SUPERIOR COURT OF WASHINGTON FOR COWLITZ COUNTY

STATE OF WASHINGTON, **Plaintiff,** **v.** **GATOR'S CUSTOM GUNS, INC., and WALTER L. WENTZ, an individual,** **Defendants.**	**No. 23-2-00897-08** **RULING AND ORDER ON MOTIONS FOR SUMMARY JUDGMENT**

Factual and Procedural History

Defendant Gator's Custom Guns, Inc., [hereinafter "Gator's Guns" or "Gator's"] is a retail firearms business located in Kelso, Washington, owned by Defendant Walter L. Wentz. This business has operated for several years in Cowlitz County supplying firearms, ammunition, and related items including semi-automatic handguns and magazines. In addition, Gator's historically sold aftermarket magazines with capacities larger than ten rounds. On July 1,2022, Engrossed Substitute Senate Bill 5078 [hereinafter ESSB 5078] went into effect making it illegal to sell or possess magazines

with more than ten round capacities in the State of Washington and included sections creating claims under the Washington Consumer Protection Act [hereinafter "CPA"]. Following the effective date of ESSB 5078, Gator's Guns filed a declaratory judgment action against the State of Washington [hereinafter "the State"] in Cowlitz County Superior Court seeking a declaration that, to the extent ESSB 5078 prohibits the sale, acquisition, or possession of magazines with more than ten round capacities, it violates Washington Constitution, Article 1, Sec. 24.

The State subsequently filed its CPA enforcement action against Gator's Guns, alleging that (1) after the effective date of ESSB 5078, Gator's sold magazines prohibited by the statute, and (2) that under ESSB 5078, this action constituted a violation of the Washington CPA. Gator's Guns responded that to the extent ESSB 5078 makes the sale or possession of magazines with over ten round capacities a violation of the CPA, ESSB 5078 violates Washington Constitution, Article 1, Art. 1, § 24, as well as the United States Constitution, Second Amendment.

At the state's suggestion, this court consolidated both Gator's and the State's lawsuits under a finding of judicial economy and overlapping constitutional claims. Gator's Guns did not oppose this consolidation.[1] The State continues to assert Gator's Second Amendment claim is not properly before the court as it was not clearly pled in Gator's initial Declaratory complaint. The State fails to mention that this Court previously addressed this issue in its ruling of January 9, 2024 (cp42). Neither party requested the

[1] This order of consolidation effectively discontinues the separate actions and creates a single new and distinct action. The fact that separate judgments are entered does not overcome the effect of the consolidation. *Jeffery v. Weintraub*, 32 Wash.App. 536, 547, 648 P.2d 914, 921 (1982)

court reconsider that order nor has the State appealed that ruling. The State neglects to mention that the case consolidation was done at the State's suggestion. (State's response, consolidated case)

Thus, the current issue before this court is as follows: To the extent that ESSB 5078 prohibits the sale and/or possession of magazines with capacities in excess of ten rounds[2] and seeks to punish this action both criminally and civilly, does it violate either Washington Constitution, Article 1, Art. 1, § 24 or the United State Constitution, Second Amendment. The following addresses these issues.

In addressing these questions, the Court considered both parties' numerous memoranda and oral arguments, and the Court has considered the following declarations filed by the parties:

1. Declaration of James Yurgealitis
2. Declaration of Lucy Allen
3. Declaration of Dennis Baron
4. Declaration of R. July Simpson with exhibits.
5. Declaration of Saul Cornell
6. Declaration of Louis Klarevas
7. Declaration of Brennan Rivas
8. Declaration of Robert Spitzer
9. Declaration of Austin Hatcher

For consideration of the declarations and exhibits, objections raised regarding hearsay have been honored, and the Court has considered all admissible and relevant evidence filed by the parties in support of the motions. This decision does not not cite to

[2] The Statute defines magazines which hold more than ten rounds as Large Capacity Magazines, which is a legislative, not an industry, definition. The Court uses "LCM", "Large Capacity Magazine", or "magazines with a capacity in excess of ten" interchangeably.

each declaration, exhibit or opinion reviewed; however, the court has considered all proper evidence presented[3].

This motion is a facial challenge to the constitutionality of the Statute, and this Court has examined and considered significant State and Federal case law to determine if it can conceive of situations where the law could be constitutional. The court has reviewed the cases cited by counsel, together with the Court's own legal research. This Court has also reviewed many of the appellate briefs and oral arguments before the United States Supreme Court to better understand the decisions issued by that Court.

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[3] The Court has reviewed more than 2,600 pages of pleadings filed in this matter leading up to the hearing on the competing Summary Judgement motions subject of this decision.

Legal Authority Table

1. *Jeffery v. Weintraub*, 32 Wash. App. 536, 547, 648 P.2d 914, 921 (1982)
2. *State v. Sieyes*, 168 Wash. 2d 276, 287, 225 P.3d 995, 1001 (2010)
3. *State v. Gunwall*, 106 Wash. 2d 54, 720 P.2d 808, 809 (1986)
4. *City of Seattle v. Evans*, 184 Wash. 2d 856, 869, 366 P.3d 906, 913 (2015)
5. *Oregon Firearms Fed'n v. Kotek Oregon All. For Gun Safety*, ---F. Supp. 3d ---, 2023 WL 4541027 (2023)
6. *State v. Jorgenson*, 179 Wash. 2d 145, 150, 312 P.3d 960, 962 (2013)
7. *United States v. Laurent*, 861 F. Supp. 2d 71, 104 (E.D.N.Y. 2011)
8. *District of Columbia v. Heller*, 554 U.S. 570, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008)
9. *McDonald v. Chicago*, 561 U.S. 742, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010)
10. *Caetano v. Massachusetts*, 577 U.S. 411, 136 S. Ct. 1027, 1030, 194 L. Ed. 2d 99 (2016)
11. *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 3–4, 142 S. Ct. 2111, 2119, 213 L. Ed. 2d 387 (2022)
12. *Arizona v. Gant*, 556 U.S. 332, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009)
13. *Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246, 207 L. Ed. 2d 679 (2020).
14. *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 1365–66, 158 L. Ed. 2d 177 (2004)
15. *Lara v. Comm'r Pennsylvania State Police*, No. 21-1832, 2024 WL 1298705, at *1 (3d Cir. Mar. 27, 2024)
16. *Nordlinger v. Hahn*, 505 U.S. 1, 112 S. Ct. 2326, 120 L. Ed. 2d 1 (1992)

Constitutional Analysis - Washington

When analyzing a case under both Washington and Federal Constitutional questions, the Court first examines the Washington constitutional question. Defense argues that Washington Article 1, Art. 1, § 24 provides greater protection than the Federal Constitution. However, to reach a ruling in this matter does not require this court to address that issue. The Court therefore does not undertake a *Gunwall* analysis.

Washington Constitution, Article 1, § 24 states:

> The right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain or employ an armed body of men.

This Court begins its analysis under the presumption that ESSB 5078 is Constitutional.

> . . . This court will presume a legislative enactment constitutional and, if possible, construe an enactment so as to render it constitutional.

Jorgenson, 179 Wash. 2d at 150

The Washington State Supreme Court does not appear to have issued a final decision addressing the interpretation of Art. 1, § 24 since the United States Supreme Court issued its decision in *Bruen.* The Supreme Court has previously found that the Art. 1, § 24 right to bear arms is an individual right in the same vein as the Second Amendment as interpreted by *Heller.*

> . . . *Heller* confirms the right to bear arms is an individual right. While textually different from the Second Amendment, many state analogs nonetheless reveal a similar sentiment—as ours certainly does.

Sieyes, 168 Wash. 2d at 287

The Washington Supreme Court continues:

> Article I, § 24 plainly guarantees an individual right to bear arms. "[T]here is quite explicit language about the 'right of the individual citizen to bear arms in defense of himself.' This means what it says. From time to time, people in the West had to use their weapons to defend themselves and were not interested in being disarmed." Hugh Spitzer, *Bearing Arms in Washington State* 9 (Proceedings of the Spring Conference, Washington State Association of Municipal Attorneys (Apr. 24, 1997)).

Sieyes, 168 Wash. 2d at 292

Sieyes was decided post-*Heller* in 2010, but just prior to the formal incorporation of the Second Amendment by the US Supreme Court in 2010 against the States in *McDonald*. The *Sieyes* Court was aware of *McDonald's* pendency before the US Supreme Court. The Washington Supreme Court appeared to presume the Second Amendment would be incorporated against the states.

> In the same vein recent trends and popular views among state attorneys general favor incorporation. At least 34 state attorneys general have signed amicus briefs in *McDonald v. City of Chicago* supporting incorporation. *See* —— U.S. ——, 130 S.Ct. 48, 174 L.Ed.2d 632 (2009).

Sieyes, 168 Wash. 2d at 290 (footnote 14)

The Washington Supreme Court noted Art. 1, § 24 provides, at a minimum, at least as much protection of an individual right as the Second Amendment. The Washington Supreme Court clearly noted the US Constitution creates a "floor" of protection the State provision cannot drop below. The State can provide more protection of the right, but not less.

> . . . Supreme Court application of the United States Constitution establishes a floor below which state courts cannot go to protect individual rights. But states of course can raise the ceiling to afford greater protections under their own constitutions. Washington retains the " 'sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution.' "

Sieyes, 168 Wash. 2d at 292

The Washington Supreme Court found that Art. 1, § 24 is "absolute" outside of its two textual exceptions. The use of the word "absolute" when describing a constitutional right is unambiguous and powerful. The only conditions on the right to bear arms under Art. 1, § 24 are (1) the protected right is one of defense of self or the state, and (2) the prohibition on creating a private militia. Failing to mention other limitations when two are specified implies there are no other limitations.

