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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' Motion to Modify Commissioner's Ruling Granting Emergency Motion to Stay

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I. Introduction

This action concerns a fundamental right of Washington citizens. Despite prevailing on summary judgment, Respondents, and the people of Washington state, continue to have their fundamental right to bear arms impaired. On April 8, 2024, the Cowlitz County Superior Court granted Respondents' motion for summary judgment and declared that ESSB 5078 (codified at RCW 9.41.370 and .375) is unconstitutional. A little more than an hour after receiving the trial court's order, Appellant filed an emergency motion for stay. Forty-nine minutes later, the Commissioner of this Court granted an emergency stay of the trial court's order. On April 17, 2024, the Commissioner held a videoconference hearing. On April 25, 2024, the Commissioner issued a Ruling Granting Emergency Motion for Stay.

Respondents respectfully request that the Court modify the Commissioner's April 25, 2024 Order so as to dissolve the stay while review is completed. The Commissioner erred by failing to adequately compare the injuries suffered by the parties. The balance of equities sharply favors dissolving the stay.

II. Relief Sought

Respondents request modification of the Commissioner's April 25, 2024 ruling granting Appellant's Emergency Motion for Stay.

III. Statement of the Case

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 Respondents. App. 15. Respondents timely petitioned to set aside the CID and sought 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. Respondents duly answered, asserting that the "allegations

amount to a violation of the Constitutional protections afforded [Respondents] 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.[1]

On March 11, 2024, the trial court heard oral argument on the parties' cross-motions for summary judgment. On April 8, 2024, the trial court issued an order declaring ESSB

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

5078 unconstitutional under both the U.S. Const. amend. II and Wash. Const. art. 1, § 24. App. 904. Appellant immediately filed a notice of appeal and an emergency motion to stay. The Commissioner of this Court granted that motion the same day.

IV. Argument

A. The balance of harms weighs in favor of dissolving the stay.

RAP 8.1(b)(3) provides that an appellate court may stay enforcement of the trial court decision upon such terms as are just. The reviewing court is directed to compare the injuries suffered by the parties.

1. Respondents continue to suffer an impairment of a fundamental right.

On one hand, with a stay in place, people in Washington suffer a continued and ongoing impairment of a fundamental

right. The right to bear arms is protected by the Declaration of Rights in the Washington Constitution, and the Bill of Rights in the United States Constitution. The right to bear arms is "necessary to an Anglo-American regime of ordered liberty and fundamental to the American scheme of justice. It is deeply rooted in this Nation's history and tradition." *State v. Sieyes*, 168 Wn.2d 276, 287, 225 P.3d 995 (2010). Self-defense is also a fundamental right. It has been described as "the first law of nature." *State ex rel. Bd. of County Comm'rs v. Clausen*, 95 Wash. 214, 239, 163 P. 744 (1917) (Chadwick, J. concurring). The right to bear arms is a fundamental right. *See, e.g.*, *Sieyes*, 168 Wn.2d at 287, (right to bear arms is fundamental and deeply rooted in history and tradition, and Second Amendment is incorporated against the states); *see also*, *Zaitzeff v. City of Seattle*, 17 Wn. App. 2d 1, 484 P.3d

470 (2021); *State v. Ibrahim*, 164 Wn. App. 503, 269 P.3d 292 (2011).

The Declaration of Rights was meant to be a primary protector of the fundamental rights of Washingtonians. Justice Robert F. Utter, Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights, 7 Seattle U. L. Rev. 491, 491 (1984). The Preamble to the Washington Constitution gives thanks "to the Supreme Ruler of the universe for our liberties[.]" Wash. Const. Preamble. These liberties are preexisting, not granted. Washington, "like other states, begins its constitution with a Declaration of Rights … [it] proclaim[s] the paramount purpose of government; 'governments … are established to protect and maintain individual rights.'" Brian Snure, A Frequent Recurrence to Fundamental Principles: Individual Rights, Free Government, and the Washington State

Constitution, 67 Wash. L. Rev. 669, 675 (1992) (quoting Wash. Const. art. I, § 1). "[T]he explicit affirmation of fundamental rights in our state constitution may be seen as a guaranty of those rights rather than as a restriction on them." *State v. Gunwall*, 106 Wn.2d 54, 62, 720 P.2d 808 (1986). As noted by the trial court, "[t]he State has no interest in enforcing an unconstitutional law." App. 958. However, the Commissioner turns the fundamental right into a privilege by surmising that 10 rounds in a "good handgun" or shotgun "should be adequate for the average Washingtonian's personal self-defense." Comm'r Ruling, p.33, n.29. That is not how fundamental rights work.

