriction on the sale, import, and manufacture of one type of deadly firearm accessory violates the right to keep and bear arms enshrined in article I, section 24 of Washington's constitution.

2) Whether Washington's restriction on the sale, import, and manufacture of one type of deadly firearm accessory violates the right to keep and bear arms enshrined in the Second Amendment of the U.S. constitution.

3) Whether the superior court erred by *sua sponte* raising a Second Amendment claim on Respondents' behalf.

4) Whether, even if the court's injunction were otherwise proper, the superior court erred by purporting to enjoin non-parties, including county and local officials.

5) Whether this case should be reassigned to a new superior court judge on remand.

IV. GROUNDS FOR DIRECT REVIEW

Direct review of this case is appropriate for four reasons.

First, "the trial court has held invalid a statute… upon the ground that it is repugnant to the United States Constitution[and] the Washington State Constitution…." RAP 4.2(a)(2).

Second, the superior court entered an "injunction" "against [] state officer[s]," forbidding them from enforcing the law passed by the Legislature. RAP 4.2(a)(5).

Third, the superior court's order turned in large measure on a purported conflict between two decisions of this Court, which the superior court attempted to resolve by determining that the latter decision was no longer good law. Direct review is therefore appropriate under RAP 4.2(a)(3).

Fourth, the superior court's order nullifies a law that the Legislature determined would save lives. It therefore involves "a fundamental and urgent issue of broad public import which requires prompt and ultimate determination." RAP 4.2(a)(4).

A. The Court Struck Down a Washington Statute under the Federal and State Constitutions and Enjoined State Officials from Enforcing the Law, Warranting Direct Review under RAP 4.2(a)(2) and (5)

RAP 4.2(a)(2) and (5) apply straightforwardly to this case. The superior court (erroneously) invalidated SB 5078 "upon the ground that it is repugnant to the United States Constitution[and] the Washington State Constitution." RAP 4.2(a)(2). Moreover, the superior court entered an "injunction" "against [] state officer[s]" responsible for enforcing SB 5078, including Petitioner Attorney General Ferguson. RAP 4.2(a)(5). The court's order declaring the law unconstitutional and enjoining state officials from enforcing it warrants direct review.

B. The Court Invented a Conflict Between Two Washington Supreme Court Opinions and Purported to Essentially Overrule the Latter Decision, Warranting Direct Review under RAP 4.2(a)(3)

As this Court has held, "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). "[A] constitutionally reasonable regulation is one that is reasonably necessary to protect public safety or welfare, and substantially related to legitimate ends sought." *Id.* at 156 (cleaned up). Courts must therefore "balanc[e] the public benefit from the regulation against the degree to which it frustrates the purpose of the constitutional provision." *Id.* Under this Court's binding precedent in *Jorgenson*, the superior court was required to evaluate the burden imposed by SB 5078 on self-defense against the public safety benefits of the law.

But the superior court refused to apply this Court's binding test from *Jorgenson*, because the court determined that *Jorgenson* conflicted with an earlier Washington Supreme Court

opinion, *State v. Sieyes*, 168 Wn.2d 276, 225 P.3d 995 (2010). The superior court understood *Sieyes* to yoke Washington's constitutional analysis irretrievably to federal standards. App. 921-23. Thus, the superior court reasoned, *Jorgenson's* analysis must give way to subsequent U.S. Supreme Court precedent. App. 923.

But this Court in *Jorgenson* could not have been clearer in holding that "article I, section 24 is *distinct* and should be interpreted *separately* from the Second Amendment." 179 Wn.2d at 153 (emphasis added). The superior court was not at liberty to ignore this binding precedent, regardless of federal case law developments. *See City of Seattle v. Evans*, 182 Wn. App. 188, 193, 327 P.3d 1303 (2014) ("Evans invites us to apply recent United States Supreme Court Second Amendment jurisprudence to reject the Washington Supreme Court's interpretation of article I, section 24. This invitation ignores our state Supreme Court's binding determination 'that the state and federal rights to bear arms have different contours and mandate

separate interpretation.'" (quoting *Jorgenson*, 179 Wn.2d at 152)); *Brumback*, 2023 WL 6221425, at *11 (rejecting identical argument as "contrary to unambiguous Washington Supreme Court authority") (citing *Jorgenson*, 312 P.3d at 963); *see State v. Griepsma*, 25 Wn. App 2d 814, 818, 525 P.3d 623 (2023), *review denied*, 532 P.3d 163 (2023) ("[I]t is the province of the Supreme Court"—not lower courts—"to decide whether to reject its prior holdings." (citing *State v. Jones*, 159 Wn.2d 231, 239 n.7, 149 P.3d 636 (2006))).