> . . . Moreover, the mandatory provision in article I, section 24 is strengthened by its two textual exceptions to the otherwise textually ***absolute*** right to keep and bear arms. Robert F. Utter, *Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights,* 7 U. PUGET SOUND L.REV. 491, 509–10 (1984) (explaining "the express mention of one thing in a constitution implies the exclusion of things not mentioned"). (emphasis added)

Sieyes, 168 Wash. 2d at 293

The only applicable exception to Art. 1, § 24 in this case is that the right to bear arms must be in the defense of self or the state.

First, the State argues that magazines[4] are not arms at all under Art. 1, § 24. The State only partially quotes the holding in *Evans*, leaving out the critically important operative words from the case holding.

> We hold that the right to bear arms protects *instruments that are designed as weapons* traditionally or commonly used by law abiding citizens for the lawful purpose of self-defense. (*italics emphasis added)*

Evans, 184 Wash. 2d at 869

[4] If a magazine is an arm, an LCM is an arm. The only difference between them is the capacity, not the function.

The rational for the *Evans* holding was based on *what the arm was designed for*[5]. By leaving out this critical passage the State incorrectly characterizes the holding in a significantly misleading way.

The pivotal questions before this Court under Art. 1, § 24 are, (1) whether or not magazines and LCMs are *designed as weapons*, and (2) whether or not they are traditionally or commonly used for self-defense.

The defendant in *Evans* was detained on non-weapons grounds and when arrested he had a kitchen paring knife in his pocket. The trial court found the paring knife was a violation of an ordinance which prohibited carrying certain dangerous fixed-blade knives. The defendant claimed the knife was an arm protected under the United States Second Amendment under the rationale of *Heller*.

The *Evans* Court discussed the test for determining whether an arm was covered by Art. 1, § 24 and focused on whether an item is designed to be a weapon.

> We hold that the right to bear arms protects instruments that are designed as weapons traditionally or commonly used by law abiding citizens for the lawful purpose of self-defense. In considering whether a weapon is an arm, we look to the historical origins and use of that weapon, noting that a weapon does not need to be designed for military use to be traditionally or commonly used for self-defense. We will also consider the weapon's purpose and intended function.

Evans, 184 Wash. 2d at 869

The Washington Supreme Court in a five to four decision determined that a knife designed primarily to be a kitchen utensil was not designed to be used as a weapon,

[5] The defendant in Evans merely had the paring knife on his person for self-defense and did not actually use the paring knife otherwise.

even if it could conceivably be used as a weapon. The Court did not rule that knives in general were not weapons.

> . . . we hold that not all knives are constitutionally protected arms and that Evans does not demonstrate that his paring knife is an "arm" as defined under our state or federal constitution.

Evans, 184 Wash. 2d at 861

The Washington Supreme Court refers in both *Sieyes* and *Evans* to the prohibition on interest balancing from those cases, and that the prohibition constrains Washington where it applies. *Evans* determined a paring knife was not "designed as a weapon", therefore it was not an "arm" entitled to constitutional protection.

Determination that the paring knife was not designed as a weapon removed it from the protected class of weapons. The Washington Supreme Court's approach avoided the application of tiers of scrutiny or interest balancing which the Court was aware was prohibited under *Heller.*

The purpose of a magazine of any size is to facilitate the function of a semi-automatic weapon[6]. Magazines (which includes LCMs) are designed as critical functional components of the operational mechanism of semi-automatic weapons. Absence of a magazine completely defeats the function of a semi-automatic firearm, even in those guns where a single shell may be fired without the magazine in place. Handguns sold in California manufactured after 2002 will not fire at all without a magazine in place due to the California requirement for magazine safety locks[7]. Without

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[6] This Court agrees with the State's expert that a semi-automatic firearm will function the same with a magazine with more than ten rounds or one with less than ten rounds.

[7] New firearms sold in California must have a magazine disconnect, which disables the ability to fire a round in the chamber without a magazine inserted in the firearm. California Unsafe Handgun Act. (2022)

a magazine a semi-automatic firearm is either a single shot weapon, or it functions not at all.

Magazines have no other design purpose than as a weapon. No one is going to butter a sandwich or dice carrots with a magazine of any size. Magazines are only useful as weapons.

Heller[8] protects modern handguns as a class under the Second Amendment as the "most commonly chosen" weapon for self-defense in America.

> . . . Whatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid.
>
> *Heller*, 554 U.S. at 629
>
> *Heller* further protects the various instruments or parts that constitute a weapon.
>
> . . . Just as the First Amendment protects modern forms of communications, *e.g., Reno v. American Civil Liberties Union,* 521 U.S. 844, 849, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997), and the Fourth Amendment applies to modern forms of search, *e.g., Kyllo v. United States,* 533 U.S. 27, 35–36, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001), the Second Amendment extends, prima facie, to all *instruments that constitute bearable arms*, even those that were not in existence at the time of the founding. (*italics emphasis added*)

Heller, 554 U.S. at 582

The Washington Supreme Court differentiates between "instruments" and "weapons", which coincides with the language of *Heller.* Neither Court limits weapons only to "firearms". The *Heller* Court did not constrain its holding to a particular

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[8] A specific arm protected under a Supreme Court ruling necessarily must be protected under Article 1, § 24 under the "constitutional floor" citation from *Heller* above. This court relies on points from Heller as relied on by the Washington Supreme Court.

mechanical design, magazine capacity, caliber, or other design parameter of modern handguns which it held were protected. The limitation in Evans was only that the right applied to instruments *designed* as weapons. The handguns in *Heller* in 2008 would include semi-automatic handguns[9].

This Court can infer from the record here, as well as the numerous cases reviewed by this Court preparing for this decision, that magazines are commonly and lawfully possessed by law abiding citizens for lawful purposes[10]. The Court can also infer from the same sources, as well as common knowledge, that a significant number of modern handguns are designed to hold, and are commonly sold with, magazines with capacities larger than ten. The State, through the challenged law, has now prohibited the sale and acquisition of such arms. As a critical functional component of a semi-automatic weapon, this Court finds magazines, including LCMs, are arms for purposes of Art. 1, § 24.

The State's expert witness, Seattle Police Chief Adrian Diaz posits why his own officers carry LCMs:

> ". . . *Nevertheless, SPD patrol officers routinely carry 17-round magazines because they need to be prepared for every scenario they might encounter.*"

Adrian Diaz declaration, p.3, State's exhibits. (emphasis added)

Being prepared for conflict aligns with the Supreme Court's definition of keep and bear from *Heller*, noted in the Federal analysis below. The State argues it is acceptable

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[9] Heller was decided the year after the highly publicized 2007 Virginia Tech Shooting where the shooter employed semi-automatic weapons and large capacity magazines. The Virginia Tech incident was briefed for the Court there.

[10] The State has cited to *Oregon Firearms Fed'n v. Kotek Oregon All. For Gun Safety*, ---F. Supp. 3d ---, 2023 WL 4541027 (2023) where the parties stipulated that millions of large capacity magazines were in the hands of the public.

for a Law Enforcement Officer to be prepared for all scenarios, but not appropriate for a member of the public to be prepared for all scenarios they might encounter.

A compelling argument regarding what "use" means under Art. 1, § 24 is the reference in *Evans* to the jury instruction used by the trial court there:

> Jury Instruction 3: A person commits the crime of Unlawful Use of Weapons when he or she knowingly **carries** a dangerous knife on his or her person. (emphasis added)

Evans, 184 Wash. 2d at 860

This Court finds that under Art. 1, § 24, using a weapon for self-defense is clearly encompassed by mere possession or carry in anticipation of such need. A different requirement would provide lesser protection of the right than the Second Amendment. The right to bear arms under Art 1, § 24 is the right to own, possess, or to carry, in anticipation of a confrontation, the same as under the Second Amendment.

The State argues the novel theory that an LCM is not used for self-defense unless it is actually fired in self-defense. The State further argues that an LCM must be fired more than ten rounds[11] to be counted as "used" for self-defense. The argument goes: If you didn't need the extra capacity, then even if you fired the gun with an LCM installed in the weapon, the magazine would not have been "used". This is not a logical or rational definition for the words "to bear". The plain language of both the State and Federal Supreme Court decisions discussing keep and carry focus on possession. The firing test has no rational basis in law or logic. It would require any weapon to be fired,

[11] The argument goes: If you didn't need to use the extra capacity, then even if you fired the gun and the LCM fed additional ammunition into the weapon, it was not "used".

or in the case of a knife - to stab someone, before the arm could be considered "kept, borne, or carried" in self-defense.

Most individuals who acquire firearms for self-defense never have occasion to fire them in a confrontation. However mere possession or carrying in case of confrontation is the right protected. Simple possession of an arm for the intended purpose of defending oneself or others is "use of the arm for self-defense" whether that need arises or not. This Court rejects the State's argument.

The *Evans* Court relied on *Heller* for its understanding the right applied to items that were *designed as weapons* and was to be prepared for confrontation.:

> . . . This definition is designed to protect *an individual's right to carry a weapon for the particular purpose of confrontation*. Id. at 592. However, this definition of "arms" still contemplates that an arm is a weapon. (*emphasis added*)

Evans, 184 Wash. 2d at 865

Evans further includes military weapons within the definition or arm, relying on *Heller*.

> . . . He is correct that the Second Amendment protects the right to possess weapons designed for personal protection as well as for use in a militia.

Evans, 184 Wash. 2d at 871

The State's argument that an arm "more suited to military use" falls outside of Art. 1, § 24 protection is contrary to the plain language of *Evans*.