"Washington's article I, section 24 was drawn from Oregon's article I, section 27 and the constitution proposed by W. Lair Hill." *City of Seattle v. Evans*, 184 Wn.2d 856, 868, 366 P.3d 906 (2015) (citing Robert F. Utter & Hugh Spitzer,

The Washington State Constitution: A Reference Guide 39 (2002)); *see also*, Beverly Paulik Rosenow, The Journal of the Washington State Constitutional Convention 512 n.40 (1999 reprint) ("Right to Bear Arms: U.S. Const., Amend 2; Ore., Const. (1857), Art. 1, sec. 27; (Hill, Prop. Wash. Const. Art. 1, sec 28.)"). The Oregon Supreme Court "concluded that the 'arms' that the state constitution guarantees a right to possess consist of those that would have been used by nineteenth-century settlers for personal defense and military purposes." Justice Jack Landau, An Introduction to Oregon Constitutional Interpretation, 55 Willamette L. Rev. 261, 265-66 (2019) (citing *State v. Kessler*, 289 Or. 359, 614 P.2d 94 (1980)).

Additionally, this Court has noted that "*Heller* also cites favorably to the Oregon Supreme Court's discussion of lawful arms in *Kessler*. Additionally, the Connecticut Supreme Court recently noted that Oregon's definitional approach mirrors the

model employed by the United States Supreme Court in [*Heller*].” *Evans*, 184 Wn.2d at 870 n.9 (internal citations and quotations omitted, alteration in original).

The Washington Constitution “protects instruments that are designed as weapons traditionally or commonly used by law-abiding citizens for the lawful purpose of self-defense.” *Evans*, 184 Wn.2d at 869. Historical origins are considered when determining whether a weapon is an arm, and that such weapons do not need to be designed for military use to be traditionally or commonly used for self-defense. *Id.* That of course means that weapons that are designed for military use can be traditionally or commonly used for self-defense. A weapon’s purpose and intended function are also considered. *Id.* The right “encompasses at least two prongs: (1) protection against governmental or military tyranny and (2) self-protection.” *Sieyes*, 168 Wn.2d at 291. The Commissioner’s

contention that “a good handgun and/or shotgun” with 10 rounds “should be adequate” is a complete evisceration of the right to bear arms, and a radical departure from the analysis of this Court and the careful consideration due a fundamental right.

The Commissioner’s contention is little more than the “judge-empowering ‘interest-balancing inquiry’” and means-end scrutiny rejected by *Bruen* because “[t]he very enumeration of the right takes out of the hands of government – even the Third Branch of Government – the power to decide on a case-by-case basis whether the right is *really worth* insisting upon.” *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 597 U.S. 1, 23, 142 S. Ct. 2111 (2022) (citing *District of Columbia v. Heller*, 554 U.S. 570, 634, 128 S. Ct. 2783 (2008)).

The Commissioner's ruling completely ignores or scornfully mocks the right to bear arms; fundamental rights are afforded a presumption of protection and should not be hastily impaired. Here, unfortunately, the disfavor of the right to bear arms has been laid bare – the Commissioner cited *State v. Jorgenson*, 179 Wn.2d 145, 155, 312 P.3d 960 (2013) for the erroneous proposition that 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." Comm'r Ruling, p.26. This is wrong in several respects.

First, the statutes at issue are not a regulation, but a complete and categorical ban. There is no limitation on persons affected, no temporal limitation, and the statutes prohibit the "manufacture, import[ation], distribut[ion], [sale], or offer for sale" of any LCM. This alone differentiates this

case from *Jorgenson*, which concerned a "limited, temporary ban on possession of firearms while released on bail pending proceedings for a serious offense[.]" *Jorgenson*, 179 Wn.2d at 164.

