NO.

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

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

Respondents.

PETITIONER STATE OF WASHINGTON'S EMERGENCY MOTION TO STAY

ROBERT W. FERGUSON
Attorney General

ANDREW R.W. HUGHES, WSBA 49515
WILLIAM MCGINTY, WSBA 41868
R. JULY SIMPSON, WSBA 45869
Assistant Attorneys General
OID No. 91157
800 Fifth Ave, Suite 2000
Seattle, WA 98104
(206) 464-7744
Andrew.Hughes@atg.wa.gov
William.McGinty@atg.wa.gov
July.Simpson@atg.wa.gov
Counsel for State of Washington

BEN CARR, WSBA 40778
BOB HYDE, WSBA 33593
JOHN NELSON, WSBA 45724
Assistant Attorneys General
OID No.
800 Fifth Ave, Suite 2000
Seattle, WA 98104
(206) 464-7744
Ben.Carr@atg.wa.gov
Bob.Hyde@atg.wa.gov
John.Nelson@atg.wa.gov

I. INTRODUCTION

The State of Washington seeks an emergency stay of an order by the Cowlitz County Superior Court invalidating Senate Bill 5078 (SB 5078), Washington's restriction on firearm accessories with a disproportionate role in mass shootings: large capacity magazines (LCMs). Having flouted this law for nearly 18 months by illegally selling thousands of LCMs, Gator's Custom Guns and Walter Wentz (collectively, Gator's) belatedly sued, arguing that it is facially unconstitutional. This Court should stay the court's order enjoining SB 5078 because the factors for issuing a stay—whether there are debatable issues and a comparison of injury with or without the stay—strongly support a stay. *See* RAP 8.1(b)(3). The issues are more than debatable because the superior court's ruling is an extreme outlier: before this superior court, *every court* to consider a post-*Bruen* challenge to a large-capacity magazine restriction under the Second Amendment and/or article I, section 24 of Washington's Constitution has *rejected* that challenge—or been

overruled. LCMs are not arms protected by either the state or federal constitutions, and even if they were, restricting their sale is a reasonable regulation consistent with our nation's history.

The balance of equities sharply favors a stay. SB 5078 literally saves lives. And even a temporary pause in the law's effect will likely unleash a flood of LCMs in Washington—as happened in California when a similar law was enjoined for a week, until the Ninth Circuit stayed the injunction. By contrast, Respondents would not be harmed because there is no constitutional right to buy or sell military-style LCMs. And because they waited over a year to bring suit—during which they flagrantly violated the law rather than seeking relief in Court—they cannot claim harm from a brief stay.

II. STATEMENT OF RELIEF SOUGHT

The State requests this Court stay the superior court's order pending appeal. The State further requests that this Court issue its decision on this emergency motion today, April 8, 2024.

Prior to the hearing, the State wrote to Gator's, informing them of the State's intent to seek a stay of any trial court order invalidating SB 5078. Declaration of William McGinty, Ex. A. Counsel for the State asked for an agreement to stay any trial court order invalidating the law to allow the State time seek a stay pending appeal on a non-emergency basis. *Id.* Gator's counsel declined. *Id.*, Ex. B.

III. STATEMENT OF THE CASE

SB 5078 became effective July 1, 2022. The Legislature adopted SB 5078 after "find[ing] that restricting the sale, manufacture, and distribution of large capacity magazines is likely to reduce gun deaths and injuries" without "interfere[ing] with responsible, lawful self-defense." Laws of 2022, ch. 104, § 1. Shortly after the law went into effect, two groups of plaintiffs sued, challenging its constitutionality. *Sullivan, et al. v. Ferguson, et al.*, Case No. 3:22-cv-05403-DGE (W.D. Wash.); *Brumback, et al. v. Ferguson, et al.*, Case No. 1:22-cv-03093-MKD (E.D. Wash.).

Gator's did not. Instead, it continued to sell LCMs illegally in massive quantities, knowingly violating the law. *See* App. 67-68. More than once, Gator's illegally sold LCMs to an undercover investigator. App. 72-73. One investigator "observed barrels and boxes of LCMs in Defendants' retail store advertised for public sale, and obtained records showing that Gator's ordered well over *11,000* LCMs for sale in Washington, after SB 5078 went into effect." App. 74-75.The Washington Attorney General's Office issued a civil investigative demand to Gator's in July 2023. App. 15.

