

**IN THE SUPREME COURT OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

Appellant,

v.

GATOR'S CUSTOM GUNS, INC., ET  
AL.,

Respondents.

No. 102940-3

RULING GRANTING EMERGENCY  
MOTION FOR STAY

The State of Washington, by and through the Attorney General's Office, has filed an emergency motion for a stay of a Cowlitz County Superior Court order invalidating Washington's statutory restriction on firearm magazines, specifically large capacity magazines (LCMs) as defined by RCW 9.41.010(25), and imposing an injunction on enforceability of "any of the provisions of ESSB 5078 as codified at RCW 9.42.300 and 9.41.375" pending appellate review. The motion is granted and a stay is imposed for reasons explained below.

Procedural Background

On Thursday, March 7, 2024, at 1:13 pm, this court received an email from the State, appropriately copied to respondent Gator's Custom Guns' (Gator's Guns), concerning this case. The State informed the court that the superior court scheduled a summary judgment hearing for Monday, March 11, 2024, at 9 am. The State represented that if the superior court issued an order invalidating and/or enjoining SB 5078 and

declined to stay operation of such order pending an appeal, the State would seek emergency relief in this court.

Based on this notification, I resumed and expanded extensive legal and historical research on firearms, including LCMs, that I conducted previously in connection with a motion for direct discretionary review filed in *Guardian Arms, LLC, et al. v. State of Wash., et al.*, No. 102436-3. The attorneys for the parties in that case are the same as those in this case. The petitioners there were firearms dealers and individuals challenging a Thurston County Superior Court order denying petitioners' motion for a preliminary injunction barring enforcement of newly enacted statutes barring the manufacture, sale, and importation of assault weapons. See RCW 9.41.010(2) (defining assault weapons); RCW 9.41.390 (prohibition against assault weapons). I denied direct discretionary review in *Guardian Arms* by way of a ruling filed on January 22, 2024. A copy of that ruling is attached to this one.<sup>1</sup>

After the March 11, 2024, summary judgment hearing in this case, the State notified this court, again with a courtesy copy to Gator's Guns, that the superior court had taken the matter under advisement and would issue a ruling later. My legal research of the LCM issue continued in anticipation of the superior court's ruling. Furthermore, as a result of my research in *Guardian Arms*, I was aware that in 2019 the federal district court in California had entered an injunction against that state's LCM ban. See *Duncan v. Bonta*, 2023 WL 6180472. I was mindful also that within a week of that

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<sup>1</sup> An aggrieved party may move to modify a commissioner's ruling, which results in de novo review of the ruling by the justices of the court. RAP 17.7. The petitioners in *Guardian Arms* did not file a motion to modify my ruling; accordingly, the ruling became final when the court issued a certificate of finality on February 22, 2024. RAP 12.5(e). The State cites and quotes the *Guardian Arms* ruling in the instant emergency motion for a stay and in the reply to Gator's Guns' answer to that motion. My ruling in *Guardian Arms* obviously has no precedential value but perhaps can be useful as a form of persuasive authority or for providing contextual background. As I remarked at oral argument when discussing an Oregon commissioner's ruling, my ruling in *Guardian Arms* "is as binding as a restaurant menu" when it comes to this case.

decision millions of LCMs flooded California—effectively depleting the national civilian inventory of LCMs—until the district court imposed a stay pending appeal. *See Duncan v. Bonta*, 83 F.4th 803, 806 (9th Cir. 2023). I therefore expected that the State would seek such a stay in this case. I also expected that the briefing submitted to the superior court in this case would present arguments very similar to those offered in *Guardian Arms*. As a consequence of this research and advance notice of the superior court’s upcoming summary judgment ruling, I felt reasonably well prepared to review the State’s potential motion for a stay if that were to happen.

It did. On Monday, April 8, 2024, the superior court filed its order invalidating and enjoining the statute, also denying the State’s request for a stay. Not long afterward, this court received notice and a copy of the order via email at 3:17 pm.

I immediately began my review of the superior court’s order. Because the superior court’s order was exceptionally well organized, I determined quickly that debatable issues existed that an appellate court will need to resolve, and while reviewing the order I began assembling the components of a potential ruling. The State filed its emergency motion for a stay at 4:14 pm, as expected, addressing issues that were apparent when reviewing the superior court’s order. The State’s motion is supported by more than 900 pages of material, consisting of pleadings submitted to the superior court, verbatim transcript of court hearings, and the State’s expert witness reports.

Over the course of an hour after this court received the superior court’s order, I determined, pursuant to factors listed in RAP 8.1(b)(3), that a temporary stay was appropriate pending a hearing on the State’s emergency motion. I was particularly concerned that the superior court’s decision would trigger a flood of LCMs entering state circulation, as happened in California, with potential effects on public safety.<sup>2</sup>

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<sup>2</sup> I had not yet seen the more than 900 pages of materials the State submitted in support of its motion but have since reviewed them. The additional material amply supports my decision to impose a temporary stay.

I completed and signed a two-page ruling imposing a temporary stay pending consideration of the State’s emergency motion for a stay. The court filed the ruling and forwarded it via email to the parties along with a scheduling order. *See* SAR 15(a) (the supreme court will appoint a commissioner “to promote the effective administration of justice”); SAR 15(b) (“The commissioner will hear and decide those motions authorized by the Rules of Appellate Procedure and any additional motions that may be assigned to the commissioner by the court”); RAP 8.3 (appellate court has authority to issue orders “before or after acceptance of review ... to insure effective and equitable review”).

As demonstrated by screenshots attached to the Declaration of Victoria Johnson, firearms owners were urged by way of social media and a YouTube channel to buy LCMs immediately after the superior court issued its injunction. One digital media commentator, for example, announced the decision and urged readers to “Go shop now!!!” *Id.* They did. I had assumed there was no inventory of LCMs in Washington, reckoning people seeking LCMs would buy them online, or if they lived close to the Idaho border, buy some there. But it turned out Gator’s Guns and several other Washington outlets—apparently not large-scale retailers like Cabela’s—had sizeable LCM inventory on hand and sold ample quantities to buyers flocking to their stores. One outlet promoted “OPERATION: Mag Drop,” announcing “10+ rnd Magazines Available.” *Id.* Buyers at some outlets posted photos online displaying up to 10 LCMs they bought that day, one saying that they had bought 45 of them. Gator’s Guns boasted on social media that it had sold LCMs to about 250 customers that day before I imposed a temporary stay.

On Thursday, April 12, 2024, Gator’s Guns filed an answer opposed to the State’s emergency motion for a stay, submitting also a copy of an Oregon Court of Appeals commissioner’s order denying a stay and expediting the appeal of a Harney

County Circuit Court order declaring Oregon Ballot Measure 114 (2022) (a firearms control measure banning LCMs and requiring a permit to buy certain firearms) unconstitutional under Article I, section 27, of the Oregon Constitution. *Arnold, et al. v. Kotek, et al.*, Ore. Ct. App. No. A183242. The State filed a reply, including the declaration of Victoria Johnson and attachments thereto, in support of its emergency motion for a stay on Tuesday, April 16, 2024.

The parties argued the motion at a videoconference hearing on April 17, 2024, which was livestreamed and archived on tvw.org.<sup>3</sup>

Now before me for determination is the State's emergency motion for a stay.

#### Standard for Obtaining a Stay Pending Review

Under Washington's court rules, an appellate court may stay a superior court decision in certain civil cases after considering whether (1) the moving party has demonstrated that the appeal involves debatable issues and (2) after comparing "the injury that would be suffered by the moving party if a stay were not imposed with the injury that would be suffered by the nonmoving party if a stay were imposed." RAP 8.1(b)(3). The parties here are the State (the moving party) and Gator's Guns and its owner (the nonmoving parties). Furthermore, as indicated, an appellate court may enter orders necessary to "insure effective and equitable review." RAP 8.3. These rules give an appellate court discretionary authority to stay a lower court decision before or after review is taken. *Moreman v. Butcher*, 126 Wn.2d 36, 42 n.6, 891 P.2d 725 (1995). Under RAP 8.1(b)(3), the existence of debatable issues means just that: there is no

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<sup>3</sup> <https://www.tvw.org/watch/?clientID=9375922947&eventID=2024041132> It should be noted that during a fleeting portion of oral argument discussing the territorial and early statehood period, I off-handedly mentioned suppression of this region's Indigenous people. Immediately after oral argument I realized with considerable regret I had not given enough weight to that dark part of our history. I take this moment to fully recognize the harsh and cruel subjugation of Washington's Indigenous tribes and their people during the territorial and early statehood period. The intergenerational trauma of that subjugation and oppression is keenly felt today. We must never forget that.

requirement that the moving party show it is likely to prevail on the merits. *Kennett v. Levine*, 49 Wn.2d 605, 607, 304 P.2d 682 (1956). Stated another way, debatability does not turn on a finding that the lower court erred, but rather, whether reasonable minds can differ on the issue at hand. One of the primary policies of a stay pending review is to preserve the fruits of a successful appeal. *Wash. Fed'n of State Emps. v. State*, 99 Wn.2d 878, 883, 665 P.2d 1337 (1983).

#### Debatable Issues

Here, the State argues there are several debatable legal issues needing resolution on appeal. Gator's Guns contends there are no debatable issues at all: the superior court decision is correct on all fours. Gator's Guns adhered tightly to this view during oral argument, counsel for both sides acquitting themselves well in my estimation.

Having reviewed the parties' briefing and attachments thereto, having thoroughly reviewed the superior court's decision, and having the benefit of oral argument, it continues to be my conclusion that there is no shortage of debatable issues in this case. To explain adequately why I believe this to be so requires examination of (1) the historical development of firearms magazines generally, (2) the historical development of LCMs, (3) the mass shooting problem associated with LCMs, (4) the legislative response to that problem, and (5) multiple issues arising from the superior court's decision invalidating and enjoining the legislative response. We start with some basic history on firearm magazines.<sup>4</sup>

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<sup>4</sup> Imprecision regarding firearms technology and history in caselaw and briefing on both sides of the issue is frustrating. The best court decision accurately describing firearms history and technology may be the supremely well-reasoned federal district court decision in *Oregon Firearms Federation, et al. v. Kotek*, (D. Ct. Ore., 2023 WL 4541027). This ruling will attempt to be as accurate, if not as extensively stated. If there are any errors as to firearms history and technology in this ruling, they are all mine. The reader will note that I make some remarks based on my lifetime experience with firearms. It should also be noted that the observations made in this analysis are not offered as findings of fact for determining the ultimate merits of this appeal; rather they provide historical context underlying my reasoning in making this purely procedural ruling.

### Firearm Magazines: A Brief Historical Survey

The development of workable repeating firearms during the first half of the Nineteenth Century led to the development of magazines, a type of ammunition feeding technology. The earliest practical form of magazine was the revolving cylinder system used in the Colt's revolver, first introduced in 1836, and some rifle and carbine variants of that design that followed but quickly faded into history. *See* Charles G. Worman, *Firearms in American History* 57 & 82 (2007). This case does not concern those weapons, including the myriad types of revolvers Washingtonians can buy today.

The earliest form of firearm magazine for long guns that is still in widespread use today is the tube-feeding system for fixed (or unitary) ammunition, activated by a spring, located under the weapon's barrel or within its butt stock. Tube magazines have existed since around 1859, initially feeding lever-action rifles and carbines, such as the Henry rifle and the many Winchester rifles and carbines that succeeded it, and the seven-shot Spencer carbine used by the United States Cavalry during the Civil War and for about a decade afterward. *Id.* at 99-103, 122.

Nearly all early bolt-action repeating rifles, such as the 1884 Mauser and the 1886 French Lebel (the first military rifle to fire smokeless powder ammunition) were fed from tube magazines. *See* Smithsonian, *Firearms: An Illustrated History* 144-47 (Rob Houston & Christine Stroyan, eds., Random House 2014). They were and still are common also with pump-action firearms, especially shotguns. *See, e.g., Shooter's Bible* 302 (115th ed., 2023) (Mossberg 500 Retrograde 12 gauge with six-shell tube magazine). A number of civilian semiautomatic rifles use tube magazines, but mainly .22 rimfire rifles (I happen to own two tube-fed semiautomatic .22 rifles, a Marlin 60 and a Remington 66). Someone trying to attempt a mass shooting with a tube-fed weapon is going to be hindered by the necessity of reloading each round into the weapon

one-by-one; accordingly, the legislature gave the tube magazine system something of a pass, as will be noted below.

Also, to be addressed more fully later, nearly all LCMs are detachable box magazines, but not all detachable box magazines are LCMs. Detachable box magazines for firearms (at least designs that were practical and worked) were first introduced in the 1880s. One of the first being the 1882 Remington-Lee, a bolt-action rifle firing the black powder .45-70 cartridge and equipped with a five-round magazine. *See* Jim Supica, Doug Wicklund & Philip Schreier, *The Illustrated History of Firearms* 137 (2d ed. 2020).

Most bolt-action rifles with detachable box magazines, both civilian and military, were (and still are) limited to four or five rounds. *See, e.g., Shooter's Bible* at 195 (Finnish-made Sako 85 Kodiak .375 H&H bolt action rifle with detachable five-round magazine). The most notable exceptions were various versions of the legendary and fast-firing British Enfield .303 military rifle, introduced in 1895 and used through the Korean War, equipped with detachable 10-round magazines; however, the usual reloading method for those rifles was a charging or stripper clip (a simple device that attaches rounds together for quick reloading). *The Illustrated History of Firearms* at 161.<sup>5</sup> Most bolt-action rifles, however, were equipped with internal or box magazines of five or less rounds, the military versions of which were loaded by stripper clip. The most famous American example was the .30-06 Springfield M1903. *Id.* at 157.<sup>6</sup>

The first practical and reliable semiautomatic firearms were pistols, two early examples of successful designs being the distinctive and evil-looking 1896 Mauser and the compact 1900 Browning manufactured by FN. *Id.* at 140, 146. These weapons held

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<sup>5</sup> One of my law school classmates (an Army veteran) liked to take his vintage .303 Enfield out for deer hunting. It is ideally suited for that purpose.

<sup>6</sup> Illustratively, there is a target range scene in *Sergeant York* (1941) where Gary Cooper loads an M1903 Springfield with a stripper clip.



10 or less rounds in standard configuration, although larger magazines were eventually developed for military use with the Mauser. Meanwhile, the United States military adopted the fearsome Browning-designed Colt M1911, which is equipped with a seven-round magazine containing .45 ACP (Automatic Colt Pistol) cartridges. *Id.* at 138.<sup>7</sup> The M1911A1 was the standard American military sidearm until about 1990.

The weapons wielded by infantry during the First World War were effective. In October 1918, Acting Corporal Alvin York engaged in a firefight with a large number of German soldiers. He was armed with an M1911 pistol (seven-round magazine) and an M1917 Enfield bolt-action rifle (five-round internal box magazine).<sup>8</sup> York killed approximately 25 Germans, who were trying to kill him, and captured 132 more of them. He was awarded the Congressional Medal of Honor.<sup>9</sup> Gator's Guns apparently believes all of us civilian Washingtonians need much more firepower than York had.

Moving on, prior to the Second World War the well-known Belgian FN concern introduced a Browning-designed semiautomatic pistol that could hold 13 rounds in a double-stack detachable magazine, but it was apparently the only inter-war center-fire pistol designed for that loading system, and it was largely unknown to the American civilian population.<sup>10</sup> *Id.*

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<sup>7</sup> Variations of the iconic M1911 are still being made by several manufacturers, some chambered for 9mm rounds, and the 1911A1 was mentioned briefly in a lively exchange during oral argument. My father brought his sidearm home after serving in the Second World War. *See Shooter's Bible* at 334 (Trump Rally Cry 1911), 346 (Charles Daly 1911 Field Grade), 353 (Citadel M-1911), 354 (Colt's Competition Pistol), 377 (Aegis Elite Custom).

<sup>8</sup> The .30-06 M1917 Enfield was a stopgap rifle based on a 1914 British design, adopted by the United States military because of the slow pace of production of the Mauser-based M1903 Springfield. The large majority of American infantrymen in the First World War were armed with the M1917. *Illustrated History of Firearms* at 158. In *Animal House* (1978), Doug Neidermeyer tried to shoot "Flounder" with an M1917.

<sup>9</sup> The Congressional Medal of Honor Society maintains a digital database of Medal of Honor recipients and their stories. Reviewing it is a moving experience. *See* [cmohs.org](http://cmohs.org).

<sup>10</sup> Utahn John Moses Browning was a brilliant and prolific firearms designer, crafting weapons for numerous manufacturers, including Winchester, Remington, and FN. He did not manufacture firearms himself but many firearms were named after him. His influence was such that the AK-47 has some of Browning's DNA (components inspired by the Browning-designed Remington Model 8).

The first workable semiautomatic rifles, introduced in the early Twentieth Century, were equipped with detachable or fixed magazines (tube or box) limited to five to ten rounds. *Id.* at 134 (1908 Mondragon military rifle), 139 (Winchester Model 1907 civilian rifle). Larger magazines were limited to military and law enforcement users. *See id.* at 216-17 (showing law enforcement versions of Remington Model 81 (ca. 1940) and Winchester Model 1907 (ca. 1955) rifles with LCMs). For example, the influential Browning-designed Remington Model 8 semiautomatic rifle, patented in 1900 and manufactured from late 1906 to 1936, held five rounds in an internal box magazine that could be fed by stripper clip. *See* [Classic Guns: Remington Model 8 Rifle - Gun Digest](#). (visited April 21, 2024). A law enforcement version of the Model 8 was designed for larger magazines, but those were not civilian weapons. *Id.* The weapons that killed Bonnie and Clyde included a customized Model 8 with a 20-round magazine. *Id.* Gator's Guns is thus correct that LCMs have been around for more than a hundred years, but they were close to nonexistent as a component of the civilian firearms market.<sup>11</sup>

In any event, it is well-known that the most famous American rifle during the Second World War and the Korean War was the renowned M1 Garand .30-06 semiautomatic rifle.<sup>12</sup> *Firearms: An Illustrated History* at 176-77. That sturdy and reliable weapon did not have a detachable magazine, instead relying on an internal magazine holding eight rounds fed by a distinctive charging clip. The Garand was close to perfect in the eyes of many, apart from its limited magazine capacity (compared to

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<sup>11</sup> The Remington Model 8 was effective and reliable but was not overwhelmingly popular, as most hunters in those days preferred more powerful, elegant, and accurate single-shot or bolt-action hunting rifles. Besides, the Model 8 and its successor, the Model 81, were rather homely by the standards of the day, looking like a prop at a Steampunk convention. [Remington's Early Autoloaders--the 8 & the 81 - Shooting Times](#). These early semiautomatic rifles are prized by collectors today. *See Gun Trader's Guide* 349 (Robert A. Sadowski, ed., 45th ed. 2023) (listing value of Model 8s in accordance with condition).