> In considering whether a weapon is an arm, we look to the historical origins and use of that weapon, noting that a weapon does not need to be designed for military use to be traditionally or commonly used for self-defense.

Evans, 184 Wash. 2d at 869

To the extent the historical design purpose of LCMs may have been for military applications, *Evans* bolsters this Court's finding that LCM design purpose is as weapons. The fact an arm may have been originally designed as an offensive weapon does not erase its utility as a defensive weapon. Even in a military confrontation the use of any weapon may be offensive or defensive at any moment.

There appears to be no post-*Bruen*, final Washington appellate court decision determining whether or not magazines that facilitate the exercise of the right of self-defense are arms under Art. 1, § 24. Several similar cases are awaiting full trial[12]. The Court here is guided by *Bruen (citing Caetano),* as Art. 1, § 24 can provide no lesser protection. The *Bruen* decision includes anything that facilitates armed self-defense and Art, 1, § 24 cannot protect less.

> . . . Thus, even though the Second Amendment's definition of "arms" is fixed according to its historical understanding, that general definition covers modern instruments that facilitate armed self-defense. Cf. *Caetano v. Massachusetts*, 577 U.S. 411, 411–412, 136 S.Ct. 1027, 194 L.Ed.2d 99 (2016) (*per curiam*) (stun guns).

Bruen, 597 U.S. at 28

The *Evans* court determined a paring knife was not designed as a weapon. The holding can be distinguished by its facts. An item designed to facilitate culinary endeavors would not necessarily fall into a protected category. A critical functional part of a semi-automatic firearm most certainly does.

[12] The State asserts a stipulated settlement agreement related to magazines which has no precedential value. It would be inappropriate for a Court to base a decision on such an agreement, not knowing what the reasons for such a settlement might be.

The Washington Supreme Court has not directly endorsed the "in common use" constitutional rule of decision[13] from *Heller.* As previously noted, Art. 1, § 24 can provide no less protection than the Second Amendment. *Evans* defines protected arms as "designed as a weapon and *used commonly for self-defense*". The test is much like the *Heller* constitutional principle but adds the design requirement. As Heller seems to require an item to be a weapon, the two principles are fairly similar. The Second Amendment only requires an arm to be in common use for lawful purposes, including self-defense.

The State further urges to this Court that there must be evidence of actual firing of an arm in a self-defense incident before the arm can be considered commonly used. As previously noted, this argument is not logical or legally sound and this Court rejects the argument. The US Supreme Court adopted "in common use" as a commonality test. (*i.e.* if the public had widely and lawfully chosen an arm for lawful purposes, including self-defense, it was protected.)

The State argues that commonality could not possibly be the test as it is a form of "circular" reasoning. The US Supreme Court addressed this argument in Heller, when the Court did NOT adopt the reasoning of the dissent of Justice Breyer.

> . . . On the majority's reasoning, if tomorrow someone invents a particularly useful, highly dangerous self-defense weapon, Congress and the States had better ban it immediately, for once it becomes popular Congress will no longer possess the constitutional authority to do so. In essence, the majority determines what regulations are permissible by looking to see what existing regulations permit. There is no basis for believing that the Framers intended such circular reasoning.

Heller, 554 U.S. at 721

[13] See in common use analysis in the Federal Section below.

Justice Breyer was not able to convince the majority to adopt his "circularity" reasoning, and likewise, this court is not persuaded. *Generally, citing a dissent is not the most convincing authority on how to interpret a majority opinion.*

This Court interprets "use" to mean what it appears to mean in *Evans*[14] and clearly means under *Heller.* In the context of Art. 1, § 24, it means, to own, possess, or to carry, in anticipation of a confrontation.

The State next argues that firearm rights guaranteed by the Washington Constitution are subject to "reasonable regulation" pursuant to the State's police power under *Jorgenson.*

In *Jorgenson*, the defendant was released on bond after probable cause for having shot someone. He was prohibited by law from possession of a firearm while on bond for a serious offense. He was later arrested with a firearm in his possession and convicted of violating the firearms restriction of his release conditions.

The *Jorgenson* Court applied intermediate scrutiny based on the limited time of loss of the right, and a judicial finding of dangerousness of the person. *Jorgenson* was not a general prohibition like ESSB 5078. *Jorgenson* relied on a comparable federal statute, and similar facts, as discussed in *Laurent* where the US District Court for the Second District determined intermediate scrutiny was the appropriate test. The *Laurent* Court discussed various levels of scrutiny to be applied in Second Amendment cases to reach its conclusion. The District Court settled on intermediate scrutiny, noting a restriction on the core right of self-defense would require strict scrutiny.

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[14] In *Evans*, the person did not stab anyone. It was a case of the defendant simply carrying a paring knife in his pocket.

> Intermediate scrutiny is the appropriate level of review for the statute at issue in the present case. *But see Masciandaro,* 638 F.3d at 471 ("[W]e assume that any *law that would burden the "fundamental," core right of self-defense in the home by a law-abiding citizen would be subject to strict scrutiny.*").

Laurent, 861 F. Supp. 2d at 104 (emphasis added)

The *Jorgenson* Court relied on *dicta* from *Heller* that certain dangerous individuals (*i.e.* felons) could be relieved of their right to bear arms. The Washington Supreme Court grouped Mr. Jorgenson in the dangerous class of individuals and applied the same intermediate scrutiny the District Court had applied in *Laurent*.

Jorgenson's reliance on the analysis in *Laurent* after *Bruen* is likely misplaced, though some other lawful justification may be applicable. *Bruen* would most likely prohibit *Laurent's* reliance on intermediate scrutiny as a decisional rationale if decided today.

The Washington Supreme Court clearly stated levels of scrutiny and interest balancing were no longer to be used in Art. 1, § 24 cases.

> . . . Moreover the Court specifically rejected a "rational basis scrutiny" as too low a standard to protect the right to bear arms.[19] *Id.* at 2818 n. 27. The Court also rejected any "interest-balancing" approach, reasoning by way of analogy: "The First Amendment contains the freedom-of-speech guarantee that the people ratified, which included exceptions for obscenity, libel, and disclosure of state secrets, but not for the expression of extremely unpopular and wrong-headed views. The Second Amendment is no different." *Id.* at 2821. Instead *Heller* held "[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad." *Id.*
>
> We follow *Heller* in declining to analyze RCW 9.41.040(2)(a)(iii) under any level of scrutiny. . .

Sieyes, 168 Wash. 2d at 294–95

Timing is important as *Jorgenson* and *Laurent* were both decided during the 14 years when courts nationally were applying the now prohibited "second step" of balancing state interests with individual rights. The prohibition in the case at bar is not a limited-in-time, or limited person, restriction. It is a complete ban. The rational of *Jorgenson* is not applicable here.

To maintain Art. 1, § 24 constitutional protection to be at least equivalent to the protection provided by the Second Amendment under *Bruen,* this Court is not permitted to apply interest balancing tests in this case and will not do so. The remainder of the State's arguments not directly applicable here are more fully discussed in the Second Amendment analysis below.

This Court analyzes ESSB 5078 in under the Washington State Constitution, Art. 1, § 24. *Heller* and *Bruen* impact the analysis to the degree the Washington State Constitutional provision cannot provide less protection than the minimum protection provided under the US Second Amendment. The Washington Supreme Court decisions in *Sieyes* and *Evans* are consistent with that proposition.

This Court 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 as this Court sees no need to do so to affect this ruling. This Court will leave that determination to other cases or to the appellate courts. The Washington Supreme Court, through *Evans* and *Sieyes*, has adopted the US Supreme Court approach which prohibits balancing tests when analyzing general laws limiting rights under Art. 1, § 24. The Washington Constitution, Art. 1 § 24 is "absolute" outside of its textual limitations. The application of interest balancing, or tiers of scrutiny, is prohibited.

This Court finds that magazines, and by extension LCMs, are arms under *Evans* and the Washington Constitution, Art. 1, § 24 and infers from the reports filed herein, and court cases reviewed, that LCMs are commonly owned by the public for lawful purposes, which includes self-defense. This Court finds that an arm designed as a weapon and traditionally or commonly possessed in anticipation of self-defense is presumptively a protected arm in Washington State. The State must provide some history of regulation in line with the requirements of Bruen (detailed below) in order for Art. 1, § 24 to provide at least the protection of the right the Second Amendment does. The State has the burden to show otherwise. The State has failed to do so.

This Court performs its analysis as a facial challenge, with the presumption that a statute is constitutional. This Court must find there exists no set of facts where the Court can find such a generalized ban or restriction on an arm (or an instrument that facilitates self-defense) as constitutional under the Washington Constitution, Art. 1, § 24.

> . . . "In contrast, a successful facial challenge is one where no set of circumstances exists in which the statute, as currently written, can be constitutionally applied." Moore, 151 Wn.2d at 669.

Evans, 184 Wash. 2d at 862

Absent application of the now-prohibited interest balancing approach, this Court cannot conceive of a set of circumstances where the complete ban of magazines with a capacity greater than ten under ESSB 5078 can be constitutionally valid under Art. 1, § 24. This Court finds ESSB 5078 as codified under RCW 9.41.300 and 9.41.375 is facially unconstitutional.

For completeness of the record, and for any reviewing Court, this Court now addresses the Federal Constitutional Challenge under the Second Amendment.

Constitutional Analysis – Federal

The United States Constitution, Bill of Rights, Second Amendment states:

> "*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.*"

The United States Supreme Court has issued four decisions regarding the Second Amendment since 2008 which are particularly relevant to the decision before this Court. Those cases are:

1) *District of Columbia v. Heller*, which held that the US Second Amendment protected an Individual right to keep and bear handguns in one's home for lawful purposes, including self-defense.