In response, on August 21, 2023, Gator's petitioned to set aside the CID (Petition). App. 1. In Gator's words, the Petition "challenge[d] the constitutionality of ESSB 5078 under Wash. Const. art. I § 24." App. 6. On September 12, 2023, the State filed suit against Gator's, alleging numerous violations of Washington's Consumer Protection Act in connection with Gator's illegal sales of LCMs. *See* App. 66. Gator's answered the State's complaint by, in part, raising the affirmative defense that

enforcing the Consumer Protection Act against them was unconstitutional. App. 86.

In October 2023, the superior court ordered the two cases consolidated, and further ordered that the consolidated case would be phased with Gator's facial challenge heard before the State's enforcement action. App. 122. At the same hearing, the court *sua sponte* questioned whether SB 5078 complied with the Second Amendment, and explained that it wanted to decide the threshold legal question of SB 5078's constitutionality under both federal and state law. App. 102.[1]

Following consolidation, the State sought the opportunity to take discovery regarding Gator's claims and defenses. App. 132-35, 144-52.The superior court largely forbade the State from doing so. App. 772-74. It ultimately ordered summary judgment

[1] The superior court erred by *sua sponte* raising a Second Amendment claim on Gator's behalf. Due to space constraints, the State will address this error at another time, if necessary.

briefing take place in January and February 2024. App. 781; *see also* CR 56.

On March 11, 2024, the court heard oral argument on the parties' cross-motions for summary judgment. On April 8, the Court issued an order invalidating SB 5078 under article 1, section 24 of the Washington Constitution and the Second Amendment. App. 904. The State requested the court stay its order to permit it to request a stay pending appellate review, but that request was denied and the order was entered with immediate effect. App. 958. The State immediately filed a notice of appeal seeking direct review by this Court.

The State's Motion for Discretionary Review and Statement of Grounds for Direct Review of the superior court's order are forthcoming.

IV. GROUNDS FOR RELIEF

A. Standards for Granting a Stay

RAP 8.1(b)(3) and 8.3 give this Court "discretion to stay the enforcement of trial court decisions." *Moreman v. Butcher*,

126 Wn.2d 36, 42 n.6, 891 P.2d 725 (1995). This Court may stay enforcement of a trial court's order "before . . . acceptance of review." RAP 8.1(b)(3); RAP 8.3.

When evaluating a stay request under RAP 8.1(b)(3), this Court must "(i) consider whether the moving party can demonstrate that debatable issues are presented on appeal and (ii) compare the injury that would be suffered by the moving party if a stay were not imposed with the injury that would be suffered by the nonmoving party if a stay were imposed." RAP 8.1(b)(3); *see Purser v. Rahm*, 104 Wn.2d 159, 177, 702 P.2d 1196 (1985). A showing of "debatable issues" does not require the moving party to demonstrate likely success on the merits of the appeal, but simply that the issue is a debatable one. *Kennett v. Levine*, 49 Wn.2d 605, 607, 304 P.2d 682 (1956).

B. The Issues Are More Than Debatable

Not only are the issues in this case debatable, but the State has a strong likelihood of prevailing on appeal. *Every other court* to address the constitutionality of LCM restrictions under the

Second Amendment and/or article I, section 24 has reached the opposite conclusion as the superior court here, or been overruled:

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

38 (1st Cir. 2024) (["P]laintiffs have failed to meet their burden of establishing that LCMs are 'Arms' within the textual meaning of the Second Amendment" and "failed to establish . . . that LCMs are weapons of self-defense, such that they would enjoy Second Amendment protection.");

- *Bevis v. City of Naperville, Illinois*, 657 F. Supp. 3d 1052, 1075 (N.D. Ill. 2023), *aff'd*, 85 F.4th 1175 (7th Cir. 2023) ("Because . . . high-capacity magazines are particularly dangerous weapon accessories, their regulation accords with history and tradition.");