Second, the Commissioner's Ruling completely ignores the fact that this Court in *Jorgenson* utilized intermediate scrutiny in that case only because the statute at issue was "[u]nlike the handgun prohibition in *Heller*, for example, which applied to everyone in the jurisdiction[.]" *Jorgenson*, 179 Wn.2d at 162. The Court continued that "[w]e simply hold that as applied here, the temporary restriction on Jorgenson's right to bear arms after a trial court judge found probable cause to believe he had shot someone does not violate the Second Amendment." *Id*. at 164. This Court concluded that "the limited, temporary ban on possession of firearms while released on bail pending proceedings for a

serious offense did not violate Jorgenson's right to bear arms under either the state or federal constitution." *Id.* As noted earlier, the trial court in *Jorgenson* is the same trial court here. The trial court is well versed in the contours of the right to bear arms, and previously upheld a statute in the face of a constitutional challenge.

Third, the Commissioner's Ruling creates a sort of hybrid between intermediate and rational basis scrutiny, neither of which are the proper standard. The Commissioner's Ruling purports that a regulation "substantially related to legitimate ends is constitutionally reasonable." Comm'r Ruling, p.26. However, whether "legitimate ends" are served is not the proper inquiry as rational basis is unequivocally not the proper standard. Intermediate scrutiny is not the proper standard, either, as the challenged statutes are not limited in any way. As this Court correctly stated in *Jorgenson*, a "law

survives intermediate scrutiny if it is substantially related to an important government purpose. The State has an important interest in restricting potentially dangerous persons from using firearms." *Jorgenson*, 179 Wn.2d at 162 (citations omitted). As just discussed, the statutes here apply to every person in Washington, and are not durationally limited. Further, no means-end analysis is permitted here, under both federal and state case law precedent. It would be contrary to precedent to engage in a level of scrutiny analysis, but if any such analysis is to be conducted, the minimum allowed would be strict scrutiny, as "State interference with a fundamental right is subject to strict scrutiny." *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 220, 143 P.3d 571 (2006). Any such law "must be narrowly tailored to serve a compelling state interest." *Id.* (citing *Washington v. Glucksberg*, 521 U.S. 702, 721, 117 S.

Ct. 2258 (1997)). The challenged statutes are neither narrowly tailored nor do they serve a compelling interest.

This Court has explicitly stated as much by noting that "[d]espite this court's occasional rhetoric about 'reasonable regulation' of firearms, we have never settled on levels-of-scrutiny analysis for firearms regulations." *Sieyes*, 168 Wn.2d at 295 n.20. Instead, this Court conducts an analysis "rooted in the United States Supreme Court's decision in *Heller* and the Oregon Supreme Court's interpretation of its state constitution's article I, section 27[.]" *Evans*, 184 Wn.2d at 869. The Commissioner completely disregarded the denial of a stay issued by the Commissioner of the Oregon Court of Appeals, which noted that merely speculative harms are not enough. *Arnold v. Kotek*, Ore. Ct. App. No. A183242, April 12, 2024 ("The court concludes that, taken together with the other considerations set forth above, this factor does not

support a stay. Although the court acknowledges that the measure itself is intended to address an issue of great importance to the public, the motion does not present a sufficient basis to conclude that there is a nonspeculative likelihood of harm that will occur during the pendency of the appeal in the absence of a stay.") Rather, the Commissioner contends that "there is plenty of speculation to spread around on this issue." Comm'r Ruling, p.33, n.29. The Commissioner misconstrues what harms are suffered by the parties.

A decision finding that a statute unconstitutionally impairs a fundamental right must at least acknowledge the fact that such a right is at issue, for the "violation of a fundamental constitutional right, even if temporary, constitutes irreparable harm." *Stevens Cty. v. Stevens Cty. Sheriff's Dep't*, 20 Wn. App. 2d 34, 94, 499 P.3d 917 (2021) (Fearing, J., dissenting) (citing *Elrod v. Burns*, 427 U.S. 347, 373, 96 S. Ct. 2673

(1976). The right to bear arms is "not 'a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees.'" *Bruen*, 597 U.S. at 70 (quoting *McDonald v. City of Chicago*, 561 U.S. 742, 780, 130 S. Ct. 3020 (2010)). Here, however, the Commissioner's Ruling does not even contain the word 'fundamental' and instead utilizes a new hybrid level of scrutiny somewhere between rational basis and intermediate scrutiny. The stay should be dissolved to prevent the ongoing impairment of the fundamental right of Respondents and the people of Washington.