<sup>12</sup> Named after Canadian-American designer Jean "John" Garand, born in Quebec.

the 10-round Enfield magazines) and the shooter's inability to top off the magazine with single rounds (a handy feature of bolt-action rifles). Surplus M1s of varying quality can be found in some firearms shops. And the Garand has long been a popular target shooting firearm in the Civilian Marksmanship Program (CMP).<sup>13</sup> If the M1 was produced today it would be legal in Washington.

As for the M1 Garand's combat effectiveness, the weapon was legendary. In April 1945 U.S. Army Staff Sergeant John R. Crews was armed with one when he charged and eliminated a German machine gun nest and another well-entrenched position, killing several Wehrmacht soldiers, capturing seven more, and causing others to flee for their lives. He too was awarded the Congressional Medal of Honor. Gator's Guns apparently thinks the typical Washington homeowner needs more firepower than that wielded by Sergeant Crews when he charged multiple dug-in positions manned by foes trying to kill him.<sup>14</sup>

#### Early Development of LCMs

Stepping back historically, detachable box magazines exceeding 10 rounds became more common—necessary, really, in combat conditions—with the advent of select-fire weapons, those capable of switching between semiautomatic and full-automatic modes of fire. The most famous early examples, introduced near the end of the First World War and shortly thereafter, were the Browning Automatic Rifle (BAR), a light machine gun firing the .30-06 round through a detachable box magazine (the Army and Marine Corps relied on the BAR until 1957); and the Auto Ordnance Thompson submachine gun (“Tommy gun”), which fires the .45 ACP round fed through

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<sup>13</sup> The CMP is a long-running non-profit organization that promotes civilian marksmanship and firearm safety training. See <https://thecmp.org/>. (visited Jan. 4, 2024).

<sup>14</sup> The Germans in that action were likely armed with the MG 42 machine gun. It was one of the most feared weapons in the German arsenal, capable of firing more than 1,200 rounds per minute, usually fed by an ammunition belt. As indicated, Crews was armed with an M1 Garand with an internal eight-shot magazine. He won.

a 20-round detachable box magazine or detachable drum magazine holding 50 or 100 rounds. *The Illustrated History of Firearms* at 170-71, 174.

The Tommy gun was sold on the civilian and law enforcement market initially, not because there was a great demand for it, but because Thompson needed to sell its innovative weapon in response to the peacetime collapse of the military firearms market. See Robert J. Spitzer, *Understanding Gun Law History After Bruen: Moving Forward by Looking Back*, 51 *Fordham Urb. L.J.* 57, 61-62 (2023).<sup>15</sup> Besides, there were no legal restrictions at that time on selling fully-automatic weapons. See *id.* at 62 (“Before the early 1920s, these fully automatic weapons were unregulated for the obvious reason that they did not exist or were not circulating widely in society.”). An advertisement of the era (included among the ample exhibits provided by the State, and known to me already because I had seen it in history books) shows a rancher or cowboy standing on the front porch of a ranch house using his Tommy Gun to mow down a pack of horsebound bandits (sombbrero-wearing Mexicans, an eye-popping example of racist advertising if there ever was one). See Exhibit E to Declaration of Andrew Hughes at 238 (Expert Report of Robert J. Spitzer, Ph.D. at 34).

The havoc wrought by Tommy guns and BARs in the hands of bank robbers and criminal gangs in the 1920s and 1930s prompted the enactment of numerous state laws prohibiting ownership of full-automatic firearms, culminating in the National Firearms Act (NFA) of 1934. 18 U.S.C. § 922(o). *Spitzer*, 51 *Urb. L.J.* at 65-67. The original version of the NFA and similar state statutes, and the facts that prompted their

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<sup>15</sup> Professor Spitzer is a leading expert on national firearms policy. He provides declarations in support of the State in this case and in *Guardian Arms*. See Exhibit E to Declaration of Andrew Hughes: Prof. Spitzer’s Expert Report. Prof. Spitzer’s law review article contains historical analysis consistent with his declarations.

enactment, are close historical analogies to the assault weapons statutes enacted in Washington and many other states.<sup>16</sup> *See id.* at 67.

The modern 30-round detachable box magazine for today's assault weapons traces its origins to the world's first true assault rifle, the German StG 44 "Sturmgewehr" (meaning, literally, assault rifle) introduced in World War Two. It is a select fire weapon firing an intermediate 7.92 mm cartridge fed by a curved 30-round detachable box magazine. *See Firearms: An Illustrated History* at 214-15. It partly inspired the Soviet AK-47 designed by Mikhail Kalashnikov, which fired an intermediate 7.62mm round fed by a curved 30-round detachable box magazine. The AK-47 is arguably the most successful military firearm in history. *Id.* at 248-49. As far as I can determine, no semiautomatic versions of the AK-47 (or its successor, the AK-74) were available in the American civilian market generally in the postwar period up to at least the 1970s, but more extensive research by actual historians may show otherwise.

#### LCMs and the Development of Assault Rifles in the United States

The United States military did not adopt an assault rifle in the 1950s, continuing with the venerable M1. Meanwhile, Army researchers determined that the key to winning an infantry battle was the amount of fire an individual infantry soldier or marine would put upon their foe. It was believed a high output weapon firing lighter ammunition would be ideal for that role. The U.S. military sought such a weapon. *See* David Cole, Survey of U.S. Army Uniforms, Weapons and Accoutrements 122 (2007), available online at <https://history.army.mil/html/museums/uniforms/survey.html>.

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<sup>16</sup> I brought up the NFA at oral argument but the resulting conversation was not particularly useful.

In the very late 1950s, the Army adopted the select-fire M14, firing the new 7.62mm NATO full-size rifle round (.308 Winchester being the civilian equivalent) fed via a 20-round detachable box magazine (which can be topped off with five-round charging clips). Like the .30-06, the 7.62mm round carries quite a punch with resulting recoil. The Army thus soon realized that fully automatic fire was impractical with the M14; therefore, the M14 was used as a semiautomatic weapon in the field. *Id.* The civilian version of the M14 is the Springfield Armory M1A, several variations of which are manufactured today, ordinarily with a 10-round magazine.<sup>17</sup>

Meanwhile, a new type of ammunition appeared in the mid-1950s, the 5.56mm NATO/.223 Remington intermediate rifle round. Much smaller and lighter than the .30-06 and 7.62 NATO rounds, the 5.56mm round leaves the weapon at a high velocity with little recoil. The introduction of the 5.56mm round would soon have a profound effect on American weapons development and would eventually become closely associated with mass shootings.<sup>18</sup>

Also, in the mid-1950s, a brilliant and innovative firearms designer named Eugene Stoner crafted a futuristic looking select-fire weapon firing the 7.62mm round

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<sup>17</sup> The Springfield Armory M1A battle rifle has never been used in a mass shooting apparently (it is rather large and heavy) and in stock form is something of a logical evolution of the M1 Garand but with a detachable box magazine. It is well-regarded and popular for target shooting. One might question whether this particular weapon should be banned under Washington's assault weapon statute. The standard model M1A (lacking tactical features of assault weapons) appears to be legal under Illinois's assault weapon statute. *See* 720 ILCS 5/24-1.9(1)(J) (listing prohibited weapons, not among them the standard version of the M1A). In any event, whether the list of prohibited weapons in Washington's statute should be amended is a policy question for the legislature to ponder.

<sup>18</sup> It is commonly known that the 5.56mm/.223 Rem. can tumble when it hits human flesh and bone, causing catastrophic wounds. Rounds topped off with a hollow point bullet compound the damage. The 5.56mm/.223 Rem. round is banned for big game hunting in Washington, such as deer and elk, apart from cougars (the cat, not the WSU student or alum). WAC 220-414-020(1)(c). It will shred or vaporize "varmint" (groundhogs and such), as I witnessed back in high school when a friend used his AR15 to blow in half a huge marmot (we stuck to paper targets after that). In hunting circles, the use of the 5.56mm/.223 Rem. is a lively topic of debate. *See, e.g.,* Keith Wood, [223 Rem Okay for Hunting Deer? - North American Whitetail](#) (weighing pros and cons of .223 Rem. depending on range, shooting conditions, the specific model of round, and the shooter's skill) (visited Jan. 22, 2024).

fed through a 20-round detachable box magazine. It was the Armalite AR10.<sup>19</sup> The Army preferred the more conventional M14, although the AR10 would later be adopted by the Armies of Portugal and Sudan. *See Illustrated History of Firearms* at 201. Several civilian versions of the AR10 are produced today but are banned under Washington's assault weapon statute.<sup>20</sup> *Shooter's Bible* at 118-119 (listing semiautomatic rifles built on the AR10 platform).

Stoner went back to work on his weapon designs and in 1956 fashioned a newer weapon inspired by the AR10, but firing the 5.56 mm round. It was the AR15. *Firearms: An Illustrated History* at 245. The new weapon was incredibly light and was capable of pumping out 5.56mm rounds with great rapidity—800 or 900 hundred rounds per minute in full-auto mode—with decent weapons control. It was fed by a 20-round detachable box magazine.

Although the AR15 seemed like the perfect solution to the problem identified by Army researchers, it took several years for the United States military to show any interest in the weapon. It was first used by United States Air Force security personnel defending air bases in Vietnam in the early 1960s and showed great promise.

The Army eventually took an interest in the AR15 but mandated a number of design changes that seriously compromised its reliability. The Army sent soldiers into the jungles of Vietnam armed with an early production version of what eventually became known as the M16. There was a strange misperception that the weapon was “self-cleaning,” none of the weapons came with cleaning kits, and soldiers were not

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<sup>19</sup> The acronym “AR” is derived from Armalite, a firm that no longer exists in its original form, reincarnated many years later as a brand subsidiary under another company.

<sup>20</sup> The more recent incarnation of the rather heavy and bulky AR10 battle rifle is not associated with mass shootings generally; however, the infamous Las Vegas mass shooter apparently had several AR10 variants in his possession. It seems he fired only a handful of rounds from one or more of them, preferring to dole out carnage from several lighter and smaller AR-15 platform weapons equipped with bump stocks and 100-round magazines. [LIST: Guns and evidence in Vegas mass shooting \(ktnv.com\)](#) (reporting list of weapons compiled by law enforcement agency) (visited Apr. 21, 2024).

properly trained on how to clean them in any event. Disaster ensued, as the weapons frequently jammed in combat. *Survey of U.S. Army Uniforms, Weapons and Accoutrements* at 122.

The M16 was redesigned to fix its reliability and reissued with cleaning kits, and soldiers (and now marines, who up until then had been using the harder hitting but heavier M14) were trained on how to clean the weapon. The M16A1 and its subsequent versions performed rather brilliantly after that, ordinarily as semiautomatic weapons, provided they were properly maintained, but the M16's reputation for jamming persists to this day. The M4 carbine is a descendant of the M16.

It is helpful to note that although the M16A1 and its successors were select fire weapons (the M16A2 operated in semiautomatic and three-round burst modes only), it was used primarily as a semiautomatic weapon. *Id.* at 123. For a time during the Vietnam War one or two members of an infantry squad would have their M16A1s set on fully automatic mode as squad fire suppression support. This was deemed necessary because the Army had not found a replacement for the BAR and would not find one until 1984, when it adopted the FN-designed M249 light machine gun, dubbed the Squad Automatic Weapon (SAW). *Id.* at 125.

The M16 made its way into the civilian market as the Colt AR15 in 1964. It was a semiautomatic weapon that was sold initially with two five-round magazines and was sold in that configuration until 1987. *See Declaration of Andrew Hughes at 489 (Expert Report of James E. Yurgealitis at 18).*<sup>21</sup> It was seldom seen, as it was marketed primarily to law enforcement. A few other civilian semiautomatic variants of contemporary Western-block military rifles made it onto the civilian market during the 1960s and 1970s, including the FN FAL, but again, there was little interest in them.

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<sup>21</sup> Yurgealitis's declaration is highly informative about modern firearm technology.



In the early 1970s, the military adopted a curved 30-round magazine for the M16. Such magazines eventually began to be sold in the civilian market, as either an original component or via aftermarket manufacturers. *Id.* at 490.

The Colt's patent on the AR15 platform expired in 1977. Not surprisingly, more manufacturers started to build rifles built around the AR15 platform. Sales increased during the 1980s.

It was also in the late 1980s that Glock entered the market with its now famous semiautomatic handguns. Glock was originally based in Austria but is now firmly planted in Smyrna, Georgia. *Gun Trader's Guide* 86 (Robert A. Sadowski ed., 45th ed. 2023). Glock offers several designs that come standard with detachable magazines exceeding 10 rounds. It also offers several designs that come standard with detachable magazines of 10 rounds or less. An example mentioned in the superior court order is the Glock 17, which, not surprisingly, comes in the box with a detachable 17-round magazine. *See Shooter's Bible* at 368. More about that weapon later.

Other handgun manufacturers started to offer semiautomatic firearms that came standard with magazines exceeding 10 rounds. Some with 20 or 30 round magazines. Most semiautomatic handguns on the market, however, come standard with magazines holding 10 or fewer rounds. This includes the many variants of the M1911 mentioned earlier.

Also classified as handguns, by firearms makers and sellers, are many shortened variations of semiautomatic assault rifles, such as the AR15, AK-47, and others. These are like stub-nose versions of an assault rifle with a collapsible butt stock or no butt stock at all, firing the same ammunition as the rifles from which they are derived. These easily concealable assault weapons have been used in mass shootings, also. LCMs are standard with these weapons, usually with a 30-round capacity. Importation and sale of these fearsome weapons has been banned in Washington since the middle of 2023, but

there are surely many grandfathered examples floating around. During the short duration the injunction against ESSB 5078 was in effect, it seems thousands of LCMs were sold that could be compatible with these weapons.

As indicated, the origin of the AR15 platform can be traced to research conducted after the Second World War aimed at enhancing the offensive power of the individual American infantry soldier or marine. The goal was for the operator to produce as much fire as possible—far beyond what was possible for a bolt-action rifle or M1 Garand—for purposes of winning a battle or firefight. It thus follows that the AR15 and other assault weapons, including handguns listed as assault weapons in Washington, are designed ideally for prevailing in combat, not primarily for personal self-defense. The State has amply demonstrated by way of expert witness declarations that this is a predominate theme in assault weapon advertising aimed at the civilian market.

After mass shootings in the early 1990s, Congress passed a law banning assault weapons in 1994. Pub. L No. 103-322, 108 Stat. 1796. This stemmed the growth of assault weapons and LCMs, but the ban expired in 2004 and repeated attempts to have it reinstated have failed, which reflects the political climate in Congress.

The proliferation of assault weapons increased rapidly after expiration of the federal assault weapon ban, and with that an even greater proliferation of LCMs. It is possible most LCMs are built by aftermarket manufacturers. For assault rifles, the most popular LCM appears to be a 30-round magazine, but 20-round magazines also appear to be quite common. The numbers discussed in the briefing and some court decisions are staggering, plainly indicating a great many assault weapon owners buy 20 and 30-round LCMs in bulk. The country is awash in them it seems.

Largely overlooked in this case are LCMs of even greater capacity, including 50 and 100-round magazines, some of them drum magazines. *See, e.g.,* [KCI AR-15 .223 / 5.56mm 100-Round Gen 2 Drum Magazine \(gunmagwarehouse.com\)](#) (visited Apr. 21,

2024) (online advertisements for 50, 60, and 100-round drum magazines for AR-15 platform rifles). FN also produces a semiautomatic version of its M249 light machinegun (the SAW mentioned above) that comes with a 200-round linked ammunition belt. *See Shooter's Bible* at 156. These larger magazines cannot be ignored. Gator's Guns would have us believe these very large capacity magazines are essential for personal self-defense (one wonders from what) and are therefore constitutionally free from any form of regulation.

### LCMs and Mass Shootings

The State has amply shown by way of its expert witness reports that LCMs have been a component in a long series of mass shootings committed by single shooters, many of which are truly breathtaking in their homicidal scale. *See generally* Exhibit C to Declaration of Andrew Hughes (Expert Report of Louis Klarevas, PhD). It is a deadly trend unprecedented in American history, apart from some isolated incidents in 1949 and 1966.<sup>22</sup> Mass shootings carried out by way of assault weapons are an historically recent phenomenon that has occurred with depressing and increasing regularity since the mid-1990s. Such atrocities have been committed in the United States in various settings, often aimed at specific populations: preschool and elementary students and teachers, high school students and teachers, university students and teachers, movie theater patrons, concert goers, members of the LGBTQ2S+ community and their

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<sup>22</sup> When discussing mass shootings in this case, we are talking about a single shooter mainly. An exception is the mass school shooting in Columbine Colorado on April 20, 1999, which was committed by two shooters. Mass shootings in the form of mob violence, vigilante actions, and military atrocities against Native people, Blacks, and other disfavored communities is a sad fact of American history that many would rather not acknowledge.

friends, Blacks, Hispanics/Latinos, Asians, and Jews.<sup>23</sup> The great majority of them involve a weapon built around the AR15 platform (a couple of them with AK-47 based weapons). Nearly all of them involve LCMs ranging from 20 to 100 rounds. The toll of lives taken by these shooters is eye-popping: 60 concert goers in Las Vegas (mainly AR15 type weapons with 100-round magazines and bump stocks), 49 nightclub patrons in a nightclub in Orlando (AR15), 27 students and teachers at Sandy Hook Elementary School (AR15), 25 in a Baptist church in Texas (AR15), 23 in a Walmart in Texas (AK-47), 21 at Uvalde in Texas (AR15). The results are truly gruesome: medical examiners had to resort to DNA testing to identify some of the very young victims of the mass shooting in Uvalde, Texas.<sup>24</sup>

Gator's Guns insists there is no meaningful correlation between LCMs and mass shootings. True, they do not happen frequently, but when they do happen, the results are horrific. And, as indicated, in nearly every case LCMs were involved. Stating that in the plural is necessary because there is historical evidence that mass shooters bring with them multiple LCMs stuffed in a gym bag or backpack. One possible exception is the Aurora movie theater shooter, who may have had only one magazine for his AR15. It held 100 rounds.<sup>25</sup> As discussed above, during the frenzy to buy LCMs after the

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<sup>23</sup> A mass shooter with semiautomatic assault rifles and other firearms slaughtered around 50 Muslim worshippers in Christchurch, New Zealand in 2019. [What we know about the New Zealand mosque shootings | PBS NewsHour](#). (visited Apr. 21, 2024). That country promptly enacted much stricter firearms control laws. Australia similarly enacted stricter laws after a lone gunman killed 35 people and wounded another 23 while using a semiautomatic assault rifle. [New Zealand Embraced Gun Reform After One Mass Shooting. Now They Watch US in Disbelief. \(vice.com\)](#). (visited Apr. 21, 2024).

<sup>24</sup> [Parents Were Asked to Give DNA Samples to Help Identify Victims - The New York Times \(nytimes.com\)](#). (visited Apr. 21, 2024). The ballistic characteristics of the 5.56mm/.223 Rem. round was discussed earlier.

