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.

Respondents' Brief

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I. Introduction

The fundamental right to bear arms is not a privilege that can be continuously winnowed by the state. It is not a second class right. Appellant suggests that Engrossed Substitute Senate Bill 5078 ("ESSB 5078") is a "common-sense law," a position that is belied by the ineffectiveness of its provisions as well as the fact that only a drastic minority of states have enacted similar laws.

The trial court did not deviate sharply from other courts which have examined similar laws, as a similar law has been declared unconstitutional in an Oregon state court, and the only district court from the Ninth Circuit to reach a determination on the merits found a similar law unconstitutional.

The trial court issued a thorough and complete analysis regarding the unconstitutional nature of ESSB 5078 under both the United States and Washington constitutions. The trial court determined that so-called "large capacity magazines" ("LCMs") are afforded a presumption of protection, and that the government failed to show that the prohibition of LCMs fits within the historical tradition of firearms regulations.

First, so-called LCMs are instruments designed as weapons, and therefore constitute "arms" for purposes of constitutional analysis. They are an integral component of a firearm, without which semiautomatic firearms will not function properly. Furthermore, LCMs are the most commonly owned

type of detachable magazine and are unequivocally in common use.

Second, the complete prohibition of commonly used arms does not fit within the presumptively valid and longstanding reasonable regulations allowed under a state's police power. Appellant urges intermediate scrutiny in reviewing a law which burdens a fundamental right. This is wrong on multiple levels as this Court has never set the level of scrutiny for the right to bear arms and no level of scrutiny is proper; but at minimum the fundamental nature of the right dictates no less than strict scrutiny. Self-defense is a fundamental right.

The trial court correctly determined that ESSB 5078 is unconstitutional under both the Washington

and U.S. constitutions. This Court should uphold the well-reasoned decision below and protect the fundamental right to bear arms.

II. Statement of the Case

A. ESSB 5078 impermissibly prohibits commonly used instruments protected by the right to bear arms.

The Legislature passed ESSB 5078 without concern for the burden and impairment of the fundamental right to bear arms. And it did so because ESSB 5078 was purportedly "likely to reduce gun deaths and injuries[.]" Engrossed Substitute Senate Bill 5078, 67th Leg., Reg. Sess., § 1 (Wash. 2022). The only consideration given the fundamental right to bear arms is that ESSB 5078 "is a well-calibrated policy based on evidence that magazine capacity

limits do not interfere with responsible, lawful self-defense." *Id.* This 'finding' however, is not within the ambit of the Legislature's powers: "[t]he construction of the meaning and scope of a constitutional provision is exclusively a judicial function." *State Highway Comm'n v. Pacific Northwest Bell Tel. Co.*, 59 Wn.2d 216, 222, 367 P.2d 605 (1961). In furtherance of a "likely" result, the Legislature impaired a fundamental right and violated the separation of powers doctrine. Accordingly, the trial court decision should be upheld.

The narrowing down of the fundamental right to bear arms based on arbitrary ammunition limitations is an impairment of that right. Washington accords great weight to the contemporary facts and

circumstances in effect at the time its Constitution was created. *State ex rel. Evans v. Bhd. of Friends*, 41 Wn.2d 133, 146, 247 P.2d 787 (1952). The word 'impair' was used twice in the original Washington Constitution as ratified in 1889.

First, that "[n]o … law impairing the obligations of contracts shall ever be passed." Wash. Const. art. I, § 23. Second, that "[t]he right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired[.]" *Id.* § 24. This Court had occasion to determine what 'impair' means less than a decade after the Constitution was ratified: "Webster's definition of 'impair' is, 'To make worse; to diminish in quantity, value, excellence or strength; to deteriorate.'" *Swinburne v. Mills*, 17 Wash. 611, 615,

50 P. 489 (1897). Washington's Constitution is to be interpreted with its common and ordinary meaning. *State ex rel. Albright v. City of Spokane*, 64 Wn.2d 767, 770, 394 P.2d 231 (1964). This is because it is the expression of the people's will, adopted by the people of Washington. *Id.* If the language is unambiguous, then it will be given its plain and ordinary meaning, and no construction or interpretation is permissible. *State ex rel. Anderson v. Chapman*, 86 Wn.2d 189, 191, 543 P.2d 229 (1975).

An arbitrary limitation on ammunition capacity is unequivocally an impairment on the right to bear arms. Stated another way, it is unquestionable that limiting the rounds available to the wielder of a firearm makes that person's ability to defend

themselves worse. ESSB 5078 impairs the right to bear arms.

B. LCMs are commonly used.

The most current estimate from the year 2018 posits that 304.3 million detachable magazines are in possession of U.S. citizens, and of that number, 79.2 million are rifle magazines with capacity for 30 or more rounds, another 9.4 million are rifle magazines with capacity between 11-29 rounds, and an additional 71.2 million are pistol magazines with capacity for 11 or more rounds. The most recent Modern Sporting Rifle (AR- and AK-platform rifles and the like) Comprehensive Consumer Report contains similar findings, with more than half of all magazines having a capacity of 30 rounds, and more

than three quarters of all magazines having a capacity of more than 10 rounds. CP 1042-1145. That means that more than half of the more than 304 million detachable magazines in circulation have capacity to accept more than 10 rounds. No mention was made by the Legislature of the fact that as of "1994, 18% of all firearms owned by civilians were equipped with magazines holding more than ten rounds, as well as statistics demonstrating that 4.7 million more such magazines were imported in the United States between 1995 and 2000." Lindsay Colvin, *History, Heller, and High-Capacity Magazines: What is the Proper Standard of Review for Second Amendment Challenges?* 41 Fordham Urb. L.J. 1041, 1061 (2014) (citing *Heller v. District of*

Columbia (*Heller II*), 670 F.3d 1244, 1261 (D.C. Cir. 2011) ("[t]here may well be some capacity above which magazines are not in common use, but, if so, the record is devoid of evidence as to what that capacity is; in any event, that capacity surely is not ten.")).

Appellant attempts to define "common use" so narrowly that it defies logic. Appellant's definition is so narrow that seatbelts are only "used" if someone is restrained by one in a vehicle crash, or a home security system is only "used" if it detects a burglar attempting to break and enter. This absurd result is the reason that "common use" is not constrained to actual incidents in which a firearm is discharged.

Appellant also disregards this Court's and the United States Supreme Court's holdings that the

right to bear arms protects weapons which are designed and suitable for military service. Instead, Appellant, and the Legislature, attempt to insert their own estimations of what is well-suited for self-defense purposes, rather than the people of Washington getting to decide that issue of paramount importance for themselves.