2. Appellant only provides purely speculative harms.

On the other hand, Appellant simply hypothesizes that a stay will save lives. The Appellant makes the hyperbolic claim that "laws like SB 5078 literally save lives[,]" yet the

legislature made no such explicit finding. Appellant's Em. Mtn. to Stay, p.27. Instead, the legislature found only "that restricting the sale, manufacture, and distribution of large capacity magazines is *likely* to reduce gun deaths and injuries." E.S.S.B. 5078, 67th Leg., Reg. Sess., § 1 (Wash. 2022) (emphasis added). A movant must show that a stay is necessary to preserve the fruits of the appeal after considering the equities of the situation. *Boeing Co. v. Sierracin Corp.*, 43 Wn. App. 288, 291, 716 P.2d 956 (1986). Notably, the movant's requirement is a *conjunctive* test as the court requires the showing of debatable issues *and* the necessity to preserve the fruits of the appeal. *Id.* at 291; (citing *Purser v. Rahm,* 104 Wn.2d 159, 702 P.2d 1196 (1985); *Kennett v. Levine,* 49 Wn.2d 605, 304 P.2d 682 (1956)). Courts apply a sliding scale where "the greater the inequity, the less important the

inquiry into the merits of the appeal." *Id.*; *see also*, *Shamley v. Olympia*, 47 Wn.2d 124, 286 P.2d 702 (1955).

The Commissioner erred in determining exactly what the "fruits of the appeal" are; the Appellant posits that a "temporary stay … pending review by this [Court] would protect the State and its citizens from [a] serious risk of harm." Em. Mtn. to Stay, p.28. But, as noted by the Commissioner, all that ESSB 5078 arguably accomplishes is to "increase potential victims' chances of survival" if a mass shooting occurs. Commissioner's Ruling, p.32. It does not prevent mass shootings; those unfortunately occur and may continue to occur. While horrid and deplorable, and one wishes there was an easy solution to prevent any such despicable act from ever occurring again, the prevention of the occurrence of a mass shooting is not the fruit of this appeal to be preserved with a stay.

The Appellant's purported fruit of the appeal to be preserved is purely speculative: that a so-called large capacity magazine purchased *after* the effective date of ESSB 5078 will be used in a mass shooting, and which will arguably cause more casualties than would have occurred with a magazine of capacity of ten rounds or less. As the Commissioner put it, the fruit of the appeal is that "something awful happens with an LCM that would not have been obtained but for [the decision to lift the stay.] Comm'r Ruling, p.32-33. It is important to note that the legislature allowed so-called large capacity magazines to continue to be possessed by lawful owners in the tens, if not hundreds of thousands in Washington State. The bill was signed a full three months before it took effect. The Commissioner's much-feared "flood of LCMs entering state circulation" was allowed to continue unabated during that time. Comm'r Ruling, p.3.

Lastly, the lack of current or historical mass shootings in Washington belies the State's premise. The State's own experts highlight the speculative nature of the purported harms. First, Lucy Allen identified eight mass shootings in Washington between 1994 and 2022. Four included confirmation that LCMs were used to perpetrate the shooting. *See*, App. 718–737, Decl. of Lucy Allen, Ex. B (Cascade Mall (2016), Marysville High School (2014), Capitol Hill shooting (2006), Fairchild AFB (1994)). Two mass shootings were reported where the perpetrator did not use an LCM. *Id.*, (Seattle Café (2012) and Coffee Shop Police (Parkland, WA, 2012)). Two mass shooting were reported in which Ms. Allen did not report the type of magazine used. *Id.*; (Federal Way Shooting (2013) and Skagit County (2008)).

Second, Dr. Lou Klarevas, "one of the foremost experts on mass shootings" according to the State's Motion, at 20-21,

lists the mass shootings that resulted in double-digit fatalities in U.S. History from 1776-2022, and only one occurred in Washington, and that shooting did not involve LCMs. App. 292, Decl. of Louis Klarevas (Seattle, WA shooting (1983)). Further, Exhibit C to Dr. Klarevas' report, titled High-Fatality Mass Shootings in the United States, 1990-2022, identifies 94 mass shootings, with only three occurring in Washington State. App. 328-30. One incident is identified as not involving LCMs (Seattle (2006)). The other two are listed as unknown whether LCMs were involved (Carnation (2007) and Alger (2008)). Additionally, nearly a third (27 of 94) of the mass shootings compiled by Dr. Klarevas "occurred at a time when and in a state where legal prohibitions on large-capacity magazines were in effect statewide or nationwide." App. 330. Moreover, there is no guarantee that mass shootings will not occur, as the data compiled by Dr. Klarevas also contains eight

shootings which did not involve LCMs in states in which LCMs were banned. *Id.* at 328-30. Applying logic and common sense, it is irrefutable that a stay will not prevent mass shootings. That is because LCMs are not the cause of mass shootings.