Binding Washington Supreme Court authority interpreting Washington law does not lose its force just because the U.S. Supreme Court announces a new test under federal law. This is especially clear here because this Court in *Jorgenson* explicitly recognized that the interest-balancing test it adopted—and that the superior court determined was now forbidden—differed from the federal Supreme Court's "reject[ion] . . . of a "freestanding 'interest-balancing' approach." *Jorgenson*, 179 Wn.2d at 156 (quoting *D.C. v. Heller*, 554 U.S. 570, 634, 128 S. Ct. 2783

(2008)). As this Court concluded: "we read the Washington Constitution's provisions independently of the Second Amendment." *Id.* at 153. The superior court's conclusion that *Jorgenson* is no longer good law, based on its perception of a conflict between *Jorgenson* and *Bruen*/*Sieyes* was clearly wrong, and warrants review under RAP 4.2(a)(3).

For completeness' sake, the State also notes four other ways the superior court got this badly wrong.

First, even if the superior court were correct that *Sieyes* required article I, section 24 to be interpreted to protect at least as much conduct as the federal constitution, there would still be no conflict between *Jorgenson* and *Sieyes* because SB 5078 is plainly constitutional under both analyses. *See, e.g.*, *Bevis*, 85 F.4th at 1197 (upholding LCM restriction under Second Amendment's *Bruen* test); *Ocean State Tactical*, 95 F.4th at 50 (same). While the tests may be different, the results are the same, and thus here article I, section 24 is no less protective than the Second Amendment.

Second, the passages from *Sieyes* that the superior court relied on to infer a conflict and disregard *Jorgenson* were clearly dicta. Indeed, this Court in *Sieyes* explicitly noted that it was not weighing in on the relationship between article I, section 24 and the Second Amendment because "neither party has adequately briefed *Gunwall* factors." *Sieyes*, 168 Wn.2d at 293. Nor did the *Sieyes* Court rule on the scope of the Second Amendment right, concluding the Appellant had failed to brief that as well. *Id.* at 296 ("[A]ppellant offers no convincing authority supporting his argument that Washington's limit on childhood firearm possession violates the United States or Washington Constitutions. Accordingly we keep our powder dry on this issue for another day."). Thus, shorn of dicta, *Sieyes* stands for nothing more than the proposition that a party waives an argument by failing to adequately raise it. It is not a license to disregard later precedent.

Third, in purporting to apply case law about article I, section 24, the superior court actually quoted from portions of

Jorgenson and *Sieyes* interpreting the *Second Amendment*. App. 922-23. It correctly noted that the *Jorgenson* Court relied on federal case law utilizing intermediate scrutiny (later prohibited by *Bruen*) to evaluate restrictions on arms possession by those accused of crimes (179 Wn. 2d at 160-61), but failed to note that it did so to determine that former RCW 9.41.040 was consistent with the Second Amendment, not article 1, section 24. Order at 19. It further quoted a long section of *Sieyes* to support the conclusion that "[t]he Washington Supreme Court clearly stated levels of scrutiny and interest balancing were no longer to be used in Art. 1, § 24 cases." Order at 19. But that portion of *Sieyes* held "[i]nstead [of levels of scrutiny or interest balancing] we look to the *Second Amendment's* original meaning, the traditional understanding of the right, and the burden imposed on children by upholding the statute." *Sieyes*, 168 Wn. 2d at 295 (emphasis added). This Court has *never* held that interest balancing tests such as intermediate scrutiny are inappropriate to

evaluate claims under article I, section 24, and the superior court erred in coming to the opposite conclusion.

Fourth, even if there were a conflict between *Jorgenson* and *Sieyes*, the later opinion—*Jorgenson*—would control. *See Lunsford v. Saberhagen Holdings, Inc.*, 166 Wn. 2d 264, 280, 208 P.3d 1092 (2009) ("A later holding overrules a prior holding sub silentio when it directly contradicts the earlier rule of law.").

In short, direct review is appropriate under RAP 4.2(a)(3) to clarify that there is no conflict in this Court's decisions or, in the alternative, to resolve whatever conflict there may be.

C. The Court Invalidated a Law the Legislature Determined Was "Likely to Reduce Gun Deaths," Warranting Direct Review under RAP 4.2(a)(4)

"Firearms equipped with large capacity magazines increase casualties by allowing a shooter to keep firing for longer periods of time without reloading." S.B. 5078, 67th Leg., Reg. Sess., § 1 (Wash. 2022) (legislative findings). Indeed, "[l]arge capacity magazines have been used in all 10 of the deadliest mass shootings since 2009, and mass shooting events from 2009 to

2018 [involving] the use of large capacity magazines caused twice as many deaths and 14 times as many injuries." *Id.* "Based on this evidence, and on studies showing that mass shooting fatalities declined during the 10-year period when the federal assault weapon and large capacity magazine ban was in effect, the [L]egislature [found] 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." *Id.* The superior court's order undermines this critical public safety goal, and the State's appeal of that order "requires prompt and ultimate determination" by this Court. *See* RAP 4.2(a)(4).

The Legislature's specific factual findings are owed "great deference." *Washington Off Highway Vehicle All. v. State*, 176 Wn.2d 225, 236, 290 P.3d 954 (2012) ("Legislatures must necessarily make inquiries and factual determinations as an incident to the process of making law, and courts ordinarily will not controvert or even question legislative findings of facts.")