Washington law has long recognized that because self-preservation is the first law of nature, the standard is based on what a reasonable person would do under the circumstances. *See, e.g.*, RCW 9A.16.110(1) ("No person in the state shall be placed in legal jeopardy of any kind whatsoever for protecting by any reasonable means necessary, himself or herself, his or her family, or his or her real or personal

property, or for coming to the aid of another who is in imminent danger of or the victim of [a violent crime]"); *see also*, WPIC 17.02 Lawful Force – Defense of Self, Others, Property ("The person [using] [or] [offering to use] the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of [and prior to] the incident.") (brackets in original); WPIC 16.02 Justifiable Homicide – Defense of Self and Others (the slayer employed such force and means as a reasonably prudent person would use under the same or similar conditions as they reasonably appeared to the slayer, taking into consideration all

the facts and circumstances as they appeared to [him] [her], at the time of [and prior to] the incident.") (brackets in original). Given the ubiquity of LCMs, they have been overwhelmingly chosen by law-abiding citizens for self-defense and other lawful purposes.

Appellant advances a patently absurd claim that having more rounds readily available is *disadvantageous* for self-defense. If faced with an assailant, or Supreme Ruler forbid, multiple assailants, it is dubious that any person would find more rounds available to be disadvantageous. Appellant proceeds to make a case against the prohibition of short-barreled shotguns and rifles, as they are "easier to carry, shoot, and conceal, making

[them] more suitable for self-defense." App. Op. Brief, p.9 (citing CP 1327-28). The Legislature's consideration of what is suitable for self-defense is not a proper exercise of its lawmaking authority.

C. ESSB 5078 will not prevent mass shootings.

The Legislature concedes that at most, ESSB 5078 will "likely" save lives. What the Legislature does not admit is that only law-abiding citizens will abide by the law; that tautology is simple, yet it lays bare the ineffectiveness of ESSB 5078 while underscoring the impairment of the fundamental right to bear arms. A person intent on committing a mass shooting will still do so, despite ESSB 5078. Perhaps they will illegally purchase or import an

LCM; perhaps they will simply affix two "non-LCMs" together "jungle-style." The point is clear: laws only burden the law-abiding, and ESSB 5078 will do nothing but impair the ability of law-abiding citizens to defend themselves.

It is beyond dispute that LCMs are in common use today. Much like handguns in *Heller*, this case "amounts to a prohibition of an entire class of 'arms' that is overwhelmingly chosen by American society for" the lawful purpose of self-defense. *District of Columbia v. Heller*, 554 U.S. 570, 628, 128 S. Ct. 2783 (2008). And just like the U.S. Supreme Court stated, it "is no answer to say, as petitioners do, that it is permissible to ban the possession of handguns so long as the possession of other firearms (*i.e.*, long guns) is

allowed." *Id.* at 629. That is precisely what Appellant argues here; that because magazines with a capacity of less than 10 rounds are available, there is no harm and no foul to the Constitution or to the right to bear arms. But law-abiding citizens have chosen LCMs, and LCMs are protected by the right to bear arms – banning LCMs violates the Constitution and its individual protections.

D. This lawsuit.

In response to a civil investigative demand, Gator's filed a petition to set aside the CID, providing analysis concerning U.S. Const. amend. II and Wash. Const. art. I, § 24, and seeking "a declaration that ESSB 5078 is unconstitutional and unenforceable, both as applied to Gator's and facially." CP 10.

Further, Gator's clarified that the "declaratory relief requested, if rendered or entered, will terminate the controversy and remove uncertainty as to the constitutionality of ESSB 5078 and its burden on the right to bear arms, which shall not be impaired, under Wash. Const. art. I § 24, and U.S. Const. amend. II." *Id.*

Appellant both sought to dismiss Gator's petition and to withdraw the CID and immediately filed an enforcement action under the Consumer Protection Act. CP 111-123. Gator's duly answered the complaint, again raising an affirmative defense under both constitutions, alleging that "Plaintiff's allegations amount to a violation of the Constitutional protections afforded Defendants by virtue of the U.S.

Constitution, amend. II, and by the Washington Constitution, art. I, § 24." CP 131.

The trial court noted that it "addressed this issue in its ruling of January 9, 2024." CP 2110. In any event, Appellant did not seek reconsideration of, or appeal, the order to consolidate, which was done at the State's suggestion. CP 2111.

On April 8, 2024, the trial court issued an order declaring ESSB 5078 unconstitutional under both U.S. Const. amend. II and Wash. Const. art. 1, § 24. CP 2109-63. The order was stayed that day.

III. Argument

At this juncture, a similar statute has been declared unconstitutional by the state which Washington based her own constitution upon. In

Arnold v. Kotek, No. 22CV41008 (Harney Cty. Cir. Ct., Oregon) (2023), Or. Ct. App. No. A183242 (2024), Ballot Measure 114 was declared unconstitutional via a facial challenge. The Oregon Court of Appeals denied a motion to stay pending the appeal. This is noteworthy, because the analysis of Oregon's Constitution has been used by this Court and has also been cited favorably by the U.S. Supreme Court. The Oregon Supreme Court "concluded that the 'arms' that the state constitution guarantees a right to possess consist of those that would have been used by nineteenth-century settlers for personal defense and military purposes." Jack Landau, *An Introduction to Oregon Constitutional Interpretation*, 55 Willamette

L. Rev. 261, 265-66 (2019) (citing *State v. Kessler*, 289 Or. 359, 614 P.2d 94 (1980)).[1]

This Court has noted that "*Heller* also cites favorably to the Oregon Supreme Court's discussion of lawful arms in *Kessler*. Additionally, the Connecticut Supreme Court recently noted that Oregon's definitional approach mirrors the model employed by the United States Supreme Court in [*Heller*]." *City of Seattle v. Evans*, 184 Wn.2d 856, 870 n.9, 366 P.3d 906 (2015) (internal citations and quotations omitted, alteration in original).

"Washington's article I, section 24 was drawn from Oregon's article I, section 27 and the constitution

[1] Hon. Jack Landau is a former Associate Justice of the Oregon Supreme Court.

proposed by W. Lair Hill." *Id.*, at 868 (citing Robert F. Utter & Hugh Spitzer, *The Washington State Constitution: A Reference Guide*, 39 (2002)); *see also*, Beverly Paulik Rosenow, *The Journal of the Washington State Constitutional Convention*, 512 n.40 (1999 reprint) ("Right to Bear Arms: U.S. Const., Amend 2; Ore., Const. (1857), Art. 1, sec. 27; (Hill, Prop. Wash. Const. Art. 1, sec 28.)"). This Court should follow the analysis under the Oregon Constitution when analyzing this case under Wash. Const. art. I, § 24 that magazine capacity restrictions impair the right to bear arms.

