

FILED
SUPREME COURT
STATE OF WASHINGTON
5/7/2024 3:08 PM
BY ERIN L. LENNON
CLERK

NO. 102940-3

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

PETITIONER,

V.

GATOR'S CUSTOM GUNS, INC., A WASHINGTON FOR-PROFIT
CORPORATION, AND WALTER WENTZ, AN INDIVIDUAL,

RESPONDENTS.

RESPONDENTS' ANSWER TO STATEMENT OF GROUNDS FOR DIRECT
REVIEW

AUSTIN F. HATCHER
ATTORNEY FOR RESPONDENTS
HATCHER LAW, PLLC
11616 N. Market St., #1090
Mead, WA 99021
(509) 220-5732
austin@hatcherlawpllc.com

S. PETER SERRANO
ATTORNEY FOR RESPONDENTS
SILENT MAJORITY FOUNDATION
5238 Outlet Dr.
Pasco, WA 99301
(509) 567-7086
pete@smfjb.org

Contents

I. Introduction.....	4
II. Nature of Case and Decision.....	9
III. Restatement of the Issues Presented for Review.....	11
IV. Grounds for Direct Review.....	12
V. Conclusion.....	14

Cases

<i>Caetano v. Massachusetts</i> , 577 U.S. 411 (2016)	4
<i>District of Columbia v. Heller</i> , 554 U.S. 570 (2008)	3
<i>Duncan v. Becerra</i> , 19 F.4th 1087 (2021)	6
<i>Duncan v. Bonta</i> , 142 S. Ct. 2895 (2022)	6
<i>Duncan v. Bonta</i> , 83 F.4th 803 (2023)	5
<i>New York State Rifle & Pistol Ass’n v. Bruen</i> , 597 U.S. 1 (2022)	3, 4
<i>State v. Jorgenson</i> , 179 Wn.2d 145 (2013).....	7, 12

I. Introduction

Respondents agree that this case is a clear-cut case for acceptance of direct review. However, there are several facets of Appellant’s Statement of Grounds for Direct Review that need correction. First, the purported “modern crisis of mass shootings” is hyperbolic; the United States Supreme Court examined both arms restrictions and arms bans under *New York State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1, 142 S. Ct. 2111 (2022) and *District of Columbia v. Heller*, 554 U.S. 570, 128 S. Ct. 2783 (2008), respectively, and in spite of both those decisions being rendered within the last 16 years found that “other cases implicating unprecedented societal concerns or dramatic technological changes may require a more nuanced approach.” *Bruen*, 597 U.S. at 27 (emphasis added). The inference is of course that although the U.S. Supreme Court had occasion to examine the contours of the right to bear

arms as recently as two years ago, no “unprecedented societal concern” merited a departure from the analysis set forth in *Heller*. The U.S. Supreme Court in *Bruen* reiterated the methodological approach in *Heller* and stated that the “two-step approach” which proliferated in the Courts of Appeals was “one step too many.” *Bruen*, 597 U.S. at 19.

The same principle applies to “dramatic technological changes” by virtue of the U.S. Supreme Court’s decision in *Caetano v. Massachusetts*, 577 U.S. 411, 136 U.S. 1027 (2016), which involved the application of the analysis concerning the right to bear arms to stun guns, a technology developed in the 1970s. Here, Appellant tries to construe an integral component of firearms as a dramatic technological change, although such components have been in existence for more than a century.

Second, Appellant contends that Respondent belatedly sued and that the challenge lacks merit. What Appellant misconstrues however, is that not “*every court* to consider a post-*Bruen* challenge to a large-capacity magazine restriction under the Second Amendment and/or article I, section 24 of Washington’s Constitution has *rejected* that challenge or been overruled.” Appellant’s Statement of Grounds for Direct Review, at 2. This is a gross mischaracterization. In fact, in *Duncan v. Bonta*, the Ninth Circuit Court of Appeals notes that “[i]mportantly, this order granting a partial stay pending appeal, neither decides nor prejudices the merits of the appeal, which will be decided after full briefing and oral argument.” *Duncan*, 83 F.4th 803, 805 n.1 (2023). While currently stayed, the district court decision at issue deemed a similar ban of so-called Large Capacity Magazines (“LCMs”) to be unconstitutional. This is the second time this case has been

