NO. 102940-3

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Appellant,

v.

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

Respondents.

APPELLANT'S BRIEF

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I. INTRODUCTION

Responding to an epidemic of gun violence and the modern crisis of mass shootings, the Washington State Legislature enacted Senate Bill (SB) 5078 to limit large capacity magazines (LCMs), a firearm accessory with a disproportionate role in carnage. Gator's Custom Guns and Walter Wentz (collectively, Gator's) seek to overturn this common-sense law under the state and federal constitutions. In an opinion that deviated sharply from other courts upholding similar laws, the superior court granted summary judgment for Gator's, declared SB 5078 facially unconstitutional, and enjoined its enforcement statewide. This Court should reverse.

The superior court's conclusion that SB 5078 violates Washington's Constitution is wrong on two levels. *First*, LCMs are not "arms" covered by article I, section 24 of the Washington Constitution, which covers only "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 such, they are not "arms." Moreover, LCMs are military-style accessories, designed to kill more rapidly on the battlefield, and virtually never used for self-defense.

Second, "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). LCMs are disproportionately used—and disproportionately deadly—in mass shootings and other horrific crimes, whereas they have little if any use in self-defense. SB 5078 is, therefore, "reasonably necessary to protect public safety or welfare" and is "substantially related" to the "legitimate ends" of reducing gun violence in Washington. *Id.* at 156. Gator's facial challenge under Washington's Constitution fails.

Gator's Second Amendment theory fares no better. LCMs are not covered by the Second Amendment because, again, they are not "arms," nor are they necessary for any firearms to

function as intended. Further, LCMs enable military-style assaults, not self-defense. And even if these accessories were within the scope of the Second Amendment, Washington's regulation of LCMs fits comfortably within the historical tradition of regulating dangerous and unusual weapons to promote public safety. Following the U.S. Supreme Court's decision in *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 142 S.Ct. 2111, 213 L.Ed.2d 387 (2022), courts have all-but *unanimously* rejected Second Amendment and article I, section 24 challenges to LCM restrictions for one or more of these reasons—or been overruled. *See infra* 18-19.

Judge Bashor of the Cowlitz County Superior Court erred in concluding that SB 5078 was facially unconstitutional. Under the superior court's dangerous constitutional misinterpretation, civilian possession of just about any arm or accessory—from LCMs to AR-15s to machineguns and on and on—would be constitutionally protected. CP 2151 (superior court order noting that "few, *if any* … modern firearms regulation[s]" survive

constitutional scrutiny) (emphasis added). This is not the law. This Court should reverse and make clear that common-sense regulation of military-style weapons and accessories does not infringe the individual right to armed self-defense.

II. ASSIGNMENTS OF ERROR AND ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

The trial court erred by granting summary judgment to Gator's on its claims that SB 5078 violated article I, section 24 of the Washington State Constitution and the Second Amendment of the United States Constitution.

The issues presented for review are:

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 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 in the Second Amendment of the U.S. Constitution.

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

III. STATEMENT OF THE CASE

A. SB 5078 Prohibits the Manufacture and Sale of LCMs

The Legislature passed SB 5078 to address the epidemic of gun violence and mass shootings that "threat[ens] . . . the public health and safety of Washingtonians." Engrossed Substitute S.B. 5078, 67th Leg., Reg. Sess., § 1 (Wash. 2022). The Legislature found that LCMs—ammunition feeding devices capable of holding more than ten rounds—contribute to "increase[d] casualties by allowing a shooter to keep firing for longer periods of time without reloading." *Id.* Citing the use of LCMs in "all 10 of the deadliest mass shootings since 2009," the Legislature noted that from 2009 to 2018 the use of LCMs in mass shooting events "caused twice as many deaths and 14 times as many injuries," whereas mass-shooting casualties declined while a federal LCM ban was in effect. *Id.* Accordingly, the Legislature found that "restricting the sale,

manufacture, and distribution of [LCMs] is likely to reduce gun deaths and injuries" without interfering with "responsible, lawful self-defense." *Id.*

SB 5078 prohibits LCMs' manufacture, distribution, import, and sale, with certain exemptions for the military and law enforcement. The law does this while "allowing existing legal owners to retain the large capacity magazines they currently own." *Id.* No firearm is rendered inoperable due to SB 5078, because all guns capable of accepting LCMs—even AR-15s and the like—can fully function with magazines that hold 10 rounds or fewer. CP 1321-27 Gator's admits this. CP 1194 ("**INTERROGATORY NO. 21**: Please identify each firearm you sell that accepts large capacity magazines but does not accept magazines holding ten or fewer rounds. **ANSWER**: None.").

B. LCMs Are Not Commonly Used in Self-Defense

"LCMs were originally designed for military use in World War I and did not become widely available for civilian use until the 1980s." *Nat'l Ass'n for Gun Rights v. Lamont*, 685 F. Supp.

3d 63, 101 (D. Conn. Aug. 3, 2023); *see also* CP 1318 ("The lineage of LCM's can be traced directly to a military heritage.").

Consistent with their military origins, "large-capacity magazines are particularly designed and most suitable for military and law enforcement applications." *Kolbe v. Hogan*, 849 F.3d 114, 137 (2017); *see also* CP 1261. They are not well-suited or commonly used for self-defense.

The available data makes this clear. In an analysis of "armed citizen" stories collected by the National Rifle Association—stories collected to support the gun lobby's opposition to gun control—expert Lucy Allen of National Economic Research Associates has shown that "it is extremely rare for a person, when using firearms in self-defense, to fire more than 10 rounds." CP 1510. Out of 736 incidents in the National Rifle Association (NRA) database analyzed by Ms. Allen, "there were 2 incidents (0.3% of all incidents), in which the defender was reported to have fired more than 10 bullets." *Id.* "On average," individuals fired only "2.2 shots." *Id.*;

see also, *e.g.*, *Oregon Firearms Fed'n v. Kotek*, 682 F. Supp. 3d 874, 920 (D. Or. July 14, 2023) ("[T]he average number of rounds fired in self-defense is 2.2.").

Ms. Allen has replicated these results through an analysis of self-defense stories archived by Factiva, "an online news reporting service and archive . . . that aggregates news content from nearly 33,000 sources." CP 1512-16. That analysis—which is likely biased toward more sensational stories in which *more* shots are fired—similarly "find[s] that the average number of shots fired per [self-defense] incident covered is 2.34." CP 1515 She found "no incidents where the defender was reported to have fired more than 10 bullets." CP 1516 Ms. Allen found similar results analyzing a unique law-enforcement resource of shooting data collected by the City of Portland, Oregon. CP 1517-1521. She "found no incidents of self-defense with a firearm where the defender fired more than 10 shots" in the Portland police reports. CP 1517.

And Gator's itself admits it is not aware of a *single instance* in which any civilian, anywhere, fired more than ten rounds in self-defense. CP 1194.

If anything, LCMs are *disadvantageous* for self-defense. As one former Seattle Police Chief explains, "firing more than a handful of rounds in self-defense may be dangerous because it increases the odds of a bystander being hit by a stray bullet and because an officer responding to such an incident may perceive the victim as the suspect." CP 1262. Further, a smaller magazine means a lower-profile gun that is easier to carry, shoot, and conceal, making weapons equipped with smaller magazines more suitable for self-defense. CP 1327-28.

C. LCMs Are Disproportionately Used in Mass Shootings

On the other hand, large capacity magazines "are often used in public mass shootings." CP 1524. And they "are being used with increased frequency to perpetrate gun massacres." CP 1876. "Since 2010, 86 percent of all high-fatality mass shootings have involved LCMs. Since 2020, 100 percent of all

high-fatality mass shootings have involved LCMs." *Oregon Firearms Fed'n*, 682 F. Supp. 3d at 897 (D. Or. July 14, 2023) (citations omitted); *see also* CP 1876-79 (explaining how "use of LCMs is a major factor in the rise of mass shootings") (capitalization omitted).

Because weapons equipped with LCMs are so much deadlier than other weapons, their use in mass shootings leads to much higher casualty rates. "The average number of shots fired in a mass shooting where an LCM was not used was sixteen. By contrast, the average number of shots fired in a mass shooting where an LCM was used was *ninety-nine*." *Oregon Firearms Fed'n*, 682 F. Supp. 3d at 898 (emphasis added) (record citations omitted); *see also* CP 1527. As a result, "[t]he average death toll for" mass shootings since 1990 in which we know LCMs were used "is 11.5 fatalities per shooting. By contrast, the average death toll for the 18 incidents in which it was determined that LCMs were not used . . ." is 7.3 fatalities per shooting." CP 1878-79. "In other words, since 1990, the use of LCMs in

high-fatality mass shootings has resulted in a 58% increase in average fatalities per incident." *Id.* Indeed, all seven of the deadliest acts of criminal violence in the United States since the September 11, 2001, terrorist attacks were mass shootings by perpetrators using LCMs. CP 1877-78.

LCMs contribute to mass shooting fatalities in at least two ways. First, they enable a shooter to fire more shots, more quickly. CP 1886-87 "The more shots fired, the greater the number of people wounded, the more bullets that hit a single person, the more serious the injuries, and the less able emergency rooms are to treat them or save lives." *Ocean State Tactical, LLC v. Rhode Island*, 646 F. Supp. 3d 368, 395 (D.R.I. 2022), *aff'd*, 95 F.4th 38 (1st Cir. 2024). Second, LCMs take away critical opportunities to escape or disarm a shooter. CP 1887-89. For example, during the Sandy Hook massacre, six first-graders were able to escape a classroom to safety while the shooter paused to swap out a magazine. CP 1887. By enabling shooters to continue shooting without pause, LCMs reduce these critical windows and

lead to more deaths. CP 1260; *see also Ocean State Tactical*, 646 F. Supp. 3d at 394–95 ("It is undisputed that requiring a pause in the shooting saves lives.") (collecting stories). In short, "LCMs are force multipliers" in the hands of a mass shooter. CP 1887.