- *Del. State Sportsmen's Ass'n, Inc. v. Del. Dep't of Safety & Homeland Sec.*, 664 F. Supp. 3d 584, 603 (D. Del. 2023) (concluding that Delaware's prohibition on LCMs is "consistent with the Nation's historical tradition of firearm regulation");

- *Hanson v. D.C.*, 671 F. Supp. 3d 1, 16 (D.D.C. 2023) ("[Large capacity magazines] fall outside of the Second Amendment's scope because they are most useful in military service and because they are not in fact commonly used for self-defense.");

- *Herrera v. Raoul*, 670 F. Supp. 3d 665, 672 (N.D. Ill. 2023), *aff'd* 85 F.4th 1175 (7th Cir. 2023) (concluding that Illinois' prohibition on LCMs is "consistent with 'the Nation's historical tradition of firearm regulation,'" (quoting *Bruen*));

- *Oregon Firearms Fed'n v. Kotek Oregon All. for Gun Safety*, --- F. Supp. 3d ---, 2023 WL 4541027, at *1 (D. Or. July 14, 2023) ("Plaintiffs have not shown that the Second Amendment protects large-

capacity magazines . . . And even if the Second Amendment were to protect large-capacity magazines, . . . restrictions on the use and possession of large-capacity magazines are consistent with the Nation's history and tradition of firearm regulation.");

- *Nat'l Ass'n for Gun Rights v. Lamont*, --- F. Supp. 3d ---, 2023 WL 4975979, at *2 (D. Conn. Aug. 3, 2023) ("Plaintiffs' proposed ownership of . . . LCMs is not protected by the Second Amendment because they have not demonstrated that . . . LCMs . . . are commonly sought out, purchased, and used for self-defense," and because LCM restrictions are "consistent with" the Nation's "longstanding history and tradition");

- *Capen v. Campbell*, No. 22-11431-FDS, 2023 WL 8851005 at *18, *20 (D. Mass. Dec. 21, 2023) ("[P]laintiffs have not demonstrated that all magazines, regardless of capacity, fall within the protection of the Second Amendment," and "the historical record demonstrates that [Massachusetts' LCM] restrictions pose a minimal burden on the right to self-defense and are comparably justified to historical regulation").

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

First, article I, section 24 of the Washington Constitution only covers "weapons traditionally or commonly used by law abiding citizens for the lawful purpose of self-defense." *City of*

Seattle v. Evans, 184 Wn.2d 856, 869, 366 P.3d 906 (2015). LCMs are not themselves weapons, nor are they necessary for any weapon to function—as Gator's admits. As a result, they are not subject to article I, section 24 at all. But even if they were, LCMs are neither designed nor commonly used for self-defense. Rather, they are military-style accessories, designed to kill more enemies more rapidly on the battlefield, and almost never used for self-defense. Gator's failed to show they are covered by section 24, and the superior court erred in concluding otherwise.

Second, even if section 24 applied to LCMs, "the firearm rights guaranteed by the Washington Constitution are subject to reasonable regulation pursuant to the State's police power." *State v. Jorgenson*, 179 Wn.2d 145, 155, 312 P.3d 960 (2013). There is nothing unreasonable about restricting the sale of deadly LCMs when the unrebutted evidence shows they make mass shootings and other horrific crimes more frequent and more deadly, and when the evidence shows they are not used for self-defense. The record shows SB 5078's limitation on the sale and

manufacture of LCMs is "reasonably necessary to protect public safety or welfare" and is "substantially related" to the "legitimate ends" of reducing mass shootings in Washington. *Id.* at 156.

Gator's Second Amendment theory fares no better. The Second Amendment does not guarantee civilians the "right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 21 (2022) (quoting *District of Columbia v. Heller*, 554 U.S. 570 (2008)). LCMs are not covered by the Second Amendment because, again, they are not "arms," nor are they necessary for any firearms to function exactly as intended. *See, e.g.*, *Oregon Firearms Fed'n*, 2023 WL 4541027, at *26. Further, LCMs are not "in common use today for self-defense." *Bruen*, 597 U.S. at 32. Finally, even if these accessories were within the scope of the Second Amendment, Washington's regulation of LCMs fits comfortably within the long historical tradition of regulating dangerous and unusual weapons to promote public safety.