(citation and internal quotation marks omitted); *accord State v. McCuistion*, 174 Wn.2d 369, 391, 275 P.3d 1092 (2012) (declining to inquire into the degree of scientific rigor underlying the Legislature's factual findings). Especially at this stage of the proceedings, in deciding whether to accept the case for direct review, this Court should defer to the Legislature's judgment that SB 5078 will save lives and, therefore, that the trial court's order will cost them. There are few more "fundamental and urgent issue[s] of broad public import" than protecting the people of this State from violence. On the ground of the Legislative findings alone, direct review is warranted under RAP 4.2(a)(4).

The record evidence bears out the Legislature's finding that LCMs are disproportionately used in mass shootings and make such shootings more lethal. Expert reports submitted in support of the State's summary judgment motion show exactly that. App. 294-303 (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"); *see also Oregon Firearms Fed'n*, 2023 WL 4541027, at *14 ("State laws banning LCMs reduce the inciden[ce] of mass shootings between 48 to 72 percent and decrease the number of fatalities that occur in these mass shootings by 37 to 75 percent.").

And, in recent years, at least *eight* peer-reviewed analyses have shown that state laws restricting LCMs and assault weapons are associated with reduced mass shooting deaths.[4]

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[4] *See* Archie Bleyer, Stuart E. Siegel, and Charles R. Thomas, "Retrospective Evidence for Pediatric Benefit of U.S. Assault Weapons Ban as Rationale for Implementing an Even More Effective Ban," 115 *Journal of the National Medical Association* 528 (2023); John J. Donohue, "The Effect of Permissive Gun Laws on Crime," 704 *ANNALS of the American Academy of Political and Social Science* 92 (2022); Dih Dih Huang et al., "The Sustained Effect of a Temporary Measure: Urban Firearm Mortality Following Expiration of the Federal Assault Weapons Ban," 224 *American Journal of Surgery* 111 (2022); Ibraheem M. Karaye, Gaia Knight, and Corinne Kyriacou, "Association Between the New York SAFE Act and Firearm Suicide and Homicide: An Analysis of Synthetic Controls, New York State, 1999-2019," 113 *American Journal of Public Health* 1309 (2023); Christopher Koper et al., "Gunshot Victimisations Resulting from High-Volume Gunfire Incidents in Minneapolis: Findings and Policy Implications," 25 *Injury Prevention* i9 (2019); Lori Post et al., "Impact of Firearm

The superior court's order, which declared unconstitutional and enjoined the enforcement of a law that the Legislature concluded and the record showed will save lives, undoubtedly raises "a fundamental and urgent issue of broad public import which requires prompt and ultimate determination." RAP 4.2(a)(4). Because of the urgency and importance of the issue, the State asks that the Court accept direct

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Surveillance on Gun Control Policy: Regression Discontinuity Analysis," 7 *JMIR Public Health and Surveillance* e26042 (2021); Michael Siegel et al., "The Relation Between State Gun Laws and the Incidence and Severity of Mass Public Shootings in the United States, 1976-2018," 44 *Law and Human Behavior* 347 (2020); Daniel Webster et al., "Evidence Concerning the Regulation of Firearms Design, Sale, and Carrying on Fatal Mass Shootings in the United States," 19 *Criminology and Public Policy* 171 (2020); *see also* Christopher S. Koper, "Assessing the Potential To Reduce Deaths and Injuries from Mass Shootings Through Restrictions on Assault Weapons and Other High-Capacity Semiautomatic Firearms," 19 *Criminology and Public Policy* 147, 148 (2020) (reviewing published literature to date and concluding that "available evidence . . . suggests that restrictions on [LCMs and assault] weapons have the potential to reduce deaths and injuries from mass shootings, at least modestly and perhaps by more substantial margins, especially for nonfatal injuries.").

review promptly and schedule argument expeditiously, no later than the end of September.

V. CONCLUSION

This Court should accept review of the superior court's order invalidating and enjoining the enforcement of SB 5078 because it 1) "held invalid a statute . . . upon the ground that it is repugnant to the United States Constitution[and] the Washington State Constitution" (RAP 4.2(a)(2)); 2) issued an "injunction" "against a state officer" (RAP 4.2(a)(5)); 3) purported to find "an inconsistency in decisions of the Supreme Court" where none exists (RAP 4.2(a)(3)); and 4) "involve[es] a fundamental and urgent issue of broad public import which requires prompt and ultimate determination" (RAP 4.2(a)(4)).

This document contains 3,492 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 23rd day of April 2024.

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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 23rd day of April 2024, at Seattle, Washington.

/s/ Andrew R.W. Hughes
ANDREW R.W. HUGHES, WSBA 49515
Assistant Attorney General

WA STATE ATTORNEY GENERAL'S OFFICE, COMPLEX LITIGATION DIVISION

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Transmittal Information

Filed with Court:	Supreme Court
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Appellant State of Washington's Statement of Grounds for Direct Review

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