Unfortunately, "the problem of high-fatality mass shooting violence is on the rise[.]" CP 1874-75; *see also id* ("[T]he rise in gun massacre violence has . . . outpaced the rise in national population—by a factor of 13."). High-fatality mass shootings are also a distinctly modern phenomenon. The first mass shooting incident in American history that resulted in 10 or more deaths happened in 1949, the next in 1966, then in 1975. CP 1879-80. But after the 1994 federal Assault Weapons Ban expired in 2004, the average rate of these incidents increased "over six-fold" when compared to the time period of 1949 to 2004. CP 1883.

D. This Lawsuit

Governor Inslee signed SB 5078 into law in March 2022, and the law became effective July 1, 2022. Engrossed Substitute

S.B. 5078, 67th Leg., Reg. Sess. (Wash. 2022). Around this time, two groups of plaintiffs filed lawsuits challenging its constitutionality. *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 chose not to.

Instead, Gator's decided to flout the law. It continued to sell LCMs illegally in massive quantities, knowing full well that it was violating the law. CP 112-13. Gator's illegally sold LCMs to two undercover state investigators. CP 117-18. One investigator "observed barrels and boxes of LCMs in Defendants' retail store advertised for public sale," and obtained records showing that Gator's ordered well over *11,000* LCMs for sale in Washington after SB 5078 went into effect. CP 119-20. The Washington Attorney General's Office issued a civil investigative demand to Gator's to understand the full extent of its unlawful conduct. CP 13.

In response, on August 21, 2023, Gator's filed a petition to set aside the CID. The Petition "challenge[d] the

constitutionality of ESSB 5078 under Const. art. I § 24." CP 6. The Petition's request for relief included a scant reference to the Second Amendment, but did not seek relief under that Amendment. CP 10. On September 12, 2023, the State filed suit against Gator's and its owner, Walter Wentz, alleging numerous violations of Washington's Consumer Protection Act in connection with Gator's illegal sales of LCMs. CP 111-123. Separately, the State moved to dismiss Gator's Petition, CP 65, and the Court held a hearing on October 16 to address the State's motion. RP 4-39. At the October 16 hearing, the Court asked whether SB 5078 complied with the Second Amendment. RP 13:9-12. The State responded that Gator's Petition did not raise a Second Amendment claim. RP 13:13-14:24, 15:20-16:7. The superior court disagreed, suggesting that the Petition's passing reference to the Second Amendment in Paragraph 33 was sufficient to raise a Second Amendment claim. RP 15:10-12, 15:16-19.The Court then ordered the two cases consolidated, and further ordered that the consolidated case would be phased such

that Gator's facial challenge would be heard before the State's enforcement action. RP 33:1-39:23. The Court did not rule on the State's motion to dismiss. *Id.*

There followed a series of unusual procedural rulings that rushed the case forward with no apparent reason. In November, the superior court ordered the parties to submit expert reports in only three weeks. RP 56:17-25. Both parties did so. CP 1009. Then, at a subsequent December hearing, Judge Bashor *sua sponte* indicated he might strike the State's experts on relevance grounds. RP 50:20-25, 67:24-68:6. At the State's request, Judge Bashor gave the State an opportunity to brief that question before critical evidence was excluded. RP 70:14-23, 74:12-15. But at the same time, he set an extremely expedited summary judgment briefing schedule, without explaining why it was necessary to proceed to summary judgment before the parties had an opportunity to conduct discovery. RP 78:13-83:1015. Judge Bashor's schedule required the State to brief the admissibility of its expert testimony while simultaneously defending against a

motion for summary judgment and filing its own protective cross-motion—without knowing whether its key evidence would be excluded. RP 80:18-81:1. On December 15, the State submitted a detailed offer of proof explaining the relevance of its expert testimony, and simultaneously sought leave under CR 56(f) to take additional discovery—or more accurately, *any* discovery—before the court ruled on summary judgment. CP 786-820. Gator's argued that discovery was unnecessary because (in its view) there were no material facts in dispute and, to the extent the parties' experts had differing opinions, Gator's would disclaim any reliance on its proffered expert testimony on summary judgment. RP 129:2-14, 132:5-8; CP 1010. (The State later agreed it would not take discovery related to Gator's proffered expert testimony, and Gator's would not rely on that testimony on summary judgment. CP 1008-10.

In January, Judge Bashor entered an order that deferred ruling on "the relevance and admissibility of any proffered evidence." CP 1005. In the same order, the court granted the

State's 56(f) motion in limited part. CP 1005-07. Specifically, the court largely denied the State's request to take discovery, including discovery related to Gator's disclosed experts, but gave the State a continuance of approximately six weeks to conduct third-party discovery related to two studies on which Gator's intended to rely. CP 1005-07.[1]In his ruling, Judge Bashor also denied the State's motion for a more definite statement under CR 12(e) to require Gator's to clarify whether it was bringing a Second Amendment claim. CP 1003-04. This time, Judge Bashor reasoned that Gator's had asserted a Second Amendment challenge not by supposedly raising it in their Complaint—the rationale articulated at the prior hearing—but by raising it as an affirmative defense to the State's consumer protection enforcement action. *Id.*

[1] Despite its best efforts, the State was not able to obtain meaningful discovery from a third-party (located in Connecticut) in the few weeks afforded it by the superior court.

Following the brief extension, the parties cross-moved for summary judgment, and Judge Bashor held a hearing on March 11. CP 1007. In April, Judge Bashor issued an order finding SB 5078 facially unconstitutional under both article I, section 24 and the Second Amendment. CP 2109-63. He entered an injunction purporting to enjoin not only the State, but "county [and] local political subdivisions," who are not parties to this suit, from enforcing the law. CP 2162.

IV. ARGUMENT

Nearly every court to consider the constitutionality of LCM laws like SB 5078 under article I, section 24 or the Second Amendment has upheld those laws—or been overruled. *See Bevis v. City of Naperville, Ill.*, 85 F.4th 1175, 1197 (7th Cir. 2023), *cert. denied sub nom. Harrel v. Raoul*, --- S.Ct. ---, 2024 WL 3259606 (U.S. July 2, 2024); *Brumback*, 2023 WL 6221425, at *8 (E.D. Wash. Sept. 25, 2023)[2]; *State v. Federal Way*

[2] Some of the federal cases cited here are unpublished, but may be cited to this Court pursuant to GR 14.1(b) as they may be cited in federal court. FRAP 32.1.

Discount Guns, No. 22-2-20064-2 SEA (King County Sup. Ct. Apr. 7, 2023); *Ocean State Tactical*, 95 F.4th 38, 52 (1st Cir. 2024); *Bevis v. City of Naperville, Ill.*, 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. Mar. 27, 2023); *Hanson v. D.C.*, 671 F. Supp. 3d 1, 16 (D.D.C. Apr. 20, 2023); *Herrera v. Raoul*, 670 F. Supp. 3d 665, 675 (N.D. Ill. Apr. 25, 2023) , *aff'd*, 85 F.4th 1175 (7th Cir. 2023); *Oregon Firearms Fed'n*, 682 F. Supp. 3d at 884; *Nat'l Ass'n for Gun Rights*, 685 F. Supp. 3d at 71; *Capen v. Campbell*, --- F. Supp. 3d ---, 2023 WL 8851005 at *18, *20 (D. Mass. Dec. 21, 2023); *see also Kolbe*, 849 F.3d at 144, *abrogated in part on other grounds by Bruen*, 591 U.S. 1 (2022) (pre-*Bruen* case); *Friedman v. City of Highland Park, Ill.*, 784 F.3d 406, 412 (7th Cir. 2015) (pre-*Bruen* case).[3] And the lone exception to this unanimity—*Duncan v. Bonta*—is

[3] The Seventh Circuit specifically re-affirmed *Friedman's* vitality post-*Bruen*. *Bevis*, 85 F.4th at 1189.

currently stayed pending appeal, based on the *en banc* court's conclusion that California "is likely to succeed on the merits" of its appeal. 83 F.4th 803, 805 (9th Cir. 2023).

This Court should follow the overwhelming precedent holding that common-sense regulations prohibiting military-style weapon accessories with an outsized role in mass shootings and other horrific gun crimes are constitutional.

A. Standard of Review

The constitutionality of a statute is a legal question that this Court reviews *de novo*. *Bennett v. United States*, 2 Wn.3d 430, 441, 539 P.3d 361 (2023). To succeed on its facial challenge to SB 5078, Gator's "must show that the [statute] is unconstitutional beyond a reasonable doubt and there are no factual circumstances under which the [statute] could be constitutional." *City of Pasco v. Shaw*, 161 Wn.2d 450, 458, 166 P.3d 1157 (2007); *see also United States v. Rahimi*, 22-915, 2024 WL 3074728, at *6 (U.S. June 21, 2024) (a facial challenge requires a party to "'establish that no set of circumstances exists

under which the Act would be valid'") (citation omitted). Facial challenges are disfavored: "'[w]hen legislation and the Constitution brush up against each other, [a court's] task is to seek harmony, not to manufacture conflict.'" *Rahimi*, 2024 WL 3074728, at *11 (citation omitted). Gator's comes nowhere near meeting its heavy burden.