2) *McDonald*, which held the US Second Amendment as analyzed in *Heller* applied equally to the Federal Government and to the States.

3) *Caetano*, which vacated and remanded a Massachusetts case involving the prohibited the possession of Stun Guns for the State of Massachusetts' failure to faithfully apply *Heller*.

4) *Bruen* applied Heller's "text, then history" analysis to a non-arm-ban case and held that New York's concealed carry special need licensing scheme was unconstitutional.

When the US Supreme Court issued *Bruen*, it followed 14 years of inferior courts around the Country mis-applying the "text, then history" test of *Heller*, by creating a new two-step analysis which was rejected by the United States Supreme Court.

> Since *Heller* and *McDonald*, the Courts of Appeals have developed a "two-step" framework for analyzing Second Amendment challenges that combines history with means-end scrutiny. The Court rejects that two-part approach as having one step too many. . .

Bruen, 597 U.S. at 2

Heller first described the text then history methodology Courts are mandated to follow when analyzing Second Amendment cases. *Heller* also rejected interest balancing in Second Amendment Cases over a decade before the prohibition was reiterated in *Bruen*.

> We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding "interest-balancing" approach. The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all.

D.C. v. Heller, 554 U.S. 570, 634, 128 S. Ct. 2783, 2821, 171 L. Ed. 2d 637 (2008)

Banning an arm implicates the Second Amendment because a ban of an arm limits the choice of arms the public is allowed to keep and carry. Once the Supreme Court determined that the DC handgun ban implicated the text of the Second Amendment, the *Heller* Court performed an exhaustive review of historical firearm regulations to determine which types of weapons the government may ban.

In Common Use

. *Heller* established a constitutional principle, or rule of decision, to apply to arm ban cases. Using the historical analysis in *Heller*, the US Supreme Court determined that only weapons that were both "dangerous" and "unusual" could be banned. The test is conjunctive, requiring the weapon to be both "dangerous" and "unusual". Unusual was defined by the US Supreme Court as commonly possessed by civilians for lawful purposes, including self-defense. The US Supreme Court did not articulate a test of a weapon being "unusually dangerous" in any of the aforementioned decisions.

The methodology is known as the in common use constitutional principle. More importantly, the in common use principle arose from the US Supreme Court's historical analysis, not the Court's textual analysis.

There is no need to re-do the historical analysis in an arm ban case. The Supreme Court has already done the historical analysis to establish the constitutional principle controlling which arms can be banned[15]. The Court needs only apply the in common use constitutional principle (*i.e.* rule of decision) and determine if an arm is commonly and lawfully owned by civilians for lawful purposes, including self-defense[16], then the arm is in common use and cannot be banned.

Notably, the US Supreme Court did NOT abrogate or reverse *Heller* in any respect, and cited *Heller* favorably as the source of the analytical methodology the Court applied in *Bruen*.

> The test that the Court set forth in *Heller* and applies today requires courts to assess whether modern firearms regulations are consistent with the Second Amendment's text and historical understanding. . .

Bruen, 597 U.S. at 3

The in common use principle was developed as the result of the US Supreme Court's historical analysis, not the textual analysis. As in the analysis under Bruen for

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[15] For an arms-ban case under the "In Common Use" test, there would be no need to re-do the historical analysis done by the Supreme Court. This principle appears to be supported in the oral arguments by the US Department of Justice Solicitor General in the recent oral arguments in U.S. v. Rahimi:
GENERAL PRELOGAR: No. I think that Bruen requires a close look at history and tradition and analogue to the extent they exist and are relevant for purposes of articulating the principle. But, ***once you have the principle locked in*** *-- and, here, the principle would be you can disarm those who are not responsible or dangerous, however the Court wants to phrase it* ***-- then I don't think it's necessary to effectively repeat that same historical analogical analysis for purposes of determining whether a modern-day legislature's disarmament provision fits within the category. US v Rahimi, No 22-915, oral arguments, page 55-56 (7 Nov. 2023) (emphasis added)***

[16] The Supreme Court did not indicate other lawful uses would not be protected, but focused on the right of self-defense as that was the focus of the case before it. Other lawful uses such as hunting were not addressed.

regulation cases, discussed later, once a court finds the law implicates the text of the Second Amendment, it becomes the burden of the State to show the banned arm is not commonly and lawfully owned by citizens for self-defense.

If the law is a mere regulation of use or carry, then the State has the burden to show there exists a historical analogue law that justifies the regulation. The application of the historical analogue principle will be discussed in the next section.

The issue before this Court for a ban is whether restricting or banning a magazine of any size implicates the Second Amendment text by limiting the civilian right to make choices as to their self-defense.

> As the quotations earlier in this opinion demonstrate, the inherent right of self-defense has been central to the Second Amendment right. The handgun ban amounts to a prohibition of an entire class of "arms" that is *overwhelmingly chosen* by American society for that lawful purpose. (*emphasis added*)

Heller, 554 U.S. at 628

As in *Heller*, the present case limits the choice of arms the public is allowed to keep and carry by prohibiting particular magazines. The ban has the effect of prohibiting the sale or acquisition of any new firearm with an ammunition capacity of more than ten.

The State incorrectly argues for a different trigger to shift the burden of proof to the Plaintiffs. The State asserts the Defendants must first, as part of the textual analysis, establish that magazines, particularly magazines holding more than ten rounds, are in fact arms, commonly fired in self-defense, and for LCMs the State asserts they must fire more than ten rounds in a self-defense incident before they can be considered as having been used for self-defense. The State asserts this must all be shown by Defendants before ESSB 5078 can possibly implicate the text of the Second Amendment.

The State's argument is a tortured and incorrect reading of both *Heller* and *Bruen*. The State conflates the word "text" with the word "test". The relevant "text" of the Second Amendment reads:

"*The right of the people to keep and bear arms shall not be infringed*".

The "test" is whether or not the State can demonstrate that the banned arm is NOT commonly possessed or owned for lawful purposes, including self-defense under *Heller*.

The State employs a rhetorical device in its argument to over-describe the asserted constitutional wrong, then the State over-defines the right that is protected. Finally, the State argues this new overly defined right is not covered by the plain text of the Constitution. This focus on the overly defined right incorrectly expands the plain text of the Constitution.

The *text* of the Second Amendment is NOT: "*the right of the people to keep and bear arms that are actually fired lawfully during a self-defense incident shall not be infringed.*" Rather, the relevant text of the Second Amendment is: "*the right of the people to keep and bear arms shall not be infringed.*"

The addition by the US Supreme Court of the words "for lawful purposes, one of which is for self-defense" is not part of the "text" of the amendment, but rather an explanation of the *right*.

The US Supreme Court in *Heller* noted that handguns were the overwhelmingly "chosen" arm of the people for self-defense.

> As the quotations earlier in this opinion demonstrate, the inherent right of self-defense has been central to the Second Amendment right. The handgun ban amounts to a prohibition of an entire class of "arms" that is overwhelmingly

chosen by American society for that lawful purpose.

Heller, 554 U.S. at 628

This Court finds that ESSB 5078 implicates the text of the Second Amendment as it limits the choice of civilians as to what arms they can choose for self-defense.

The State asserts ESSB 5078 is not a ban due to its "grandfather clause". Individuals who legally possessed LCMs in the State of Washington prior to the effective date of ESSB 5078 get to keep their magazines after the effective date, albeit with some strong prohibitions on transfer[17]. The States's argument is not convincing.

"Ban" means "to prohibit especially by legal means, or to prohibit the use, performance or distribution of".[18] *Little more needs to be said.* ESSB 5078 prohibits by legal means the distribution or acquisition of LCMs. ESSB 5078 prohibits any new LCMs after its effective date and limits the transfer of existing LCMs[19]. A person cannot acquire a new LCM after the effective date outside of exemptions (military or law enforcement) not relevant here.

This Court presumes the law prohibiting importation of magazines would disallow a person who lawfully owns an LCM pre-ban yet has always stored it in a vacation home in another state to "import" that otherwise legally owned magazine into Washington. Likewise, a non-resident individual who legally owns an LCM in a state

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[17] Though not at issue in this case, the grandfather clause of ESSB 5078 may implicate the equal protection clause post *Heller* pursuant to the reference to fundamental rights in *Nordlinger*, 505 U.S. at 10.

[18] https://www.merriam-webster.com/dictionary/ban

[19] Viewed in a different light, ESSB 5078 effectively prohibits the acquisition of a Glock 17 handgun as designed, or any firearm with an ammunition capacity of more than ten, which is a ban of an entire class of arms – firearms with a capacity of more than ten rounds - a ban by a feature.

with no such prohibition and owned the LCM prior to ESSB 5078's effective date, would not be able to move to Washington and "import" their otherwise legally owned magazine[20].

More importantly, any person who does not already own an LCM in Washington State as of the effective date of ESSB 5078 is prohibited from acquiring one in the State of Washington. Under the penumbra of rights of the Second Amendment, the right to acquire arms is necessary to exercise the core purpose of the right. Included is the right to acquire a fully functional weapon. Were this court to hold individuals have no legal right way to acquire protected arms, such a ruling would eviscerate the core purpose of the right.

This Court concludes and finds that ESSB 5078 is a ban of an arm under the Second Amendment; therefore, the burden of proof shifts to the State to demonstrate that magazines with a greater a than ten round capacities are NOT owned lawfully by a significant number of civilians for lawful purposes, including self-defense.