1. The Superior Court's Ruling Is an Extreme Outlier.

The aberrant nature of the superior court ruling—by itself—is sufficient to demonstrate a debatable issue. *Duncan v. Bonta*, 83 F.4th 803 (9th Cir. 2023), is instructive. There, the Ninth Circuit *en banc* court was in essentially the same position as this Court. After a district court spurned the great weight of precedent and enjoined California's LCM restriction, California petitioned for a stay pending review. And there, under the more stringent federal standards for a stay—which require "'the stay applicant [to] ma[k]e a strong showing that [they are] likely to succeed on the merits'"—the court found a stay was appropriate. *Duncan*, 83 F.4th at 805 (quoting *Nken v. Holder*, 556 U.S. 418, 426 (2009)). As the Court explained, California "[wa]s likely to succeed on the merits" because, at that time, every district court but one to "have considered a Second Amendment challenge to large-capacity magazine restrictions since *Bruen* was decided" had ruled against plaintiffs. *Duncan*, 83 F.4th at 806. Things have

only gotten more lopsided since. The one outlier identified in *Duncan—Barnett v. Raoul*, 671 F. Supp. 3d 928 (S.D. Ill. 2023)—was subsequently overturned by the Seventh Circuit. *Bevis*, 85 F.4th at 1182. And since then, two more courts joined the chorus in rejecting a challenge to LCM restrictions. *Capen*, 2023 WL 8851005 at *18, *20; *Ocean State Tactical*, 95 F.4th at 52.

Under Washington's constitution, too, each prior court to consider a challenge to SB 5078 (or Washington's similar restrictions on assault weapons) has rejected the arguments the superior court here endorsed. *See State of Washington v. Federal Way Discount Guns*, Case No. 22-2-20064-2 SEA (Jan. 6, 2023, King Cnty Sup. Ct.); *Brumback*, 2023 WL 6221425, at *11; *see also* Ruling Denying Direct Discretionary Review, *Guardian Arms, et al. v. State of Washington, et al.*, Wash. Supreme Court No. 102436-3 (Jan. 22, 2024) at 45 ("The State has established that a reasonable limit on private ownership of particularly

destructive semiautomatic weapons—dangerous weapons—is necessary for public safety and welfare.").

What was true in *Duncan* is even truer here: because the superior court's conclusion is contrary to the conclusion of every other court to address these same issues, the issues are unquestionably debatable.

2. The State Is Likely to Prevail on the Merits

Not only does this avalanche of contrary authority show that the State can meet the rather low bar of the issues being debatable, but there are excellent reasons why no other court agrees with the superior court here: it is flatly wrong on the merits.

Article I, section 24 of the Washington State Constitution provides: "The right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired[.]" Analyzing this provision in light of the federal Supreme Court's landmark Second Amendment decision in *Heller*, 554 U.S. 570, this Court concluded that section 24 should be "interpret[ed] . . .

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

This Court has articulated a two-step test under section 24. First, it asks 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.

If so, then section 24 is implicated, and the court moves to the second step. At step two, the court asks whether the regulation is a "reasonable regulation pursuant to the State's police power." *Jorgenson*, 179 Wn.2d at 155.

Gator's claim fails at both steps.

a. LCMs Are Not "Arms"

LCMs are not "arms" within the meaning of section 24 for two independent reasons.

First, LCMs by themselves are not arms. *See Ocean State Tactical*, 646 F.Supp.3d at 386-87. Instead, they are merely a

subclass of "ammunition feeding device[s]"—accessories that, when added to weapons, make them more capable of mass murder. *Oregon Firearms Fed'n*, 2023 WL 4541027, at *25 ("Magazines are an accessory to firearms, rather than a specific type of firearm.").