reviewed *en banc*. The first time, the Ninth Circuit reversed an appellate panel decision affirming the district court decision deeming the LCM ban unconstitutional.¹ The U.S. Supreme Court granted certiorari, vacated the *en banc* decision, and remanded the case following *Bruen*.² While it is possible the Ninth Circuit rejects the challenge just like it did in its previously vacated ruling, it has not done so as of the writing of this or the Appellant's brief, so it is incorrect to state that *every court* has rejected a challenge or been overruled. Further, Appellant ignores *Arnold v. Kotek*, Or. Ct. App. No. A183242, in which a trial court found a similar LCM ban to be unconstitutional and the Court of Appeals denied a stay. Additionally, *Brumback v. Ferguson*, 1:22-CV-03093-MKD

¹ *Duncan v. Becerra*, 19 F.4th 1087 (9th Cir. 2021) (*en banc*).

² *Duncan v. Bonta*, 142 S. Ct. 2895 (2022).

(E.D. Wash.) has not rejected the challenge or disposed of it, the court simply denied a motion for preliminary injunction.

In short, not *every court* has rejected a challenge or been overruled. Currently, the Ninth Circuit has a decision deeming a LCM ban as unconstitutional, albeit stayed. The sister state of Oregon has a decision, not stayed, that a LCM ban is unconstitutional. Washington's Constitution is based on the Oregon Constitution, and both this Court and the U.S. Supreme Court have cited favorably to analysis of the Oregon Supreme Court when examining the right to bear arms.

Lastly, Appellant invents a "phantom conflict" between decisions of this Court where none exists. Appellant attempts to stretch a single sentence of *dicta* from *State v. Jorgenson*, 179 Wn.2d 145, 312 P.3d 960 (2013) into its holding; not only is Appellant's reading and analysis wrong, but it is also ironic, as the trial court here was the trial court in *Jorgenson*, and a

similar result should follow here: this Court should affirm the trial court's decision.

II. Nature of Case and Decision

On March 23, 2022, ESSB 5078 was approved by the Governor and filed in the Office of the Secretary of State. However, the bill did not take effect until July 1, 2022. Laws of 2022, ch. 104. The legislature allowed a full three months to elapse between passage of the bill and its effective date. No exigent circumstances were declared at that point, and none exist today.

In July 2023, the Washington State Attorney General's Office issued a civil investigative demand ("CID") to Gator's. App. 15. Gator's timely petitioned to set aside the CID and seeking declaratory relief (the "Petition") that would "terminate the controversy and remove uncertainty as to the constitutionality of ESSB 5078 and its burden on the right to

bear arms, which shall not be impaired, under Wash. Const. art. I § 24, and U.S. Const. amend. II.” App. 10.

The Attorney General’s Office moved to dismiss the Petition, which was denied. The Attorney General’s Office withdrew the CID, and the State of Washington filed an enforcement action under the Washington Consumer Protection Act (“CPA enforcement action”). App. 66. Gator’s duly answered, asserting that the “allegations amount to a violation of the Constitutional protections afforded [Gator’s] by virtue of the U.S. Constitution, amend. II, and by the Washington Constitution, art. I, § 24.” App. 86.

The State suggested consolidation of the two actions, due to the overlapping constitutional claims and for purposes of judicial economy regarding the Petition and the CPA enforcement action. App. 905. The trial court did not *sua sponte* raise the unconstitutionality of ESSB 5078. Further,

no motion for reconsideration was brought on the order to consolidate, or the order denying dismissal of the Petition.³

On March 11, 2024 the parties presented oral argument on their respective cross-motions for summary judgment. On April 8, 2024, the trial court issued its order invalidating ESSB 5078, under both U.S. Const. amend. II and Wash. Const. art. I, § 24. A little more than an hour later, Appellant filed an Emergency Motion for Stay, which was granted in less than an hour.