<sup>25</sup> [Gun's magazine shaped the pace of Colorado theater massacre - Los Angeles Times \(latimes.com\)](#). (visited Apr. 21, 2024). To be more precise, the shooter started with a 12-gauge pump-action shotgun, a weapon better suited to hunting or self-defense. As is typical of tube-fed weapons, it had to be reloaded after a few shells. Rather than deal with the hassle of reloading that weapon, the shooter switched to his AR15 with the 100-round magazine. The magazine jammed. The shooter then switched to a Glock pistol with an

superior court entered its ruling, customers frequently bought as many as 10 LCMs, one person claiming to have bought 45 of them.<sup>26</sup>

Gator's Guns further asserts there is no mass shooting problem in Washington because there have been "only four" mass shootings in this state that involved LCMs. Under Gator's Guns's reasoning the Las Vegas shooting—60 dead and over 400 wounded—does not reflect a societal problem involving LCMs because it happened only that one time and in that foreign state. Contrary to Gator's Guns's view, there is a mass shooting problem in the United States and Gator's Guns has not persuaded me that Washington is immune from it. The legislature obviously felt the same.

#### The Legislative Response: ESSB 5078

The statute at issue, Engrossed Substitute Senate Bill (ESSB) 5078, went into effect on July 1, 2022, based on the legislature's finding "that restricting the sale, manufacture, and distribution of large capacity magazines is likely to reduce gun deaths and injuries" without "interfer[ing] with responsible, lawful self-defense." LAWS OF 2022, ch. 104, § 1. The new law, codified within chapter 9.41 RCW, was prompted by mass shootings like the ones described above, nearly all of which involved LCMs of some type.

The statute mainly at issue in this case states that "[n]o person in this state may manufacture, import, distribute, sell, or offer for sale any large capacity magazine,"

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LCM. [Aurora Gunman's Lethal Arsenal - The New York Times \(nytimes.com\)](#). (visited Apr. 21, 2024).

<sup>26</sup> As far as I aware, the current standard ammunition load for an American soldier or marine operating in the field is seven 30-round magazines, six in ammunition pouches and one in the weapon, 210 rounds in total, with variations according to operational conditions. *Survey of U.S. Army Uniforms, Weapons and Accoutrements* at 119. In contrast, civilians snatching up LCMs during the short April 8 buying spree easily exceeded that military standard. The Uvalde shooter had in his possession more than 1,200 rounds of ammunition, firing around 160. He had 58 magazines in and around the school, an average of more than 20 rounds per magazine. [The gunman in Uvalde carried more ammunition into Robb Elementary School than a U.S. soldier carries into combat - CBS News](#). (visited Apr. 21, 2024).

with certain exceptions not at issue here. RCW 9.41.370. The statute defines a large capacity magazine as “an ammunition feeding device with the capacity to accept more than 10 rounds of ammunition, or any conversion kit, part, or combination of parts, from which such a device can be assembled if those parts are in possession of or under the control of the same person.” RCW 9.41.010(25). This definition does not include (a) a magazine that has been permanently altered to limit its capacity to 10 rounds, (b) a .22 caliber tube magazine, and (c) a tube magazine on a lever-action rifle or carbine.

The legislature picked an interesting number as the cut-off point. Why it chose the number 10 is uncertain and may require some legislative history research. But that number makes sense historically when considering that the M1903 bolt-action rifle holds five rounds in an internal box magazine, the M1911 pistol holds seven rounds in a detachable magazine, the M1 Garand holds eight rounds in an internal box magazine, the Enfield SMLE bolt-action rifle is equipped with a 10-round detachable box magazine, and the Soviet-era SKS semiautomatic rifle in standard form holds 10 rounds in an internal box magazine. Ten is a reasonable number. Historically, soldiers and marines won firefights with less magazine capacity, and it is reasonable to expect that a homeowner can ward off a burglar with 10 rounds, with additional magazines on hand if the homeowner is relying on a semiautomatic firearm. Compelling data provided by one of the State’s expert witnesses, Lucy P. Allen, shows that the average number of rounds expended in a civilian self-defense shooting is 2.2. *See Exhibit G to Declaration of Andrew Hughes (Expert Report of Lucy P. Allen)*. Gator’s Guns has provided no contrary evidence.

The 2.2 statistic makes sense. In my 20-plus years of reviewing thousands of criminal cases from all over Washington, I cannot recall a single instance where an individual civilian and a criminal perpetrator engaged in a sustained firefight. What ordinarily happens in these incidents is either (1) the criminal gets shot, or (2) the

criminal flees in the face of the civilian armed with a firearm. That the criminal is going to take time to size up the type of firearm and magazine capacity thereof in the hands of the homeowner and then dig in for a fight seems doubtful. On the flipside, I am well aware of the few mass-shootings that have occurred in this state.

As one would expect, it seems most homeowners, automobile drivers, and individuals legally carrying a concealed firearm, are armed with a handgun of some sort. Regarding such weapons, Gator's Guns seemingly favors semiautomatic handguns, preferably with LCMs, and at oral argument I expressed admiration of the M1911. But one could reasonably disagree: a revolver is more reliable, easier to use, and the intruder can see that it is loaded, preferably with .357 magnum or similarly powerful cartridges. That particular issue is beyond the scope of this discussion but deserves some fleeting mention.

In any event, it is abundantly clear that the statute is aimed at detachable LCMs and belt feeding systems. As indicated, detachable magazines are available in a wide range of capacities, from three (for shotguns and larger caliber hunting rifles) to as many as 100 (as was used in the Las Vegas and Aurora movie theater shootings). Many assault weapons come in the box with one or more 20 or 30-round detachable box magazines, but they can easily accommodate a five or 10-round magazine. A few, like the Springfield Amory M1A (discussed above), are equipped with 10-round box magazines but can accommodate optional 20 or 30-round magazines. Numerous "pistols" falling within the assault weapon category can accommodate LCMs and some come standard with such magazines, particularly Glocks and a number of FNs, however, as far as I can determine, all of these weapons are capable of being fitted with a 10-round or less magazine.

Relatedly, Gator's Guns seemingly persuaded the superior court that the statute bans "standard capacity magazines." This is a red herring. Whether a particular

magazine is “standard” depends on the manufacturer’s marketing. Yes, a semiautomatic firearm may come in the box equipped with an LCM, as the manufacturer’s marketing team intended, but it is quite capable of working with a 10-round magazine also. Such lower capacity magazines are cheap and plentiful. And firearms manufacturers have shown a ready willingness to conform their products to state firearms regulations. *See Shooter’s Bible* at 149 (semiautomatic weapons manufactured by Dark Storm Industries with fixed 10-round magazines for “citizens in states with onerous firearm ownership restrictions”). The “standard capacity magazine” argument gains no traction here.

Importantly, ESSB 5078 prohibits more capacious LCMs, such as the 50 and 100-round magazines discussed earlier but largely overlooked in the briefing and the superior court’s order. If I deny the State’s motion for a stay, thus reinstating the superior court’s injunction while the appeal of it is pending, Gator’s Guns and every other firearms vendor in Washington (including online vendors) would be free to sell as many LCMs as they can, including the 50 and 100-round versions. That happened on April 8, 2024, until I imposed a temporary stay. Right now, no vendor in Washington may sell an LCM, including the 50 and 100-round versions.

#### LCMs as “Arms”

Gator’s Guns further persuaded the superior court that an LCM is an “arm” falling within the protection of article I, section 24 and the Second Amendment, a potentially dispositive issue. One can argue an LCM is a weapon if you whack someone on the head with it. But in reality, an LCM is an optional component of a firearm, not a weapon or “arm” standing alone. Yes, a semiautomatic firearm will not function without a magazine; however, it will work just fine with a five or ten-round magazine. It just has to be reloaded with a fresh magazine more frequently than with an LCM.

To further illustrate this point, another firearm component is the receiver/trigger assembly. Prohibiting a fully automatic receiver/assembly system does not render such



a firearm useless: it can be fitted with a semiautomatic version. The existence of civilian versions of select-fire weapons like the M16 (AR15), AK-47, M249, and others prove that point. The argument that an LCM is an “arm” is rather unpersuasive.

Granted, an assault weapon equipped with a 10-round detachable magazine will not be as proficient in terms of rounds fired per minute, but it will work as intended despite the hassle of taking a few seconds off the trigger to swap out magazines. The State has provided compelling evidence that potential mass shooting victims were able to flee or overwhelm the shooter when the shooter paused to swap out magazines. Limiting magazine capacity to 10 rounds majorly evens the odds in favor of unarmed civilians, especially children.

Gator’s Guns relatedly persuaded the superior court that an LCM and a 10-round magazine “function identically.” Ruling at 47. They do in the sense that (1) they can be attached to an assault weapon, and (2) they feed the weapon as each round is fired. But as I explained at oral argument, the similarity ends at the eleventh round. In any event, as discussed earlier, it is quite likely whatever home invader, carjacker, or robber one is defending against will have already fled or been incapacitated within those first 10 rounds. So, no, an LCM and a 10-round magazine are not identical in how they function.

The federal district court decision in *Kotek* is most persuasive on this issue, concluding an LCM is not a “bearable arm” under the Second Amendment, consistent for the most part with the foregoing analysis. *See Kotek*, 2023 WL 4541027, at 25-26. While I am mindful *Kotek* is currently being appealed in the Ninth Circuit, it cannot be ignored that the threshold question of whether an LCM is an “arm” for purposes of constitutional analysis is more than debatable.

#### ESSB 5078 and the State Constitution

As indicated, the superior court ruled that ESSB 5078 is unconstitutional under article I, section 24 of the Washington Constitution, which states in relevant part that

“[t]he right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired.”

In undertaking its state constitutional analysis, the superior court correctly recognized that a statute is presumed constitutional unless proven otherwise. *State v. Jorgenson*, 179 Wn.2d 145, 150, 312 P.3d 960 (2013). With respect to the regulation of firearms, it is well-settled that the right to bear arms under article I, section 24 is not unlimited; to the contrary, the right to bear arms for self-protection under our state’s constitution is subject to “reasonable regulation pursuant to the state’s police power.” *Id.* at 155. A regulation that is reasonably necessary to protect the safety and welfare of the public and is substantially related to legitimate ends is constitutionally reasonable. *Id.* Furthermore, this court held that the right to bear “arms” under our state’s constitution “protects instruments that are designed as weapons traditionally or commonly used by law-abiding citizens for the lawful purpose of self-defense.” *City of Seattle v. Evans*, 184 Wn.2d 856, 869, 366 P.3d 906 (2015).

Illustratively, in the *Guardian Arms* case mentioned earlier, a matter in litigation in Thurston County, the plaintiffs (firearms dealers and a number of individual firearms owners represented by the same counsel representing Gator’s Guns) sought a preliminary injunction against the newly-enacted ban on assault weapons, making virtually the same state constitutional argument Gator’s Guns makes in this case. The superior court there rejected the argument and denied the motion for a preliminary injunction, relying mainly on this court’s decision in *Evans*. As indicated, I denied discretionary review in the ruling attached to this one. Simply put, the superior court and I conformed to this court’s precedent in interpreting article, section 24. Litigation is continuing in that matter in Thurston County Superior Court, but it shows that superior courts in different counties of this state can have different views on the matter.

Here, as noted above, the superior court deemed LCMs to be weapons or arms protected by article I, section 24, and that as such they are commonly used as weapons for self-defense, ultimately determining there was no “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.” Ruling & Order on Mots. for Summ. J. (Ruling) at 21. In reaching this conclusion, the superior court was heavily influenced by the analysis explicated in the United States Supreme Court’s decision in *New York State Rifle & Pistol Ass’n, Inc., et al. v. Bruen*, 597 U.S. 1, 142 S. Ct. 2111, 213 L. Ed. 2d 387 (2022), ruling that “[t]he 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.” Ruling at 21. The court concluded the State failed to provide such history (in effect a 1791 regulation analogous to a ban on LCMs, a type of magazine that would not come into being for more than a century). Well before reaching that result, the superior court recognized that this court has not yet examined the teachings of *Bruen* in relation to article 1, section 24. Ruling at 7. The superior court then proceeded to fashion what is in effect a new article I, section 24 test revolving around *Bruen*. Although that is quite an interesting approach, this court, as final arbiter on state constitutional questions, will need to weigh in on the issue, as well as the threshold and potentially dispositive question of whether an LCM is an “arm” at all. Again, this is a debatable issue.<sup>27</sup>

#### The Second Amendment Question

The superior court, applying standards explicated in *D.C. v. Heller*, 554 U.S. 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008), and *Bruen* (or at least the *Bruen* test as the superior court interpreted it), ruled that ESSB 5078 violates the Second Amendment

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<sup>27</sup> An assumption is being made here that this court will retain this case for a decision on the merits rather than transfer it to the Court of Appeals. The court, not I, will determine that at a later date. See RAP 4.2.

to the United States Constitution, which 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 infringed.”

The threshold question on the Second Amendment issue is whether it was properly before the superior court at all. It seems Gator’s Guns raised the Second Amendment as an affirmative defense to the State’s separate Consumer Protection Act action, which was later consolidated with Gator’s Guns action for declaratory and injunctive relief, which was based solely on article 1, section 24 of the Washington Constitution (the same strategy pursued in *Guardian Arms*). Gator’s Guns seized on consolidation to assert the Second Amendment offensively via its motion for summary judgment, and the superior court obliged that strategy. Whether the State preserved error as to that issue is a related question. That question need not be decided here but will need to be sorted out on appeal, another reasonably debatable issue. If the reviewing court ultimately determines the Second Amendment question was not properly teed up for purposes of the summary judgment motion, Gator’s Guns will need to rely solely on its argument pertaining to our state constitution.

Assuming the Second Amendment issue was properly before the superior court, the lower court first determined that ESSB 5078 runs afoul of *Heller*, which held in part that a handgun ban was unconstitutional because it “amounted to a prohibition of an entire class of ‘arms’” commonly used for lawful purposes. *Heller*, 554 U.S. at 628. Embracing the highly debatable notion that LCMs are arms, the superior court seemed to place great weight on the large numbers of LCMs likely held by private firearms owners, ignoring the likelihood that many owners possess sizeable quantities of LCMs, and disregarding powerful evidence that LCMs are close to useless as a component of self-defense. The court also adopted a fiction that the restriction of LCMs renders some firearms useless, and thus prohibited as a class, citing the example that a Glock 17

comes with a 17-round magazine. But that reasoning ignores that a semiautomatic firearm designed to accommodate an LCM will function with a five or ten round magazine. A Glock 17 will accept a magazine holding that lesser number of rounds.<sup>28</sup> In other words, it can be fairly argued the statute does not ban an entire class of commonly used firearms under *Heller*.

The court's reasoning is also partly based on the notion that a semiautomatic firearm originally designed to be equipped with an LCM is not "fully functional" without one. The fallacy in that reasoning is that aftermarket magazine makers produce LCMs that far exceed "standard" capacities, such as the 50 and 100-round magazines mentioned earlier. Besides, the "standard" magazine for a particular firearm is largely a matter of marketing: as discussed, firearms manufacturers can easily adapt their wares to comply with state regulations. In any event, the issue of whether an LCM is an arm at all is a very large anchor pulling on the superior court's debatable *Heller* analysis.

As for *Bruen*, and again ignoring for the moment the hugely debatable threshold question of whether an LCM is an "arm," the superior court applied that decision's historic analogy test in a manner that is arguably extreme. In a nutshell, the court concluded that *Bruen* requires the State to identify a close historical analogy to firearms regulations as they existed in 1791. This is an unsettled question nationwide, with mainly federal courts grappling with whether the baseline should be 1868, when the Fourteenth Amendment was adopted, making the Bill of Rights applicable to the States, or 1791, which the Constitution was adopted, or something else entirely. If the baseline is 1868, the State provided ample evidence of arguably analogous dangerous weapons laws enacted before that year, many going back to the early decades of the Nineteenth

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<sup>28</sup> An LCM can be modified by the manufacturer or a gunsmith to hold only a lesser number of rounds. Further, as noted earlier, firearms manufacturers have been known to modify their products to conform to state law. *See* Declaration of Hughes at 490 (Yurgealitis Report at 19).

Century. As for 1791, the State's closest analogy was seemingly laws regulating the storage of gunpowder, which the superior court rejected as nothing more than a fire protection measure.

This problem with trying to apply *Bruen* to modern firearm technology is encapsulated in some of the statements in the superior court's ruling. For example, "[m]agazine laws did not come into effect until at least 1917 (one state) and most others were post-1925." Ruling at 41. As discussed, LCMs virtually did not exist in the civilian realm until after World War One, became hugely problematic with the criminal use of the Tommy Gun and BARs, and really did not enter the civilian market in appreciable numbers until the 1980s or later.

The superior court relatedly stated that "[s]emi-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*." *Id.* at 41 (emphasis added). This statement is partly founded on a myth (one of many) being circulated in these types of cases by parties challenging assault weapon and LCM regulations: that repeating and/or semiautomatic weapons were fairly common long before this nation was founded. True, there were all kinds of attempts to develop repeating firearms throughout history, but nothing really worked until Samuel Colt invented his revolver in 1836. All prior attempts were impractical or downright dangerous to the shooter. I mentioned this problem briefly at oral argument.

An interesting example of these dead-end attempts to develop a repeating weapon is early air gun technology in the late Eighteenth and early Nineteenth Century: imagine a gun attached to a round tank, kind of like a propane tank. Lewis and Clark brought an air gun along on their great expedition to wow the various Native Tribes. Air guns never caught on in those days because they were cumbersome, delicate, and difficult to recharge. A person madly pumping away to recharge one of these early air

guns would likely be killed by a foe armed with a musket or other weapon. Air guns soon disappeared from the scene and those early attempts are largely forgotten. Professor Spitzer is very effective in debunking this historical chicanery in his declaration and law review article.

The superior court further stated that the United States Supreme Court recognized that this nation's founders had "no appetite to limit gun rights" Ruling at 43. "Though the specific technology available today *may not have been envisioned*, the Founders expected technological advancements. Many were inventors." (emphasis added). *Id.* This is an interesting viewpoint: the founders "may not have" envisioned a firearm firing a high velocity bullet at a rate of fire multiple times beyond that of a musket, not to mention a high capacity feeding device for such a weapon, but many of them were inventors and were therefore unconcerned with any potential advancements in destructive power wrought through the miracle of science and engineering. Keeping those words in mind, I have no difficulty believing the court reviewing this case will want to grapple with this thorny and debatable Second Amendment question.

#### Societal Concern

Finally, as to the broad issue of debatability, the superior court stated that the problem of mass shootings "is not an unprecedented societal concern." Ruling at 39 (underline in the original). The State argues strenuously that mass shootings are an urgent societal issue. Gator's Guns contends there is no such issue at all. In my view there is such a societal problem, as reflected in the discussion above. No more analysis of this question is needed. The reviewing court will consider this debatable issue.

#### Balancing Test

Now it is time to balance the harm to the moving party (the State) if a stay is not imposed and the harm to the nonmoving party (Gator's Guns and its owner) if a stay is imposed. RAP 18.1(b)(3). The State contends there is an unacceptable public safety risk

if I do not impose a stay and the trade in LCMs resumes. Gator's Guns asserts that lifting the current stay of the superior court's order will cause no harm because the State's concerns are speculative only. Gator's Guns further contends a stay will harm a great number of lawful firearms owners who wish to equip themselves with LCMs and thus perpetrate a violation of their state and federal constitutional rights.