Rather, they are simply the most commonly owned type of detachable magazine, chosen by law abiding citizens because they facilitate effective self-defense. *See*, App. 916 n.10, noting that the State cited *Oregon Firearms Fed'n v. Kotek*, 2023 WL 4541027, in which "the parties stipulated that *millions* of large capacity magazines were in the hands of the public." (emphasis added).

The Appellant has offered nothing but speculation. This should not be enough to continue to burden the fundamental right of Respondents and the people of Washington. The power to issue a stay "is one that will be

exercised with caution, and only in those cases where such an order is necessary to preserve the fruits of the appeal in the event it should prove successful." *Shamley*, 47 Wn.2d at 126. Appellant posits that dissolution of the stay could possibly enable a would-be mass shooter to purchase an LCM and go on to perpetrate a mass shooting in Washington. The Commissioner corroborates the speculative nature of the purported harms suffered by Appellant, stating that "[i]t is all but certain mass shootings will occur in Washington." Comm'r Ruling, p.32. That is the only purported "fruit of the appeal" that Appellant seeks to preserve.

Comparing the injuries to the parties unequivocally weighs in favor of dissolving the current stay.

Here, we have a fundamental right weighed against merely speculative and potential public safety benefits, and, as Appellant's own expert noted, the speculation is substantial as

mass shootings are not common occurrences in Washington. As briefed *supra*, the fruits of the appeal would not be destroyed by dissolution of the stay as the legislature allowed so-called LCMs to continue to be possessed by lawful owners, and more than three months elapsed between the enactment of ESSB 5078 and its effective date, which means that Washington citizens had three months to obtain LCMs.

The State's concession that LCMs are highly desirable and sought by law abiding citizens does little more than support Gator's position that LCMs are commonly possessed by law abiding citizens. Additionally, the purported concern as to the danger posed to public safety by LCMs is overblown: "[t]he legislature recognizes that rates of suicide have been growing in the United States as well as in the state of Washington. Seventy-nine percent of all firearm deaths in Washington state are suicides. More people die of suicide by

firearm than by all other means combined." Laws of 2020, Ch. 313, § 1. Accordingly, not only are the purported dangers to public safety purely speculative, they also would only account for an infinitesimally small percentage of deaths attributed to a shooter with a firearm.

Unlike circumstances where dissolving a stay would allow for the consumption or use of a good (such as allowing construction to continue when stayed), dissolving a stay returns and protects the rights to the People of Washington. The balance of equities weighs in favor of dissolving the stay. On one hand, a stay is a *de facto* enforcement of a statute declared unconstitutional and which burdens a fundamental right of Washington citizens. On the other hand, ESSB 5078 provides no benefits other than speculation that it may reduce lives lost in a potential mass shooting.

There are no exigent circumstances necessitating a stay. The state of Washington has no interest in enforcing an unconstitutional law. App. 958. “A constitutional guarantee subject to future judges’ assessments of its usefulness is no constitutional guarantee at all.” *Bruen*, 597 U.S. at 23 (quoting *Heller*, 554 U.S. at 634). The Commissioner’s April 25, 2024 Ruling is precisely the judicial assessment converting a constitutional guarantee into a privilege which the U.S. Supreme Court warned about. This Court should protect the fundamental right to bear arms and dissolve the stay.

V. Conclusion

For the foregoing reasons, the Court should dissolve the stay and protect the fundamental right of Washingtonians to choose their own means of self-defense. The right to bear

arms is not a privilege subject to arbitrary and capricious limitations based on speculative harms.

This document contains 3,945 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 28, 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 28th day of May, 2024, at Spokane, Washington.

*/s/ Austin F. Hatcher*___________

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