III. Restatement of the Issues Presented for Review

(1) Whether Washington's ban of the sale, import, and manufacture of the most commonly owned type of ammunition feeding components violates the right to keep and

³ The trial court notes that issue was resolved on January 9, 2024. App. 905-06.

bear arms enshrined in article I, section 24 of the Washington Constitution.

(2) Whether Washington's ban of the sale, import, and manufacture of the most commonly owned type of ammunition feeding components violates the right to keep and bear arms enshrined in the second amendment to the United States Constitution.

IV. Grounds for Direct Review

Respondents agree that direct review of this case is appropriate. However, the grounds upon which direct review is appropriate is more narrow than Appellant suggests.

First, Respondents agree that direct review is appropriate under RAP 4.2(a)(2).

Second, Respondents agree that direct review is appropriate under RAP 4.2(a)(5).

Third, Respondents disagree that direct review is appropriate under RAP 4.2(a)(3), as the trial court did not purport to find a conflict between two decisions of this Court, but rather that *Jorgenson*, which concerned a “limited, temporary ban on possession of firearms while released on bail pending proceedings for a serious offense” was not applicable. *Jorgenson*, 179 Wn.2d at 164. Moreover, this Court in *Jorgenson* utilized intermediate scrutiny, as the statute at issue there was “sufficiently limited in the scope of affected persons and its duration to warrant review under intermediate scrutiny.” *Id.* at 162. However, that is not the proper standard for analysis of state interference with a fundamental right when such interference consists of a generally applicable law of perpetual duration.

Fourth, Respondents agree that direct review is appropriate under RAP 4.2(a)(4), as a fundamental right is at issue.

V. Conclusion

For the foregoing reasons, the Court should accept direct review.

This document contains 1,399 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted,

/s/ Austin F. Hatcher

Austin F. Hatcher, WSBA 57449

S. Peter Serrano, WSBA 54769

Attorneys for the Respondents

Silent Majority Foundation

5238 Outlet Dr.

Pasco, WA 99301

pete@smfjb.org

austin@hatcherlawpllc.com

Counsel for Respondents

CERTIFICATE OF SERVICE

I hereby certify that on May 7, 2024, I electronically filed the foregoing with the Clerk of the Court using the Washington State Appellate Courts' Secure Portal, which sends a copy of uploaded files and a generated transmittal letter to active parties on the case. The generated transmittal letter specifically identifies recipients of electronic notice.

DATED this 7th day of May, 2024, at Spokane, Washington.

/s/ Austin F. Hatcher

Austin F. Hatcher, WSBA 57449

S. Peter Serrano, WSBA 54769

Attorneys for the Respondents

Silent Majority Foundation

5238 Outlet Dr.

Pasco, WA 99301

pete@smfjb.org

austin@hatcherlawpllc.com

Counsel for Respondents

HATCHER LAW, PLLC

May 07, 2024 - 3:08 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 102,940-3
Appellate Court Case Title: State of Washington v. Gator's Custom Guns, Inc., et al.
Superior Court Case Number: 23-2-00897-0

The following documents have been uploaded:

- 1029403_Answer_SOG_for_Direct_Review_20240507145439SC859391_3143.pdf
This File Contains:
Answer to Statement of Grounds for Direct Review
The Original File Name was Answer to Statement of Grounds for Direct Review.pdf

A copy of the uploaded files will be sent to:

- CPRReader@atg.wa.gov
- Christine.Truong@atg.wa.gov
- SGOOLyEF@atg.wa.gov
- Victoria.Johnson@atg.wa.gov
- andrew.hughes@atg.wa.gov
- ben.carr@atg.wa.gov
- bob.hyde@atg.wa.gov
- comcec@atg.wa.gov
- john.nelson@atg.wa.gov
- july.simpson@atg.wa.gov
- noah.purcell@atg.wa.gov
- pete@silentmajorityfoundation.org
- serrano4pascocitycouncil@gmail.com
- william.mcginity@atg.wa.gov

Comments:

Sender Name: Austin Hatcher - Email: austin@hatcherlawpllc.com

Address:

11616 N MARKET ST UNIT 1090

MEAD, WA, 99021-1837

Phone: 425-998-3489

Note: The Filing Id is 20240507145439SC859391