Gator's does not seriously dispute this, but contends SB 5078 nevertheless implicates section 24 because "magazines are an integral and essential component of the weapon in which they are used." App. 797. Gator's might have a point if SB 5078 banned *all* magazines. But "[t]his 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*, 2023 WL 4541027, at *26. SB 5078 only prohibits the manufacture and sale of one subclass of magazines commonly associated with mass shootings and other violent crime: LCMs. As Gator's admits, LCMs are *never* necessary for weapons to operate as intended. App. 863; *see also* App. 653. Consequently, SB 5078 does not restrict any

"arms." *See Oregon Firearms Fed'n*, 2023 WL 4541027., at *26; *Ocean State Tactical*, 646 F. Supp. 3d at 388; *Capen*, 2023 WL 8851005 at *18.

Second, even if LCMs were weapons in some general sense, they are not "weapons traditionally or commonly used by law abiding citizens for the lawful purpose of self-defense." *Evans*, 184 Wn.2d at 869. Here, the undisputed evidence shows that LCMs are not designed for and almost never used for self-defense.

LCMs serve combat functions—not self-defense. They "are designed to enhance a shooter's capacity to shoot multiple human targets very rapidly." *Kolbe*, 849 F.3d at 125 (cleaned up). "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*, 2023 WL 4975979, at *24. 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 repeatedly concluded that "large capacity magazines are a military feature." *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. Congress reached the same conclusion when it banned the transfer and possession of new LCMs as part of the 1994 Assault Weapons Ban. As the House Report on the bill explained: "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 … so that a single person … can easily fire literally hundreds of rounds within minutes." H.R. Rep. No. 103-489 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1820.

Befitting their role as tools of war, LCMs have virtually no utility for self-defense. *See Duncan v. Bonta*, 19 F.4th 1087, 1104–05 (9th Cir. 2021), *cert. granted*, *judgment vacated on other grounds*, 142 S. Ct. 2895 (2022), and *vacated and*

remanded, 49 F.4th 1228 (9th Cir. 2022). Here, unrebutted testimony from State expert Lucy Allen shows that individuals almost never fire more than ten rounds in self-defense. App. 690-99; *see also, e.g.*, *Oregon Firearms Fed'n*, 2023 WL 4541027, at *12 ("[I]t is exceedingly rare (far less than 1 percent) for an individual to fire more than ten shots in self-defense."). Thus, an LCM's defining feature—the ability to *shoot* more than ten times without reloading—is essentially never used in self-defense.[2] As Seattle Police Chief Adrian Diaz put it, there is no place for large-capacity magazines in civilian self-defense." App. 855-56.

By contrast, LCMs are routinely used in mass shootings and other high-profile criminal activity to devastating effect, as the Legislature found. SB 5078, § 1; *see also* App. 328-30. According to Dr. Lou Klarevas, one of the foremost experts on

[2] Of course, merely "brandishing an LCM" without firing any shots "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." *Oregon Firearms Fed'n*, 2023 WL 4541027, at *33.

mass shootings, LCMs are "force multipliers when it comes to kill potential." App. 298. 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. App. 290.

In short, LCMs are not "weapons traditionally or commonly used" for "self-defense." *Evans*, 184 Wn.2d at 869. They are therefore not protected under article I, section 24.

b. Restricting LCMs Is Constitutionally Reasonable

Even if Gator's were correct that section 24 presumptively protected the right to sell LCMs, Gator's would still need to show "beyond a reasonable doubt," *City of Pasco*, 161 Wn.2d at 458, that SB 5078 is constitutionally unreasonable. *Jorgenson*, 179 Wn.2d at 155. Gator's cannot carry this burden.

The rights guaranteed by article 1, section 24 are not unlimited, but "are subject to reasonable regulation pursuant to the State's police power." *Id.* (citing *State v. Krantz*, 24 Wn.2d

350, 353, 164 P.2d 453 (1945)). 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 easily satisfies this standard.