As noted in the Washington analysis above, *Heller* defined what keep and bear meant, and it had nothing to do with shooting. *Heller* focused on lawful possession. If a significant number of people lawfully own magazines with a capacity over ten nationally, and their intent is to use them lawfully for self-defense, that is sufficient. The Court did not address other possible lawful purposes as being protected, as only the right of self-defense was at issue in *Heller*.

[20] Failure to recognize another state resident who lawfully possessed an LCM in the other state prior to the effective date of the law and then prohibit them from bringing it to Washington when they move here, seemingly implicates a possible full faith and credit issue.

The US Supreme Court's focus is on possession of an arm for the purpose of being prepared for a possible conflict.

> . . . in the course of analyzing the meaning of "carries a firearm" in a federal criminal statute, Justice GINSBURG wrote that "[s]urely a most familiar meaning is, as the Constitution's Second Amendment ... indicate[s]: 'wear, bear, or carry ... upon the person or in the clothing or in a pocket, for the purpose ... of being armed and ready for offensive or defensive action in a case of conflict with another person.' "

Heller, 554 U.S. at 584

This definition quite nicely lines up with the Washington jury instruction that was referenced from the *Evans* case in the Washington Analysis above.

The US Supreme Court found the right to bear arms under the Second Amendment is not limited to handguns.

> . . . Thus, even though the Second Amendment's definition of "arms" is fixed according to its historical understanding, that general definition covers modern instruments that facilitate armed self-defense. Cf. *Caetano v. Massachusetts*, 577 U.S. 411, 411–412, 136 S.Ct. 1027, 194 L.Ed.2d 99 (2016) (*per curiam*) (stun guns).

Bruen, 597 U.S. at 28

Handguns sold with magazines with capacities over ten have been widely available for many years. Magazine capacity was restricted for ten years under the National Assault Weapons Act of 1994[21], which expired in 2004. It is common knowledge that the public has been purchasing LCMs since 2004 in large numbers. The Court's review of the many cases related to LCMs cited by counsel and this Court's case law review yields these are extremely widespread in civilian hands.

[21] Violent Crime Control and Law Enforcement Act of 1994, H.R. 3355 (1994). As discussed in this decision, this restriction falls outside of the period the Court can consider for analogue laws.

Oregon Firearms Fed'n is a recent cases cited by the State as rejecting a Second Amendment challenge to a magazine ban. The parties to that case stipulated, and the Court apparently agreed, that millions of LCMs are owned by the public:

> Nevertheless, based on the parties' pretrial stipulation, this Court finds that millions of Americans today own LCMs . . .

Oregon Firearms Fed'n, No. 2:22-CV-01815-IM, 2023 WL 4541027, at *11 (D. Or. July 14, 2023)

The *Oregon Firearms Fed'n* Court rejected the commonality rational of *Heller* described previously in the Washington analysis above. The *Oregon Firearms Fed'n* Court determined the plaintiffs needed to demonstrate actual self-defense incidents relying on the rejection of the test of mere possession which appears clear from *Heller*.

No one seriously disputes that there are millions of LCMs in the possession of the public As in *Heller* handguns were the overwhelming choice of weapon chosen for self-defense, here, millions of Americans have chosen LCMs as the format of their weapon. The relevant metric is possession in anticipation of need. Though some LCMs are clearly used unlawfully, the State has not presented evidence before this Court that the millions of LCMs lawfully owned by the public are used unlawfully. The conclusion is that most of those millions of LCMs are lawfully owned for lawful purposes, including self-defense. This Court finds the approach in *Oregon Firearms Fed'n* unconvincing.

More importantly, *Heller* was decided by the US Supreme Court on a motion to dismiss. There was no trial. The Court was able to analyze and render its ruling without the benefit of knowing exactly how many handguns were in circulation, or how many self-defense incidents there were, or how many shots were fired. The US Supreme Court was able to do so because those metrics are not part of the test and are

inapplicable here. The US Supreme Court found that the millions of handguns owned lawfully by citizens were their chosen arm for self-defense. The Court can easily find the same here as it relates to magazines with a capacity of more than ten.

This Court cannot determine the genesis of the "used for self-defense" test as argued by the State. It is not a derivative of any Supreme Court decision or *dicta* this Court has found. To the contrary, the used-for-self-defense analysis does not have a logical or rational basis and the test conflicts with the Supreme Court definitions noted above and below. This Court cannot square such a test with the plain language of *Heller*.

The State has not provided evidence that LCMs are NOT commonly and lawfully owned or possessed by civilians for lawful purposes, including self-defense. The State instead chose to provide expert opinions concluding only that LCMs are not commonly "fired for self-defense purposes", or are not the best choice for self-defense, neither of which are relevant metrics. The opinions submitted regarding firing or number of rounds fired are likewise not relevant to the decision of this Court.

The State has not met its burden for the purposes of applying the in common use rule of decision. The State has not demonstrated that LCMs in the hands of the civilian population in the United States are NOT held primarily for lawful purposes, including self-defense. This Court finds that ESSB 5078 is unconstitutional under the *Heller* in common use constitutional principle.

For completeness, and for any reviewing court, this Court will include the analysis of this case as if it were simply a regulation of use under *Bruen*.

Bruen Regulation analysis

A non-ban case focuses on laws regulating the use or acquisition of arms, *i.e.* where arms can be used, when they can be used, licensing, concealed carry, waiting periods, etc. The in common use rule of decision is not applicable to a regulation of use case unless the law includes the ban of a weapon. Though this Court finds this case is a ban case, the *Bruen* analysis is included for completeness.

Bruen reiterated, and more explicitly explained, the methodology used by the US Supreme Court in *Heller*. *Bruen* did not establish a new test than that previously articulated by the US Supreme Court in *Heller* and *McDonald*[22]. The only real difference[23] between *Heller* and *Bruen* is the US Supreme Court in *Heller* already completed the historical analysis to establish the constitutional principle of in common use for Courts to apply in arm ban cases.

The textual analysis does not change under a firearms regulation case. The relevant "text" of the Second Amendment still reads: "*The right of the people to keep and bear arms shall not be infringed*". A law which regulates, limits, or hinders an individual's right to keep and bear arms necessarily implicates the text of the Second Amendment. This Court here has already found that ESSB 5078 implicates the text of the Second Amendment by limiting the choices civilians can make regarding their weapons for self-defense.

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[22] *Bruen* did clarify that numerous inferior courts were improperly applying *Heller* and were fashioning new tests which were not compatible with the US Supreme Court's mandate in *Heller*.

[23] *Heller* was an arm ban case, subject to the in common use principle, while *Bruen* was a regulation of carry, where in common use would have not application.

The State has the burden to demonstrate its law does not improperly infringe on the fundamental rights of the Second Amendment. To do so, the State must provide relevantly similar historical analogue laws to justify the regulation. As in other fundamental rights cases the State has the burden of proof. As in Fourth Amendment search cases, the State would have the burden of proving a warrantless search complied with an exception to the Fourth amendment warrant requirement.[24] Similarly, in a Second Amendment case, the State has the burden of proof to show a relevantly similar historical analogue law to justify ESSB 5078.

> . . . Like all analogical reasoning, determining whether a historical regulation is a proper analogue for a distinctly modern firearm regulation requires a determination of whether the two regulations are "relevantly similar." . . .

Bruen, 597 U.S. at 28–29

The Proper Historical Analogue Period

The State argues this Court should look to the "enduring American tradition of firearms regulation" when searching for analogues. This is not the directive of *Bruen* nor did that approach originate from US Supreme Court Decisions. *Bruen* was not an invitation to take a stroll through the forest of historical firearms regulation throughout American history to find a historical analogue from any random time period.

The US Supreme Court looks primarily to 1791 when trying to understand the constitutional right as it is applied to the United States, and similarly, the US Supreme Court looks to 1791, the time of the founding when analyzing the understanding of the

[24] Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest. When these justifications are absent, a search of an arrestee's vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies. *Gant*, 556 U.S. at 351

right and incorporating those rights against the states. In *Heller*, *McDonald* and *Bruen*, the US Supreme Court reviewed and considered both earlier and later laws, and generally up to the time of the Reconstruction of 1868 and some even later. *The laws outside of the founding period of 1791 were all rejected by the US Supreme Court.* The focus of the US Supreme Court has generally been 1791 for the historical understanding of other constitutional rights incorporated against the various states.

Pre-dating *Heller*, in the Washington State case of *Crawford*, the US Supreme Court looked to 1791 when analyzing the application of the confrontation clause to a criminal matter in the State of Washington.

> . . . As the English authorities above reveal, the common law in 1791 conditioned admissibility of an absent witness's examination on unavailability and a prior opportunity to cross-examine. The Sixth Amendment therefore incorporates those limitations. The numerous early state decisions applying the same test confirm that these principles were received as part of the common law in this country.

Crawford, 541 U.S.at 54

When *Heller* was incorporated against the States by *McDonald*, The Court made a clear statement that the application of the Second Amendment as it is incorporated against the States is the same Second Amendment which applies to the Federal Government.

> Finally, the Court abandoned "the notion that the Fourteenth Amendment applies to the States only a watered-down, subjective version of the individual guarantees of the Bill of Rights," stating that it would be "incongruous" to apply different standards "depending on whether the claim was asserted in a state or federal court." *Malloy,* 378 U.S., at 10–11, 84 S.Ct. 1489 (internal quotation marks omitted). Instead, the Court decisively held that incorporated Bill of Rights protections "are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights

against federal encroachment."

McDonald, 561 U.S. at 765

Outside of the Second Amendment, the US Supreme Court's 2020 decision in *Espinoza,* regarding state funding of religious schools in Montana, relied on 1791 as the critical time for comparison in a First Amendment case. The *Espinoza* Court clarified that laws later than 1791 can only be used to reinforce an earlier practice or law but cannot create a new one.