B. SB 5078 Complies with Article I, Section 24 of the Washington Constitution

Article I, section 24 of the Washington Constitution provides: "The right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired . . ." This Court, analyzing this provision in light of the U.S. Supreme Court's landmark Second Amendment decisions in *D.C. v. Heller*, 554 U.S. 570, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008), and *McDonald v. City of Chicago*, 561 U.S. 742, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010), conducted a *Gunwall* analysis and concluded that section 24 should be "interpret[ed] . . . separately

and independently of its federal counterpart." *Jorgenson*, 179 Wn.2d at 155.[4]

The test articulated by this Court has two steps. First, a court must ask whether the particular weapon or accessory at issue is covered by section 24, which "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. "In considering whether a weapon is a [protected] arm," the court must consider "the weapon's purpose and intended function." *Id.*

If this step is satisfied and article I, section 24 is implicated, then the court moves to the second step, which is grounded in the longstanding principle that "the firearm rights guaranteed by the Washington Constitution are subject to

[4] Bizarrely, the superior court below said it "has not done a *Gunwall* analysis as to whether or not the Washington Constitution, Art. 1, § 24 provides greater protection than the US Second Amendment." CP 2128. This Court already did so in *Jorgenson*, which the superior court ignored. *Infra* at 41-42.

reasonable regulation pursuant to the State's police power." *Jorgenson*, 179 Wn.2d at 155. "[A] constitutionally reasonable regulation," this Court explained, "is one that is reasonably necessary to protect public safety or welfare, and substantially related to legitimate ends sought." *Id.* at 156 (cleaned up). Thus, if section 24 is implicated, the court must "balanc[e] the public benefit from the regulation against the degree to which it frustrates the purpose of the constitutional provision." *Id.*

Gator's claim fails both prongs of Washington's constitutional test.

1. LCMs Are Not Arms Within the Meaning of Article I, Section 24

Gator's claim fails at *Evans'* threshold step for two independent reasons. *First*, LCMs are accessories, not arms, and are unnecessary for any arm to function as intended. *Second*, section 24 applies only to weapons commonly used for self-defense—which LCMs are not.

a. LCMs are accessories, not arms

Article I, section 24's plain texts applies only to "arms." But LCMs are not arms. CP 1305; *see also Ocean State Tactical*, 646 F. Supp. 3d at 387, *aff'd on other grounds*, 95 F.4th 38 (1st Cir. 2024). Instead, they are merely a subclass of "container[s] for ammunition cartridges"—accessories that, when added to weapons, make them more capable of mass murder. CP 1305; *see also Oregon Firearms Fed'n*, 682 F. Supp. 3d at 912 ("Magazines are an accessory to firearms, rather than a specific type of firearm."). Accordingly, LCMs do not come within the plain text of section 24.

Plain language and a historical analogy help illustrate the point. Imagine if an officer told their troops: "Grab your arms and assemble on the training ground." Any soldier who showed up carrying just an LCM would be ridiculed, because the LCM is not an "arm." Looking to history, *Heller* cites a bow and arrow as an example of an "arm," 554 U.S. at 581, but an LCM is not analogous to either. Instead, it is more akin to a quiver used for

holding arrows. *See, e.g.*, *Ocean State Tactical*, 646 F. Supp. 3d at 387, *aff'd on other grounds*, 95 F.4th 38 (1st Cir. 2024) ("[M]agazines themselves are neither firearms nor ammunition. They are holders of ammunition, as a quiver holds arrows . . . ."). And the State is not aware of any case law suggesting that quivers themselves are "arms."

To be sure, it is theoretically possible that restrictions on products that are not themselves "arms" may nevertheless "impair" the right to bear arms in self-defense under article I, section 24 (although this Court has not addressed that question). *Cf. infra* at 48-49 (discussing Second Amendment caselaw). For example, a complete ban on "triggers" might effectively ban the use of firearms, and could therefore violate article I, section 24.

SB 5078, however, does no such thing. Far from being a restriction on *all* magazines, SB 5078 only prohibits the manufacture and sale of *one subclass* of magazines commonly associated with mass shootings and other violent crime. It leaves untouched individuals' ability to buy and sell countless varieties

of magazines holding ten rounds or fewer. SB 5078 also leaves individuals free to possess and use the LCMs they already own. SB 5078 therefore does not meaningfully limit any individual's ability to use *any* type of firearm for lawful purposes. *See* CP 1321-27 (discussing widespread availability of lawful magazines). "Accordingly, . . . LCMs are not 'bearable arms'" under article I, section 24. *Oregon Firearms Fed'n*, 682 F. Supp. 3d at 912; *see also Ocean State Tactical*, 646 F. Supp. 3d at 387; *Capen*, 2023 WL 8851005 at *18.

To be sure, *some type* of magazine may be required for some firearms to operate. But a *large capacity* magazine never is—as Gator's admits. CP 1194, 1306; *Oregon Firearms Fed'n*, 682 F. Supp. 3d at 912; *Ocean State Tactical*, 646 F. Supp. 3d at 386 ("[A] firearm does not need a magazine containing more than ten rounds to be useful."). "This case . . . is not simply about the constitutionality of all magazines generally; it is about magazines that allow the user to shoot eleven or more rounds

without reloading." *Oregon Firearms Fed'n*, 682 F. Supp. 3d at 912.

The superior court ignored this distinction, seemingly reasoning that if magazines *as a class* are necessary components of some firearms, then *all* magazines must necessarily be protected. CP 2119-21. In other words, the court committed the "logical fallacy" of assuming "that if a broader category of something is constitutional, then the smaller parts within it must also be constitutional." *Nat'l Ass'n for Gun Rights*, 2023 WL 4975979, at *17. To understand why this is a fallacy, look at gun barrels: certainly a barrel is necessary for a gun to fire, but the U.S. Supreme Court in *Heller* nonetheless *expressly approved* of restrictions on short-barreled shotguns. 554 U.S. at 625. This same exercise applies to any gun component. For example, armor-piercing rounds have been banned for almost forty years under the Law Enforcement Officers Protection Act, 18 U.S.C § 922(a)(7), (8); is that restriction unconstitutional just because some type of ammunition is necessary for a firearm to function?

Of course not. Similarly, while firearms need some way to aim them, that does not mean that any and all laser sights are constitutionally protected arms, *see* 21 C.F.R. § 1040.10 (imposing power limits on lasers). And this court has made clear that just because some types of knives qualify as "arms" under article I, section 24, "not all knives are 'arms.'" *Evans*, 184 Wn.2d at 869 (citing *City of Seattle v. Montana*, 129 Wn.2d 583, 594, 919 P.2d 1218 (1996)).

Here, because the undisputed evidence shows that LCMs are not necessary to the exercise of the right to keep or bear any arms, they are not protected by article I, section 24. Gator's claim thus fails at this threshold step.

b. LCMs are not traditionally or commonly used for self-defense.

Gator's claim also fails at the threshold because section 24 only covers arms that are traditionally and commonly used for self-defense. It does not afford a right to keep and bear military-style weapons, including firearms equipped with LCMs.

LCMs undeniably serve combat functions, not

self-defense functions. They "are designed to enhance a shooter's capacity to shoot multiple human targets very rapidly"—a consummately, and uniquely, military function. *Kolbe*, 849 F.3d at 125 (internal quotation marks omitted). "LCMs were originally designed for military use in World War I and did not become widely available for civilian use until the 1980s." *Nat'l Ass'n for Gun Rights*, 685 F. Supp. 3d at 101; *see also Hanson*, 671 F. Supp. 3d at 13. Still today, LCMs "are particularly designed and most suitable for military and law enforcement applications." *Kolbe*, 849 F.3d at 125. The federal Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) has made this determination repeatedly, over decades, in reports on the importability of certain weapons. *See*, *e.g.*, ATF, *Study on the Importability of Certain Shotguns* (Jan. 2011), https://www.atf.gov/resource-center/docs/january-2011-importability-certain-shotgunspdf/download ("[L]arge capacity magazines are a military feature.") (discussing previous reports). The military nature of LCMs was also a central concern of

Congress when it banned them nationwide as part of the 1994 Assault Weapons Ban. As the House Report on the bill explained, "the expert evidence is that the features that characterize a semiautomatic weapon," including use of LCMs, "are not merely cosmetic, but do serve specific, combat-functional ends." H.R. Rep. No. 103-489 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1820. "High-capability magazine[s] . . . make it possible to fire a large number of rounds without re-loading, then to reload quickly when those rounds are spent." *Id.* "Furthermore, expended magazines can be quickly replaced, so that a single person with a single assault weapon can easily fire literally hundreds of rounds within minutes." *Id*.

Because LCMs are designed to enable shooters to kill as many enemies in combat as possible, they 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). As the State's expert

Lucy Allen has shown—and court after court has found—individuals almost never fire more than ten rounds in self-defense. CP 1510 *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."); *Ocean State Tactical*, 95 F.4th at 45 ("[C]ivilian self-defense rarely—if ever—calls for the rapid and uninterrupted discharge of many shots, much less more than ten."); *Capen*, 2023 WL 8851005 at *20 ("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."). Rather, the data shows that individuals on average fire 2.2 shots in self-defense. CP 1510; *see also Hanson*, 671 F. Supp. 3d at 14 ("[T]he 2.2 figure has remained exceptionally stable over time.").[5]

[5] Although Gator's made no effort to challenge Ms. Allen's expertise, the superior court noted, *sua sponte* and without any explanation, that it "is challenged to find [Ms. Allen's] methodology reliable enough to be admissible."