Similarly, a federal district court in the Ninth Circuit held a magazine capacity restriction to be unconstitutional under the Second Amendment. That

case is currently stayed, but the Ninth Circuit Court of Appeals notes that "[i]mportantly, this order granting a partial stay pending appeal, neither decides nor prejudges the merits of the appeal, which will be decided after full briefing and oral argument." *Duncan v. Bonta*, 83 F.4th 803, 805 n.1 (2023).

This Court should protect the fundamental right to bear arms by upholding the trial court decision. Magazines, as an integral component of a firearm, and because as "instruments designed as weapons traditionally or commonly used by law-abiding citizens for the lawful purpose of self-defense," cannot be prohibited. *Evans*, 184 Wn.2d at 869. To hold otherwise would turn the fundamental right to bear

arms into a privilege, with the State getting to decide how many rounds are suitable for self-defense.

A. Standard of Review.

The constitutionality of a statute is reviewed *de novo*. *Bennett v. United States*, 2 Wn.3d 430, 441, 539 P.3d 361 (2023) (citing *Schroeder v. Weighall*, 179 Wn.2d 566, 571, 316 P.3d 482 (2014)). "Where the validity of a statute is assailed, there is a presumption of the constitutionality of the legislative enactment, unless its repugnancy to the constitution clearly appears or is made to appear beyond a reasonable doubt." *Clark v. Dwyer*, 56 Wn.2d 425, 431, 353 P.2d 941 (1960) (citing *Port of Tacoma v. Parosa*, 52 Wn.2d 181, 324 P.2d 438 (1958)). A party challenging the constitutionality of a statute bears the burden of

proving its case beyond a reasonable doubt. *Amalgamated Transit v. State*, 142 Wn.2d 183, 206, 11 P.3d 762 (2000). However, this is not a burden of proof as in the context of a criminal proceeding but is simply one of deference to a co-equal branch of government. Here,

> [T]he 'beyond a reasonable doubt' standard used when a statute is challenged as unconstitutional refers to the fact that one challenging a statute must, by argument and research, convince the court that there is no reasonable doubt that the statute violates the constitution. The reason for this high standard is based on our respect for the legislative branch of government as a co-equal branch of government, which, like the court, is sworn to uphold the constitution.

Island County v. State, 135 Wn.2d 141, 147, 955 P.2d 377 (1998). The standard does not prevent this Court from exercising its constitutional role to "make the

decision, as a matter of law, whether a given statute is within the legislature's power to enact or whether it violates a constitutional mandate." *Id.*; *see also*, *Marbury v. Madison*, 5 U.S. 137, 2 L. Ed. 60 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

Just such a violation has occurred here. Although "a court will not controvert legislative findings of fact, the legislature is precluded … from making *judicial* determinations or legal conclusion[s]." *Port of Seattle v. Pollution Control*, 151 Wn.2d 568, 625, 90 P.3d 659 (2004) (emphasis and alteration in original). ESSB 5078 purports that "magazine capacity limits do not interfere with responsible, lawful self-defense." ESSB 5078, 67th

Leg., Reg. Sess., § 1 (Wash. 2022). However, "[t]he construction of the meaning and scope of a constitutional provision is exclusively a judicial function." *State Highway Comm'n*, 59 Wn.2d at 222. The legislature may not determine what is "within the purview of a constitutional provision, for such a determination involves an interpretive process or function which, in the final legal analysis, under our system of government, is reposed in the judicial branch." *Tacoma v. O'Brien*, 85 Wn.2d 266, 271, 534 P.2d 114 (1975). This Court cannot abdicate the determination of the fundamental right to bear arms in self-defense or allow the separation of powers to be violated by ESSB 5078. This Court should uphold the

trial court's decision declaring ESSB 5078 unconstitutional.

B. ESSB 5078 violates Wash. Const. art. I, § 24.

The Declaration of Rights was meant to be a primary protector of the fundamental rights of Washingtonians. Justice Robert F. Utter, *Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights*, 7 Seattle U. L. Rev. 491, 491 (1984).[2] The Preamble to the Washington Constitution gives thanks "to the Supreme Ruler of the universe for our liberties[.]" These liberties are preexisting, not

[2] Justice Utter wrote the referenced article while a Washington Supreme Court Justice.

granted. "At the heart of the Washington Constitution is the emphasis on protecting individual rights. Washington, like other states, begins its constitution with a Declaration of Rights… [it] proclaim[s] the paramount purpose of government; 'governments … are established to protect and maintain individual rights.'" Brian Snure, *A Frequent Recurrence to Fundamental Principles: Individual Rights, Free Government, and the Washington State Constitution*, 67 Wash. L. Rev. 669, 675 (1992) (quoting Wash. Const. art. I, § 1). The conclusion of the Declaration of Rights as originally adopted provides that "frequent recurrence to fundamental principles is essential to the security of individual right and the perpetuity of free government." Wash.

Const. art. I, § 32. "[T]he explicit affirmation of fundamental rights in our state constitution may be seen as a guaranty of those rights rather than as a restriction on them." *State v. Gunwall*, 106 Wn.2d 54, 62, 720 P.2d 808 (1986).

The "mandatory provision in article I, section 24 is strengthened by its two textual exceptions to the otherwise textually absolute right to keep and bear arms." *State v. Sieyes*, 168 Wn.2d 276, 293, 225 P.3d 995 (2010) (quoting Utter, *Freedom and Diversity in a Federal System*, 7 Seattle U. L. Rev. at 509-10). The two textual exceptions are simply that the right protects defense of self and the state, and that individuals or corporations cannot maintain an armed body of men. This Court is to "give a broad reading to

the 'explicit affirmation of fundamental rights in our state constitution.'" *State v. Jorgenson*, 179 Wn.2d 145, 155, 312 P.3d 960 (2013) (quoting *Gunwall*, 106 Wn.2d at 62).

In defense of self or state, "the right to bear arms protects instruments that are designed as weapons traditionally or commonly used by law-abiding citizens for the lawful purpose of self-defense." *Evans*, 184 Wn.2d at 869. Detachable magazines, as an integral component of a firearm, are unquestionably an instrument designed as a weapon. This Court went on to note that when "considering whether a weapon is an arm, we look to the historical origins and use of that weapon, noting that a weapon does not need to be designed for military use to be traditionally

or commonly used for self-defense. We will also consider the weapon's purpose and intended function." *Id.* Assuming that Appellant's assertion that LCMs are "military-style" and have "military origins" is correct, then the fact that they were "designed for military use" means they have been "traditionally or commonly used for self-defense." In fact, an arm's design for military use is part of what affords Constitutional protection. Bowie knives, dirk knives, the United States Marine Corps Ka-Bar fighting knife, jackknives, switchblades, and swords have been protected due to their "military origins," "history," and "purpose." *Id.* at 867-68, 870 (citing *State v. Kessler*, 289 Or. 359, 361-70, 614 P.2d 94

(1980) and *State v. Delgado*, 298 Or. 395, 400-03, 692 P.2d 610 (1984)).