Turning first to the public benefits, SB 5078 serves a critical public safety goal of reducing shootings deaths. The Legislature made specific factual findings that "large capacity magazines increase casualties by allowing a shooter to keep firing for longer periods of time without reloading" and that "mass shooting events … where the use of large capacity magazines caused twice as many deaths and 14 times as many injuries." S.B. 5078, 67th Leg., Reg. Sess., § 1 (Wash. 2022). "[T]he legislature f[ound] that restricting the sale, manufacture, and distribution of large capacity magazines is likely to reduce gun deaths and injuries." *Id*. These legislative findings are owed

"great deference." *Washington Off Highway Vehicle All. v. State*, 176 Wn.2d 225, 236, 290 P.3d 954 (2012); *see also Jorgenson*, 179 Wn.2d at 149. Moreover, these findings are corroborated by unrebutted evidence. App. 294-304 (concluding that "epidemiological calculations lead to the . . . conclusion" that "when bans on LCMs are in effect, per capita, fewer high-fatality mass shootings occur and fewer people die in such shootings").

Gator's has offered absolutely *nothing* to meaningfully rebut the Legislature's conclusion, let alone show that the Legislature conclusions were obviously wrong. App. 879.

The second part of the *Jorgenson* analysis focuses on whether SB 5078 frustrates the right to bear arms in self-defense under section 24. Here too, the unrebutted evidence shows that LCMs do virtually nothing to enhance a person's ability to protect themselves. *Supra* at 18-20; *see also Capen*, 2023 WL 8851005, at *20 ("[t]he limit on magazine capacity imposes virtually no burden on self-defense."). Once again, Gator's offered *nothing whatsoever* to prove otherwise.

The trial court simply rejected binding authority, concluding that *Jorgenson* was "not applicable here" because it was supposedly incompatible with the U.S. Supreme Court's interpretation of the Second Amendment in *Bruen*. App. 923. Instead, the Court concluded that article I, Section 24 was "'absolute' outside of its textual limitations," and refused to consider whether SB 5078 was constitutional reasonable. *Id.* The trial court's order invalidating SB 5078 is not merely debatable, it is wrong.

3. SB 5078 Is Consistent with the Second Amendment

In *New York Rifle & Pistol Association v. Bruen*, 597 U.S. 1, 24 (2022), the United States Supreme Court announced a new two-step test for applying the Second Amendment: "[1] When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. [2] The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical

tradition of firearm regulation." Under *Bruen* step one, Gator's has failed to demonstrate that LCMs are self-defensive "arms" protected by the Second Amendment, but even if it could do so, SB 5078's restriction on LCMs' manufacture and sale fits comfortably within the United States' historical tradition of weapons regulation.

a. LCMs are not arms

For the same reasons that LCMs are not arms under *Evans* they are not arms under *Heller* and *Bruen*; both constitutions presumptively protect the same sort of "arms." *Evans*, 184 Wn.2d at 872 ("Both the federal and state constitutions require us to give protection to certain weapons that have been designed and commonly used for self-defense."). LCMs are neither used nor useful for self-defense, and are instead offensive, military style weapon accessories that have no more constitutional protection than assault weapons or M-29 tactical nuclear weapon launchers. *See Bevis*, 85 F.4th at 1197.

b. SB 5078 fits within the historical tradition of regulating weapons associated with lawless violence

The State identified numerous historical analogues and presented expert testimony from professional historians showing that SB 5078 fits well within the history and tradition of the United States. App. 335-648, 840-50 (identifying analogous laws restricting trap guns, knives, clubs, pistols, machineguns, and magazine capacity from all periods of American history). The trial court ignored it all, holding that because LCMs are allegedly in common use, they cannot be banned. App. 928. But even if there were evidence in the record demonstrating that LCMs were (1) arms and (2) commonly used for self-defense, "*Heller* does not hold that access to all weapons 'in common use' are automatically entitled to Second Amendment protection without limitation." *Hartford v. Ferguson*, 676 F. Supp. 3d 897, 903 (W.D. Wash. 2023). Instead, common use only creates a *presumption* of constitutionality that "can be overcome" with historical evidence. *Id.* Here, the undisputed historical evidence

plainly shows that SB 5078 is consistent with America's historical tradition of arms regulation.

C. The Balance of Harms Weighs in Favor of a Stay

Comparing the injuries of the parties, the harm that would be suffered by the Petitioners and the people if a stay of proceedings is not imposed far outweigh any speculative harm to Respondents if a stay is imposed. *See* RAP 8.1(b)(3).