Certainly, as the superior court acknowledged, guns can be used in self-defense without any shots being fired. *Accord* CP 2122. But this doesn't help Gator's argument at all because in that scenario, the LCM's defining feature—allowing the shooter to shoot more than ten times without reloading—is not used. And there is no evidence whatsoever that an LCM in any way enhances armed self-defense when someone merely brandishes a weapon equipped with one. *See Oregon Firearms Fed'n*, 682 F. Supp. 3d at 921 ("[B]randishing an LCM does not facilitate self-defense" because "the size of a firearm's magazine—as opposed to the firearm itself—has little deterrent effect in the average civilian self-defense context.").

By contrast, LCMs are routinely used in mass shootings and other high-profile criminal activity to devastating effect, as

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[]CP 2156. Ms. Allen's methodology has been routinely accepted by—and persuasive to—courts, and the superior court's baseless aspersions lack merit. CP 1535-36; *see also*, *e.g.*, *Oregon Firearms Fed'n*, 682 F. Supp. 3d at 896 (relying on Ms. Allen's testimony for factual findings).

the Legislature found. Engrossed Substitute S.B. 5078, 67th Leg., Reg. Sess. § 1 (Wash. 2022). ; *see also* H.R. Rep. No. 117-346, at 21-22 (2022) (discussing, in detail, how "[l]arge capacity magazines have been used in many high-profile mass shootings"); *see also* CP 1917-19. According to Dr. Lou Klarevas, one of the foremost experts on mass shootings, LCMs are "force multipliers when it comes to kill potential." CP 1887. LCMs have been used in at least two-thirds of gun massacres since 1990, "result[ing] in a 58% increase in average fatalities per incident" compared to mass shootings that did not involve LCMs. CP 1879.

In short, under a straightforward reading of this Court's precedent, LCMs do not come within article I, section 24 because they are not "weapons traditionally or commonly used" for "self-defense." *Evans*, 184 Wn.2d at 869.

Despite the undisputed evidence that LCMs are not designed or used for self-defense, the superior court suggested LCMs ought to be protected precisely *because* of their military

pedigree. CP 2123. That misreads *Evans*. What *Evans* says is that "a weapon does not need to be designed for military use to be traditionally or commonly used for self-defense." *Evans*, 184 Wn.2d at 869. But this does not mean that *every* weapon designed for military use is necessarily protected. Just because some weapons designed for non-military purposes are useful in self-defense (e.g., pepper spray), does not mean that all weapons designed for the military are necessarily useful for self-defense (e.g., nuclear weapons). Under the superior court's misreading of *Evans*, every military weapon, from machineguns to cluster bombs, would be constitutionally sacrosanct. This is not the law.[6]

The superior court also erred in suggesting that LCMs are constitutionally protected simply because there may be a lot of them in the United States. *See* CP 2190. The law, the evidence, and common sense all refute this misguided notion.

[6] The superior court also purported to "distinguish[]" *Evans* "by its facts," suggesting that *Evans* was merely about separating weapons from kitchen implements. CP 2182. But that limitation is found nowhere in *Evans*.

As a legal matter, whether LCMs are commonly *possessed* is not the relevant question. The question under *Evans* is instead whether LCMs are "weapons traditionally or commonly *used*" for "self-defense," *Evans*, 184 Wn.2d at 869 (emphasis added), which they are not.

Moreover, the superior court's misguided popularity-contest approach would mean that the legislature could regulate only rare weapons, even though rare weapons are not the ones causing problems. As the Seventh Circuit pointed out, Tommy guns were "all too common" during the Prohibition era, but this "popularity d[oes]n't give" dangerous military-style weapons "constitutional immunity." *Friedman*, 784 F.3d at 408. Indeed, it is precisely because machineguns—and now LCMs—became increasingly prevalent and increasingly associated with horrific crimes that governments stepped in to regulate them.[7] "It defies reason to say that legislatures can only ban a weapon if they ban

[7] As detailed below, this same pattern applies to a whole host of historical weapons regulations, from Bowie knives to slungshots to modern assault weapons. *Infra* at 58-71.

it at (or around) the time of its introduction, before its danger becomes manifest." *Ocean State Tactical*, 95 F.4th at 50. The superior court's reasoning also leads to the absurd conclusion that a firearm accessory's constitutionality waxes and wanes based on whether the gun industry chooses to engage in mass campaigns to flood the market. *See Oregon Firearms Fed'n*, 682 F. Supp. 3d at 915 (explaining how "firearm manufacturers and dealers make decisions that both limit consumer choice and magnify the commonality of LCMs"); *Capen*, 2023 WL 8851005 at *8 (rejecting argument that "the constitutionality of the regulation of different firearms would ebb and flow with their sales receipts"). Finally, "relying on how common a weapon is at the time of litigation would be circular," because a weapon's popularity often depends on whether it is banned or not. *Friedman*, 784 F.3d at 409; *see also Kolbe*, 849 F.3d at 141. By focusing on an objective analysis of whether a particular weapon or accessory is commonly or traditionally used for self-defense, *Evans*' use-based test largely avoids these obvious pitfalls.

Finally, as a factual matter, even if common ownership were the relevant metric, there is *zero* evidence in the record about how common LCM ownership actually is. Below, Gator's relied on unauthenticated, unreliable, and inadmissible hearsay for the contention that LCMs are supposedly common. CP 1029. And the superior court correctly sustained the State's hearsay objections to this material. CP 2169. Gator's did not appeal that ruling. As a result, there is no evidence in the record from which the superior court (or this Court) could infer that LCMs are commonly owned. Thus, even under Gator's own theory of the law, they have failed to meet their burden.

LCMs are not protected under article I, section 24.

2. SB 5078 Is a Constitutionally Reasonable Regulation

Even if Gator's were correct that section 24 presumptively protects the right to own LCMs, that is not the end of the inquiry. Rather, Gator's would still need to show that SB 5078 is

constitutionally unreasonable in all its applications. *Jorgenson*, 179 Wn.2d at 155. They cannot.

The rights guaranteed by article I, section 24 are not unlimited, but "are subject to reasonable regulation pursuant to the State's police power." *Id*. Specifically, "a constitutionally reasonable regulation is one that is reasonably necessary to protect public safety or welfare, and substantially related to legitimate ends sought." *Id.* (cleaned up). Courts therefore must "balanc[e] the public benefit from the regulation against the degree to which it frustrates the purpose of the constitutional provision." *Id.* SB 5078 amply satisfies this standard: it is a reasonable, evidence-based law designed to increase public safety that places little if any burden on the right to bear arms in self-defense.

Turning first to the public benefits, SB 5078 serves a critical public safety goal. The Legislature justified SB 5078 with specific factual findings, which are owed "great deference." *Wash. 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). Here, the Legislature concluded that restricting the sales of LCMs results in fewer mass shootings, far fewer mass shooting deaths, and increased public safety generally. Engrossed Substitute S.B. 5078, 67th Leg., Reg. Sess., § 1 (Wash. 2022); *see also supra* 5-6 (quoting SB 5078). Gator's offered *no evidence* below that would undermine the Legislature's factual conclusions about the public safety benefits of SB 5078, let alone any evidence to overcome the great deference this Court owes those findings. *See Wash. Off Highway Vehicle All.*, 176 Wn.2d at 236; *Jorgenson*, 179 Wn.2d at 149. Indeed, as detailed above, the record evidence bears out the Legislature's finding that LCMs are disproportionately used in mass shootings and make such shootings more lethal. *Supra* at 6-12.

The second part of the *Jorgenson* analysis focuses on whether SB 5078 frustrates the right to bear arms in self-defense. As detailed above, it does not. LCMs do virtually nothing to enhance a person's ability to protect themselves, given that no firearm requires an LCM to function and it is at best extraordinarily rare for someone to fire more than 10 rounds in self-defense. *Supra* at 15-18. "Given the lack of evidence that LCMs are used in self-defense, it reasonably follows that banning them imposes no meaningful burden on the ability of . . . residents to defend themselves." *Ocean State Tactical*, 95 F.4th at 45; *see also Capen*, 2023 WL 8851005, at *20 ("In short, and in simple terms, the limit on magazine capacity imposes virtually no burden on self-defense."). Gator's thus cannot show that Washington's law unreasonably frustrates Washingtonians' ability to defend themselves.

Under this Court's binding precedent, SB 5078 easily passes constitutional muster. But the superior court *refused* to apply that binding precedent, asserting 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. CP 2184-86. Thus, the superior court reasoned, *Jorgenson*'s analysis must give way to subsequent U.S. Supreme Court precedent. CP 2128 This was error: it flatly contradicts *Jorgensen*'s clear holding.

In *Jorgenson*—decided three years after *Sieyes*—this Court 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). 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 refused to apply—differed from the federal Supreme Court's "reject[ion] . . . of a "freestanding 'interest-

balancing' approach." *Id.* at 156 (quoting *Heller*, 554 U.S. at 634). As this Court concluded: "we read the Washington Constitution's provisions independently of the Second Amendment." *Jorgenson*, 179 Wn.2d at 153. The superior court's conclusion that *Jorgenson* is no longer good law because of shifting federal standards was clearly wrong.