The history of Washington is illustrative of why protection against tyranny and self-defense are explicitly mentioned in Wash. Const. art. I, § 24. Washington Territory experienced two periods of martial law prior to statehood and ratification of the Washington Constitution. The first period incredibly saw the Chief Justice send an armed posse to arrest the Governor for the Governor's executive overreach of suspending the right of habeas corpus for a handful of Native American sympathizers, although there was no ongoing struggle with the local tribes. In response, the Governor, after having loyal soldiers and clerks repel the Chief Justice's posse, sent his own armed

contingent to arrest the Chief Justice, and imprisoned him at a local fort for roughly two weeks. The second period occurred in 1886, a mere three years before the Constitutional Convention, and saw two weeks of military control of the government, curfews, military patrols, courts martial, and military edicts which resulted in citizens being ejected from their homes. Utter, *Freedom and Diversity in a Federal System*, 7 Seattle U. L. Rev. at 516-17. Respondents obviously do not encourage the Chief Justice to send an armed posse to arrest the Attorney General for attempting to enforce ESSB 5078, but this Court should declare ESSB 5078 unconstitutional.

Appellant only partially sets forth the *Gunwall* analysis by correctly noting that the Washington

Constitution is "interpret[ed] … separately and independently of its federal counterpart." *Jorgenson*, 179 Wn.2d at 155 (2013). However, this Court in *Gunwall* concluded that "Washington retains 'the sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution.'" *Gunwall*, 106 Wn.2d at 59 (quoting *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 81, 100 S. Ct. 2035 (1980)). The *Gunwall* analysis is useful in "determining whether, in a given situation, the constitution of the State of Washington should be considered as extending broader rights to its citizens than does the United States Constitution." *Id.* at 61. The logical conclusion is that "Supreme Court application of the United

States Constitution establishes a floor below which the state courts cannot go to protect individual rights. But states of course can raise the ceiling to afford greater protections under their own constitutions." *Sieyes*, 168 Wn.2d at 292.

Appellant urges a "second step" of analysis under Wash. Const. art. I, § 24. This "second step" is really just an examination of the police power of the state, which "*Heller* and *McDonald* left … largely intact." *Jorgenson*, 179 Wn.2d at 156. Despite being "largely intact," there are significant limitations thereon; "[i]n Washington the police power is subject to all the rights specified in our Declaration of Rights, including the constitutional right of the individual citizen to keep and bear arms. We are not at liberty

to disregard this text[.]" *Sieyes*, 168 Wn.2d at 293. Further, "*Heller* explicitly recognized 'presumptively lawful' firearm regulations, such as those banning felons and the mentally ill from possessing guns." *Jorgenson*, 179 Wn.2d at 156 (citing *Heller*, 554 U.S. at 626-27 & n.26). The acknowledgment that *Heller* and *McDonald* left the police power intact evinces the interplay between the federal and state constitutions; while they are separate and distinct, the federal constitution creates a baseline of protection and is not simply ignored when analyzing a state constitution.

A closer look at *Heller* shows that such regulations need to be "longstanding" and are limited in scope. The U.S. Supreme Court noted that while its analysis was not exhaustive, its presumptively

lawful regulations were "longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *Heller*, 554 U.S. at 626-27. A complete prohibition on the most common type of detachable magazine is not one of these presumptively lawful regulations.

Appellant also errs in urging intermediate scrutiny here, which was used by this Court in *Jorgenson*. However, this Court noted that approach is only available when "evaluating restrictions on gun possession by *particular people* or *in particular places*." *Jorgenson*, 179 Wn.2d at 160 (emphasis

added). That may be correct when evaluating limited restrictions for specific classes of people, as it is analogous to First Amendment challenges pertaining to time, place, and manner restrictions on speech. *Id.* But intermediate scrutiny is not available when analyzing a law of general applicability such as ESSB 5078; the challenged statute in *Jorgenson* was "sufficiently limited in the scope of affected persons and its duration to warrant review under intermediate scrutiny." *Id.* at 162.

This Court has generally declined to analyze the right to bear arms under any level of scrutiny. This Court should not use any level of means-end scrutiny, but here, at minimum, strict scrutiny would be the only proper level: "[w]here the State interferes with a

fundamental right, we apply strict scrutiny; such an infringement must be 'narrowly tailored to serve a compelling state interest.'" *Nielsen v. Dep't of Licensing*, 177 Wn. App. 45, 53, 309 P.3d 1221 (2013) (quoting *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 220, 143 P.3d 571 (2006)). All of the rights enumerated in the Washington Constitution Declaration of Rights are fundamental. As ESSB 5078 applies to every person in Washington, strict scrutiny, at minimum, should be utilized. Self-defense has been described as "the first law of nature." *State ex rel. Bd. of County Comm'rs v. Clausen*, 95 Wash. 214, 239, 163 P. 744 (1917). It is fundamental and part of our very nature.

So too is the right to bear arms in furtherance of self-defense fundamental. *See, e.g.*, *Sieyes*, 168 Wn.2d at 287 (right to bear arms is fundamental and deeply rooted in history and tradition, and Second Amendment is incorporated against the states); *see also*, *Zaitzeff v. City of Seattle*, 17 Wn. App. 2d 1, 484 P.3d 470 (2021); *State v. Ibrahim*, 164 Wn. App. 503, 269 P.3d 292 (2011). Washington case law supports the proposition that game laws banning the killing of wild animals are nullified in defense of property, let alone defense of self. Eugene Volokh, *State Constitutional Rights of Self-Defense and Defense of Property*, 11 Tex. Rev. L. & Pol. 399, 408 n.34 (2007) (citing *Cook v. State*, 192 Wash. 602, 611, 74 P.2d 199 (1937) ("one has the constitutional right to defend and

protect his property, against imminent and threatened injury by a protected animal, even to the extent of killing the animal[.]"), and *State v. Burk*, 114 Wash. 370, 195 P. 16 (1921) ("The right of defense of person and property is a constitutional right … and is recognized in the construction of all statutes.") (quoting *State v. Ward*, 170 Iowa 185, 152 N.W. 501 (1917)). Even in the context of defense of others, the right to preservation of life is obviously of paramount importance. *Id.* at 411 n.47 (citing *Gardner v. Loomis Armored Inc.*, 128 Wn.2d 931, 913 P.2d 377 (1996) (armored car driver exited vehicle in violation of company policy to intervene on behalf of bank customers being held at knifepoint)).