The difficulty for the State is that it cannot prove a negative: that keeping the stay in place will prevent a mass shooting. However, the historical record shows that LCMs greatly increase the number of fatalities and injuries inflicted in a mass shooting and that the frequency of such incidents has grown in recent years. The historical record shows also that potential victims can flee and that shooters can be overcome when pausing their rampage to swap out magazines. It is all but certain mass shootings will occur in Washington. This legislation will not necessarily prevent them from happening but it will increase potential victims' chances of survival. By declaring the statute unconstitutional and enjoining its enforcement, the superior court deprives Washington's citizens of needed protection enacted by their elected representatives.

Furthermore, as I quipped at oral argument, Washington is not protected by a "force field." Just because a shooting happens on the other side of the country does not mean it will not happen here. And there is no magical screening mechanism for identifying a potential mass shooter when they walk into Gator's Guns or another shop to buy a multi-pack of 30-round magazines or one or two 100-round magazines. Once an outwardly law-abiding customer harboring homicidal thoughts obtains LCMs if a stay is not imposed, the fruits of the State's appeal truly will be lost. The idea that I could lift the stay and something awful happens with an LCM that would not have been



obtained but for that decision keeps me awake at night. So yes, there certainly is some speculation involved, but the surrounding reality is stark and scary.<sup>29</sup>

As for Gator's Guns' concerns about the effect a stay will have on lawful firearm owners, I truly understand that, and I sympathize with those firearm owners generally. But they can buy as many 10-round magazines as they can load into their cars or trucks while this appeal plays out. Besides, and this is very important, those affected firearms owners are not the nonmoving parties in this litigation. RAP 8.1(b)(3). As Gator's Guns's counsel conceded at oral argument, Gator's Guns and its owner are the nonmoving parties here. This is not a class action of any sort. Gator's Guns sells magazines. It can sell as many 10-round magazines as it can fit into its store. In fact, it apparently still has a large inventory of LCMs that are in limbo during the pendency of this appeal. If Gator's Guns prevails on appeal it will be free to sell them and any new ones they acquire.

Gator's Guns' counsel at oral argument pointed out that its owner is an individual firearm owner affected by the current stay. To be more precise, he is an individual firearm owner who owns a shop storing thousands of LCMs. If he failed to add to his personal stash of LCMs during that 90-minute window, that is on him. As I mentioned at oral argument, and as Gator's Guns's counsel conceded, those LCMs in Gator's Guns' possession are not perishable goods. As indicated, if Gator's Guns and its owner

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<sup>29</sup> In this regard, I respectfully decline to follow the commissioner's scholarly ruling in *Arnold v. Kotek*, discussed above. Ore. Ct. App. No. A183242. Besides, there is plenty of speculation to spread around on this issue. Assault weapon (and by association LCM) marketing seems based in no small part on amplifying and exploiting potential buyers' speculative fears that they are at risk of being overwhelmed by dark forces of some sort. In my view, the popularity of assault weapons and LCMs is largely due to highly effective marketing creating a perceived (but not actual) need for military grade firepower for personal self-defense. As stated elsewhere in this ruling, a good handgun (up to 10-round capacity) and/or shotgun (four to six-round capacity) should be adequate for the average Washingtonian's personal self-defense. Rifles that are not assault weapons are more than adequate for hunting and other recreational shooting.

prevail on appeal they can sell as many as they want and its owner can stock up on as many as he can fit into his home.

Conclusion

In sum, for the reasons stated above, there are numerous debatable issues to be resolved on appeal, and the balance of harms favors a stay. RAP 8.1(b)(3). Whether the superior court's decision should be affirmed or reversed will be decided on appeal.

Accordingly, the emergency motion for a stay pending appellate review is granted. The current stay of the order entered on April 8, 2024, in Cowlitz County Superior Court Cause No. 23-2-00897-08, will remain in place until this court orders otherwise.<sup>30</sup>

So ordered,

  
COMMISSIONER

April 25, 2024

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<sup>30</sup> This ruling is without prejudice to any future motion to lift the stay. If Gator's Guns disagrees with this ruling, it may exercise its right to file a motion to modify. RAP 17.7. As indicated, a motion to modify is reviewed and decided by the justices. On April 23, 2024, the State filed a statement of grounds for direct review. RAP 4.2(b). At a later date, the justices of this court will decide whether to retain this appeal or transfer it to the Court of Appeals RAP 4.2.

## IN THE SUPREME COURT OF THE STATE OF WASHINGTON

GUARDIAN ARMS, LLC, et al.,

Petitioners,

v.

STATE OF WASHINGTON, et al.

Respondents.

No. 1 0 2 4 3 6 - 3

RULING DENYING DIRECT  
DISCRETIONARY REVIEW

This case concerns the Washington legislature’s effort to ban the manufacture, sale, and importation of “assault weapons” with the boundaries of this state. Here, two Washington firearms dealers (Guardian Arms, LLC and Millard Sales, LLC (collectively “firearms dealers”)); individual Grant County residents Michael McKee, Edgar Salazar, Paul Hill, Theodore Hile, Brina Yearout, Nathan Poplawski, and Jaxon Holman (collectively “Grant County residents”); and nonprofit organization Silent Majority Foundation (Foundation) (all collectively petitioners), filed an action for declaratory and injunctive relief against respondent State of Washington, seeking to invalidate Substitute House Bill 1240 (SHB 1240), an act “prohibiting the manufacture, importation, distribution, selling, and offering for sale of assault weapons,” with limited exceptions. LAWS OF 2023, Chapter 162; *see also* RCW 9.41.390(1). The superior court denied petitioners’ motion for a preliminary injunction against implementation and enforcement of SHB 1240 pending a decision on petitioners’ request for a permanent

injunction and declaration that SHB 1240 violates article I, section 24 of the Washington Constitution. Petitioners now seek discretionary review of the denial of a preliminary injunction directly in this court, arguing the superior court committed obvious error that renders further proceedings useless, and that this court should retain the case for a decision on the merits instead of transferring the case to the Court of Appeals. RAP 2.3(b)(1); RAP 4.2. Respondents State of Washington and intervener Alliance for Gun Responsibility oppose discretionary and direct review. Discretionary review is not warranted in this case for reasons explained extensively below. Because review is denied, there is no need to decide whether to retain this case or transfer it to the Court of Appeals. This will be a lengthy ruling due to the complex, historical, and controversial nature of this issue.<sup>1</sup>

### The Mass Shooting Problem

“One of the kids that I had in the unit, he was shot in the shoulder. The student that I was helping up from the side of the unit, he had bullet fragments on his thigh,” she said. “And then we had another student with blown off fingers. And she was just in and out. We were trying to get her oxygen and trying to keep her alive.”

EMT Virginia Vela, quoted in Shimon Prokupecz & Matthew J. Friedman, “*So much blood*”: Medics tell what they saw and did after Uvalde massacre. CNN, (Mar. 18, 2023). at <https://www.cnn.com/2023/03/18/us/uvalde-robb-elementary-emt-response/index.html>.

The above-quoted remarks of a medical first responder relate to the massacre of 19 elementary school children and two of their teachers carried out by a young man wielding a semiautomatic assault rifle in Texas. Similar massacres committed by

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<sup>1</sup> Many of the observations in this ruling are based on personal experience and knowledge gained in several decades of handling, cleaning, shooting, discussing, and studying firearms. I learned to shoot when I was nine-years-old, on my family’s small ranch in Spokane County. Though firearms were a significant part of my younger life, I do not hold myself out to be an expert in that field. I am not a professional historian, either.

shooters wielding semiautomatic assault rifles have been committed in the United States in various settings, often aimed at specific populations: elementary and preschool students and their teachers, high school students and teachers, university students and teachers, movie theater patrons, concertgoers, members of the LGBTQ2S+ community and their friends, Blacks, Asians, and Jews. It is a post-World War Two phenomenon that has occurred with depressing and increasing regularity since the mid-1990s. The body count for some of these atrocities committed by individual shooters rival historic military actions: 60 concert goers in Las Vegas (mainly AR15 type weapons), 49 nightclub patrons in a nightclub in Orlando (AR15), 27 students and teachers at Sandy Hook Elementary School (AR15), 25 in a Baptist church in Texas (AR15), 23 in a Walmart in Texas (AK-47), 21 at Uvalde in Texas (AR15).<sup>2</sup> These weapons are problematic additionally due to their frequent use by criminal gangs and in shootings of law enforcement officers. The State has provided compelling evidence that this is a public safety problem of great significance.

Petitioners argue there is no real urgency because mass shootings in Washington are rare and that most of them have been committed with firearms that were not semiautomatic assault rifles. That is an interesting line of argument. If we were to swap the mass shootings committed in Washington with the single mass shooting in Las Vegas, petitioners would seemingly contend there is no real problem in Washington because there was only that one incident. Petitioners' reasoning on this point is

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<sup>2</sup> For comparison, Marine Gunnery Sergeant John Basilone was awarded the Congressional Medal of Honor after killing at least 38 Japanese soldiers attacking his position one evening during the Guadalcanal campaign. He was armed with a Browning M1917 .30 caliber machine gun. Much later in the War, 20-year-old Lieutenant Audie Murphy was awarded the Medal of Honor after using a Browning M2 .50 caliber machine gun to kill 50 advancing German soldiers. The soldiers Basilone and Murphy killed were well armed and hell bent on killing them and their comrades. See [http: arlingtoncemetery.mil](http://arlingtoncemetery.mil) (visited December 19, 2023). In contrast, the large number of men, women, and children slaughtered in the mass shootings described above were unarmed civilians who meant the shooters no harm. The weapons used were semiautomatic assault rifles.

unpersuasive. Mass shootings carried out by semiautomatic assault weapons is a serious public safety issue. At issue here is whether the superior court erred in denying a preliminary injunction against the statute designed to address the problem.

#### Defining the Weapons and Shooting Technology at Issue

Petitioners dislike the statutory term “assault weapon,” arguing it is a made-up politically-motivated term, preferring their own made-up family-friendly term “modern sporting rifle” or “MSR.” It is doubtful that either Mikhail Kalashnikov (designer of the AK-47) or Eugene Stoner (designer of the AR15) viewed their military creations as modern sporting firearms when they fashioned them. Such military weapons, firing intermediate cartridges discussed elsewhere in this ruling, have universally been called “assault rifles,” a term the Germans coined in 1944 (“sturmgewehr”). As the State has amply demonstrated, the domestic firearms industry used the terms “assault rifle” or “assault weapon” for decades and has only recently shied away from them. Another term that is frequently used by the firearm production and marketing industry and aficionados of these weapons is “tactical,” which has an obvious military connotation.

Another essential term is “semiautomatic,” also called “autoloading.” This refers to a mode of firing where the weapon reloads itself after each pull of the trigger, using the force of the previously fired shot (recoil or blowback operated), or energy trapped from the gas left behind by that shot (gas operated). The weapon thus fires a shot each time the trigger is pulled. This is in contrast to “fully automatic” mode, where the weapon reloads and fires continuously as long as the trigger is pulled back. Fully automatic mode was first developed for machine guns, but many military weapons can switch between fully automatic and semiautomatic, with a few weapons having an intermediate mode for firing three-round bursts. These are called “select-fire” weapons. SHB 1240 specifically concerns semiautomatic assault weapons as defined within the statute.

For the sake of technical precision, it is important to note that SHB 1240 applies to multiple sub-categories of semiautomatic firearms. They include the following: (1) the civilian versions of military assault rifles and carbines<sup>3</sup> firing intermediate centerfire ammunition, denoted “semiautomatic assault rifles” for purposes of this ruling (though, as will be discussed, the fully-automatic-versus-semiautomatic distinction is largely meaningless); (2) larger and heavier semiautomatic military style weapons firing full-size rifle cartridges, described as “semiautomatic battle rifles” in this ruling (though the semiautomatic designation as to these weapons is a meaningless distinction also); (3) certain smaller semiautomatic weapons firing center-fire pistol cartridges, called “semiautomatic submachine guns” here; and (4) a few outlier weapons that defy classification, such as machine guns set for semiautomatic fire and .50 caliber semiautomatic sniper rifles.

Since SHB 1240 uses the term “magazine” in multiple places, it is necessary to discuss what that word means. There are generally three types of magazine systems, excluding revolvers: tube, the oldest type of internal magazine, first used with lever action rifles; internal box, first used with bolt action rifles; and detachable box, also first used with bolt action rifles, which can be removed from the weapon and replaced with another magazine compatible with the weapon being fired. The types of magazines are not necessarily exclusive to the types of weapons using them. For instance, the groundbreaking French 1886 Lebel MLE bolt action military rifle used a tube magazine running through its butt stock. *See* Smithsonian, *Firearms: An Illustrated History* 146-47 (Rob Houston & Christine Stroyan eds., Random House 2014). The distinctive Model 1895 Winchester lever action—still produced today—uses a four or five-round box magazine. *See* Jim Supica, Doug Wicklund, & Philip Schreier, *The Illustrated*

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<sup>3</sup> A “carbine” is a short rifle, traditionally associated with horse cavalry but now used in various military capacities.

*History of Firearms* 109, (2d ed. 2020).<sup>4</sup> Some pump action and semiautomatic rifles made today use tube magazines and they are very common with pump action and semiautomatic shotguns. Tube magazines are slow to reload because each round must be loaded separately into the magazine. A lesser known type of magazine is rotary, used in the little-known Johnson army rifle during the Second World War, and used today in a number of non-military style rifles and carbines. *See Id.* at 174 (showing example of Johnson rifle); *Shooter's Bible* 200 (115<sup>th</sup> ed., 2023) (Savage Arms "A17" series of semiautomatic .17 caliber "varmint" rifles with 10-round rotary magazine).<sup>5</sup>

Another type of loading system not mentioned in SHB 1240 but worth discussing here is called a "stripper clip" or "charging clip," a simple device that attaches several cartridges together for quick loading through the open breach of the weapon, the number of rounds in the clip depending on the weapon. *See Illustrated History of Firearms* at 150. Stripper clips were the most common means of loading military bolt action rifles; however, some semiautomatic military rifles, like the M1 Garand and Soviet origin SKS, are loaded via stripper or charger clips (the Garand is famous for using a unique style of charger clip). *Id.* at 172. Even some firearms with detachable magazines, such as the iconic British Enfield SMLE bolt action rifle of both world wars and the American M-14 battle rifle, can be reloaded or "topped off" with a stripper clip. *See Firearms: An Illustrated History* at 151; *see also* [M1A M14 Stripper Clips, Set of](#)

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<sup>4</sup> The two illustrated histories cited in this ruling provide accurate historical background information with photographic examples drawn from a vast array of firearms stored in collections maintained by the Smithsonian Institution and the National Rifle Association (NRA). Declarations appended to the State's answer to the motion for discretionary review also provide some very detailed and useful historical and technical information.

<sup>5</sup> *Shooter's Bible* lists many hundreds of currently produced and marketed rifles, shotguns, handguns, and black powder firearms with their suggested retail prices. There are additional sections listing "optics" (scopes, laser sights, and related accessories) and ammunition. The book also contains an extensive table comparing the ballistic characteristics of specific types, brands, and models of ammunition. A similar publication is *Gun Digest*.



5, 7.62 NATO, \*Very Good\* ([apexgunparts.com](http://apexgunparts.com)). (advertising used five-round stripper clips for M1A/M14) (visited Jan. 9, 2024).

When talking about magazines, it is important to note that since 2022 Washington has banned “large capacity magazines,” which is defined as any “ammunition feeding device” that accommodates more than 10 rounds of ammunition, except for .22 caliber and lever action tube magazines. RCW 9.41.370(1); RCW 9.41.010(25). It must be acknowledged, however, that a great number of large capacity magazines (often called high capacity magazines) likely still exist in the civilian community. The related and important issue of military ammunition combat load is more historical in nature and will be discussed later.

As indicated, the statutory term “assault weapons” will be used extensively in this ruling and is reasonably descriptive of the type of weapon regulated by SHB 1240 generally. Other descriptive terms will be applied where necessary for historical context.<sup>6</sup>

#### Interpreting SHB 1240

Understanding precisely what SHB 1240 governs requires careful examination of the statute. An appellate court interprets a statute so as to discern and carry out the legislature’s intent. *Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). If the statute is unambiguous, it is interpreted and given effect in accordance with its plain meaning as an expression of the legislature’s intent. *Associated Press v. Legislature*, 194 Wn.2d 915, 920, 454 P.3d 93 (2019). The court will resort to legislative history and other aids of interpretation only if the statute is ambiguous. *Campbell & Gwinn*, 146 Wn.2d at 11.

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<sup>6</sup> The declaration of former law enforcement officer James E. Yugealitis provides a very useful introductory level summary of firearm technology. *See* App. to State’s Answer to Mot. for Disc. Rev. at 672-85.

As indicated, SHB 1240 prohibits the manufacture, importation, distribution, sale or offering for sale “any assault” weapon, apart from certain exceptions not at issue here. RCW 9.41.390. By its plain terms, the statute does not ban mere possession of such weapons by an individual owner who obtained their weapon before the effective date of the act, but rather the ongoing manufacture and trade in such weapons within Washington, including importation. RCW 9.41.390(1). There is an exception for transfer by inheritance of an assault weapon acquired before the act went into effect. RCW 9.41.390(2)(e). Violation of the statute is a gross misdemeanor. RCW 9.41.390(4). Otherwise, if a person owns an assault weapon obtained before the act went into effect, they can keep it. In other words, SHB 1240 does not eliminate the presence of assault weapons within Washington but seeks to end their continued proliferation within the state.

Of critical importance in this case, SHB 1240 defines “assault weapons” by multiple means. First, it defines as assault weapons a list of 62 specific firearms, with several types lumped together as a single entry, such as “AK-47 in all forms” and “AR15, M16, or M4 in all forms.” RCW 9.41.010(2)(a)(i). It is an interesting list that encompasses semiautomatic assault rifles, battle rifles, submachine guns, one model of light machine gun, and the .50 caliber sniper rifles mentioned above.<sup>7</sup>

A second category of firearm defined as an assault weapon is a “semiautomatic rifle that has an overall length of less than 30 inches,” in other words very short carbines or semiautomatic submachine guns described above. RCW 9.41.010(2)(a)(ii). This is

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<sup>7</sup> A very similar Illinois statute contains such a list of banned firearms, but is more nuanced; impliedly exempting the standard-issue Soviet origin SKS with a fixed 10-round magazine, the popular Ruger Mini-14 without tactical features, the M1 Garand, and certain Springfield Armory battle rifles patterned after the M14. 720 ILCS 5/24-1.9(a)(1)(J)(i)(VI), (J)(xix), J(xvii). The Illinois Supreme Court rejected a state constitutional challenge to the statute and the United States Supreme Court denied further review. *See Caulkins, et al. v. Pritzker, et al.*, \_\_\_ N.E. 3d \_\_\_, 2023 IL 129453, 2023 WL 5156850, *cert. denied*, 23-510, 2024 WL 72021.

the one category that appears to apply to rimfire weapons, which makes sense since a short barreled and easy to conceal semiautomatic .22 can be quite deadly at close range.