The superior court was equally wrong to reject *Jorgenson* on the theory that its "rational[e]" is cabined to "limited-in-time, or limited person, restriction[s]." CP 2186. *Jorgenson* instead reaffirmed a test for evaluating *all* claims brought under section 24, not merely Mr. Jorgenson's particular case. This Court explained: "We have long held that the firearm rights guaranteed by the Washington Constitution are subject to reasonable regulation," and that "a constitutionally reasonable regulation is one that is 'reasonably necessary to protect public safety or welfare, and substantially related to legitimate ends sought.'" *Jorgenson*, 179 Wn.2d at 155-56 (quoting *Montana*, 129 Wn.2d at 594). Nowhere did this Court suggest that this holding was

limited to a certain subclass of weapons regulations. Rather, the Court's explicit reliance on *City of Seattle v. Montana* shows otherwise, because *Montana* upheld Seattle's ban on carrying fixed-blade knives—i.e., a generally applicable law that banned the carrying of an entire class of weapons. 129 Wn.2d at 595, *abrogated in part on other grounds by Yim v. City of Seattle*, 194 Wn.2d 682, 451 P.3d 694 (2019). In *Jorgenson*, this Court relied on *Montana* extensively in its section 24 analysis, clearly showing that the *Jorgenson* standard applies to generally applicable laws. *See Jorgenson*, 179 Wn.2d at 150, 153, 154, 155, 156, 157 (repeatedly quoting and citing *Montana*). The test announced by *Jorgenson* applies to cases brought under article I, section 24 regardless of the particular facts.

In light of the overwhelming evidence that LCMs are force multipliers in the hands of mass shooters and offer virtually no benefit for self-defense, the Legislature acted reasonably in concluding that restricting sales of new LCMs was reasonably necessary to protect public health and safety. *Cf. Friedman*, 784

F.3d at 412 ("The best way to evaluate the relation among assault weapons, crime, and self-defense is through the political process and scholarly debate . . . .").

The superior court's ruling that SB 5078 violated article I, section 24 should be reversed.

C. SB 5078 Complies with the Second Amendment

In *Bruen*, the U.S. Supreme Court announced a new two-step test for Second Amendment claims: "[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 Second Amendment claim fails at both steps.

Under *Bruen* step one, Gator's has failed to demonstrate that LCMs are self-defensive "arms" protected by the Second Amendment's text. But even if it could do so, SB 5078's

restriction on LCMs' manufacture and sale fits comfortably within the United States' historical tradition at *Bruen* step two.

1. LCMs Are Not Arms

a. LCMs are accessories

Gator's Second Amendment claim fails at *Bruen* step one for the same reasons its section 24 claim fails under *Evans*: LCMs are not arms, and certainly not arms commonly used for self-defense.

The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. In *Heller*, the U.S. Supreme Court defined "arms" as "'[w]eapons of offence, or armour of defence'" or "any thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another." 554 U.S. at 581 (quoting Founding-era sources). As detailed above, LCMs are not themselves "[w]eapons of offence, or armour of defence," nor are they used "to cast at or strike another." *Ocean State*

Tactical, 646 F. Supp. 3d at 385-86. They are merely a subclass of "ammunition feeding device[s]"—i.e., accessories. *Oregon Firearms Fed'n*, 682 F. Supp. 3d at 911.

This distinction between arms and accessories reflects how the Second Amendment would have been understood at the time of the Founding and the Fourteenth Amendment—two key time periods relevant to the historical understanding of the Second Amendment. *Bruen*, 597 U.S. at 37-38; *McDonald*, 561 U.S. at 778 (plurality op.) (focusing on how "the *Framers and ratifiers of the Fourteenth Amendment*" understood the right to bear arms); *see also* CP 1409, 1411-1412. In the most authoritative research available on this subject, Professor Dennis Baron has applied a corpus linguistics analysis—essentially, "[a]nalyzing the usage of [a] word or phrase in as many sources as possible [to] permit[] language scholars to understand how the word or phrase was used to convey meaning"—to determine whether English speakers during the Founding and Reconstruction Eras would have understood the term "arms" to

include magazines or related instruments like cartridge boxes. CP 1409, 1414-20; *cf. Facebook, Inc. v. Duguid*, 592 U.S. 395, 412 (2021) (Alito, J., concurring) (approving of the use of corpus linguistics to analyze "empirical" textual questions). As Professor Baron explains, "in the vast majority of [historical] examples, arms referred to weapons. Arms generally did not include ammunition or other weapon accessories, including the cartridge box, the historical analogue to the magazines." CP 1403, 1420. Put another way, magazines do not come within the Second Amendment's definition of "arms," as the Framers and ratifiers would have understood it. For this reason, LCMs—like other firearm accessories—do not fit the U.S. Supreme Court's definition of "arms."

Against Professor Baron's analysis, Gator's submitted no contrary historical evidence. Without any historical basis to construe "arms" to include LCMs, the superior court's contrary finding flies in the face of the *Bruen* Court's direction that "the Second Amendment's definition of 'arms' is fixed according to

its historical understanding." *Bruen*, 597 U.S. at 28. *See also* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849, 856-57, 861 (1989) (explaining that "plumb[ing] the original understanding of an ancient text . . . requires the consideration of an enormous mass of material" from contemporaneous sources, "an evaluation of the reliability of that material," and "immersing oneself in the political and intellectual atmosphere of the time"). Gator's bore the burden to prove that LCMs are "arms" as that term is historically understood, and Gator's failed to carry that burden. The superior court's blithe rejection of the only evidence in the record on this issue was error.

Restrictions on LCMs also do not, as described above, otherwise infringe individuals' right to bear arms. For example, in *Jackson v. City and County of San Francisco*, the Ninth Circuit explained that although the Second Amendment "does not explicitly protect ammunition, . . . without bullets, the right to bear arms would be meaningless," and thus "[a] regulation

eliminating a person's ability to obtain or use ammunition" would infringe upon the Second Amendment right by "mak[ing] it impossible to use firearms for their core purpose." 746 F.3d 953, 967-68 (9th Cir. 2014)*, abrogated on other grounds by Bruen,* 591 U.S. 1 (2022). Similarly, because many (albeit not all) modern firearms use magazines, it is possible that a restriction on *all* magazines would infringe on the right to bear arms because it would make the weapons that rely on them unusable. But LCMs are not necessary for *any* weapon to fire exactly as intended. *Supra* at 26-27. As a result, the Second Amendment does not apply at all to LCMs, and Gator's claim again fails at the threshold. Simply put, a law restricting magazine capacity no more infringes the right to bear arms than a law restricting vehicle speed or emissions infringes the right to travel. *Cf. Saenz v. Roe*, 526 U.S. 489, 119 S.Ct. 1518, 143 L.Ed.2d 689 (1999) (upholding fundamental right to travel).

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

Gator's Second Amendment claim fails at *Bruen*'s first step for a second, independent reason: like article I, section 24 of the Washington Constitution, the Second Amendment does not cover every conceivable weapon, from clubs to missiles. Instead, it only covers arms that are commonly used for self-defense. It does not afford a right to keep and bear military-style weapons, including firearms equipped with LCMs.

The Second Amendment "secures for Americans a means of self-defense." *Rahimi*, 2024 WL 3074728, at *5. "'[L]ike most rights, the right secured by the Second Amendment is not unlimited . . . [it] was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.'" *Bruen*, 597 U.S. at 21 (quoting *Heller*, 554 U.S. at 626); *see also Bruen*, 597 U.S. at 2157 (Alito, J., concurring) (*Bruen* does not call into question restrictions on "the kinds of weapons that people may possess"). *Bruen* embraced the "historical tradition of prohibiting the carrying of 'dangerous and

unusual weapons.'" 597 U.S. at 21 (quoting *Heller*, 554 U.S. at 627). As the *Heller* Court explained, at the time of the Founding, "[t]he traditional militia was formed from a pool of men bringing arms 'in common use at the time' for lawful purposes like self-defense." 554 U.S. at 624. It was "these kinds of weapons (which have changed over the years) [that] are protected by the Second Amendment in private hands, while military-grade weapons (the sort that would be in a militia's armory), such as machineguns, and weapons especially attractive to criminals, such as short-barreled shotguns, are not." *Friedman*, 784 F.3d at 408 (citing *Heller*, 554 U.S. at 624–25). *Heller* thus acknowledged that "weapons that are most useful in military service—M–16 rifles and the like—may be banned . . ." 554 U.S. at 627; *see also Kolbe*, 849 F.3d at 131 (same); *Bevis*, 85 F.4th at 1193 (same). This "important limitation on the right to keep and carry arms" remains critical to understanding the Second Amendment. *Bruen*, 597 U.S. at 81 (Kavanaugh, J., concurring). And it is fatal to Gator's core premise in this case, as multiple courts have

recognized. *Bevis*, 85 F.4th at 1179; *Hanson*, 671 F. Supp. 3d at 11-14; *Oregon Firearms Fed'n*, 682 F. Supp. 3d at 922-23; *Nat'l Ass'n for Gun Rights*, 685 F. Supp. 3d at 102-03; *see also Kolbe*, 849 F.3d at 144; *Friedman*, 784 F.3d at 412.

Heller and *Bruen* place the burden on Gator's to show that LCMs are in common use for self-defense. *See Bruen*, 597 U.S. at 32 (quoting *Heller*, 554 U.S. at 627) (explaining that the plain text of the Second Amendment, as understood by the Founders, only covers "weapons 'in common use' today for self-defense"); *see also United States v. Alaniz*, 69 F.4th 1124, 1128 (9th Cir. 2023) ("In alignment with *Heller*, [*Bruen* step one] requires a textual analysis, determining," among other things, "whether the weapon at issue is 'in common use' today for self-defense."). Gator's has comprehensively failed to carry its burden. The undisputed evidence in this record shows that LCMs are not commonly used for self-defense. *Supra* at 7-8. Rather, consistent with their purpose of "enhanc[ing] a shooter's capacity to shoot multiple human targets very rapidly," *Kolbe*, 849 F.3d at 125,

LCMs are unusually dangerous accessories "that are most useful in military service." *Heller*, 554 U.S. at 627. They are therefore not protected by the Second Amendment.