ESSB 5078 would not pass the most intensive level of scrutiny, which requires a showing that the statute is "necessary to achieve a compelling government purpose–proof the law is the least restrictive means of achieving the purpose." *Sieyes*, 168 Wn.2d at 294 n.18. All that the Legislature can even offer is that ESSB 5078 will "likely" save lives.

1. LCMs are "arms" and are accordingly protected by Wash. Const. art. I, § 24.

Firearms capable of firing more than ten rounds have been in existence since 1580, and commercial mass market success for rifles with magazines of capacity larger than 10 rounds was achieved in 1866, more than 20 years prior to the ratification of the Washington Constitution. David B. Kopel, *The*

History of Firearm Magazines and Magazine Prohibitions, 78 Alb. L. R. 849, 852-57 (2015). Without a magazine inserted, a semiautomatic weapon will not function properly. Take for instance, the AR-15; once a magazine is empty, the bolt carrier group locks to the rear and does not cycle back to the closed position until the wielder manually returns the bolt, typically after inserting a new magazine. In short, a magazine is not a mere "accessory" which is optional or superfluous, it is integral. Magazines are "arms" protected by Wash. Const. art. I, § 24.

Estimates on the number of LCMs in circulation range from more than 30 million to 159.8 million or higher. CP 1029, *see also*, Colvin, *History, Heller, and High-Capacity Magazines*, 41 Fordham Urb. L.J. at

1069. Regardless of where one settles on finding which estimates are more credible, the ineluctable reality is that magazines with a capacity for more than 10 rounds number in the *millions*. They are common and therefore protected.

LCMs are the logical and technological outgrowth of the age-old problem of maximizing available ammunition to the wielder of a firearm. They are commonly and traditionally used because they have been chosen overwhelmingly by law-abiding citizens for the purposes of self-defense and defense of the state.

Appellant's proffered hypothetical illustrates how integral a magazine is to a weapon: imagine a military officer, about to step off on a mission,

directing his or her troops to "Grab your weapons and prepare to cross the line of departure." Imagine those Marines or soldiers about to step off on a mission without magazines; they would fail the pre-combat inspection for not having essential gear and would not be allowed to cross the line of departure. Without magazines, are they to carry their bullets in their cargo pockets, bouncing around like little lead skittles? Would they manually load each bullet into the chamber of their rifle and send the bolt home? No. A magazine is an essential component of a firearm.

To use the hypothetical offered by Appellant, *Heller* cites a bow and arrow as an example of an "arm," 554 U.S. at 581. Appellant erroneously asserts that an LCM is not analogous to either, but rather

that LCMs are more akin to quivers. That is incorrect. Quivers are not a component of a bow and are not essential to the functioning of a bow. A magazine is more akin to a bowstring; without a bowstring, a bow will not function properly. Without a magazine, a firearm will not function properly, and is essentially a single shot breechloader.

Appellant then argues that because sawed-off shotguns are restricted, then the LCM "subclass" of magazines can be restricted. But whether there are different types or subclasses is not the inquiry; the inquiry is whether the arms are commonly or traditionally used. LCMs are. A quick note on sawed-off shotguns, banned in the "uncontested and virtually unreasoned case" of *United States v. Miller*, 307 U.S.

174, 59 S. Ct. 816 (1939). *Heller*, 554 U.S. at 625 n.24. *Miller* was decided even though "defendants made no appearance in the case, neither filing a brief nor appearing at oral argument; the Court heard from no one but the Government (reason enough, one would think, not to make that case the beginning and the end of this Court's consideration of the Second Amendment). *Id.* at 623, *see also*, Brian L. Frye, *The Peculiar Story of* United States v. Miller, 3 N.Y.U. J.L. & Liberty 48 (2008). The Appellant's disfavor of the right to bear arms is given away by the fact that a contemplated complete ban on triggers only "might" effectively ban the use of firearms. *Miller* is not a thorough analysis of the contours of the right to bear arms.

2. LCMs are commonly or traditionally used for self-defense and defense of the state.

The right to bear arms "encompasses at least two prongs: (1) protection against governmental or military tyranny and (2) self-protection. While the latter arguably finds more relevance today, both underlie the Second Amendment and support its application to the states." *Sieyes*, 168 Wn.2d at 291 (internal citations omitted). As of 2021, "[a]bout half (48%) of firearms owners (39 million individuals) have owned magazines that hold more than 10 rounds, and 71% of such owners indicate that they have owned such magazines for defensive purposes (Home Defense or Defense Outside the Home)." William English, *2021 National Firearms Survey: Analysis of*

Magazine Ownership and Use, Georgetown McDonough School of Business Research Paper No. 4444288 (May 4, 2023). This leads to the ineluctable conclusion that LCMs are commonly used. They number in the millions.

Detachable magazines have been used since before the founding of this State, and as long as semiautomatic firearms have been in existence. Appellant concedes that they have been in widespread use and commercially available since at least the 1980s, a period of more than 40 years. They are commonly used, and hence protected.

3. ESSB 5078 is not a regulation, nor is it reasonable.

ESSB 5078 impairs the ability of the individual citizen to bear arms in defense of himself and the state and seeks to eradicate the agency of individual citizens to determine what is reasonable for their own self-defense.

Appellant attempts to justify this position with a misguided reliance on *Jorgenson*, extrapolating the narrow position and holding of that case to a complete prohibition of LCMs. In discussing "reasonable regulations" the Supreme Court noted that the U.S. Supreme Court, in *Heller* and *McDonald* "left this police power largely intact." *Jorgenson*, 179 Wn.2d at 156. That, however, is not a grant of carte blanche powers to ignore constitutional rights, or to engage in interest balancing.

ESSB 5078 is not constitutionally permissible even under Appellant's tortured reading of *Jorgenson*. This Court was careful to note that "[t]he State has an important interest in restricting *potentially dangerous persons* from using firearms." *Id.* at 162 (emphasis added). The statute at issue in *Jorgenson* was limited to "only persons charged with specific serious offenses from possessing firearms, and only while released on bond or personal recognizance." *Id.* As applied to Jorgenson, who was "released on bond after a judge found probable cause to believe Jorgenson had shot someone," the grounds were clearly met. *Id.* This Court was clear that *Jorgenson* was limited; "[w]e simply hold that as applied here, the temporary restriction on Jorgenson's right to bear

arms after a trial court judge found probable cause to believe he had shot someone does not violate the Second Amendment." *Id.* at 164.