The third category is a “kit, part, or combination of parts” from which one can construct an assault weapon or convert another type of firearm into one. RCW 9.41.010(2)(a)(iii). This category obviously covers “ghost guns” and kits intended to increase the lethality of a firearm that otherwise would not fall within the definition of an assault weapon.

The fourth definitional category has a more complex structure and is of particular concern in this case: “A semiautomatic, center fire rifle<sup>8</sup> that has the capacity to accept a detachable magazine *and has one or more of the following*: (a) a separate and/or distinct pistol grip; (b) a thumbhole stock; (c) a folding or telescoping stock; (d) a forward pistol or other grip designed to steady the weapon with the nonfiring hand; (e) a flash suppressor or silencer or like device “designed to reduce the visual or audio signature of the firearm;” (f) a muzzle brake or like device or attachment designed to “reduce recoil or muzzle rise;” (g) a threaded barrel designed to attach a flash suppressor or muzzle break or like device; (h) a grenade or flare launcher; and/or (i) a barrel shroud that encircles all or part of the barrel to protect the shooter’s hand from heat, apart from a solid forearm that covers only the bottom of the barrel. RCW 9.41.010(2)(a)(iv)

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<sup>8</sup> “Center fire” refers to a cartridge with a primer located in the center of its base. Center fire cartridges were developed during the second half of the nineteenth century and work best with high powered ammunition. “Rimfire” refers to an older and somewhat less efficient technology where the primer is located within the rim at the base of the cartridge. In modern firearms, rimfire is limited to weaker low velocity cartridges ordinarily, such as the ubiquitous .22. *See* Declaration of James E. Yurgealitis at 5 n.1; App. to Answer to Mot. for Disc. Rev. at 672. The weaker ballistic characteristics of rimfire cartridges is likely why ESB 1240 does not extend to semiautomatic .22 rifles and carbines unless they are less than 30 inches long. It should be noted, however, that at close range a well-placed .22 slug can be fatal to a human being, as occurred during a mass shooting at a shopping mall in Washington that killed five people. A more powerful example of a rimfire cartridge is the .17 HR, which is a high velocity round specially designed for extremely accurate “varmint” rifles capable of picking off groundhogs at several hundred yards. There is no existing .17 HR weapon I am aware of that comes anywhere near SHB 1240’s definition of an assault weapon.

(emphasis added). This subcategory is of particular concern here because it seemingly encompasses every semiautomatic assault rifle or semiautomatic battle rifle offered for sale today in the civilian market, including semiautomatic assault rifles and battle rifles based on the AR10, AR15, M1A, HK, FN FAL, and AK-47 platforms. Most of the weapons specifically listed under the first category described above fall within this category, too.

A fifth category is any semiautomatic center fire rifle with a fixed magazine capable of accommodating more than 10 rounds. RCW 9.41.010(2)(a)(v). Thus far I have not identified a firearm matching this subcategory.<sup>9</sup>

A sixth category is a semiautomatic pistol with a detachable magazine and tactical-like features similar to those listed above. RCW 9.41.010(2)(a)(vi). There are numerous examples produced by various manufacturers, but they need not be discussed further here.

A seventh category is semiautomatic shotguns with tactical-like features similar to those listed above, with the addition of fixed magazines accommodating more than seven rounds and “revolving cylinder” shotguns. RCW 9.41.010(2)(a)(vii). This is a relatively small class of weapons but there are some pretty fearsome examples floating around the civilian firearms market. However, most semiautomatic shotguns accommodate six or less rounds in a tube or box magazine.

Importantly, SHB 1240’s definition of assault weapon does not include “any firearm that is manually operated by bolt, pump, lever, or slide action.”

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<sup>9</sup> As indicated, Washington bans “large capacity magazines,” those containing more than 10 rounds. RCW 9.41.370(1); RCW 9.94.010(25). Ordinarily, a Soviet pattern SKS would be legal under this provision because it has a 10-round internal magazine but is listed as banned under RCW 9.41.010(2)(a)(i), possibly because it can be modified to accommodate a detachable box magazine. As will be discussed in more detail below, the M1 Garand has an eight-round internal magazine that cannot be so modified. There may be a centerfire weapon firing smaller cartridges capable of holding more than 10 rounds in an internal box magazine, perhaps a handgun of some type, but I have not found it yet.

RCW 9.41.010(2)(c). Numerous models of bolt and lever action rifles and carbines are available in the civilian firearms market, both in rimfire and centerfire versions. Currently produced models of pump action rifles are rather few (there were many more in the past), but models of pump action shotguns are quite numerous.

SHB 1240 is unambiguous, though challenging to interpret by a person unfamiliar with firearms. It means what it says and it plainly reflects the legislature's intent to define assault weapons and restrict their availability in Washington.

#### Discretionary Review

As mentioned above, petitioners challenge SHB 1240 on state constitutional grounds, and the superior court denied their motion for a preliminary injunction. A full hearing on the merits has yet to occur. Accordingly, petitioners seek interlocutory review, claiming the superior court committed obvious error that renders further proceedings useless under RAP 2.3(b)(1).

A superior court commits “obvious error” within the meaning of RAP 2.3(b)(1) if its decision is clearly contrary to statutory or decisional authority with no discretion involved. *See* I WASHINGTON APPELLATE PRACTICE DESKBOOK, § 4.4(2)(a) at 4-34—4-35 (4th ed. 2016) (interpreting RAP 2.3(b)(1)). Stated another way, the error is obvious because it is plain or manifest. The obvious error also must render further proceedings “useless.” *See id.* at 4-36. Or stated more simply, the court “made a plain error of law that markedly affects the course of the proceedings.” II WASHINGTON APPELLATE PRACTICE DESKBOOK, § 18.3 at 18-14 (4th ed. 2016) (discussing analogous rule under RAP 13.5(b)(1)). More generally, interlocutory review is disfavored, appellate courts being very reluctant to insert themselves into superior court proceedings. *Minehart v. Morning Star Boys Ranch, Inc.*, 156 Wn. App. 457, 462, 232 P.3d 591 (2010). No obvious error occurred here as explained more fully below.

### Preliminary Injunction

A preliminary injunction is an extraordinary remedy that is rarely granted and only when clearly and plainly justified. *Kucera v. State, Dep't of Transp.*, 140 Wn.2d 200, 209, 995 P.2d 63 (2000); *Swiss Baco Skyline Logging Co. v. Haliewicz*, 14 Wn. App. 343, 345, 541 P.2d 1014 (1975). The movant must show (1) they have a clear legal or equitable right related to the instant matter, (2) they have a well-grounded fear of an immediate invasion of that right, and (3) that the act or acts the movant seeks to enjoin has resulted in or will result in actual and substantial injury to them. *Kucera*, 140 Wn.2d at 209. The three elements are examined in light of equity, including balancing the relative interests of the parties and the public, depending on the circumstances. *Id.* If the movant fails to establish any one the elements, the court will deny the motion for injunction. *Huff v. Wyman*, 184 Wn.2d 643, 651, 361 P.3d 727 (2015).

Petitioners describe SHB 1240 in such hyperbolic terms as to suggest it outlaws semiautomatic firearms generally. As discussed above, it does not. A semiautomatic rifle with a detachable box magazine of less than 10 rounds should be legal under the act so long as it does not include the tactical features listed in RCW 9.41.010(2)(a)(iv). For example, Browning's BAR Mark III—representative of a traditional semiautomatic hunting rifle—would appear to be an acceptable semiautomatic firearm under the act. *See Shooter's Bible* at 128. There are a great many semiautomatic shotguns and handguns that would appear not to fall afoul of the act. *See e.g., id.* at 272 (Beretta A300 Ultima 12-gauge semiautomatic shotgun), 274 (Browning A5 variants in 12 and 16 gauge), 346 (Charles Daly 1911 Field Grade .45 ACP pistol), 367 (Glock G48 9 mm pistol). Further, as indicated, the act exempts rimfire semiautomatic rifles, provided they are not less than 30 inches in overall length. Specifications set forth on Ruger's website indicates its long-running 10/22 carbine exceeds that length, so that particular

weapon would appear to be allowed under the act.<sup>10</sup> [Ruger® 10/22® Carbine Autoloading Rifle Model 1151](#). (visited Jan. 10, 2024). On the other hand, Ruger’s popular Mini-14 would likely fall within the act due to its ability to accommodate a 20 or 30-round magazine and possibly also due to certain of its military style features. [Mini-14® \(ruger.com\)](#) (visited Jan. 10, 2024). However, as indicated, the M1 Garand would appear to be exempt due to its length and limited fixed magazine capacity.<sup>11</sup>

As shown by the iconic M1 Garand, it is possible to design a military-style semiautomatic weapon that will comply with the act. For example, the M1A and Mini-14, which eject spent cartridge casings out the top of the weapon like an M1 Garand or a bolt-action rifle, can be reloaded or topped off with a stripper clip, so those weapons can probably be redesigned to comply with the act without much difficulty. *See* [Load your Mini-14 via Stripper Clips | Ruger Forum](#). (visited Jan. 9, 2024). In fact, firearms manufacturers are already modifying their designs to comply with firearms regulations imposed by various states, as amply illustrated in the *Shooter’s Bible*. *See id.* at 149 (Dark Storm Industries semiautomatic military style .308 rifle designed to comply with restrictive state regulations, though unlikely to comply with Washington’s act). In any event, SHB 1240 is not nearly as restrictive of semiautomatic weapons as petitioners claim. Some of the individual petitioners say they want to buy more semiautomatic firearms to add to their already existing arsenal. They can.

#### Constitutional Issue

In any event, the central issue is whether petitioners have a “clear legal or equitable right” under our state’s constitution to own or possess assault weapons. As to

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<sup>10</sup> Petitioners are correct that a Ruger 10/22 was used in a mass shooting in a Washington shopping mall that killed five people. As tragic as that event was, it did not result in nearly as many deaths as shootings listed above involving semiautomatic assault rifles.

<sup>11</sup> As discussed, the Illinois Act impliedly exempts the M1 Garand and a few other military-style firearms.

that issue, the Washington Constitution 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.” Const. art. I, § 24. This is not an unlimited right, as it is well-settled that the right to bear arms—particularly firearms—for self-protection under article I, section 24 of the Washington Constitution is subject to “reasonable regulation pursuant to the state’s police power.” *State v. Jorgenson*, 179 Wn.2d 145, 155, 312 P.3d 960 (2013). A regulation that is reasonably necessary to protect the safety and welfare of the public and is substantially related to legitimate ends is constitutionally reasonable. *Id.*

In relation to this issue, petitioners rely heavily on this court’s definition of an “arm” under article I, section 24, explicated in *City of Seattle v. Evans*, 184 Wn.2d 856, 366 P.3d 906 (2015). The court there held that the right to bear “arms” under our state’s constitution “protects instruments that are designed as weapons traditionally or commonly used by law-abiding citizens for the lawful purpose of self-defense.” *Id.* at 869.

To ascertain whether assault weapons as defined under SHB 1240 fall into that constitutionally protected category defined in *Evans* requires some exploration of firearms history. And while this is not a Second Amendment case, the United States Supreme Court has adopted an analysis of firearms regulations that requires meaningful historical inquiry. *See New York State Rifle & Pistol Ass’n, Inc., et al. v. Bruen*, 597 U.S. 1, 26-30, 142 S. Ct. 2111, 213 L. Ed. 2d 387 (2022). A similar approach seems appropriate for limited purposes of this ruling. It is required also due to the parties’ tendency to overgeneralize and oversimplify an historically and technically complex issue. For example, petitioners conflate assault weapons with more traditional civilian style semiautomatic weapons, in effect arguing assault weapons are really no different



than conventional firearms that “have been used for more than a century” for self-defense, hunting, and recreation. Petitioner’s Mot. for Temp. Restraining Order at 5. Respondents for their part sometimes oversimplify the variety of weapons affected by the statute, though their expert witness declarations are most impressive. Some historical and technical context may help explain the basis for this ruling.

We start with a brief review of firearms development as it stood in 1889, the year Washington became a state. That year occurred during an epoch-making shift from black powder-based firearm technology—the age of matchlock, flintlock, percussion, and early efforts to develop repeating firearms and fixed metallic ammunition—to smokeless powder and its profound effect on weaponry.

#### Metallic Cartridges and Smokeless Powder

Black powder firearms were common in 1889 and had been around in one form or another for close to a millennium. Muzzle loading muskets, smoothbore and (increasingly) rifled, and shotguns were the main form of long gun through the American Civil War.

The development of early forms of fixed metallic cartridges containing black powder around the mid-nineteenth century led to the development of effective breech loaders (using various breech block systems), lever action (usually firing less powerful metallic cartridges), and bolt action systems (a few with tube or box magazines designed to hold a small number of metallic cartridges). Metallic cartridges made revolvers more effective as well. *See generally Illustrated History of Firearms* at 108-37. Most early metal cartridge casings were fabricated from copper but more durable brass casings were developed in the 1870s, the origin of the brass casings used today. *See Firearms: An Illustrated History* at 112-13. The development of metallic cartridges preceded the appearance of smokeless powder, invented in 1884 by a French chemist. This new substance produced little residue and smoke and provided far greater

propulsive power than black powder, enabling the development of smaller bore metallic cartridges of exponentially greater range and velocity. *See Firearms: An Illustrated History* at 142-43. It took a few years for firearm and munitions designers to adjust to smokeless powder: a firearm shooting smokeless powder ammunition needed to be much stronger and built with greater precision.

#### Bolt-Action Rifles and the Spitzer Bullet

The first bolt-action rifle, the German Dreyse Needle-Fire rifle was introduced in 1841, and the ancestor to the modern bolt-action rifle, a single-shot Mauser firing metallic cartridges, was introduced in 1871. *Firearms: An Illustrated History* at 108-09, 114-15. They and other early bolt-action rifles fired black powder cartridges; however, the bolt-action system was ideally suited to the greater power of smokeless powder ammunition. Consequently, European designers and manufacturers of bolt-action rifles were quick to jump onto the smokeless powder bandwagon, leading to a proliferation of mainly military repeating bolt action rifles in the 1880s and 1890s. The French Army adopted the first bolt action repeating rifle to fire smokeless ammunition in 1886: the 8 mm Lebel. Mauser soon followed. It did not take long for the British to get into the game with its famous series of Lee-Metford and Enfield rifles. The Russians and Italians adopted new bolt-action rifles in 1891. *See id.* at 144-47.

Near the end of the 19th Century another European innovation arrived on the scene: the sharply pointed and tapered-in-the-rear “spitzer bullet,” which hastened the development of high velocity ammunition with flat trajectories. *See id.* at 142. The combination of smokeless powder and the spitzer bullet was ideally suited to a belt fed weapon Hiram Maxim designed in 1883: the machine gun. *See id.* at 184-87. Modern hunting rifles and the assault weapons at issue here fire such bullets of varying caliber,

most often the 5.56 mm NATO/.223 Remington (assault rifles) or 7.62 mm NATO/.308 caliber (battle rifles) with respect to assault weapons.<sup>12</sup>

Meanwhile, the miniscule and underfunded U.S. military of the late 19th Century<sup>13</sup> was slow to embrace these foreign technological advancements. An American designed bolt action rifle firing black-powder cartridges, the Ward-Burton, was rejected in 1871 due to functionality and safety issues. Instead the Army adopted the 1873 Springfield rifle and carbine, single-shot weapons firing a new and powerful .45-70 black powder metallic cartridge loaded through an innovative “trap door” system.<sup>14</sup> This was the weapon that U.S. Army infantry soldiers and cavalry troopers were armed with in 1889, and many of them would carry them through the Spanish-American War (1898) (apart from lucky units armed with newly-issued bolt

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<sup>12</sup> Spitzer bullets are best loaded into box or rotary magazines. Tube magazines for spitzer bullet center-fire cartridges are disfavored due to the possibility of the tip of one cartridge slamming into the primer of the round ahead of it, causing the forward round to cook off inside the magazine. Some Remington rifles have a tube magazine designed such that the cartridges spiral and stay out of exact alignment as they advance up the tube, thus getting around that problem. See *Gun Trader's Guide* 347-48 (Robert A. Sadowski ed., 45th ed. 2023) (listing older model Remington pump action rifles with tube magazines). In contrast, standard .22 ammunition, most pistol ammunition, and metal cartridge ammunition developed in the late black-powder era are topped with slugs that are more rounded or blunt in shape, better suited for tube magazines.

<sup>13</sup> The 1870s and 1880s were difficult decades for the Army. After the Civil War, a hostile Congress slashed the size of the Army and capped its funding such as to allow a maximum of only between 27,000 to 30,000 men, a number that was rarely met. Pay was paltry (and often delayed) and living conditions were stark. Officers lacked promotional opportunities. Desertion and turnover rates among enlisted men were extraordinarily high. Nearly half of the enlisted men during those lean years were recent immigrants (mainly from Ireland and German-speaking countries). The only really positive news for the Army in those days was the high morale, professionalism, and discipline of the Black “buffalo soldiers” of the storied 9th and 10th cavalry and the 24th and 25th infantry, but even those fine soldiers endured great prejudice, even among their White comrades. See Robert M. Utley, *Frontier Regulars, The United States Army and the Indian: 1866-1891*. 16-29 (1973). In the 1870s and 1880s, “[m]ost civilians looked upon soldiers with condescension if not contempt.” *Id.* at 23. The situation began to improve gradually in the 1890s. See also Charles G. Worman, *Firearms in American History*. 138 (describing the difficulties of post-Civil War Army service), & 142 (2007) (recounting the distinguished service of the Black regiments).

<sup>14</sup> The 1873 Springfields were improved versions of the 1866 Springfield rifle, which was a muzzle loading rifled musket converted into a .50 caliber breech loader by way of a hinged “trapdoor” system developed by E.S. Allin. *Illustrated History of Firearms* at 125.

action rifles described below), with some National Guard and militia units carrying these ancient weapons through the American-Philippine War (1899-1902) and beyond. See Charles G. Worman, *Firearms in American History*, (2007) at 143-46.<sup>15</sup>

Eventually, in the mid-1890s, the U.S. Army adopted an elegant Norwegian rifle with a smooth bolt action system and a unique and visually distinctive loading system (through a hinged opening on the right side of the weapon) for its smokeless powder cartridges, the .30-40 Krag-Jørgensen (Krag); however, the cartridge fired by that beautifully crafted weapon was less powerful than the 7 mm M1893 Mausers wielded by the Spaniards and the Krag took longer to reload. See *Illustrated History of Firearms* at 150; *Firearms: An Illustrated History* at 144-45. The Krag would eventually be replaced by the extremely accurate Mauser-based M1903 Springfield bolt action rifle, firing the new and powerful .30-06 cartridge.<sup>16</sup> Entering service in 1906, the M1903 served as the principle American combat rifle until the early days of the Second World War.<sup>17</sup>

### Repeating Rifles

A related development was repeating action firearms, which have a convoluted history. Petitioners claim repeating firearms have been in existence since the early 18th Century, implying they were common. They undercut their credibility with that claim. As respondents have persuasively shown, particularly through the declarations of university professors Brian DeLay and Robert J. Spitzer, there were some early efforts to develop repeating firearms during the flintlock era but they were dead-end designs:

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<sup>15</sup> Theodore Roosevelt carried a personally owned weapon in Cuba, a Winchester lever action Model 1895. See *Firearms in American History* at 174 (describing the Model 1895).