2. SB 5078 Fits Well Within the History and Tradition of Regulating Weapons Used in Criminal Violence in the United States

Even if LCMs were covered by the Second Amendment's text, Gator's challenge would fail at *Bruen* step two because SB 5078 "is consistent with the Nation's historical tradition of firearm regulation." 597 U.S. at 24. The "historical tradition" portion of the *Bruen* test follows from the Second Amendment's codification of a preexisting right, *see Heller*, 554 U.S. at 592, 603; *Bruen*, 597 U.S. at 20, 25, 34, 50. Particularly in a case like this, where government regulation responds to technological change and unprecedented societal concerns, this historical analysis requires a "nuanced approach," focusing on "whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified." *Bruen*, 597 U.S. at 27, 29. The "analogical

reasoning requires only that the government identify a well-established and representative historical *analogue*, not a historical *twin*." *Id.* at 2133; *see also Rahimi,* 2024 WL 3074728, at *6 ("The law must comport with the principles underlying the Second Amendment, but it need not be a 'dead ringer' or a 'historical twin.'").

SB 5078 responds to the recent proliferation of LCMs. This distinctly modern phenomenon has increased the rate of mass shootings and, even more dramatically, increased their lethality. The history and tradition of the United States includes numerous examples of laws exemplifying the principle that legislatures may restrict the use of weapons disproportionately used in criminal violence. Thus, courts around the country have repeatedly concluded that even if LCMs were presumptively protected by the text of the Second Amendment (which they are not), prohibiting their manufacture, import, and sale is well within the historical tradition of the United States.

a. *Bruen* requires analogous historical laws, not historical twins

Obviously, LCMs did not exist in 1791 when the Second Amendment was ratified, or in 1868 when the Fourteenth Amendment was ratified. *See* CP 1611-30 (documenting history of firearms development from the Reconstruction era through to the early 1900s). "[S]emi-automatic weapons did not become 'feasible and available' until the beginning of the twentieth century, with the primary market being the military." *Oregon Firearms Fed'n v. Brown*, 644 F.Supp.3d 782, 803 (D. Or. 2022). *See also* CP 1383. "LCMs did not come factory-issued with more than five percent of firearm models until 1984." *Oregon Firearms Fed'n*, 682 F. Supp. 3d at 926; *see also* CP 1383-1388 (magazine capacities were typically no more than ten rounds into the mid-twentieth century).

The mere fact that impractical and experimental multi-shot weapons were developed earlier does not impact this analysis. There is no dispute that such weapons were never popular, owing to their inherently flawed designs. *See* CP 1611-1617. So, while

it is certainly true that multi-shot weapons have been a goal for weapons designers for a very long time, it was not until after the Civil War that the first practical repeaters achieved civilian popularity, and longer still until multi-shot weapons with capacities larger than ten rounds became popular in the civilian marketplace. CP 1619-1621.

These developments, which enabled civilians to wield weaponry capable of killing more people more quickly than ever before, contributed directly to unprecedented increases in the frequency and lethality of mass shootings. *Oregon Firearms Fed'n*, 644 F. Supp. 3d at 803-04; *see also* CP 1876-83, *supra* at 8-10. And it quickly led to a wide range of laws restricting such weapons, as detailed in the next section.

In a case like this, where elected policymakers respond to recently developed technology and distinctly modern challenges, *Bruen* requires a "nuanced approach" in which direct historical precedent is not required. *See* 597 U.S. at 27; *Ocean State Tactical*, 95 F.4th at 44 (applying *Bruen's* "nuanced approach"

to LCM restriction "since the record contains no evidence that American society previously confronted—much less settled on a resolution of" the problem of "the increasing frequency of LCM-aided mass shootings").

The *Bruen* Court was clear that when reasoning by analogy to evaluate whether an historical law is relevantly similar to a modern one, courts must examine how the law burdens rights to armed self-defense and *why* historical legislatures chose to adopt it. *Bruen*, 597 U.S. at 29-30; *see also Rahimi*, 2024 WL 3074728, at *6 ("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.' . . . Why and how the regulation burdens the right are central to this inquiry.") (quoting *Bruen*, 597 U.S. at 24) (first alteration in *Rahimi*). Under *Bruen*, this court must evaluate whether SB 5078 is consistent with the history and tradition of the United States, "even if [it] is not a dead ringer for historical

precursors." *Bruen*, 597 U.S. at 30; *see also Rahimi*, 2024 WL 3074728, at *9-*10 (concluding that provision disarming certain domestic abusers was relevantly similar to—if "by no means identical to"—historical analogues because it responded to a similar problem and imposed similar burdens).

b. States have long regulated particularly dangerous weapons used for lawless violence

SB 5078 follows "an unbroken tradition" since at least the Founding "of regulating weapons" associated with unlawful violence to protect community safety. *Bevis*, 85 F.4th at 1179. The same basic pattern has repeated itself throughout American history. First, someone invents a weapon, which initially has no significant impact on society. CP 1594. If the technology can be readily manufactured and works as intended, the military will often adopt it. *Id.* Afterward, military-style weapons often wind up on the commercial market and pass into civilian use. *Id.* If so, they sometimes contribute to criminal violence that terrorizes the public. *Id.* Here is where, time and again, states decide to regulate

these sorts of weapons. CP 1630-34, 1597-1610.

A full consideration of the history of the United States shows that there is a well-established tradition of regulating dangerous weapons when their proliferation leads to widespread societal problems. Weapons regulations that follow this pattern are useful analogues to SB 5078 because they are "comparably justified" as a response to changing technology and new threats of violence and terror, and they "impose a comparable burden on the right of armed self-defense" by regulating especially dangerous weapons while leaving law-abiding citizens free to possess other weapons appropriate for self-defense. *Bruen*, 597 U.S. at 29.

i. Regulations on trap guns and clubs

Some of America's earliest weapons regulations concerned "trap guns," which were "devices or contraptions rigged in such a way as to fire when the owner need not be present." CP 1609. New Jersey prohibited setting trap guns in 1771, and 15 more states followed between then and 1925,

including Washington in 1909. CP 1838-1847; *see also Oregon Firearms Fed'n*, 644 F. Supp. 3d at 804 n.19 ("[N]ine states enacted anti-trap gun laws in the 1700s and 1800s."). New Jersey enacted its 1771 law because "a most dangerous Method of setting Guns has too much prevailed in this Province." CP 1609. Trap guns were set for core self-defense purposes, such as "to defend [] places of business, properties, or possessions." CP 1610. Nonetheless, the weight of public opinion was against them "because of the likelihood that innocent persons could be injured or killed, and also because such devices represented an improper, arbitrary, and excessive meting out of 'justice.'" CP 1610.

Even older are laws regulating clubs and other bludgeoning instruments. Perhaps the simplest weapon technologically, these sorts of arms include billy clubs, slungshots (a flexible strap with a rock or piece of metal at one end), and sandbags (a fabric bag filled with sand or rocks). CP 1604-1609. American restrictions on these sorts of weapons

predate the Second Amendment and "[six] states enacted these laws between 1750 and 1799." CP 1606. Eventually, "every state in the nation had laws restricting one or more types of clubs," owing to their widespread use in criminal violence. CP 1605 (noting widespread opprobrium for bludgeoning instruments). Slungshots in particular "were viewed as especially dangerous or harmful when they emerged in society, given the ubiquity of state laws enacted after their invention and their spreading use by criminals and as fighting implements." CP 1607. "Forty-three states enacted nearly eighty anti-slungshot laws between 1850 and 1900," sometimes outlawing them entirely. *Del. State Sportsmen's Ass'n*, 664 F. Supp. 3d at 600.

These laws restricting trap guns and clubs "are relevantly similar" to modern regulations restricting the sale, manufacture, and import of LCMs because they focus narrowly on specific weapons associated with lawless violence and do not substantially burden lawful self-defense with the wide variety of

lawful arms appropriate for this purpose. *Oregon Firearms Fed'n*, 682 F. Supp. 3d at 929-30.

ii. Regulations on Bowie knives and pistols

The history and tradition of regulating weapons associated with criminal violence continued into the 19th and 20th centuries with regulations of Bowie knives and pistols, among others.

Knives are obviously very old, with a wide variety of knives having been utilized throughout human history for various purposes. But in the 1830s, the "Bowie knife" became popular after Jim Bowie used the distinctive knife to kill one man and injure another "in a duel that turned into a melee and became the subject of nationwide news coverage." CP 1353, 1597-58; *Del. State Sportsmen's Ass'n, Inc.*, 664 F. Supp. 3d at 600. The knives "were widely used in fights and duels, especially at a time when single-shot pistols were often unreliable and inaccurate." CP 1598, 1353-54. The proliferation of Bowie knives, and their subsequent widespread criminal usage, "gave rise to the widespread adoption of laws barring or restricting these

weapons." CP1599-1600; *see also Capen*, 2023 WL 8851005 at *22 ("Bowie knives, in particular, were extensive and ubiquitous, and were subject to regulation by 49 states because of the dangers they posed to ordinary citizens.") (cleaned up). Starting in the 1830s and ending around the start of the twentieth century, "every state" except New Hampshire "restricted Bowie knives." CP 1600. Fifteen states "all but banned the possession of Bowie knives outright (by banning both concealed and open carry)," while others taxed their acquisition or possession, often prohibitively. CP 1600, 1702-05, 1744-1837, 1852-54. "[T]hese taxes were clearly designed to discourage trade in and public carry of" Bowie knives. CP 1371. Alabama, for example, imposed a $100 tax ($3,369.28 today)[8] for each Bowie knife transfer, including gifts. CP 1744-45. Still other jurisdictions entirely banned the sale or possession of Bowie knives. Georgia, for example, made it unlawful "to sell, offer to sell, or to keep,

[8] *See* MeasuringWorth.com, (last visited July 10, 2024).

or to have about their person or elsewhere" a Bowie knife. CP 1764 (1837 Ga. Acts 90, § 1). Tennessee made it a misdemeanor to "sell, or offer to sell . . . any Bowie knife." CP 1819 (citing 1837–1838 Tenn. Pub. Acts 200, ch. 137 § 1).