The trial court here was the trial court in *Jorgenson*. The contours of the right to bear arms were analyzed properly there as they were here. Moreover, as briefed *post*, the analysis from *Jorgenson* was almost identically replicated in the recent case of *United State v. Rahimi*, 602 U.S. ____, 144 S. Ct. 1889 (2024), showing how the trial court is familiar and comfortable with the delimiting principles on the right to bear arms.

As the trial court properly analyzed and the individual right to bear arms, it's ruling should be upheld.

C. ESSB 5078 violates the Second Amendment.

"The Constitution of the United States is the supreme law of the land." Wash. Const. art. I, § 2. As recently clarified by the U.S. Supreme Court:

> When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation. Only then may a court conclude that the individual's conduct falls outside the Second Amendment's unqualified command.

N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 17, 142 S. Ct. 2111 (2022) (internal quotations and citations omitted). This is not a radical departure from the previous analytical framework, but rather a return to the standard set forth in *Heller* and an

explicit rejection of means-end scrutiny of the right to bear arms. Appellant may wish for the old "two-step approach," but "it is one step too many." *Id.* at 19.

First, Appellant misses the fact that the *Bruen* test presumptively protects *individual conduct*, which is necessarily broader than just protecting "arms." The right to bear arms protects the ability to acquire ammunition, and by extension, ammunition feeding devices:

> Constitutional rights thus implicitly protect those closely related acts necessary to their exercise… The right to keep and bear arms, for example, "implies a corresponding right to obtain the bullets necessary to use them," *Jackson v. City and County of San Francisco*, 746 F.3d 953, 967 (C.A.9 2014), and "to acquire and maintain proficiency in their use," *Ezell v. Chicago*, 651 F.3d 684, 704 (C.A.7 2011) … Without protection for these closely related

> rights, the Second Amendment would be toothless.

Luis v. United States, 578 U.S. 5, 26-27, 136 S. Ct. 1083 (2016) (Thomas, J., concurring); *see also*, *Teixeira v. County of Alameda*, 873 F.3d 670, 677 (9th Cir. 2017) ("As with purchasing ammunition and maintaining proficiency in firearms use, the core Second Amendment right to keep and bear arms for self-defense wouldn't mean much without the ability to acquire arms.") (internal quotations omitted); *Fyock v. Sunnyvale*, 779 F.3d 991, 998 (9th Cir. 2015) (recognizing "right to possess the magazines necessary to render… firearms operable").

Second, if the individual conduct is presumptively protected, the government must

demonstrate consistency "with this Nation's historical tradition of *firearm* regulation." *Bruen*, 597 U.S. at 17 (emphasis added). While a "historical twin" is not required, the plain language of the holding in *Bruen* dictates that firearms regulations must be analogized to other firearm regulations. Although *Miller* was a curious case, it does collect colonial era laws pertaining to the militia, in which the only ammunition provisions pertain to *minimum* requirements. *Miller*, 307 U.S. 179-82.

Interest balancing and means-end analysis is no longer viable under *Bruen*, even for cases concerning regulations rather than bans, as "[t]he Second Amendment is the very *product* of an interest balancing by the people and it surely elevates above

all other interests the right of law-abiding, responsible citizens to use arms for self-defense. It is this balance–struck by the traditions of the American people–that demands our unqualified deference." *Bruen*, 597 U.S. at 26 (internal quotations and citation omitted) (emphasis in original). More explicitly, while "judicial deference to legislative interest balancing is understandable – and, elsewhere, appropriate – it is not deference that the Constitution demands here." *Id.*

Similar to Washington case law, federal case law is clear that self-defense is a fundamental and natural right; in fact, "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)

(citing *Heller*, 554 U.S. at 597) (emphasis in original). The right to bear arms sustains the right to self-defense; "even though the Second Amendment's definition of 'arms' is fixed according to its historical understanding, that general definition covers modern instruments that facilitate armed self-defense." *Bruen*, 597 U.S. at 28; cf. *Caetano v. Massachusetts*, 577 U.S. 411, 136 S. Ct. 1027 (2016) (*per curiam*) ("'the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding,' [*Heller*, 554 U.S. at 582], and that this Second Amendment right is fully applicable to the States[.]" [*McDonald*, 561 U.S. at 750.]"). This Court recognized in *Sieyes* that the Second Amendment was

properly incorporated against the states even before *McDonald*. Likewise, this Court should eschew the popularity contest urged by Appellant to simply follow non-binding federal district court decisions and instead analyze the Second Amendment claim entirely free of those ill-reasoned decisions. *See generally,* Robert F. Utter, *Swimming in the Jaws of the Crocodile: State Court Comment on Federal Constitutional Issues when Disposing of Cases on State Constitutional Grounds*, 63 Tex. L. Rev. 1025 (1985). Carrying ammunition in ample quantities and in magazines determined suitable by an individual is manifestly individual conduct. Therefore, the burden shifts to Appellant to show that the challenged statute

comports with historical firearm regulations. Appellant cannot do so.

1. LCMs are "arms" under the Second Amendment.

The U.S. Supreme Court noted that "Timothy Cunningham's important 1771 legal dictionary defined 'arms' as 'any thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another.'" *Heller*, 554 U.S. at 581 (internal citations omitted). This simple definition, supports the conclusion that magazines, which a person "useth… to cast at or strike another" befits the definition of "arms." *Id.*

The Ninth Circuit has further clarified that the Second Amendment protects the commerce of

firearms, as "the Founders were aware of the need to preserve citizen *access* to firearms in light of the risk that a strong government would use its power to disarm the people." *Teixeira v. Cnty. of Alameda*, 873 F.3d 670, 686 (9th Cir. 2017) (emphasis in original). ESSB 5078 is the government seeking to do just that. ESSB 5078 allows for the government and law enforcement agencies to continue to purchase LCMs but prohibits the people from so doing. This governmental overreach should be stopped and prevented.

2. LCMs are in common use.

Not only are magazines, as an essential component of a firearm, protected "arms," they are commonly used.

Caetano is instructive on "common use." In the *per curiam* decision, the Supreme Court vacated a decision of the Supreme Judicial Court of Massachusetts upholding a law prohibiting the possession of stun guns. The Court dispensed with all arguments the Appellant advances here. The law was found "inconsistent with *Heller*'s clear statement that the Second Amendment extends to arms that were not in existence at the time of the founding." *Caetano*, 577 U.S. at 412 (cleaned up). The Court also dispensed with the rationale of the Massachusetts court that "stun guns are 'unusual' because they are 'a thoroughly modern invention' … [which] is inconsistent with *Heller*." *Id.* The conjunctive test dictates that a weapon may only be banned if it is

dangerous *and* unusual. The Court also held: "*Heller* rejected the proposition 'that only those weapons useful in warfare are protected.'" *Id.*

Justice Alito, in his concurring opinion, noted that "[i]f *Heller* tells us anything, it is that firearms cannot be categorically prohibited just because they are dangerous." *Id.* at 418. Justice Alito summarized that "*Miller* and *Heller* recognized that militia members traditionally reported for duty carrying "the sorts of lawful weapons they possessed at home," and that the Second Amendment therefore protects such weapons as a class, regardless of any particular weapon's suitability for military use." *Id.* at 419. Additionally, and most usefully, it was noted that

"approximately 200,000 civilians owned stun guns as of 2009." *Id.* at 420.