<sup>16</sup> Surplus Krags meanwhile went into the civilian market, where modified versions were (and still are) prized by sportsmen and collectors.

<sup>17</sup> It should not be forgotten that most “doughboys” who served in the Great War were armed with a stopgap bolt action rifle, the .30-06 M1917, an adaptation of a British Enfield design. *Illustrated History of Firearms* at 158.

impractical and dangerous to the user (due to the lack of precision manufacturing, an attempt to fire a single shot could ignite all of them at once, with disastrous results). *See Firearms: An Illustrated History* at 64-65 (showing an Italian example). Anyone familiar with the history of firearms development knows that single-shot muzzle loading muskets and rifled-muskets reigned supreme through the Civil War era.

During the black powder percussion cap<sup>18</sup> era, the first practical repeating firearm was the Colt pistol, and designs that followed or were inspired by it, including some interesting carbines and rifles using the revolver system; however, it took time to reload each round with separate percussion cap, gunpowder, and shot, although some combustible cartridges made of paper were available. *See Firearms: An Illustrated History* at 88-89. The legendary Colt Model P—best known as the “Peacemaker”—did not come into being until 1873 with the advent of reliable metallic cartridges. *Firearms in American History* at 159. The revolver-based carbines and rifles never really caught on, even with metallic cartridges. *See id.* at 160. A .22 reproduction of one of these interesting weapons is available in today’s firearms market. *See Shooter’s Bible* at 163 (Heritage Manufacturing “Rough Rider Ranch Carbine”).

An early example of a repeating long firearm with metallic cartridges was the tube-fed .44 caliber Henry lever action repeating rifle, introduced shortly before the Civil War began. One or two Union volunteer regiments carried them into battle, but the Army initially was not particularly interested in repeating firearms, as they were deemed expensive and complicated to use, and were difficult to repair. *Firearms in*

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<sup>18</sup> The percussion cap is a black powder ignition system invented around 1816 that gradually began to replace the flintlock. *Firearms in American History* at 44. It took a long time for this new technology to take hold. Although the U.S. Army adopted a percussion smoothbore musket in 1842, most American soldiers fighting in the Mexican-American War (1846-1848) were still armed with 1816 pattern flintlock muskets. *Id.* at 66. One exception was a volunteer regiment from Mississippi commanded by Jefferson Davis, armed with an 1841 model of rifled musket and instrumental in the American victory at Buena Vista. *Firearms in American History* at 67. Due to a shortage of modern percussion rifled muskets a few regiments early in the Civil War went to battle armed with flintlocks. *Id.* at 111.

*American History* at 106. The Army did, however, adopt for cavalry use the reliable and effective seven-shot Spencer repeating carbine, which was loaded through the butt stock. *Id.* at 114. The Spencer was eventually replaced by the single-shot trapdoor 1873 Springfield carbine mentioned earlier, which fired the more powerful .45-70 black powder cartridge. *Id.* at 139-40. The Army at that time recognized that the age of single-shot military weapons would soon come to an end but waited until it could find a safer and more reliable design of repeating firearm. *Id.* at 140.

Not long after the Civil War, the famous tube-fed series of Winchester (successor to Henry) lever action repeating rifles entered the scene, firing mainly pistol grade or somewhat more powerful ammunition. *Id.* at 171. The famous Model 1873 was in production for nearly half a century, totaling nearly 720,000 units. *Id.* The U.S. Army took no interest in these lever action weapons, though the Royal Canadian Northwest Mounted Police adopted the Model 1876 carbine, which fired the more powerful .45-75 cartridge, and significant numbers of military style Winchester rifles were exported for use by foreign armies, particularly Turkey and Russia.<sup>19</sup> *Id.* at 99-102, 171-73. A great variety of Henry and Winchester inspired lever action firearms are available in today's firearm market, as shown in *Shooter's Bible*.

#### Civilian Firearms Ownership in 1889 Washington

In light of the foregoing history, if a typical homeowner, farmer, or rancher in Washington possessed a firearm when the state was founded, it almost certainly would have been a civilian pattern late black-powder era rifle, shotgun or pistol. Myriad designs were available. Single-shot rifles were popular for both hunters and target shooters (very popular in those days) because of their superior accuracy. *Id.* at 171,

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<sup>19</sup> In 1919 Winchester introduced the advertising slogan that its lever-action was the firearm that "won the West." *Firearms: An Illustrated History* at 119. To the extent the West was "won"—the original inhabitants most certainly have views about that—the weapon most responsible was arguably the trapdoor .45-70 Springfield rifle and carbine.

177-79. Lever action weapons, particularly the Winchester Model 1873, which fired more powerful center-fire cartridges, were almost certainly popular with ranchers guarding against coyotes and other predators and some game hunters. The Winchester was a good deer rifle and more powerful lever action rifles produced by Winchester and rival Marlin could kill any game in North America. *Id.* at 177. Shotguns, both domestically produced and imported from Europe were popular for hunting birds, game, and for self-defense. *Id.* at 179-84. A household might well have had a muzzle-loading firearm, including an heirloom like a flintlock Pennsylvania/Kentucky long rifle or Hawken flintlock or percussion rifle. A few people of greater means might have obtained one of the newfangled European smokeless powder weapons, but it seems unlikely. The first American-produced smokeless powder firearm may not have appeared until at least 1892.<sup>20</sup> For example, Winchester did not produce a smokeless capable lever action until the wildly popular Model 1894, more than three million of which were produced by 1975. *Id.* at 173-74. That particular weapon is still produced.

Petitioners' implied notion that a typical Washingtonian needed a personal firearm for military use is not compelling. The early pioneer/settler era arguably had passed its peak by 1889. Wars with the Native tribes residing in Washington Territory ended in the late 1850s, though coaxing some tribes into the unjust reservation system imposed upon them was a problem that lingered late in the territorial era. In any event, the tribes posed no real threat to the non-Indigenous population. The so-called Pig War with the British Empire over the status of the border with British Columbia—a diplomatic crisis with no human bloodshed—was a fading memory. The tragic Nez

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<sup>20</sup> In 1892 Marlin introduced a smokeless powder .22 caliber lever-action rifle, followed by a more powerful version in 1893. Winchester introduced its legendary Model 1894 in its designated model year. *See Firearms in American History* at 173-74; *Gun Trader's Guide* at 296. The Army's Krag was introduced in the mid-1890s but, as indicated, it took several years for that bolt action weapon to overtake the trapdoor Springfield in numbers. *Firearms in American History* at 145-46.

Perce War that skirted Washington Territory had occurred a dozen years before. Aging Washingtonians who fought in the Civil War did so as members of volunteer or regular Army regiments. The U.S. Army did not have a large presence in the new state. *See* footnote 4 *supra*. The state had a small National Guard presence, established in 1887 and descended from territorial militia, and regular army units stationed in Washington numbered only 98 officers and 1,018 enlisted men in 1890. *See* The Official History of Washington National Guard (1961), Volume 4 at 151-52; digitized copy available at [Microsoft Word - FIELDS VOL IV.doc \(wa.gov\)](#). In those days, the National Guard was mainly concerned with quelling civil unrest, such as labor strife. National Guard infantry or cavalry were supplied and armed with military firearms, as were their forebears in colonial times and during the Revolution. *See id.* at 162 (Inspector General reporting in October 1890 that Washington National Guard troops were armed with “breech loading Springfield rifles caliber .45, pattern of 1873, 1878, and 1884,” trapdoor type weapons).<sup>21</sup> The slaughter at Wounded Knee would happen in 1890 but that was far outside the borders of Washington. Realistically, there was no need for a Washingtonian in 1889 to possess a personal firearm for military purposes.

#### Development of Semiautomatic Weapons

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<sup>21</sup> Petitioners seemingly equate private owners of assault weapons to the storied “minutemen” of the Revolution. The minutemen were a subcategory of government-mandated militia—the “well-regulated militia” that inspired the Second Amendment—armed with military-grade muskets ordinarily supplied by their local jurisdiction. *See* Official History of Washington National Guard, Volume 1 at 9-16 digitized copy available at [Microsoft Word - FIELDS VOL IV.doc \(wa.gov\)](#) (describing formation of militias during the colonial period and soon after adoption of the Second Amendment). For example, Congress decreed in 1792 that each state militiaman be equipped with a musket capable of firing a 1/18 pound ball (around .69 caliber), 24 cartridges (ball and powder combinations), spare flints, bayonet, and knapsack. *Id.* at 14. The minutemen did their bit courageously in the early days of the Revolution; however, that founding conflict was won ultimately by the Continental Army, aided late in the war by French army and naval forces. *See* Russell F. Weigley, *The American Way of War* 20-39 (1973) (describing the Americans ultimate path to victory over the British). Petitioners’ vision of millions of untrained and loosely organized civilians armed with a vast variety of privately-owned military-style firearms, many of which are incompatible with each other, unsanctioned by state or federal government, is nothing like what the minutemen or other early state militia were all about.



What a typical Washingtonian firearms owner would not have had in 1889 was a semiautomatic weapon. That was simply not a possibility. Petitioners claim “semiautomatic firearms have been in circulation since their invention in the 1880s.” Mot. for Disc. Rev. at 10-11. That assertion is misleading to say the least and is refuted by Brian DeLay’s well-researched declaration. In any event, the 1880s reference may be to a semiautomatic rifle initially designed by Manuel Mondragon of Mexico sometime between 1885 and the early 1890s (depending on the source). *Illustrated History of Firearms* at 134 (1885); *Firearms: An Illustrated History* at 176 (1891). But a newly designed firearm cannot enter “circulation” until some manufacturer produces it. Although the Mondragon was apparently the first workable semiautomatic rifle, it was initially deemed “too complex for military use.” *Firearms: An Illustrated History* at 176. Petitioners have not established the Mondragon or any other semiautomatic rifle was produced and widely circulated in the civilian or military market in the later years of the nineteenth century. To the contrary, it appears the Mondragon underwent a long period of field testing before a Swiss manufacturer started producing it in 1908. It was used in small numbers by German aviators early in the First World War as a weapon to take aloft for shooting at enemy aircraft. *Illustrated History of Firearms* at 166. The Mexican army did apparently adopt it and it was likely used during the Mexican Revolution. The Mondragon was then forgotten—so obscure that there is no reference to it in contemporary published listings of historic or collectable firearms, such as *Gun Trader’s Guide*.<sup>22</sup> However, there are some interesting websites and that discuss this fascinating weapon. [Mexican Mondragon semiauto \(forgottenweapons.com\)](http://forgottenweapons.com). (visited Jan. 10, 2024). It is all but impossible that a Washington resident in 1889 would have heard of it.

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<sup>22</sup> *Gun Trader’s Guide* (Robert A. Sadowski ed., 45th Ed., 2023) lists thousands of modern and historic firearms and their current market prices, depending on condition of the weapon. The guide also indicates the production years of specific firearms.

The first effective semiautomatic weapons of any note were pistols developed in Germany, the first being the Borchard C-93 (1893). *Illustrated History of Firearms* at 134, 146. A far more successful semiautomatic weapon was the distinctive 1896 Mauser “broom handle” pistol.<sup>23</sup> *Id.* at 143, 146. The Mauser could be converted into a type of carbine with a cleverly designed detachable shoulder stock. The rather sinister looking Mauser was a popular military firearm adopted by armies and paramilitary groups worldwide prior to the Second World War. *Id.* at 168-69. It was not a weapon to be found in a typical Washington State household in the late 1890s or first decade of the 1900s.<sup>24</sup>

Semiautomatic pistols began to enter the civilian and military market with greater frequency in the first decade of the 20th Century. Arguably, the most influential designs were those of American John M. Browning, a brilliant and prolific designer who fashioned weapons for numerous American and foreign manufacturers. Browning designed a highly effective semiautomatic pistol in 1895, but Colt would not produce it, thinking the American public would not be interested in such a weapon. The well-known Belgian FN (Fabrique Nationale) company felt otherwise and started producing the pistol in 1900.<sup>25</sup> *Firearms: An Illustrated History* at 167.

A few years before the First World War, the U.S. military adopted as its standard sidearm the Browning-designed Colt M1911 semiautomatic pistol, a hand-held piece of artillery that fired the awesomely powerful .45 ACP (Automatic Colt Pistol) round. This legendary pistol, particularly the M1911A1, remained the standard issue military

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<sup>23</sup> So-named because of its distinctive pistol grip.

<sup>24</sup> The Mauser pistol inspired Star Wars prop designers to fashion Han Solo’s “BlasTech DL-44 blaster” out of one. *See Gun Trader’s Guide* at iv (telling the story of the prop weapon, sold at auction for \$1,057,500). Gletcher makes an impressive air gun replica of the 1932 version of the Mauser, listed at \$143.99. *Shooter’s Bible* at 254.

<sup>25</sup> Unlike Colt and Winchester, Browning did not establish a company manufacturing firearms. Rather, he designed weapons produced by others. The present Browning Arms Company is a U.S. subsidiary of FN.

sidearm in the U.S. military until 1990 and is still in limited use today. *Id.* at 178-79. Civilian versions of the M1911 are still manufactured by numerous companies. *See, e.g., Shooter's Bible* at 79 (Savage 1911), 334 (Auto-Ordnance "Trump Rally Cry" 1911).<sup>26</sup>

It is quite possible a number of Washingtonians seeking a self-defense weapon in the early decades of the 20th Century would have armed themselves with semiautomatic pistols. It is equally likely however, they would have possessed a cheaper, easier to use, and more reliable single- or double-action<sup>27</sup> revolver or a "pocket persuader" like a single shot derringer of some type. *See Firearms in American History* at 162-67, 184-90.

Civilian semiautomatic rifles began to appear in the United States in the early 1900s. The Winchester Model 1903 fired rimfire .22 rounds developed specifically for that weapon, fed by way of a tube magazine in the butt stock. It was probably a good rifle for plinking (shooting up cans and bottles and paper targets) and controlling the family farm's gopher population. The Winchester Model 1905 was more substantial, firing a relatively weak center-fire cartridge fed by a 5 or 10-round box magazine. Some European military forces imported a small number of Model 1905's as a stopgap weapon for use in aircraft early in the First World War, before machine gun mountings were developed. A successor variant, the .351 caliber Model 1907 was produced from 1907 to 1957 but only 59,000 were produced, many for law enforcement.<sup>28</sup> *Illustrated History of Firearms* at 217.

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<sup>26</sup> My father brought his M1911A1 back from his service in the Pacific during the Second World War. It was the most intimidating weapon I ever handled.

<sup>27</sup> A single action revolver requires the shooter to cock the hammer before each shot. A double action requires only that the shooter pull the trigger for each shot.

<sup>28</sup> Semiautomatic shotguns began to appear around the same time, and numerous examples are produced today; however, semiautomatic shotguns are not really at issue here, unless they have large magazine capacities. Most semiautomatic shotguns have very limited magazine capacities due to being tube fed.

Another early civilian semiautomatic rifle was the Browning-designed Remington Model 8, which entered the American market in late 1906. The rifle was originally manufactured by FN and sold in Europe some years before but very few were sold as the Europeans much preferred bolt action rifles. The Model 8 held five rounds stored in a non-detachable box magazine that could be fed by way of a stripper clip. The Model 8 was the first semiautomatic civilian rifle capable of killing larger game; however, it was not a military firearm. Some law enforcement agencies did purchase the Model 8 rifle, some with special detachable box magazines sold only to law enforcement, capable of storing 10 to 15 rounds. One or more of these law enforcement versions were used to kill Bonnie and Clyde. In any event, the Model 8 did not start a sudden boom in semiautomatic rifle sales, and interestingly, neither of the historical reference sources cited in this ruling even mention it. Although the Model 8 was influential and had a long production life, from 1906 to 1938, it was not produced in great numbers in comparison to manually operated firearms. *Gun Trader's Guide* at 349. Remington later offered the Model 81 hunting rifle, manufactured from 1936 to 1950. *Id.* Notwithstanding the availability of semiautomatic hunting rifles, most shooters prior to the Second World War preferred bolt action or lever action rifles. Bolt action rifles in particular were (and still are in my view) “more robust and reliable, and easier to maintain.” *Firearms: An Illustrated History* at 224.<sup>29</sup>

In his oft-cited dissent in *Heller v. District of Columbia*, 670 F.3d 1244 (2011) (*Heller II*), then Judge Brett Kavanaugh placed great importance on these early twentieth century semiautomatic rifles, suggesting they are really no different than the semiautomatic assault and battle rifles in circulation today. *Id.* at 1287. But those earlier rifles were designed as hunting firearms, had limited magazine capacity, did not fire

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<sup>29</sup> One of the most interesting rifles I fired was a 1911 Mauser Argentine army rifle. It worked like new and was unbelievably accurate.

particularly powerful cartridges in comparison to more modern ammunition, and bear no resemblance at all to the rapid firing military grade weapons we are concerned with today.<sup>30</sup> Simply put, SHB 1240 does not concern this earlier generation of semiautomatic weapon.

### Modern Civilian Semiautomatic Rifles

Semiautomatic hunting rifles became more common after the Second World War, including several excellent .22 rimfire rifles and carbines shooting center-fire pistol ammunition, updated models of which are available today. *See Firearms: An Illustrated History* at 280-81 (displaying Winchester “Model 100” .308 hunting rifle and Remington “Nylon 66” .22 rifle); *Shooter’s Bible* at 189 (listing Rossi RS 22 semiautomatic .22 rifle with 10-round box magazine); *Gun Trader’s Guide* at 350-51 (listing Remington Model 7400 produced from 1981 to 2005). Until the current flood of semiautomatic assault rifles, civilian centerfire semiautomatic weapons rarely accommodated more than five or 10 rounds in an internal box, detachable box, or tube magazine. None of them resembles the military-style weapons under consideration here. *See, e.g., Shooter’s Bible* at 128-29 (displaying multiple versions of the long-running Browning BAR semiautomatic hunting rifle<sup>31</sup>), 200 (Savage Arms “A17” series of semiautomatic .17 caliber “varmint” rifles with 10-round rotary magazine), 204 (Savage Arms “Model 64 Takedown” .22 semiautomatic with 10-round detachable box magazine). Now, however, side-by-side review of the *Shooter’s Bible* and the *Gun Trader’s Guide* indicates the traditional semiautomatic hunting rifle has been overtaken by a staggering array of military style weapons in the current market, particularly after expiration of the Federal Assault Weapon Ban in 2004. Consequently, most newly manufactured traditional-pattern civilian repeating rifles sold on the firearms market

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<sup>30</sup> As indicated, there were some larger magazines developed for the 1905 Winchester and Remington Model 8 but were limited to military or law enforcement use.