1. Denying a stay will significantly injure the Petitioners and the public interest

The Legislature's findings, and significant corroborating evidence, demonstrate that laws like SB 5078 literally save lives. *See* App. 294-304 (expert testimony confirming that LCM restrictions lead to "fewer high-fatality mass shootings … and fewer people d[ying] in such shootings"). Pausing SB 5078 even temporarily will undermine the Legislature's goals and put Washingtonians at increased risk of shooting violence. To quote *Duncan* with minimal modification: "If a stay is denied, [Washington] indisputably will face an influx of large-capacity magazines like those used in mass shootings" nationwide.

Duncan, 83 F.4th at 806. When a similar California law was enjoined for just one week in 2019 (before the Ninth Circuit stayed the injunction) "Californians bought millions of magazines over ten rounds, essentially buying the nation's entire stock of them in less than one week." *Id.* (quotation omitted); *see also* Washington Gun Law, "How to Legally Purchase Magazines if an Injunction Happens," YOUTUBE, https://www.youtube.com/watch?v=pw_D-Drmwns, Mar. 20, 2024 (advising Washingtonians how to "stock[] up" on LCMs in any time period between an injunction and a stay in this case).

A temporary stay of the superior court's order pending review by this would protect the State and its citizens from this serious risk of harm. This Court should stay the superior court's injunction to ensure effective and equitable review by this Court and prevent "[the] destruction of the fruits of a successful appeal." *Wash. Fed'n of State Emps. v. State*, 99 Wn.2d 878, 883, 665 P.2d 1337 (1983).

2. Respondent will not be harmed by a temporary stay

Respondent, by contrast, will not suffer meaningful harm from a temporary stay of proceedings pending review of the superior court's order. Gator's raised its Second Amendment challenge only in response to the State's enforcement of the Consumer Protection Act against it. App. 1. That enforcement action will be stayed pending appeal. RAP 7.2(a). Neither will any third-parties be substantially injured by a stay. *See Duncan*, 83 F.4th at 806 (holding stay of an injunction against California's LCM law would not "substantially injure other parties.").

Moreover, Respondent's conduct undermines any claim of exigency. SB 5078 went into law on July 1, 2022, and rather than suing then to protect their asserted rights, Respondent openly flouted the law. Having opted to violate the law rather than take any action to protect their rights, Respondent cannot now claim immediate harm. *See Wise v. Inslee*, 2:21-CV-0288-TOR, 2021 WL 4951571, at *6 (E.D. Wash. Oct. 25, 2021) (concluding

plaintiffs' delay of two months in filing suit "implies a lack of urgency and irreparable harm") (quoting *Oakland Trib., Inc. v. Chron. Pub. Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985)).

V. CONCLUSION

This Court should grant Petitioners' Motion for Emergency Stay Pending Review. Because the trial court's order has immediate effect, Petitioners respectfully request that this Court issue a decision on this emergency motion today.

This document contains 4,965 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 8th day of April 2024.

ROBERT W. FERGUSON
Attorney General

/s/Andrew Hughes
ANDREW R.W. HUGHES, WSBA #49515
WILLIAM MCGINTY, WSBA #41868
R. JULY SIMPSON, WSBA #45869

BEN CARR, WSBA #40778
BOB HYDE, WSBA #33593
JOHN NELSON, WBSA #45724
Assistant Attorneys General
Andrew.Hughes@atg.wa.gov
William.McGinty@atg.wa.gov
July.Simpson@atg.wa.gov
Ben.Carr@atg.wa.gov
Bob.Hyde@atg.wa.gov
John.Nelson@atg.wa.gov
OID No. 91157
7141 Cleanwater Drive SW
PO Box 40111
Olympia, WA 98504-0111
(360) 709-6470
Counsel for Petitioner State of Washington

DECLARATION OF SERVICE

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

S. Peter Serrano
Austin Hatcher
Silent Majority Foundation
5238 Outlet Dr.
Pasco, WA 99301
pete@smfjb.org
austin@smfjb.org
Counsel for Respondents

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

DATED this 8th day of April 2024, at Seattle, Washington.

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