Contrast the approximately 200,000 stun guns that are "commonly used" (i.e., owned) in *Caetano*, to the millions of LCMs owned throughout the United States (Page 46; 51-52, *supra*) it is indubitable that LCMs are commonly used. Even assuming, *arguendo*, that the findings in ESSB 5078 as to the dangerous quality of LCMs are correct, LCMs are not unusual as they are commonly owned. Accordingly, the government cannot unilaterally simply declare them prohibited.

3. There are no analogous firearms restrictions.

While true that the inquiry "requires only that the government identify a well-established and representative historical analogue, not a historical twin[,]" the government may not rely on "outliers[.]" *Bruen*, 597 U.S. at 30. The Appellant does so here. The Supreme Court in *Bruen* mentioned "unprecedented societal concerns or dramatic technological changes" but that does not change the analysis; those grounds simply "may require a more nuanced approach." *Id.* at 27. A court must still "guard against giving postenactment history more weight than it can rightly bear." *Id.* at 35. "[T]o the extent later history contradicts what the text says, the text controls." *Id.* at 36.

The first laws restricting magazine capacity were enacted during the Prohibition era, almost a century and a half after the Second Amendment was adopted, and more than half a century after the Fourteenth Amendment was adopted. Kopel, *The History of Firearms Magazines* at 864. Michigan and Rhode Island prohibited weapons which were capable of being fired more than 16 or 12 times, respectively, without reloading. *Id.* The bans were later repealed in 1959 and 1975, respectively. *Id.* at 864-65. In 1933, Ohio instituted a special licensing permit for possession or sale of a semiautomatic firearm with an ammunition feeding device with a capacity of more than 18 rounds. *Id.* at 865. Of note, it only concerned simultaneous purchase of the firearm and the

ammunition feeding device. *Id.* That law was repealed in 2014. *Id.*

The only "longstanding" statute banning large capacity magazines is in the District of Columbia, the jurisdiction at issue in *Heller*. *Id.* It is doubtful even that this restriction is "longstanding" under *Bruen*, as "not all history is created equal. Constitutional rights are enshrined with the scope they were understood to have *when the people adopted them*." *Bruen*, 597 U.S. at 34 (citing *Heller*, 554 U.S. at 634-35) (emphasis in original). The District of Columbia magazine ban was enacted in 1932. Kopel, *The History of Firearms Magazines* at 866. But, as noted by the Supreme Court in *Bruen*, "[t]he Second Amendment was adopted in 1791; the Fourteenth in 1868. Historical

evidence that long predates either date may not illuminate the scope of the right if linguistic or legal conventions changed in the intervening years." *Bruen*, 597 U.S. at 34. The only historical analogues that concern ammunition restrictions are minimum amounts to be possessed by citizens.[3] The Militia Act of 1792 required that each citizen have between 20 to 24 shots. 1 Stat. 271, 2 Cong. Ch. 33.

Washington State has no historical tradition of limiting ammunition capacity or magazines. The closest regulation is from 1933, which banned the manufacture, buying, selling, loaning, furnishing,

[3] For collection of colonial laws, and firearms laws generally, see Duke Ctr. For Firearms L., available at: https://firearmslaw.duke.edu/repository/search-the-repository/, last accessed August 12, 2024.

transportation, possession, or control of machine guns. Laws of 1933 ch. 64, §§ 1-5.

Appellant attempts to point to carry restrictions of Bowie knives and revolvers, but outright bans were exceedingly rare. Appellant goes further off the rails with comparisons to Prohibition-era and the interstitial period between World Wars regarding machine guns. Machine guns were never popular with the general public, instead being preferred by rumrunners, bootleggers, and the like. The National Firearms Act of 1934 aimed to address the problem of "gangster weapons" that had been used in the violence of the Prohibition Era. Nicholas J. Johnson, *The Power Side of the Second Amendment Question: Limited, Enumerated Powers and the Continuing*

Battle over the Legitimacy of the Individual Right to Arms, 70 Hastings L.J. 717, 751 (2019). Even then, the NFA was simply an exercise of the Congressional authority to tax, and only imposed a tax on the making and transfer of machine guns. The United States Attorney General at the time, Homer Cummings, doubted whether machine guns could be banned under the Second Amendment. *Id.* at 753. Assistant U.S. Attorney General Joseph Keenan reiterated that position. *Id.* Not only is 1934 too late under the *Bruen* relevant time period directive, but a taxation regulation is not analogous. The actual prohibition of transfer or possession of machine guns did not occur until 1986, much too late to be considered. The federal Assault Weapons Ban is

similarly much too late to be considered, and in any event, was allowed to expire in 2004.

Restrictions on trap guns and clubs are not analogous, as trap guns are not wielded in self-defense, and clubs are not firearms. Further, as Appellant concedes, laws concerning them only "sometimes outlaw[ed] them entirely." App. Op. Brief at 61. These laws are too late, do not place a similar burden on the right to bear arms via the "how" or "why" and are not analogous to ESSB 5078.

Laws regulating Bowie knives fare no better. Appellant points to only two statutes that completely prohibit the sale of Bowie knives; therefore only two statutes meet the "how" and "why" comparison, but again, are not firearm restrictions. Conversely, there

are two state supreme court cases which declared statutes prohibiting Bowie knives and pistols completely as unconstitutional. *See, e.g.*, *Nunn v. State*, 1 Ga. 243 (1846) (cited with approval in *Heller*); *Cockrum v. State*, 24 Tex. 394 (1859). Likewise, the regimes referenced by Appellant such as those in Tennessee and Alabama where openly carrying a pistol was prohibited, were held to violate the state constitutional provision "even though the statute did not restrict the carrying of long guns." *Heller*, 554 U.S. at 629 (citing *Andrews v. State*, 50 Tenn. 165, 187 (1871); *see also*, *State v. Reid*, 1 Ala. 612, 616-17 (1840) ("A statute which, under the pretence [*sic*] of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them

wholly useless for the purpose of defence, [*sic*] would be clearly unconstitutional").