<sup>31</sup> The current Browning BAR is unrelated to the famous BAR light machine gun.

today are bolt or lever action. *See e.g., Shooter's Bible* at 194-97 (listing numerous examples of bolt action rifles manufactured by highly-regarded Finnish company Sako), 220-22 (listing bolt action rifles produced by legendary gun maker Weatherby), 214 (listing modernized recreations of historic Winchester lever action rifles marketed by Taylor's & Co. Firearms), 226-33 (listing bolt action and lever action rifles produced by Winchester Repeating Arms). A few companies manufacture pump or slide action rifles, but pump action shotguns are far more numerous. *See Shooter's Bible* at 214 (Taylor's & Co. "Lightning" slide action rifle based on a late-nineteenth century Colt design but firing modern pistol ammunition, such as .357 magnum).

#### Semiautomatic Military Rifles

Meanwhile, there were many attempts to develop semiautomatic military rifles, the obscure Mondragon being the earliest example of one that worked. The French, Germans, and Soviets developed a few examples, but the first such weapon that was widely produced as a standard military firearm was the legendary .30-06 M1, designed by Canadian-born John Garand, which the U.S. Army adopted in 1936. First used in combat by Filipino soldiers defending against Japanese invaders, the M1 Garand gradually replaced the M1903 Springfield as the primary Army and Marine infantry rifle by the end of 1942.<sup>32</sup> *Firearms: An Illustrated History* at 176-77.

The Garand holds eight rounds fed into an internal box magazine by way of a distinctive charging clip. The sturdy and reliable Garand was the standard United States infantry weapon until 1957. *Gun Trader's Guide* at 401. More than five million Garands were produced but they did not enter the civilian market in great numbers, as most Garands were put into armories for refurbishing or were passed on to National Guard units and various foreign militaries.<sup>33</sup> However, if a Garand made it onto the civilian

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<sup>32</sup> The M1903 continued for several decades as a highly effective sniper rifle.

<sup>33</sup> The infamous Kent State University shootings in 1970 were carried out by National Guard troops wielding M1 Garands.

market, a Washington homeowner could have reasonably been interested in obtaining one for hunting, target shooting, and maybe even personal defense.<sup>34</sup> In fact, the Garand has long been a popular target shooting firearm in the Civilian Marksmanship Program (CMP).<sup>35</sup> Springfield Armory<sup>36</sup> produced copies of the M1 Garand from 1979 to 1990. *Gun Trader's Guide* at 388.

Though military in origin, the M1 Garand is impliedly exempt under both SHB 1240 and the very similar Illinois statute. Ironically, petitioners cite the Garand as a weapon soldiers liked to retain after their military service, implying it is equivalent to the assault weapons regulated under SHB 1240; however, the Garand is not capable of accepting more than eight rounds in its internal magazine. Accordingly, it does not appear the M1 Garand is the type of weapon the legislature intended to control under SHB 1240. *See* RCW 9.41.010(2)(a) (defining “assault weapon”).

#### Fully Automatic Military Weapons

Fully automatic firearms are not at issue here, but to fully appreciate the issue at hand it is necessary to briefly discuss them. Designing a rifle capable of fully automatic fire posed a particularly difficult challenge for gun designers. With the exception of the Maxim gun—the prototypical machine gun—sustained fire weapons were exceedingly rare and in their infancy in 1889. The British Army first used the Maxim gun in the late 1880s, updating to smokeless powder versions in the 1890s. *Firearms: An Illustrated*

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<sup>34</sup> It should be noted that in 1963 the Department of the Army sold 150,000 units of the less powerful M1 .30 caliber carbine to NRA members for \$20 each. *Gun Trader's Guide* at 402. Though not nearly as powerful as today's assault rifles and battle rifles, the M1 carbine likely qualifies as an assault weapon under SHB 1240 due to its ability to accept a large capacity magazine.

<sup>35</sup> The CMP is a long-running non-profit organization that promotes civilian marksmanship and firearm safety training. *See* <https://thecmp.org/>. (visited Jan. 4, 2024).

<sup>36</sup> It is important to note that Springfield Armory Incorporated is a private firm, not to be confused with the historic U.S. government Springfield Armory facility that produced U.S. military weapons from 1777 to 1968. *Firearms: An Illustrated History* at 62-63; *Gun Trader's Guide* at 388.

*History* at 184-85. The U.S. Army, often late to the game in those days, did not adopt a machine gun until 1895, but it was not very satisfactory. *Id.* at 188.

The first truly effective American machine gun was the water-cooled Browning-designed M1917 .30 caliber, wielded by John Basilone during his heroic stand at Guadalcanal. *Id.* The air-cooled version, the M1919, served until the 1960s. *Id.* at 192-93. An air-cooled .50 caliber version, the M2, introduced in 1933, was wielded by Audie Murphy, firing from the top of an armored vehicle in Germany, and is used to this day. *Id.* The .50 caliber Browning was also used in numerous U.S. combat aircraft during the War, such as the P-51 Mustang. *Id.*

It is undisputed machine guns are not owned by your typical Washingtonian; however, the immensely powerful .50 BMG (Browning Machine Gun) round is used in a firearm listed as an assault weapon in SHB 1240: the Barrett M107A1, a semiautomatic rifle with a 10-round detachable box magazine. RCW 9.41.010(2)(a)(i). The Barrett can pick off a person a mile away. It is rather expensive: \$12,867. *Shooter's Bible* at 121.<sup>37</sup> Some manufacturers and importers also offer semiautomatic versions of light machine guns. *See Shooter's Bible* at 156 (listing as a "rifle" the FN "M249PS Para," semiautomatic version of M249 light machine gun, offered with 30-round box magazine or 200-round disintegrating link ammo belt); *Gun Trader's Guide* at 245 (listing as a rifle the Century International Arms "Degtyarev DP28," a semiautomatic version of a light machine gun wielded by Soviet Red Army soldiers during the Great Patriotic War). Petitioners essentially argue these weapons are "modern sporting rifles."

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<sup>37</sup> The most expensive firearm listed in the *Shooter's Bible* appears to be the Beretta SL3 over-and-under shotgun, with an MSRP of \$25,900 to \$32,500 *Id.* at 273. The single-shot Big Horn Armory "K95 Stutzen" hunting rifle has an MSRP of \$11,416 ("Luxus" model) or \$26,775 ("Baronesse"). *Id.* at 127. The bolt-action MasterPiece Arms "Mauser M98 Magnum," a big-game rifle for shooting cape buffalo and elephants and the like, is listed at \$12,882 ("Expert") or \$13,805 ("Diplomat"). *Id.* at 177. Another big game rifle is the old-timey double-barrel Krieghoff "Big Five," which lists for \$17,999. *Id.* at 172. These are the type of traditional sporting firearms ordinarily associated with royalty and extreme wealth.



The first hand-held fully automatic weapons were submachine guns, which ordinarily fire pistol ammunition. The first examples, German and Italian weapons, appeared during the First World War. They were most effective in close combat in the trenches or in an urban environment. *See Firearms: An Illustrated History* at 206-07.

The United States military did not adopt a submachine gun during the Great War. The Thompson submachine gun, firing the .45 ACP round fed via a 20-round detachable box magazine or (more famously) a 50 or 100-round drum magazine was introduced too late for that conflict. The U.S. military did not show much interest in the Thompson after the Great War and most law enforcement agencies wanted little to do with it, but the “Tommy gun” was sold on the then unregulated civilian firearms market and eventually became symbolic of the “Roaring Twenties,” bank robbers, and organized crime wars. *See id.* at 210-13. Probably one of the reasons some law enforcement agencies purchased the Model 8 Remington was to counter Thompson guns and purloined BARs wielded by criminals. These weapons were so problematic it led Congress in 1934 to pass the National Firearms Act, strictly regulating the sale and ownership of fully automatic firearms. 18 U.S.C. § 922(o). *See* Declaration of Robert J. Spitzer, Ph.D. at 6-14; App. to Answer to Mot. for Disc. Rev. at 370-78 (describing the early history of the Thompson gun and BAR and related enactment of the National Firearms Act and state laws restricting such weapons).

The Thompson gun was eventually adapted for military use in the Second World War, ordinarily using the 20-round box magazine. Because the weapon was relatively heavy and rather expensive to manufacture, the U.S. Army eventually replaced it with

the simple and light M3 submachine gun—the “grease gun”—which also fired the .45 ACP round. *Firearms an Illustrated History* at 210.<sup>38</sup>

Semiautomatic versions of submachine guns are among the weapons at issue here. For example, Auto-Ordnance offers the “Bootlegger Thompson,” a semiautomatic “tribute to the Roaring ‘20s” that fires .45 ACP rounds from a 50-round drum magazine. *Shooter’s Bible* at 120. That particular weapon is expressly listed as an “assault weapon” under RCW 9.41.010(2)(a)(i). Several particularly fearsome submachine gun-like weapons are also listed as “handguns” in the *Shooter’s Bible*. *See id.* at 70-71 (listing as “handguns” several 9 mm firing submachine gun like weapons produced by Century Arms); 78 (listing two AR type “handguns” firing 5.56 NATO rounds from 10, 20, or 30 round detachable magazines, manufactured by Patriot Ordnance); 355 (listing a CZ-USA (Ceska Zbrojovka) built “handgun” firing either 5.56 mm or 7.62 mm Warsaw Pact rounds from a 30-round magazine).

With respect to a fully automatic long gun, in 1918 the U.S. Army adopted another Browning-designed weapon, the iconic BAR (Browning Automatic Rifle), which fired the .30-06 cartridge from a 20-round detachable box magazine. The BAR was much heavier than a bolt action rifle and worked best with a bipod. The M1918A2 version of the BAR was the standard squad level light machine gun in the U.S. military during the Second World War and served in that role through the Korean War. *See Illustrated History of Firearms* at 174. The US Army did not find a satisfactory replacement for the BAR until 1984, when it adopted the Belgian-designed 5.56 mm M249 Squad Automatic Weapon (SAW). David Cole, *Survey of U.S. Army Uniforms*,

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<sup>38</sup> So-named due to its resemblance to the mechanic’s tool. The British adopted an even simpler submachine gun, the .9 mm Sten gun, which looks like a short pipe with a barrel sticking out of one end, a wire butt stock sticking out of the other end, and a thin box magazine sticking out of its left side. It was quite effective. *See Firearms: An Illustrated History* at 208.

*Weapons and Accoutrements* at 125-26 (2007).<sup>39</sup> In the meantime, the heavier 7.62 mm M60 machine gun and individual rifleman using M16A1 rifles in fully automatic fire mode acted in a stop gap role during the Vietnam War. *Id.* at 125.

### Assault Rifles

It was during the Second World War that the Germans introduced the first true assault rifle: the Sturmgewehr 44 (StG44), a compact weapon capable of both semi and fully automatic fire. The Sturmgewehr fired an intermediate type of cartridge: a shorter version of the 7.92 mm round used in German rifles and machine guns. It was therefore more powerful and accurate than a submachine gun but had less recoil than a standard rifle. Like a submachine gun, the Sturmgewehr had a separate pistol grip, which made the gun highly controllable.<sup>40</sup> Much of the weapon was made of stamped metal parts, so it was lighter and easier to manufacture. It was fed through a curved 30-round

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<sup>39</sup> This wonderful resource is used as a textbook for U.S. Army history courses taught at Fort Sam Houston, Texas. A downloadable pdf copy is available at *Survey of U.S. Army Uniforms, Weapons and Accoutrements*. (visited Jan. 11, 2024) <https://history.army.mil/html/museums/uniforms/survey.html>.

<sup>40</sup> Petitioners suggest “pistol grips,” a prominent feature of assault rifles, are nothing more than a common traditional feature of rifles. On this point, Judge Kavanaugh mentioned that many early semiautomatic Winchester and Remington rifles were available with “pistol grips.” *Heller*, 670 F.3d at 1287 (Kavanaugh, J., dissenting). This is a red herring when viewed in historical context. It is true in the late nineteenth century some rifles and shotguns began to appear with wood buttstocks artfully sculpted to include curved palm and finger grips that were termed “pistol” grips. *See Firearms in American History* at 170 (Model 1873 Winchester with pistol grip), 172 (photograph showing a young Teddy Roosevelt holding a Model 1876 Winchester with a pistol grip), 180 (Burgess shotgun with pistol grip). Such elegant butt stocks are fairly common today and appear on some older American military arms, such as the M1 Garand and the standard issue M-14/M-1A; however, these nuanced butt stock stylings are nothing like the distinct and separate pistol grips on assault rifles and many modern battle rifles. The pistol grips on these more modern military-style rifles are much different, resembling the separate pistol grips on submachine guns; true pistol grips in other words. *See Illustrated History of Firearms* at 216-217 (showing law enforcement civilian derived shotguns and rifles with traditional style pistol grips and military derived weapons with separate submachine gun or assault rifle style pistol grips). Separate and distinct pistol grips make it far easier to control a semiautomatic weapon during rapid firing. The same can be said for forward grips the shooter can hold with their non-triggering hand and telescoping butt stocks. *See Declaration of Ryan Busse* at 13-14; *Answer to Mot. for Disc. Rev.* at 242-43 (discussing utility of pistol grips, forward grips, and other ergonomic features on assault weapons).

magazine. It enabled a soldier to carry a fully automatic capable weapon with greater magazine capacity with a combined weight comparable to a conventional bolt action rifle. Introduced relatively late in the War, the StG44 proved to be an effective weapon. *See Firearms: An Illustrated History* at 176-77, 214-15, 244; *Illustrated History of Firearms* at 199.

One of the men who took note of the StG44 (and the M1 Garand and even the Remington Model 8) was Mikhail Kalashnikov. In the late 1940s he designed for the Soviet military a simple and sturdy weapon using relatively few moving parts that bore some resemblance to the German weapon, including the separate pistol grip. It fired the new intermediate 7.62 x 39 mm round, stored in a curved 30-round magazine. It was capable of semi and fully automatic fire. Though not particularly accurate, it was about as reliable as a crowbar and was extremely easy to use, even by small children pressed into combat. It was the AK-47. *Firearms: An Illustrated History* at 248-49; *Illustrated History of Firearms* at 199. Updated semiautomatic versions of this iconic weapon are sold on the civilian market today *See, e.g., Shooter's Bible* at 119 (Arsenal, Inc. SAS M-7, "a classic AK-47 design" that fires the 7.62 x 39 mm Warsaw Pact round fed by a 30-round magazine), 236 (Zastava Arms ZPAM70, firing 7.62 Warsaw Pact ammunition from 30-round magazine).

The United States military approached the full auto rifle problem quite differently. In 1917 American designer Frank Burton fashioned an innovative rifle capable of full auto fire using a lighter .345 cartridge stored in an innovative large capacity magazine, but the U.S. Army rejected it.<sup>41</sup> *Firearms: An Illustrated History* at 244.

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<sup>41</sup> I mention the Burton because one of petitioners' alleged experts destroyed their credibility by implying in a declaration that the Burton was evidence that rifles with large capacity magazines were common during that era. Only one example of the Burton was made. Declaration of Brian DeLay at 38; App. to Answer to Mot. for Discr. Rev. at 209.

It was not until after the Korean War that the Army made a serious effort to find a fully automatic capable weapon to replace the M1 Garand. Post-war research by the Army Operations Research Office (ORO) determined that most small arms combat takes place at shorter ranges. *Survey of U.S. Army Uniforms, Weapons and Accoutrements* at 122. The researchers found that the combat team with the greatest firepower will win in such situations. *Id.* Aiming made little difference in a fire fight because targets tend to move around. *Id.* ORO concluded that the most reliable predictor of casualties was the total number of rounds fired. *Id.* ORO believed the Army should equip its soldiers with a fully-automatic capable rifle firing lighter ammunition to accommodate the increased usage. *Id.*

In the mid-1950s, an innovative firearm designer, Eugene Stoner of the Armalite firm, offered up the AR10, a remarkably advanced battle rifle that fired the new standard 7.62 mm NATO round (.308 civilian).<sup>42</sup> Like the Sturmgewehr and AK-47, the AR10 has a separate pistol grip. The Army tested this futuristic looking weapon but preferred the more conventionally designed rifle that was adopted as the M14 (a fine rifle in its own right, available today in the civilian market as the Springfield Armory M1A semiautomatic battle rifle and its variants). *See Shooter's Bible* at 210. The AR10 eventually found a home with the armies of Portugal and Sudan and was (and still is in updated versions built by other manufacturers) sold in the civilian market as a semiautomatic rifle. *See Illustrated History of Firearms* at 201 (summarizing AR10's military history); *Shooter's Bible* at 118-119 (listing three semiautomatic battle rifles based on the AR-10, built by Armalite/Strategic Armory Corps<sup>43</sup>). The AR10, the M1A, and European equivalents like the FN FAL are prime examples of battle rifles, firing 7.62 NATO and like full-size rifle ammunition. The drawback of fully automatic fire

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<sup>42</sup> The term "AR" is derived from Armalite.

<sup>43</sup> Not the same company as the original Armalite concern.

with this type of weapon is that it is extremely difficult to control the rifle due to the heavy recoil produced by the full-sized cartridges. For example, the Army soon found the M14 was unsuited for fully automatic fire. *Survey of U.S. Army Uniforms, Weapons and Accoutrements* at 122. Thus, it seems battle rifles are almost never used in that mode in military operations, at least without a bipod. Functionally, they are semiautomatic rifles whether in military or civilian guise.

Meanwhile, Stoner went back to the drawing board and in 1956 designed America's first true assault rifle, the AR15, which closely resembled the AR10 but fired the intermediate 5.56 mm NATO military round (.223 Remington civilian). *Firearms: An Illustrated History* 245; see also Declaration of Ryan Busse at 3; App. to Answer to Mot. for Disc. Rev. at 232.<sup>44</sup> It had a separate pistol grip like the AR10. With the aid of the AR15's muzzle brake, and due to its light weight, the 5.56 mm NATO round produces little recoil, almost as little as a .22 rimfire round, and is therefore capable of being fired rapidly with better control than a weapon firing heavier rounds. The Army was not particularly interested in the AR15 initially, but the Air Force adopted it in 1964 for its security forces. The original version of the AR15, fed by way of a 20-round detachable box magazine, was reliable and quite promising.

Over the Army's objection, Secretary of Defense Robert McNamara ordered that the M16 be adopted to replace the M14. Due to Army mandated design changes and lack of cleaning kits and instruction the initial version of the M16, the XM16E1, proved fatally problematic, frequently jamming when used in combat in Vietnam. Subsequent versions of the M16, starting with the M16A1, are more reliable and they eventually replaced the heavier M14 as the standard infantry rifle.<sup>45</sup> *Survey of U.S. Army Uniforms, Weapons and Accoutrements* at 122. Decades later, updated versions of the M16, such

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<sup>44</sup> Busse's declaration concerning the capabilities and proliferation of modern military-style weapons is highly persuasive.