The trial court discounted this history because laws about Bowie knives are not "firearm regulations" but about knives instead. CP 2149. This is not a legally relevant distinction. The Second Amendment protects the right to "keep and bear arms," including knives—not the right to "keep and bear firearms." U.S. Const., amend. II. *Bruen* itself noted that fighting knives and daggers were commonly used for self-defense prior to the availability of modern handguns. 597 U.S. at 41; *see also* CP 1353 ("Prior to the widespread availability of revolvers near the mid-nineteenth century, large knives were considered the most dangerous weapon around."). The trial court also observed that "[n]one of these laws appear to have completely prohibited ownership," CP 2149, while ignoring that SB 5078 *likewise* does not prohibit the ownership of LCMs, and that at least two of the

cited laws completely prohibited the sale of Bowie knives in a very similar manner to SB 5078's prohibition on the sale, manufacture, and import of LCMs. CP 1764, 1819.

The regulatory pattern of restricting certain dangerous weapons repeated when multi-shot revolvers appeared. While Colt's revolver achieved the technological capability of firing multiple shots without reloading as early as the 1830s, the gun did not become popular until after the Civil War, once it reached the civilian market. CP 1618-19 ("[O]nce revolvers began to spread from the military to the civilian market following the Civil War, and became associated with lawless violence, they were swiftly met by laws and regulations aimed at curbing their possession and use."); CP 1359 ("[After the Civil War] [m]anufacturers turned to the civilian market, promoting revolvers to potential buyers across the country."). When that happened, revolvers "overtook dirks and bowie knives as the weapon considered most problematic in American communities." CP 1357. State and local governments responded

with regulations to discourage the carrying and use of such guns. CP 1367-68, 1618-19. Tennessee and Arkansas completely prohibited the sale of easily concealed pistols in the late 1800s, complementing the public-carry restrictions, prohibitive tax rates, and other laws regulating pistols that were common throughout the United States. CP 1376, 1697-1700; *Oregon Firearms Fed'n*, 682 F. Supp. 3d at 932 ("[B]y the early twentieth century, there was some form of anti-concealed carry law passed in every state or territory, or cities within those states or territories, except for New Hampshire.").

These laws are "relevantly similar" to modern LCM restrictions because they "place a comparable burden on the right to armed self-defense" by leaving numerous other weapons and accessories suitable for self-defense available to civilians, and because "[t]he justifications underpinning these regulations are relevantly similar." *Id.* at 931 (finding historical Bowie knife regulations relevantly similar to LCM regulations), 932 (same for historical pistol regulations). SB 5078 is actually less

restrictive than many of the historical Bowie knife regulations, because Washington does not prohibit the possession or carry of LCMs that Washington residents lawfully possess—nor does it ban a category of weapons, but only restricts one type of accessory that expands firearms' rapid-fire capacity. SB 5078 is well supported by analogous historical weapon regulations.

iii. Regulations on automatic and semi-automatic weapons

Automatic and semi-automatic weapons were introduced into America's civilian marketplace after being adopted by the military during World War I, and quickly became the subject of a nationwide effort to restrict their possession and use. CP 1621-1634. The Thompson submachinegun (Tommy Gun) was first marketed to civilians in the United States starting in the 1920s, and it was advertised as the "ideal weapon for the protection of large estates, ranches, plantations, etc." CP 1626. Despite its marketing as a defensive weapon, the Tommy Gun became known for its ability to murder a large number of people

quickly, most infamously in the St. Valentine's Day massacre of 1929. CP 1625.

Reacting to these new, dangerous, and suddenly widely available weapons, 32 states enacted anti-machinegun laws between 1925 and 1934. CP 1630. Many of these laws regulated semi-automatic weapons in addition to automatics, often using magazine capacity as the metric to distinguish between regulated and unregulated weapons. CP 1630-31. "In fact, magazine capacity/firing limits were imposed in at least 23 states, representing approximately 58% of the American population at that time." CP 1633. And at the federal level, the National Firearms Act has also banned machineguns since 1934. 18 U.S.C. § 922(o).

These restrictions were and are undoubtedly consistent with the Second Amendment: in *Heller*, the Supreme Court found the hypothetical suggestion that "restrictions on machineguns . . . might be unconstitutional" to be "startling." *Heller*, 554 U.S. at 624; *see also Capen*, 2023 WL 8851005 at

*12–13 ("[T]he Second Amendment does not protect either short-barreled shotguns or machine guns.").

And, of course, responding to the same modern phenomenon of mass shootings that SB 5078 responds to, Congress in 1994 enacted a sweeping ban on assault weapons that included a prohibition on the sale and possession of "large capacity ammunition feeding devices," defined as "a device that has a capacity of . . . more than 10 rounds of ammunition," manufactured after the law went into effect. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 1101103, 108 Stat. 1998; *see also* CP 1595. This was the prevailing law in the United States for ten years, before it was allowed to expire. *Id.* § 110105. Today, "fourteen states plus the District of Columbia restrict LCMs." CP 1596. About 34.5 percent of the United States population—115 million people—live in jurisdictions that restrict LCMs. CP 1596.

These laws from the twentieth century "confirm[] the historical traditions from the eighteenth and nineteenth

centuries" showing that weapons associated with criminal violence are subject to reasonable regulation. *See Oregon Firearms Fed'n*, 682 F. Supp. 3d at 934. These twentieth-century measures—which are consistent with and represent a continuation of the longstanding American tradition of regulating weapons like trap guns, clubs and other bludgeons, Bowie knives, and pocket pistols—are particularly relevant because they show how America treated automatic and semiautomatic weapons shortly after those items began to spread into the civilian market. Not one of these laws was ever ruled unconstitutional, and they form part of the "regular course of practice" that can "liquidate & settle the meaning of" the Second Amendment. *Hanson*, 671 F. Supp. 3d at 23 (quoting *Bruen*, 597 U.S. at 35-36). They are, of course, also very closely analogous to SB 5078.

3. SB 5078 is consistent with the historical tradition of weapons regulation

The undisputed evidence shows that SB 5078 is consistent

with the history and tradition of weapons regulation in the United States. The State Defendants' three expert historians contextualize and explain the broad contours of weapons regulation in the United States, and show that the above-summarized historical regulations are analogous to SB 5078. *See generally* CP 1343-97, 1438-1501, 1586-1865.

Gator's "cannot dispute the existence of this enduring American tradition" of regulating weapons most suitable for military uses. *Bevis*, 85 F.4th at 1200. And it is no answer to argue that the Founding Generation did not pass laws limiting ammunition capacity, because guns did not commonly come with magazines in excess of 10 rounds until 1984—and even then only *five percent* of semiautomatic weapons came standard with magazines capable of holding more than ten rounds. *Oregon Firearms Fed'n*, 682 F. Supp. 3d at 893. Ten years later, Congress prohibited such magazines. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 1101103, 108 Stat. 1998. Congress's action in 1994 echoes earlier state

legislation from the Prohibition Era limiting magazine capacity shortly after fully automatic firearms became a technological and commercial reality. *See* CP 1633. It makes sense that these regulatory actions did not occur until magazine capacity size actually became an issue warranting regulation. *See Rahimi*, 2024 WL 3074728, at *13 (Sotomayor, J., concurring) (rejecting dissent's approach, under which "the legislatures of today would be limited not by a distant generation's determination that such a law was unconstitutional, but by a distant generation's failure to consider that such a law might be necessary."); *id* at *30 (Barrett, J., concurring) (holding that "imposing a test that demands overly specific analogues" "assumes that founding-era legislatures maximally exercised their power to regulate, thereby adopting a 'use it or lose it' view of legislative authority.").

And while it is undisputed that certain curio weapons that can shoot multiple times without reloading have been in existence for hundreds of years, it is also undisputed that such weapons never proliferated widely in society, and thus no

legislature ever had reason to regulate them. *See* CP 1611-1618. The historical fact is that when weapons start causing problems, legislatures respond with regulation. *Bevis*, 657 F. Supp. 3d at 1068–1072 (surveying weapons regulations including regulations on trap guns, Bowie knives, and semiautomatic weapons).

This unrebutted historical evidence shows conclusively that SB 5078 is consistent with the history and tradition of regulating trap guns and blunt weapons at the founding, Bowie knives and pistols in the mid-1800s, machineguns during the Prohibition era, and assault weapons in recent decades. Each of these laws burdened rights of armed self-defense at least as much as SB 5078—that is to say, not much—by making it impossible, or very inconvenient, to use a particular kind of weapon or accessory, or to fire a weapon more than a certain number of times without reloading. But, like SB 5078, they left numerous effective weapons and accessories fully available for civilians' use for self-defense. And, also like SB 5078, they targeted only

particularly dangerous weapons or weapon uses associated with criminal violence. Thus, SB 5078 imposes comparable burdens on the right to armed self-defense as these historical analogues, and is comparably justified, satisfying *Bruen*'s second step.