As a last resort, Appellant turns to regulations on machine guns from the Prohibition era. As briefed *ante*, these regulations were under the commerce power, and were not outright bans. Further, these laws come too late, and prohibition of machine guns comes even later. Appellant attempts to stretch dicta from two separate cases into a matryoshka doll reading to justify ESSB 5078. The 'startling' aspect from *Miller* which is referenced in *Heller* is if "*only* those weapons useful in warfare are protected." *Heller*, 554 US at 624 (citing *Miller*, 307 US at 179) (emphasis added). The Supreme Court cautions that the phrase 'part of ordinary military equipment' is not

to be read in isolation, but rather considered in light of the recognition that "[t]he traditional militia was formed from a pool of men bringing arms 'in common use at the time' for lawful purposes like self defense... [small-arms] weapons used by militiamen and weapons used in defense of person and home were one and the same." *Id.* at 624-25 (citing *Kessler*, 289 Ore. 359, 614 P.2d 94, 98 (1980)).

In short, not a single law restricted firearms during the Founding or Reconstruction eras similarly to ESSB 5078. The only laws regarding ammunition capacity or firearms from those eras were laws designed to ensure that the militia was adequately prepared, which included ample ammunition.

This Court should uphold the trial court's decision that ESSB 5078 is unconstitutional.

D. Remand is not proper, and neither is reassignment.

The assertion by the Appellant that (1) a Second Amendment claim was omitted is without basis, and is laughable on its face, as the Appellant was the Plaintiff in the trial court and could not remove the case to federal court. *See*, 28 USC section 1441(a) ("any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants").

The Appellant's position that a Second Amendment claim was omitted is predicated on the

omission of a single word: also. In Respondents' initial Petition to Set Aside the CID, following a summation of current challenges to ESSB 5078 ongoing in federal courts, as well as federal case law that the right to bear arms extends to ammunition, it was stated that "Gator's hereby [also] challenges the constitutionality of ESSB 5078 under Wash. Const. art. I, sec 24." A brief *Gunwall* analysis followed, as well as analysis that the Second Amendment was incorporated by this Court prior to *McDonald*.

Similarly, In Gator's Answer to the enforcement lawsuit filed by the State of Washington, the affirmative defense was raised that "Plaintiff's allegations amount to a violation of the Constitutional protections afforded Defendants by virtue of the U.S.

Constitution, amend. II, and by the Washington Constitution, art. I, sec 24." CP 131.

Moreover, this precise issue has been litigated, and the State did not appeal that decision.

The Appellant simply abhors a judge who disagrees with their analysis. Missing from the citation to *State v. McEnroe* is that "reassignment is generally *not* available as an appellate remedy if the appellate court's decision effectively limits the trial court's discretion on remand." 181 Wn.2d 375, 387 (2014) (emphasis in original). All that is required if this Court is to overturn the trial court is that "sufficient guidance" be given as to the applicable legal standard. *See, e.g., Id.* n.10 "*United States v. Wolf Child*, 699 F.3d 1082, 1102-03 (9th Cir. 2012).

(trial court's previously expressed view that defendant "categorically presented a danger to all children" not grounds for reassignment where appellate opinion "gives sufficient guidance that, should [the trial judge] determine it is necessary to impose new conditions [of supervised release] he will impose only suitably narrow conditions that will comply with the applicable legal requirements set forth above)."

Even assuming, arguendo, that the trial court "erroneously rule[d] that SB 5078 is unconstitutional in all of its applications," that is not sufficient for reassignment. Put simply, "legal errors alone do not warrant assignment." *Id.* at 388 (citing *Liteky v. United States*, 510 U.S. 540, 555, 114 S. Ct. 1147

(1994) ("Almost invariably, [erroneous rulings] are proper grounds for appeal, not for recusal.")). Even if the trial court judge has "strongly held views... he is bound on remand by this court's decision." *Id.*

The Appellant effectively argues for an abuse of discretion as to CPA penalties before the trial court has even wielded any discretion.

Appellant also posits that the trial court is not impartial because the relevancy of expert reports, and the need for extensive and wasteful depositions was not necessary for resolution of the facial challenge. This is directly in line with recent federal case law. For instance, in *Bruen*, the Supreme Court stated that "the historical inquiry that courts must conduct will often involve reasoning by analogy–a commonplace

task for any lawyer or judge." *Bruen*, 597 U.S. at 28. The Supreme Court recently repeated that stance, that analogical reasoning is well within the purview of courts; [a] court must ascertain whether the new law is 'relevantly similar' to laws that our tradition is understood to permit, 'apply[ing] faithfully the balance struck by the founding generation to modern circumstances.' Discerning and developing the law in this way is 'a commonplace task for any lawyer or judge.'" *Rahimi*, 144 S. Ct. at 1898. Even more recently, the Eighth Circuit rejected the government's claim that challengers to Minnesota's permit-to-carry statute "did not meet their 'burden' of proving *Bruen*'s textual part because they did no submit expert reports or facts about the Second Amendment's text … this

[purported] requirement contradicts *Bruen*'s command that part one is a 'focused' application of the 'normal and ordinary meaning' that would have been discernable by the people." *Worth v. Jacobson*, 2024 U.S. App. LEXIS 17347 n.4 (8th Cir. July 16, 2024).

Expert evidence is not 'critical' to claims regarding the right to bear arms. If the Court desires to review the expert reports, they are properly part of the record, and the Designation of Clerk's Papers has been filed concurrently with this brief. Respondents did stipulate that the expert reports would not be relied upon for their motion for summary judgment only, but did not agree to strike or withdraw the reports, and the Court did not order them stricken. CP 1008-10.

At issue are legislative, not adjudicative facts. The State's entire argument turns on whether ESSB 5078 is relevantly similar or analogous to the historical tradition of firearms regulations; comparing historical laws to current laws, which is "reasoning by analogy–a commonplace task for any lawyer or judge." *Bruen*, 597 U.S. at 28. The trial court here is no crusader for the right to bear arms, or if the trial court holds such "strongly held views" it diligently and faithfully applied the analysis in *Jorgenson*, in which a law restricting the right to bear arms was upheld, both by the trial court and this Court.

IV. Conclusion

For the foregoing reasons, this Court should upheld the mandatory provisions of the Washington

Constitution and the United States Constitution, and prevent further impairment or infringement of the right to bear arms. The trial court authored a considered and thorough analysis, and that decision should be upheld.

This document contains 9,657 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 12, 2024, I electronically filed the foregoing with the Clerk of the Court using the Washington State Appellate Courts' Secure Portal, which sends a copy of uploaded files and a generated transmittal letter to active parties on the case. The generated transmittal letter specifically identifies recipients of electronic notice.

DATED this 12th day of August 2024, at Spokane, Washington.

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