<sup>45</sup> The hard-hitting M14 is still in limited use by the military.

as the M16A3 and M16A4, now using a 30-round magazine, were increasingly replaced by the shorter and lighter M4 carbine, which also traces its roots to the AR15. Millions of these weapons were produced for the militaries of the United States and aligned countries.

### Semiautomatic Assault Rifles

Petitioners are correct the AR15 in its original form was available on the civilian market as a semiautomatic, but the State has established by way of a very persuasive expert declaration that it was rarely seen before the current proliferation of such weapons.<sup>46</sup> It and other military-style semiautomatic firearms were essentially novelty weapons, most often marketed to law enforcement agencies. But in 1977 the patent on the AR15 platform expired. Now there is a plethora of different weapons on the market built around the AR15 and other assault and battle rifle platforms, usually firing the .223 and/or 5.56mm NATO round from detachable box magazines of 20 to 30 rounds. More recently, some of these weapons fire newer cartridges, such as the 6.5mm Creedmor and 300 AAC (7.62 x 35mm). There are far too many examples (over 200) to list completely in this ruling. *See, e.g., Shooter's Bible* at 17 (Anderson Manufacturing AM-15), 25 (Del-Ton DT Scout), 26 (Doublestar Corp. "Star-15 Carbine" and "DRD Tactical Sub-6" (cross between AR and AK)), 27 (FN America "FN15 DMR3" and "FN15 Patrol Carbine"), 41 (UINTAH Precision Semi-Auto AR-15), 142 (Colt's Manufacturing Co. "M4 Monolithic" and "M4 Trooper"), 146 (Daniel Defense "DDF RIII"), 150 (Dark Storm "Variant 1 Rifle"<sup>47</sup>), 152 (Del-Ton, multiple

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<sup>46</sup> Petitioners claim the AR15 has been sold on the civilian market since the early 1950s. The weapon was not designed until 1956 and apparently did not go into the civilian market until around 1964.

<sup>47</sup> Dark Storm Industries offers certain variants of assault and battle rifles with fixed 10-round magazines to "citizens in states with onerous firearm ownership restrictions," thus demonstrating firearms manufacturers' ability to adapt their wares to legal technical requirements. *Shooter's Bible* at 149. And from 2006 to 2010 Bushmaster offered a variant of the AR15 that had an internal magazine loaded from the top of the weapon. *Gun Trader's Guide* at 243.

weapons firing 5.56 NATO and with 30-round box magazines), 174 (listing three semiautomatic assault rifles offered by Live Q or Die firing 300 AAC), 208-09 (listing five Smith & Wesson AR15 style rifles firing the 5.56 NATO round with 30-round magazines available and two military style semiautomatic rifles firing the 6.5 mm Creedmoor round, one with a 10-round magazine and the other with a 20-round magazine). 225-26 (Wilson Combat, multiple military-style weapons, including “Recon Tactical” and “Urban Sniper Rifle”). The popular Ruger AR-556 can be fitted with a 30-round magazine and a bayonet. *Id.* at 191. Some of these weapons can be modified to fully automatic firing mode with the right parts and expertise. They range in price from less than \$500 to more than \$5,000 depending on the manufacturer and model, with some 5.56 mm/.223 chambered weapons selling well under \$1,000. *See, e.g., Shooter’s Bible* at 115 (American Tactical “Alpha-15” listed at \$469.95 to \$519.95). Battle rifles, which must be strong enough to handle more powerful ammunition, tend to be more expensive, though there is considerable overlap in pricing between the two types of weapons. *See id.* at 157 (Heckler & Koch “MR 556A1” 5.56 NATO listed at \$3,499 and “MR762A1 Long Rifle Package III” 7.62 NATO listed at \$7,249.99), 210 (Springfield Armory “M1A Standard Issue” 7.62 NATO listed at \$1,770 to \$1,875). Sales of semiautomatic assault rifles accelerated in the early 1990s but were paused for 10 years by the federal assault weapon ban. Former 18 U.S. § 922 (v)(1). Sales resumed after the ban expired in 2004. *See Declaration of Ryan Busse* at 7-8; *App. to Answer to Mot. for Disc. Rev.* at 236-37 (documenting increase in numbers). The shift in the market can be perceived when *Shooter’s Bible* and *Gun Trader’s Guide* are compared. I take at face value petitioner’s assertion that millions of law-abiding citizens currently own these weapons. But all too often individuals take their problems out on a large number of defenseless people by way of such firearms. Semiautomatic assault and battle



rifles do not merely “look scary,” as petitioners claim. Mot. for Disc. Review at 4. They are highly efficient killing machines.

#### Assault Rifles and Ammunition Load

Related to magazines, discussed above, full-size rifle ammunition has some weight, so magazines with more than 20 rounds of full-size rifle ammunition are somewhat cumbersome. The M14 has a 20-round magazine (the civilian M1A ordinarily is equipped with a 10-round magazine), so it and its NATO equivalents like the FN-FAL are rather heavy in that configuration. Intermediate cartridges like the .223 are much lighter, so a 20 or 30-round magazine is more practical in an assault rifle. An individual soldier can carry significantly more ammunition as well. *See* Declaration of Ryan Busse at 4; App. to Answer to Mot. for Disc. Rev. at 233.

In contrast, when Washington entered the Union in 1889, a typical infantryman carried 45 or 50 .45-70 cartridges in a looped ammunition belt. *Survey of U.S. Army Uniforms, Weapons and Accoutrements* at 41. A new looped ammunition belt was adopted in 1894 for use with the .30 Krag rifle, capable of carrying 100 rounds. *Id.* at 44. A 1910 pattern belt held 10 individual ammo pockets, each capable of carrying two five-round clips of .30-06 cartridges for the M1903, resulting in a total load of 100, not counting five more in the rifle. *Id.* at 68. That could be augmented by a six-pocket bandoleer that could be slung over the soldier’s shoulder, with another 60 rounds. *Id.* at 68. The 10-pocket belt and six-pocket bandoleer setup continued through the Second World War, except each pocket would accommodate only one of the new M1 Garand eight-round clips, thus resulting in a decrease in the overall ammo load. *Id.* at 91. Today, in contrast, the standard load for an infantry soldier is seven 30-round magazines, one in the weapon and six in pouches—210 rounds of 5.56 mm ammunition—but more or less would be carried depending on operational requirements and individual

preferences. *Id.* at 119. This greater ammunition load is possible due to the much lighter weight of the 5.56 mm round.

This bit of military history is important in light of the firepower generated by mass shooters wielding semiautomatic assault rifles. Such rifles firing 5.56 NATO/.223 Rem. cartridges seem to be the weapon of choice for mass shooters due to their ability to pump out hundreds of rounds of rapid semiautomatic fire in a very short amount of time with better weapon control. Additional magazines are readily available, as reflected by Bushmaster's surprisingly inexpensive 10-pack of 30-round 5.56 NATO magazines. See [Magazines - Bushmaster® Firearms | American Made](#) (visited Jan. 4, 2023).

Of course, large capacity magazines are now illegal in Washington, but there are likely so many circulating in the civilian community that they could be easy to obtain. In any event, in contrast to the high ammo load a soldier carried in the era of smokeless powder repeating rifles, it seems unlikely a typical Washington resident in 1889 possessed more than a few 20-round boxes of rifle, shotgun, and/or handgun cartridges. The arsenals of semiautomatic military style weapons and ammunition possessed by many civilian individuals today would have been impossible to conceive of when Washington achieved statehood.

#### Semi- versus Full-Automatic Fire

Petitioners suggest an assault rifle is not the same as a “modern sporting rifle” because the former is capable of fully automatic firing. They relatedly state no military in the world, United States included, issues a semiautomatic rifle as standard equipment. That is a distinction without a meaningful difference in my view. It is commonly known among shooters that an individual cannot accurately aim an assault rifle or battle rifle in fully automatic firing mode, at least outside extremely close range. As previously mentioned, the M14 was determined to be too light for fully automatic fire. *Survey of*

*U.S. Army Uniforms, Weapons and Accoutrements* at 122. During the Vietnam War, M16A1s were pressed into stopgap service as automatic weapons for squad support, but that was only because there was then no replacement for the BAR. *Id.* at 125. The M16A2 was designed only for semiautomatic and three-burst fire. *Id.* at 123. The three-burst mode is intended primarily for soldiers with little training or combat experience. *Id.* The smaller M4A1 carbine is capable of fully automatic fire but that function is used, if at all, in limited situations only, such as to clear a room full of enemy combatants in house-to-house fighting. *Id.* In general, full auto capability, including three-round burst, is a useful feature for a military rifle but is rarely used in the field, at least by the American military.

In addition to accuracy problems, full-auto fire burns through ammunition at a prodigious rate (600 to 800 rounds per minute, depleting a 30-round magazine in two seconds or less) and greatly increases the possibility of the weapon overheating and malfunctioning during a firefight. Accordingly, full-auto fire support in combat is better left to machine guns, including light machine guns designed to support infantry squads, such as the FN-designed M249 Squad Automatic Weapon (SAW), which are purpose built for sustained fully automatic fire.<sup>48</sup>

The lack of fully automatic firing capability does not make an assault rifle significantly less deadly in the civilian world in any event since the weapons are capable of pumping out large volumes of fire in semiautomatic firing mode with better weapon control than traditional semiautomatic hunting rifles. *See* Declaraton of Ryan Busse at 16; App. to Answer to Mot. for Disc. Rev. at 245 (“a competent shooter with an AR-15 and preloaded large capacity magazines can accurately fire more than 100 rounds per minute with very short pauses to change magazines”). The semiautomatic assault rifles

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<sup>48</sup> For those shooters wanting the feel of a machine gun, FN America offers the “FN M249S Para,” a semiautomatic version of the M249, available with a 30-round box and a 200-round disintegrating linked belt. MSRP of \$11,094. *Shooter’s Bible* at 156.

sold in the civilian market are best described as military assault rifles without the fully automatic fire function. As indicated, they are highly efficient killing machines.

### Semiautomatic Assault Rifles as Hunting Firearms

Hunting is not really at issue in this case but since petitioners insist the weapons at issue are commonly used for hunting, some discussion is warranted. Petitioners are correct that the AR15 and like weapons can be used as hunting rifles. In relation to this issue, there is a robust debate within hunting circles over whether the .223 Remington is an effective and ethical deer hunting round. *See, e.g.*, Keith Wood, [223 Rem Okay for Hunting Deer? - North American Whitetail](#) (weighing pros and cons of .223 Rem. depending on range, shooting conditions, the specific model of round, and the shooter's skill) (visited Jan. 22, 2024). It is a marginal round for deer, depending on the specific cartridge. *See id.*; *see also Shooter's Bible* at 557-58 (listing ballistics for 71 different .223 Rem. cartridges offered by six different manufacturers). The 223 Rem. is better suited to smaller targets, such as varmints, though based on my personal observations, the shooter had better bring a scoop shovel and a bucket to retrieve their trophy. What the 5.56 mm NATO/.223 Rem. bullet can do (and has done on far too many occasions) to small children need not be explained here.

Full-size rifle rounds fired by semiautomatic or battlefield rifles, like the M1A and Belgian designed FN FAL (the outstanding standard rifle of the British Army and many other countries for several decades), are equivalent to traditional "deer rifles" ballistically—killing the prey without torturing or destroying it—but petitioners fail to explain why such a weapon with a detachable magazine of more than 10 rounds is

essential for hunting.<sup>49</sup> In any event, whether a firearm is capable of being used for hunting is beside the point. The question today is one's constitutional right to a weapon for self-defense.

### Assault Weapons for Self-Defense

Turning to self-defense, the AR15 and its many variants, and the AK-47 and its progeny are really military rifles designed for prevailing in a fire fight, putting out lots of concentrated semiautomatic fire in a matter of seconds in order to kill or incapacitate military or paramilitary opponents. The same can be said for battle rifles, though it seems they are less commonly used in mass shooting incidents.

Petitioners cannot point to any history that assault weapons are traditionally and commonly used to defend oneself at home—be it a house, apartment, or farm/ranch—or that such weapons are necessary and essential for that purpose. Assault weapons are complex, unwieldy to operate, and pose an increased risk of hitting innocent bystanders with stray shots. *See* Declaration of James E. Yurgealitis at 4; App. to Answer to Mot. for Disc. Rev. at 671. A reliable centerfire handgun will do the job (revolver or semiautomatic, though a revolver is generally easier to use and more reliable). *See, e.g., Shooter's Bible* at 354 (Colt “Python” .357 magnum revolver), 404 (Ruger “Security-9 Compact Pro” 9 mm semiautomatic pistol). Petitioners are correct that it is more

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<sup>49</sup> Some shooters argue that anyone who really needs a 20 or 30-round load of cartridges to hunt for deer or elk has questionable shooting skills. *See* David E. Petzal, *Sorry, But Your Remington Autoloader is a Crappy Deer Rifle*, Field & Stream (2023) (stating, “[a]s a rule, hunters who buy semi-autos have no faith in their marksmanship” and relating with some bemusement the tale of a shooter who expended 19 rounds from a traditional pattern Remington 742 semiautomatic hunting rifle to take down an antelope), Remington Model 742 and 7400 Rifle Review | Field & Stream ([fieldandstream.com](https://www.fieldandstream.com)) (visited Jan. 4, 2023). Anyone familiar with firearms knows a reasonably skillful and stealthy shooter—like my late father—can bring down a deer, an elk, or a black bear with a single shot from a bolt action .270 caliber or similar rifle equipped with an internal four or five-shot magazine. A skilled shooter can do the same with any number of high-quality single-shot rifles, also. *See Shooter's Bible* at 193 (listing well-regarded Ruger No. 1 falling-block single-shot rifle). The argument that a semiautomatic assault weapon with a large capacity magazine is a good choice for hunting is not compelling. In fairness, however, I am mindful an individual may have only one firearm to hunt with.

difficult to hit a target with a handgun in comparison to a rifle or carbine, but handguns still work quite well in close quarters, where self-defense is most likely to occur. Moreover, the State has presented compelling evidence that the great majority of incidents involving self-defense with a firearm involved handguns, and that the average number of shots fired in such encounters is 2.34, not 20 or 30. *See* Declaration of Lucy P. Allen at 10; App. to Answer to Mot. for Disc. Rev. at 70.

It must also be noted that a 12-gauge shotgun loaded with “double aught” (00) buckshot is a particularly formidable self-defense weapon. *See, e.g., Shooter’s Bible* at 296 (Hatsan USA “Escort Dynamax” 12-gauge semiautomatic shotgun with five-round tube magazine), 305 (Mossberg “590 Thunder Ranch” 12-gauge pump action shotgun with six round tube magazine). Petitioners’ apparent belief that a shotgun is not an effective weapon for self-defense is not only unpersuasive, it runs counter to the long history of shotguns being used by American law enforcement and private security guards.<sup>50</sup>

A non-assault weapon carbine firing centerfire cartridges .22 LR, will work as well. Even the iconic and quick firing Winchester Model 94 and Model 95 center fire carbines are still available. *Shooter’s Bible* at 228, 230. There are numerous and effective options other than an assault weapon available for individuals seeking a self-protection firearm.

Petitioners assert military veterans are more used to using weapons they trained with during their service and therefore can defend themselves more readily with a like weapon. That makes sense as far as it goes, but a veteran trained to operate a complex military weapon should have no difficulty becoming familiar with a less complex

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<sup>50</sup> Whenever an automobile passenger claims “shotgun”—the front passenger seat—they are paying homage to shotgun wielding guards on stagecoaches and freight wagons. *See Firearms in American History* at 181. During that same era U.S. Marshall Bill Tilghman, “Doc” Holliday, and Wyatt Earp used shotguns loaded with buckshot with deadly effect. *Id.* at 183-84.

civilian weapon, like a revolver, or bolt-action or lever-action rifle, or a pump action shotgun. This line of argument is not compelling.

As discussed, the state has a reasonable desire to protect the public from mayhem meted out by assault weapons, and the statute at issue is substantially related to that worthy end. Petitioners cite no controlling authority that they have a clear and equitable right under article I, section 24 to this particular type of weapon for purposes of personal defense. Washingtonians certainly have a right to own or possess a firearm for self-defense generally, but not any type of weapon they desire. Petitioners also imply they have a constitutional right to own personally any kind of semiautomatic firearm they want to defend the state. We have the Washington National Guard for that purpose, along with the different branches of the United States military.

The State has established that a reasonable limit on private ownership of particularly destructive semiautomatic weapons—dangerous weapons—is necessary for public safety and welfare. As explained at some length above, the weapons covered by the statute were not traditionally used for civilian personal defense and are not designed originally for that purpose. They are designed primarily as military weapons but adapted to avoid laws prohibiting ownership of fully automatic firearms. At their very core, assault weapons are military weapons designed to win firefights. They have nothing in common with weapons for personal self-defense as was understood when this state was founded. They are dangerous.

Since petitioners fail to show that they have a clear and equitable right to own assault weapons, they necessarily cannot show that they have a well-grounded fear of an immediate invasion of that right. *Kucera*, 140 Wn.2d at 209. In light of the vast array of non-affected firearms available for self-defense—as amply illustrated in *Shooter's Bible*—petitioners cannot show SHB 1240 will result in actual and substantial injury to

them. *Id.* at 209. The superior court did not commit obvious error in rejecting petitioners' state constitutional arguments.

### Second Amendment

Petitioners contend the superior court committed obvious error by not addressing their Second Amendment claims. But this case is not centered on the Second Amendment. Petitioners instead grounded their action specifically on an alleged violation of article I, section 24 of the Washington Constitution. Petitioners have cited Second Amendment cases like *Bruen*, but in support of injunctive relief on state constitutional grounds. Further, the Supreme Court has not taken review of a case involving an assault weapon statute like SHB 1240. As indicated, the Court denied review of the Illinois Supreme Court decision rejecting a state constitutional challenge to that state's assault weapon statute. Thus far, there is no controlling Second Amendment case in conflict with the superior court's decision in this case. The superior court did not commit obvious error in deciding the issue on state constitutional grounds raised by petitioners.<sup>51</sup>

### Conclusion

As discussed, petitioners contend the superior court committed obvious error when it denied their request for a preliminary injunction. RAP 2.3(b)(1). They fail to persuasively show the existence of such error for the reasons explained above. It is important to note that this interlocutory ruling is not intended to resolve the ultimate issue whether SHB 1240 comports with the Washington Constitution. Petitioners can still make that argument in the superior court. In the meantime, SHB 1240 remains in effect as the legislature intended.

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<sup>51</sup> The District Court for the Western District of Washington rejected a Second Amendment challenge to HB 1240. *See generally Hartford v. Ferguson*, \_\_\_ F.3d \_\_\_, 2023 WL 3836230 (W.D. Wash. Jun. 6, 2023).



The motion for discretionary review is therefore denied. As indicated, there is no need to consider whether to transfer the case to the Court of Appeals or retain it here under RAP 4.2.

  
COMMISSIONER

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January 22, 2024