> The Department argues that a tradition *against* state support for religious schools arose in the second half of the 19th century, as more than 30 States—including Montana—adopted no-aid provisions. See Brief for Respondents 40–42 and App. D. Such a development, of course, cannot by itself establish an early American tradition. Justice SOTOMAYOR questions our reliance on aid provided during the same era by the Freedmen's Bureau, *post*, at 2297 (dissenting opinion), but we see no inconsistency in recognizing that such evidence may reinforce an early practice but cannot create one. . .

Espinoza, 140 S. Ct. at 2258–59

Espinoza reviewed 30 late 19th century state laws without 1791 precursor laws and determined the laws were insufficient to establish a compelling historical tradition of regulation and the US Supreme Court found the Montana law unconstitutional.

Bruen focused its analysis on laws in the period between 1791 and 1868 when the 14th amendment was adopted.

> The burden then falls on respondents to show that New York's proper-cause requirement is consistent with this Nation's historical tradition of firearm regulation. To do so, respondents appeal to a variety of historical sources from the late 1200s to the early 1900s. But when it comes to interpreting the Constitution, not all history is created equal. "Constitutional rights are enshrined with the scope they were understood to have when the people adopted them.". . .

Bruen, 597 U.S. at 4

However, the *Bruen* Court explained the limits of using later laws as analogues when determining the constitutionality of Second Amendment Cases.

> Finally, respondents point to the slight uptick in gun regulation during the late-19th century—principally in the Western Territories. As we suggested in *Heller*, however, late-19th-century evidence cannot provide much insight into the meaning of the Second Amendment when it contradicts earlier evidence. See *id.*, at 614, 128 S.Ct. 2783; *supra*, at 2137.[28] Here, moreover, respondents' reliance on late-19th-century laws has several serious flaws even beyond their temporal distance from the founding.

Bruen, 597 U.S. at 66

Bruen finally identifies 1791 as the proper period of laws for this Court to consider unless later laws confirm an earlier tradition.

> A final word on historical method: Strictly speaking, New York is bound to respect the right to keep and bear arms because of the Fourteenth Amendment, not the Second. See, *e.g.*, *Barron ex rel. Tiernan v. Mayor of Baltimore*, 7 Pet. 243, 250–251, 8 L.Ed. 672 (1833)*Barron ex rel. Tiernan v. Mayor of Baltimore*, 7 Pet. 243, 250–251, 8 L.Ed. 672 (1833) (Bill of Rights applies only to the Federal Government). Nonetheless, we have made clear that individual rights enumerated in the Bill of Rights and made applicable against the States through the Fourteenth Amendment have the same scope as against the Federal Government. See, *e.g.*, *Ramos* v. *Louisiana*, 590 U.S. ——, ——, 140 S.Ct. 1390, 1397, 206 L.Ed.2d 583 (2020); *Timbs* v. *Indiana*, 586 U.S. ——, —— – ——, 139 S.Ct. 682, 686–687, 203 L.Ed.2d 11 (2019); *Malloy v. Hogan*, 378 U.S. 1, 10–11, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964). And we have generally assumed that the scope of the protection applicable to the Federal Government and States is pegged to the public understanding of the right when the Bill of Rights was adopted in 1791. . . .

Bruen, 597 U.S. at 37

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More recently, last month the Third Circuit in *Lara* denied a request for an *en banc* hearing to reconsider the appellate panel's choice of 1791 as the applicable period for a Second Amendment Challenge.

Given the clear direction from the Supreme Court, this Court looks to the time around 1791 when reviewing historical analogue laws. If a later law confirms an earlier law as late as 1868 exists, that can be considered.

This Court has strong reservations in relying on any of the reconstruction era firearms laws to the extent they were part of the "Black Codes". With the unspoken purpose of such laws, they would not be relevantly similar to the purpose of a legitimate later or modern firearm regulation. Until the Supreme Court expands their analogical focus beyond 1791, this Court as an inferior court must follow the Supreme Court founding era mandate.

A More Nuanced Approach

The State argues *Bruen* requires a Court to apply a more nuanced approach when addressing Second Amendment cases. The general "nuanced" argument comes from a sentence of *dicta* in *Bruen*.

> While the historical analogies here and in *Heller* are relatively simple to draw, other cases implicating unprecedented societal concerns or dramatic technological changes may require a more nuanced approach. . .

Bruen, 597 U.S. at 27

The State reads far too much into this comment. *First,* the language is *dicta* and not part of the *Bruen* holding. *Second,* by its plain language, it is permissive, not mandatory. *Third,* and most importantly, the comment applies only to the choice of historical analogue laws, not the Second Amendment generally, the "in common use"

test, or interest balancing. *Fourth,* before this court could consider laws that are less relevantly similar, the State would need to establish the existence of either a "dramatic technological change" or "an unprecedented societal concern". The comment merely gives an inferior court some latitude in considering historical analogue laws in the proper case.

The State posits gun violence and mass shootings as an unprecedented societal concern and large capacity magazines as a dramatic technology change. Neither argument is convincing. The "nuanced" comment references "other cases" than Heller and Bruen, the conclusion being the technological change or societal concerns considered in those cases had already been considered as part of those decisions.

Gun Violence is not Unprecedented.

Critical to this analysis, *Heller* was decided in 2008, the year after the mass shooting at Virginia Tech in 2007, where a handgun with an LCM was employed killing more than 30 innocent individuals. The incident is referenced in the States expert materials herein. The shooting was also widely publicized and was included in the briefing to the *Heller* Court. Gun violence was on the table when the US Supreme Court decided *Heller*. The result was the in common use constitutional principle.

Public safety was also vigorously argued in *McDonald* and clearly rejected by the Supreme Court.

> Municipal respondents maintain that the Second Amendment differs from all of the other provisions of the Bill of Rights because it concerns the right to possess a deadly implement and thus has implications for public safety. Brief for Municipal Respondents 11. And they note that there is intense disagreement on the question whether the private possession of guns in the home increases or decreases gun deaths and injuries. *Id.*, at 11, 13–17.

> The right to keep and bear arms, however, is not the only constitutional right that has controversial public safety implications. All of the constitutional provisions that impose restrictions on law enforcement and on the prosecution of crimes fall into the same category.

McDonald, 561 U.S. at 782–83

The Court continued:

> Municipal respondents cite no case in which we have refrained from holding that a provision of the Bill of Rights is binding on the States on the ground that the right at issue has disputed public safety implications.

McDonald, 561 U.S. at 783

The Washington legislature has found that gun violence and mass shootings are on the increase and defendants do not realistically dispute this assertion. The problem, however, is not an unprecedented societal concern. The US Supreme Court considered gun violence and general dangerousness in both *Heller* and *McDonald* rejected the argument a decade ago for fundamental rights cases involving the Second Amendment.

LCM Technology Not New

Large capacity magazines are functionally identical to standard capacity magazines which have been publicly available for over one-half century or more. This fact is common knowledge as well as documented in the State's expert reports.

The US Supreme Court had LCMs, semi-automatic handguns, and mass shootings on the table in *Heller* and did not carve out an exception for LCMs or magazine capacity in general, or semi-automatic handguns. The US Supreme Court simply held that handguns as a class were protected in 2008, 14 years before *Bruen.* LCMs and smaller magazines both utilize identical technology, and do not represent

"dramatic technological change" not already encompassed in the Supreme Court decisions.

Though the nuance comment is not in reference to the in common use principle, where in common use applies (in a ban case) the principle determines which arms are in common use today, which necessarily accounts for the modern technology those arms employ today.

Even if this Court were to find either the technology or the societal concerns were new, it would only *permit* the Court to take a more nuanced approach in considering analogue laws. This Court finds neither argument to be "new" and now considers the proposed analogue laws presented.

Analogue Laws Considered

The State has provided a litany of laws to justify its regulation in this case. Most of the laws provided are post-1868 and are not relevant to the analysis. This Court has reviewed the extensive arms law charts and report provided by State's expert Robert Spitzer. This Court finds there are no relevantly similar analogue laws related to hardware restrictions near 1791 cited in those materials.

The 1771 New Jersey law prohibiting trap guns predates the Declaration of Independence and the creation of the Second Amendment. The New Jersey law was a hunting regulation[25] so its purpose was not firearms regulation. No other State enacted a trap gun law until two around Reconstruction and all others were much later. A total of

[25] The New Jersey law was designed for the preservation of deer and other game and to prevent trespassing, and was categorized under dangerous **or** unusual weapons, contrary to the conjunctive test in Heller. https://firearmslaw.duke.edu/laws/1763-1775-n-j-laws-346-an-act-for-the-preservation-of-deer-and-other-game-and-to-prevent-trespassing-with-guns-ch-539-c2a7-10

16 states apparently enacted trap gun laws, with the majority after the Reconstruction era. Trap guns don't have an operator and would not be considered "bearable". Trap guns were not possessed or carried for self-defense. As the New Jersey law was not a firearm regulation, the later trap gun laws do not represent a historical arm regulation or law near the founding (see *Espinoza* above). The Court further finds the trap gun laws not relevantly similar to ESSB 5078.

The Bowie knife laws from Mr. Spitzer's Exhibit H are primarily no earlier than 1837 and most congregating between 1860-1900, far after the target historical period, and none are close to the founding. None of these laws appear to have completely prohibited ownership. Most of these restrictions are from the Reconstruction era and later. *Bruen* requires relevantly similar historical *firearms* regulations. The knife laws were not firearms regulations and are not relevantly similar analogues.