Multiple courts have reached the same conclusion, relying on the historical tradition outlined above. *Oregon Firearms Fed'n*, 682 F. Supp. 3d at 935 (upholding Oregon LCM law under *Bruen* step two after trial); *Hanson*, 671 F. Supp. 3d at 24-25 (holding Prohibition-era regulations were appropriate analogue for District of Columbia LCM law); *Bevis*, 85 F.4th at 1201-02 (relying on Bowie knife regulations, blunt-weapon regulations, and machinegun regulations, among others, to find Illinois LCM regulation was consistent with United States history and tradition); *Herrera*, 670 F. Supp. 3d at 675-76 (same); *Del. State Sportsmen's Ass'n*, 664 F. Supp. 3d at 600-03 (same, as to Delaware LCM law); *Nat'l Ass'n for Gun Rights*, 685 F. Supp. 3d at 112 (same, as to Connecticut LCM law); *Capen*, 2023 WL 8851005, at *20 (same, as to Massachusetts

LCM law; "[T]he Court finds that the prohibition on LCMs in the Act comports with the nation's historical tradition of weapons regulations."); *Ocean State Tactical*, 95 F.4th at 46 ("[I]t seems reasonably clear that our historical tradition of regulating arms used for self-defense has tolerated burdens on the right that are certainly no less than the (at most) negligible burden of having to use more than one magazine to fire more than ten shots."); *see also e.g.*, *Hartford v. Ferguson*, 676 F. Supp. 3d, 897, 904-07 (D. Wash. 2023) (relying on trap gun, Bowie knife, blunt weapon, pistol, and machine gun regulations in finding challenge to Washington's assault weapon sales ban unlikely to succeed at *Bruen* step two).

The superior court, however, chose to ignore this well-established pattern, and focus only on regulations in effect in 1791, when the Second Amendment was enacted. CP 2141, 2143. But *Bruen* simply does not require—or even permit—courts to ignore the vast majority of U.S. history in this way. Instead, as the Supreme Court emphasized just last month, the

Second Amendment is not "a law trapped in amber." *Rahimi*, 2024 WL 3074728 at *6. While courts "must [] guard against giving postenactment history more weight than it can bear," *Bruen*, 597 U.S. at 35, where—as here—more recent history confirms (rather than contradicts) public understanding at the time of ratification, such history is part of the "regular course of practice," which "can liquidate & settle the meaning of disputed or indeterminate terms & phrases in the Constitution," *id.* at 35-36 (quoting *Chiafalo v. Wash.*, 591 U.S. 578, 593, 140 S.Ct. 2316, 207 L.Ed.2d 761 (2020)) (internal quotation marks and citations omitted). Such history includes late nineteenth century and twentieth century history that builds upon and is consistent with earlier practices. *Hanson*, 671 F. Supp. 3d at 22-23; *Ocean State Tactical*, 95 F.4th at 52 (rejecting "assertion that the laws regulating sawed-off shotguns, Bowie knives, and M-16s provide no insight into our Nation's historical tradition of firearm regulation") (quotation omitted). Any other approach would impose the "regulatory straightjacket" that the *Bruen*

Court explicitly rejected. 597 U.S. at 30. Indeed, the superior court basically recognized as much, musing that, under its reading of *Bruen*, "[t]he result is few, if any, historical analogue laws by which a state can justify a modern firearms regulation." *Id.* at 43. But the U.S. Supreme Court explicitly rejected this type of argument in *Rahimi*, concluding: just as "the reach of the Second Amendment is not limited only to those arms that were in existence at the founding[, … b]y that same logic, the Second Amendment permits more than just those regulations identical to ones that could be found in 1791." 2024 WL 3074728, at *6.

Simply stated, the superior court erred by demanding evidence of laws regulating magazine capacity before there were magazines. *See* CP 2149. SB 5078 is consistent with the history and tradition of firearms regulation in the United States, and it is therefore constitutional under the Second Amendment.

D. This Case Should be Reassigned on Remand

In the event this Court reverses the superior court's order overturning SB 5078, the case will need to be remanded to the

superior court to hear the State's consumer-protection enforcement action against Gator's for illegally selling thousands of LCMs after state law banned their sale. The case should be reassigned on remand. The State does not make this request lightly, but does so only because reassignment is essential to ensuring a fair proceeding going forward.

"[R]eassignment may be sought for the first time on appeal where, for example, the trial judge will exercise discretion on remand regarding the very issue that triggered the appeal and has already . . . expressed an opinion as to the merits, or otherwise prejudged the issue." *State v. McEnroe*, 181 Wn.2d 375, 387, 333 P.3d 402 (2014) (footnotes omitted). Similarly, "where review of facts in the record shows the judge's impartiality might reasonably be questioned, the appellate court should remand the matter to another judge." *State v. Solis-Diaz*, 187 Wn.2d 535, 540, 387 P.3d 703 (2017).

Here, the superior court has unquestionably expressed an opinion on the merits of, and prejudged, the State's efforts to

enforce SB 5078 against Gator's. Not only did the superior court erroneously rule that SB 5078 is unconstitutional in all of its applications, it did so under a Second Amendment theory that the court itself suggested, after Gator's initially declined to raise it themselves.[9] And in its opinion below, the superior court *sua sponte* raised two additional (meritless) theories under which, in its opinion, SB 5078 might be unconstitutional. CP 2135 n.17 (suggesting that SB 5078 "may implicate the [E]qual [P]rotection [C]lause"); CP 2136 n.20 (suggesting SB 5078 "seemingly implicates a possible full faith and credit issue").

[9] Gator's omission of a Second Amendment claim was intentional. When Gator's counsel (the Silent Majority Foundation) first sought to challenge SB 5078 in a different case, they asserted a Second Amendment theory, and the State promptly removed that case to federal court. Notice of Removal, ECF #1, *Brumback v. Ferguson*, Case No. 1:22-cv-03093 (E.D. Wash.). Since then, the Silent Majority Foundation has brought three additional lawsuits challenging Washington's firearms restrictions, and in each case has declined to plead Second Amendment claims, presumably to avoid removal. CP 1; *Guardian Arms v. Inslee*, Case No. 23-2-00377-13 (Grant Cnty.Sup. Ct, subsequently transferred to Thurston Cnty. Sup. Ct.); *Does 1-5 v. Inslee*, Case No. 23-2-00092-33 (Stevens Cnty. Sup. Ct., pending transfer to Thurston Cnty. Sup. Ct.).

Going forward, the superior court addressing the State's Consumer Protection Act (CPA) claims against Gator's will have significant discretion that this Court cannot "effectively limit[] . . . on remand." *McEnroe*, 181 Wn.2d at 387. While each of Gator's thousands of illegal LCM transactions constitutes a *per se* CPA violation, RCW 9.41.375—meaning the superior court will not have discretion with regard to finding violations—the trial court will have significant discretion in setting penalties, injunctive relief, and any other remedies for Gator's violation of the law. *See State v. Mandatory Poster Agency, Inc.*, 199 Wn. App. 506, 525, 398 P.3d 1271 (2017) ("We review the trial court's assessment of civil penalties within the [CPA's] statutory limits for an abuse of discretion."); *State v. Ralph Williams' N. W. Chrysler Plymouth, Inc.*, 87 Wn.2d 298, 313, 553 P.2d 423 (1976) ("The trial judge possesses broad discretion [to enjoin deceptive and unfair practices], and we will overturn the decision only if there is a strong showing of an abuse of discretion."); RCW 19.86.080(1) ("[T]he prevailing party may, in the

discretion of the court, recover the costs of said action including a reasonable attorney's fee . . ."). This alone is reason to reassign the case on remand.

Additionally, the superior court below has prejudged issues that will be relevant to its exercise of discretion. Courts in Washington consider "five factors . . . in determining the appropriate penalty for a CPA violation: (1) whether defendants acted in good faith, (2) injury to the public, (3) defendant's ability to pay, (4) desire to eliminate any benefits derived by the defendants from the violation at issue, and (5) necessity of vindicating the authority of the law enforcement agency." *Mandatory Poster Agency*, 199 Wn. App. at 526. The superior court below has already prejudged aspects of this test by determining that Gator's open disregard for Washington's statutory restriction on LCM sales was an exercise of fundamental rights, shielded by the state and federal constitutions, and conversely that the Attorney General's Office lacked authority to enforce the law.

The superior court judge's impartiality can also reasonably be questioned given certain rulings made below. For example, while expert evidence is critical to claims under article I, section 24 and the Second Amendment, the trial judge *sua sponte* threatened to strike the State's expert reports as irrelevant. RP 67:24-68:6. Similarly, instead of allowing the State a full and fair opportunity to conduct discovery, including discovery of the expert opinions Plaintiffs' put into the record, the trial judge short-circuited discovery and issued a rushed summary judgment schedule for no apparent reason. *See* CP 1007. His hostility toward SB 5078 was so obvious to Plaintiffs that they disclaimed any reliance on expert evidence even in the face of several expert reports submitted by the State. CP 1010. This would obviously not be a reasonable tactic before an impartial judge, and only made sense because it was clear that the trial court judge was going to strike down SB 5078 no matter what the evidence was.

Reassignment to a new judge is therefore warranted. *See Henderson v. Thompson*, 200 Wn.2d 417, 439, 440, 518 P.3d

1011 (2022) ("On remand, Henderson's case should be reassigned to a different judge in light of the opinions the judge has already expressed as to the reasons for Thompson's counsel's behavior, as well as the reasons Henderson was excluded from the courtroom when the jury returned its verdict."); *In re Marriage of Black*, 188 Wn.2d 114, 137, 392 P.3d 1041 (2017) (reassigning on remand where "evidence of bias casts doubt on the trial court's entire ruling").

V. CONCLUSION

For the foregoing reasons, the State of Washington respectfully requests that this Court reverse the superior court's grant of summary judgment to Gator's and its denial of summary judgment to the State as to the constitutionality of SB 5078, and that the Court remand to a new superior court judge for further proceedings.

This document contains 13,957 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 12th day of July 2024.

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