Prior to the Reconstruction Period there were some concealed carry restrictions in the early 1800's up through Reconstruction with no laws restricting ammunition capacity whatsoever. Magazine laws did not come into effect at all until at least 1917 (one state) and most others were post-1925. None of the laws outside of the trap gun laws appear to be outright bans. Semi-automatic weapons and magazine capacity laws were not in place until 1927 and later even though some forms of semi-automatic weapons were available on a limited basis at the time of the founding.

Laws that were introduced after the Reconstruction era are simply too late in time for this Court to consider absent a precursor law from the founding period as noted in the section preceding. Mr. Spitzer's declaration does not cite any relevantly similar

historical analogues to ESSB 5078 from the proper time period. His post-1868 data is not relevant for the case.

The Supreme Court already examined the Common Law Offenses, Statutory Prohibitions and Surety laws none are relevantly similar to a prohibition or limitation on the amount of ammunition a person may carry or what type of ammunition feeding device used.

> *Common-Law Offenses*. As during the colonial and founding periods, the common-law offenses of "affray" or going armed "to the terror of the people" continued to impose some limits on firearm carry in the antebellum period. But there is no evidence indicating that these common-law limitations impaired the right of the general population to peaceable public carry.
>
> *Statutory Prohibitions.* In the early to mid-19th century, some States began enacting laws that proscribed the concealed carry of pistols and other small weapons. But the antebellum state-court decisions upholding them evince a consensus view that States could not altogether prohibit the public carry of arms protected by the Second Amendment or state analogues.
>
> *Surety Statutes*. In the mid-19th century, many jurisdictions began adopting laws that required certain individuals to post bond before carrying weapons in public. Contrary to respondents' position, these surety statutes in no way represented direct precursors to New York's proper-cause requirement. While New York resumes that individuals have no public carry right without a showing of heightened need, the surety statutes presumed that individuals had a right to public carry that could be burdened only if another could make out a specific showing of "reasonable cause to fear an injury, or breach of the peace." Mass. Rev. Stat., ch. 134, § 16 (1836). Thus, unlike New York's regime, a showing of special need was required only *after* an individual was reasonably accused of intending to injure another or breach the peace. And, even then, proving special need simply avoided a fee.

Bruen, 597 U.S. at 5

The gunpowder storage laws often cited as firearms regulations were for the purpose of fire control, not firearms regulation, and are not relevantly similar analogues.

The State has provided numerous modern laws from 1868 to the present. None of these laws are logical outgrowths of earlier laws, nor do they confirm any 1791 laws. Most of the laws are simply modern laws not relevant to this Court's decision. None of the laws proposed by the State from the proper period to be considered are relevantly similar historical analogues to ESSB 5078.

Washington has held Art. 1, § 24 is near absolute. The US Supreme Court has classed the Second Amendment as fundamental. The US Supreme Court recognized there are extremely few limits on the federal right, by recognizing there was no appetite to limit gun rights by the Founders. Though the specific technology available today may not have been envisioned, the Founders expected technological advancements. Many were inventors. The Founders included Article 1, Section 8, Clause 8 – the Patent and Copyright Clause, to promote technological progress. The result is few, if any, historical analogue laws by which a state can justify a modern firearms regulation.

The US Supreme Court did not endorse the existence of a "rich historical tradition" of gun regulation. Just the opposite. The US Supreme Court mandate requires the State to provide a relevantly similar historical analogue law from the founding period around 1791.

This Court, in reviewing the historical analogues provided, cannot identify a 1791 era relevantly similar firearms law which could conceivably justify ESSB 5078 today. The State has not met its burden of proof. ESSB 5078 is unconstitutional under *Bruen*'s historical analogue analysis.

Other Considerations before the Court

Having completed the review of historical analogue laws, and again for completeness, the Court will address a few unaddressed points raised, and remaining arguments.

Definition of Infringe

The US Supreme Court did not specifically define the term "infringed". To determine the meaning of the word requires this court to consult the same founding period dictionaries.

Samuel Johnson's dictionary[26] at the time of the founding, the term Infringe meant "to destroy" or "to hinder". Noah Webster's dictionary[27] defined infringe the same. The term "to hinder" meant to obstruct, to stop, to impede[28].

A law which hinders, limits, or decreases the right to keep and bear arms implicates the text of the Second Amendment.

Definition of Arms

To better understand this court's characterization of LCMs as arms, a more complete analysis is included. The term *Arms* is defined in several paragraphs from *Heller*, which must be read together to understand the meaning of the term within the Second Amendment.

> Before addressing the verbs "keep" and "bear," we interpret their object: "Arms." The 18th-century meaning is no different from the meaning today. The 1773 edition of Samuel Johnson's dictionary defined "arms" as "[w]eapons of offence, or armour of defence." 1 Dictionary of the English Language 106 (4th

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[26] https://johnsonsdictionaryonline.com/views/search.php?term=infringe

[27] https://webstersdictionary1828.com/Dictionary/Infringe

[28] https://johnsonsdictionaryonline.com/views/search.php?term=hinder

> ed.) (reprinted 1978) (hereinafter Johnson). Timothy Cunningham's important 1771 legal dictionary defined "arms" as "any thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another." 1 A New and Complete Law Dictionary; see also N. Webster, American Dictionary of the English Language (1828) (reprinted 1989) (hereinafter Webster) (similar).

Heller, 554 U.S. at 581

The Court continued:

> . . . the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.

Heller, 554 U.S. at 582

Anything that constitutes a bearable arm that could be worn for self-defense or employed for either offense[29] or defense against another person would fall under the historical definition of Arm.

The definition of arm is not limited to founding era arms. The *Heller* Court protected modern handguns a class at a minimum as they were understood in 2008[30]. Modern handguns in 2008 included semi-automatic handguns equipped with magazines greater than ten.

The comment in *Heller* that M16's can be banned was certainly not the issue presented in Heller to the US Supreme Court, but even so, the simple fact an M16 is generally accepted as a military arm, does not remove the weapon from the class of items that fit the definition of "arm".

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[29] There is no functional difference between offensive use and defensive use other than the role played in a confrontation. Every defensive weapon can be used offensively and vice versa.

[30] *Heller* was issued in 2008 in the shadow of the 2007 Virginia Tech Mass Shooting referenced in the States expert reports, and of common knowledge. That shooting included semi-automatic pistols and large capacity magazines.

Bruen did not alter the definition of an arm, as no definition of arm was necessary. *Bruen* was purely about obtaining a license to carry handguns, not banning them. *Bruen* was a "use regulation case" where the in common use rule of decision would not be applicable. Under the *Heller* definition, most any weapon a person owns would fit the definition of arm[31].

Corpus Linguistics

Attempting to re-define the term arm, the State provides a report from Dennis Baron, a linguist. Mr. Baron employed a research methodology called *Corpus Linguistics* to help understand the historical definition of "arm" and "magazine", and to compare them to "accoutrement". Mr. Baron's report relies on the founding-era corpora as well as post-1861 texts. He indicates the word "magazine" first appeared around 1860.

Importantly, Mr. Baron points to his work being quoted in the majority opinion of *Heller*, though fails to mention the Supreme Court essentially rejected his methodology to determine the meaning of "to bear arms".

> Of course, as we have said, the fact that the phrase was commonly used in a particular context does not show that it is limited to that context, and, in any event, we have given many sources where the phrase was used in nonmilitary contexts. Moreover, the study's collection appears to include (who knows how many times) the idiomatic phrase "bear arms against," which is irrelevant. The *amici* also dismiss examples such as " 'bear arms ... for the purpose of killing game' " because those uses are "expressly qualified."

Heller, 554 U.S. at 588–89

[31] Washington case law is more focused definition of arms from *Evans*, 184 Wash.2d at 864 which required an "arm" to have been designed to be an arm as opposed to a culinary tool.

Mr. Baron opines a magazine is most analogous to a cartridge box and therefore not an arm. The analogy is misplaced. A cartridge box was used to carry or store cartridges. It would be like the box of shells one purchases from a retailer today. A cartridge box is not a part of a firearm, never connects to it, and doesn't enable the arm to fire in a semi-automatic fashion[32].

A magazine is a functional device which is designed to do one job – to feed the semi-automatic function[33] of the arm. Magazines are critical to the core function of a semi-automatic weapon. The right to keep and bear arms presumes a functional weapon. Ten round magazines and LCMs function identically[34].

Mr. Baron argues that magazines are "accoutrements" not "arms". His report (at page 20) also indicates armor is an accoutrement and not an arm. Notably, Samuel Johnson's founding era dictionary used by the US Supreme Court quoted earlier includes armor within the definition of "arm".

The Court cannot find the Corpus Linguistics methodology presents with a basic modicum of reliability necessary for the Court to consider it, nor is it any more reliable than what was already rejected by the Supreme Court in *Heller.* The study cannot redefine the US Supreme Court's definitions. This Court places no weight or relevance on Mr. Baron's opinion for this case.

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[32] As a person would have carried their cartridge box along with their weapon, and the weapon would needed ammunition to function, a cartridge box could likely be seen as an instrument that facilitates armed defense historically.

[33] Whether a magazine is internal or detachable, without one, a semi-automatic weapon is, at best, a single shot firearm.

[34] The observations by the Court are common knowledge to anyone with a basic understanding of the operation of a semi-automatic firearm and are not contradicted by any of the experts' reports reviewed herein.

Interest Balancing

The State continues to assert interest balancing is allowed under the more nuanced approach under *Bruen.* This ignores the nuanced comment is related only to the choice of analogue laws, and not to interest balancing. This Court rejects the argument.

People just don't need that many shots.

The State posits the average number of shots fired in a self-defense incident is approximately three. This figure comes from the report of economist Lucy Allen[35]. MS Allen's declaration is based primarily on data she sourced from anecdotal news story data, supplemented with data from Portland, Oregon police shell casing data. The latter data appears to be also based partly on news stories. MS Allen's professional background appears mostly in asbestos research, not firearm research. This Court is challenged to find her methodology reliable enough to be admissible.

Looking at the report in the light most favorable to the State, and even were this Court to give 100% credence to the data and her conclusions, they are not relevant to the issues this Court must decide. The definition of keep and bear is possession and carry, not how many shots are fired in an incident. The argument is just another version of interest balancing – *you only need three shots* - which is not allowed in fundamental rights cases. The idea that civilians have an alternative the Government approves of was rejected in *Heller*:

> It is no answer to say, as petitioners do, that it is permissible to ban the possession of handguns so long as the possession of other firearms (*i.e.,* long

[35] This court is no more convinced of the reliability of MS Allen's report than other Courts that have rejected it. Adding the Portland Police data is somewhat helpful, but doesn't address the questionable other data.

guns) is allowed. It is enough to note, as we have observed, that the American people have considered the handgun to be the quintessential self-defense weapon.

Heller, 554 U.S. at 629

No other right is conditioned on a person's "need". If a person could attain salvation by going to Church only on Sundays, could the State then prohibit attendance on other days under the First Amendment? The answer is obvious.

This Court rejects the shots fired argument as both an impermissible interest balancing test and irrelevant to the decision before the Court.

Other magazines are allowed

The State asserts that since ten-round magazines are not restricted or banned, the State can therefore restrict or ban LCMs. This is essentially the identical argument as the foregoing which the Supreme Court rejected in in *Heller.* For the same reasons, this Court rejects the argument.

Not Suitable for Self Defense – More suitable for Military

The State argues there are better choices of arms for self-defense purposes and that LCMs are more suited for military use. Oddly, the State expert arguing this point asserts his own officers carry 17-round magazines to be prepared for whatever contingency might occur. This is the exact preparedness the Second Amendment protects for citizens.

As stated earlier, Police do not carry for assaultive purposes, they carry for defensive purposes. The *Heller* cite above regarding choice of arms is applicable here. It is not that a weapon must be the best choice for self-defense to be protected, *it just must be one commonly chosen by the public for that lawful purpose*. The actual purpose

of firing a weapon can only be determined after it has been fired. Thankfully we may never know how many firearms truly were purchased for the purpose of self-defense.

Also noted earlier in this decision, being a military arm does not disqualify an arm from being either an arm or being protected.

This Court rejects this argument.

Common Sense Legislation

The State finally argues the Legislature has determined the law will have a beneficial effect on gun violence in the State of Washington and that ESSB 5078 is an important law. The Court recognizes that violence in general and gun violence specifically are public safety issues. These are not new issues and have been previously addressed by the US Supreme Court.

> We are aware of the problem of handgun violence in this country, and we take seriously the concerns raised by the many *amici* who believe that prohibition of handgun ownership is a solution. The Constitution leaves the District of Columbia a variety of tools for combating that problem, including some measures regulating handguns, see *supra,* at 2816 – 2817, and n. 26. But the enshrinement of constitutional rights necessarily takes certain policy choices off the table. These include the absolute prohibition of handguns held and used for self-defense in the home. Undoubtedly some think that the Second Amendment is outmoded in a society where our standing army is the pride of our Nation, where well-trained police forces provide personal security, and where gun violence is a serious problem. That is perhaps debatable, but what is not debatable is that it is not the role of this Court to pronounce the Second Amendment extinct.

Heller, 554 U.S. at 636

The State filed a declaration from Louis Klarevas, a political scientist discussing generally the dangerousness of LCMs and detailing the history of mass shootings. The dangerousness concern was previously addressed in *McDonald*.

> The right to keep and bear arms, however, is not the only constitutional right that has controversial public safety implications. . . Municipal respondents cite no case in which we have refrained from holding that a provision of the Bill of Rights is binding on the States on the ground that the right at issue has disputed public safety implications.

McDonald, 561 U.S. at 783

As originally announced in *Heller*, reiterated in *McDonald*, and heavily re-stressed in *Bruen*, consideration of and balancing of the state's interest is outside of the scope the what the court may consider:

> If the last decade of Second Amendment litigation has taught this Court anything, it is that federal courts tasked with making such difficult empirical judgments regarding firearm regulations under the banner of "intermediate scrutiny" often defer to the determinations of legislatures. But while that judicial deference to legislative interest balancing is understandable—and, elsewhere, appropriate—it is not deference that the Constitution demands here. The Second Amendment "is the very *product* of an interest balancing by the people" and it "surely elevates above all other interests the right of law-abiding, responsible citizens to use arms" for self-defense. *Heller*, 554 U.S. at 635, 128 S.Ct. 2783. It is this balance—struck by the traditions of the American people—that demands our unqualified deference.

Bruen, 597 U.S. at 26

If *Bruen* was a landmark case, it was for chastising inferior courts for over a decade of continuing to apply tiers of scrutiny and interest balancing to Second Amendment cases after the US Supreme Court had rejected that approach in *Heller* and *McDonald*. This Court is mandated to apply Supreme Court precedent when addressing second amendment cases, regardless of well-meaning implorations of the parties, or incorrect applications of the US Supreme Court tests by other courts.

In fundamental rights cases such as this, it is presumed that civilians exercising the right to bear arms intend to do so lawfully. Therefore, it is offensive to prospectively

limit or hinder the right. We do not prohibit speech generally with the expectation offensive words will be spoken. Such action would be chilling and unconstitutional.

Conclusion

The United States Constitution and the Bill of Rights exist to define the outer limits of what Legislatures and Courts are allowed to do. Amending the Constitution and Bill of Rights cannot be done simply by enacting a law, or by a pronouncement from a Court. To move beyond the defined limits requires the Constitution to be amended. Amending the documents is intended to be difficult to assure transitory governments or societal mores cannot easily overstep the constitutional limitations.

This Court finds there are no relevant facts in dispute in this case and all issues raised in this motion are legal issues. The legal issues are proper for disposition under Summary Judgment standards. The Court has reviewed each motion independently, taking the undisputed facts of the case and in each motion considering the evidence most favorably for the non-moving party. The Court has determined the relevance and weight of the various opinions and reports submitted for consideration. The Court makes its findings beyond a reasonable doubt.

Washington Ruling

Pursuant to the reasoning set out in the Washington Analysis above, This Court finds there are no factual circumstances this Court can conceive under which ESSB 5078 as written and codified could be constitutional under the Washington Constitution, Article 1, Section 24. The Court finds ESSB 5078 is facially unconstitutional under the Washington Constitution.

Federal Ruling

Pursuant to the reasoning set out in the Federal Analysis above, this Court finds ESSB 5078 implicates the text of the Second Amendment of the US constitution.

The State has not demonstrated that LCMs are not in common use[36] under the *Heller* in common use test.

The State has failed to provide a relevantly similar historical analogue from the proper period, and therefore the State has failed to meet its burden under the *Bruen* historical analogue test.

The Court finds there are no factual circumstances this Court can conceive under which ESSB 5078 as written and codified could be constitutional under the United States Constitution, Second Amendment. The Court finds, ESSB 5078 is facially unconstitutional under the United States Constitution.

Consumer Protection Action

This case is brought under a Consumer Protection Enforcement Action claim by the State of Washington against Defendants. The violations alleged are the sale of what this Court finds are protected arms under Washington Constitution Article 1, § 24, as well as United States Constitution, Bill of Rights, Second Amendment.

The CPA does not regulate "how" an LCM is sold; it prohibits the sales and importation of magazines with a capacity greater than ten. It is logically inconceivable that an item that is constitutionally protected to possess could be prohibited from sale to the very people who have the protected right to possess it.

[36] "In common use", meaning commonly owned by citizens lawfully for self defense

As such there is no set of facts this Court can conceive of which would allow the Consumer protection sections of ESSB 5078 as written to pass constitutional muster and this Court specifically finds those sections unconstitutional.

Order

1. The Court Grants the Defense Motion for Summary Judgement on both its Article 1, Section 24 claim, and on their Second Amendment Claim.
2. The Court Denies the States Motion for Summary Judgement on both its Article 1, Section 24 claim, and their Second Amendment Claim.

Injunction

This Court hereby immediately enjoins the State of Washington, or its officers and agents, or the enforcement personnel of any state, county, or local political subdivisions from enforcing any of the provisions of ESSB 5078 as codified at RCW 9.42.300 and 9.41.375 against any individual, or entity which it would otherwise apply. The Attorney General's Office is ordered to immediately inform affected enforcement entities of this injunction.

In compliance with RCW 7.40.080, defendants are hereby required to post a bond in the amount of $500 (cash or secured bond) with the Clerk of this Court, pending further proceedings herein and entry of final orders. Said bond shall be posted within 5 court days of entry of this order, however the effectiveness of the injunction is not contingent on the filing of the bond in the interim.

Attorney's Fees

Both parties have requested and award of Attorney fees in this matter. The Court does not address fees in this decision but will consider those claims upon motion before Court to allow for separate briefing and proof of fees and costs incurred.

Stay of Injunction

At the conclusion of the summary judgment oral argument, the State first orally mentioned that if the Court were to enjoin ESSB 5078 the State requested any such injunction stayed pending appeal. Defendants orally objected to this request. No motion has been filed with this Court regarding the issue of a possible stay.

The State has no interest in enforcing an unconstitutional law. The Court will address the question of a stay if a proper motion is filed with notice.

It is so ordered.

Dated this 8th day of April 2024.

// Judge Gary B. Bashor

Judge Gary B. Bashor
Cowlitz County Superior Court