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' REPLY TO APPELLANT'S ANSWER TO RESPONDENTS' MOTION TO MODIFY COMMISSIONER'S RULING

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Contents

Cases

Statutes

Other Authorities

I. Introduction

The State again mischaracterizes both the current state of challenges regarding ammunition capacity laws as well as the nature of the harms suffered by the parties. Respondents', and the People of Washington's, harm consists of the violation of fundamental rights protected by Washington Constitution Article I, Section 24 and the Second Amendment of the United States Constitution. That harm must be weighed against the State's speculative harm that *could* occur *if* the stay was lifted, and so-called Large Capacity Magazines ("LCMs") were sold, and any such magazines was used in the commission of a mass shooting (notably, the only crime the legislature was concerned about in the adoption of SB

5078 was the commission of a mass shooting). Engrossed Substitute S.B. 5078, 67th Leg., Reg. Sess., § 1 (Wash. 2022).) ("ESSB 5078").

Additionally, the State mischaracterizes the status of review of LCM bans and restrictions. Not "*every court* to consider a post-*Bruen* challenge" to magazine restrictions under U.S. Const. amend. II and/or Wash. Const. art. I, § 24 has rejected the challenge or been overruled. Appellant's Answer to Motion to Modify Comm'r Ruling, p.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 prejudges 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 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

[1] *Duncan v. Becerra*, 19 F.4th 1087 (9th Cir. 2021) (*en banc*).
[2] *Duncan v. Bonta*, 142 S. Ct. 2895 (2022).

answer to the Motion to Modify, 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 (2024), 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 (E.D. Wash. 2023) has not rejected the challenge, nor has it 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. Our sister state of Oregon has a decision, in which a stay was denied, that an 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.

Second, the balance of equities is decidedly in favor of dissolution of the stay. The "effectiveness" of ESSB 5078 is not undercut by dissolving a stay. Even a "deluge of LCMs" being sold if the stay is dissolved is not a harm that can override the ongoing impairment of a fundamental right of Appellees, which consist of both an individual and a limited liability company. The legislature already allowed a "deluge" of so-called LCMs by allowing 90 days to elapse between passage of ESSB 5078 and its effective

date. The legislature already allowed so-called LCMs to be maintained by lawful owners who possessed them prior to the effective date of ESSB 5078. The popularity of ownership of the so-called LCMs is conceded by the State and the Commissioner by referencing the fact that a "deluge of LCMs sold in just the two hours the superior court's ruling was in effect" occurred. Appellant's Answer, p.2. In that time, "gun dealers like Gator's engaged in a sales blitz to sell hundreds of LCMs in Washington." *Id.* at 6. When an injunction was entered against California's LCM ban, "within a week of that decision millions of LCMs flooded California – effectively depleting the national inventory of LCMs[.]" Comm'r Ruling, p.2-3. Citizens of this state and this country have overwhelmingly

decided that so-called LCMs have utility for self-defense. Additionally, no mass shooting has been reported in Washington in 2024;[3] thus the "sales blitz" that occurred post-trial court decision had no impact on public safety. Accordingly, the stay should be dissolved.

II. Argument

A. Appellant did not carry its burden that the issues are debatable.

Appellant does little more than appeal to non-binding case law for the proposition that the issues are debatable. This is erroneous in a couple respects: (1) the case law is not "unanimous" as asserted by the

[3] Gun Violence Archive: Mass Shootings in 2024. Available at: https://www.gunviolencearchive.org/reports/mass-shooting?sort=desc&order=Incident%20Date. Last accessed: June 18, 2024.

Appellant; and (2) no other court has examined a ban on so-called LCMs under Wash. Const. art. I, § 24.

First, as briefed *supra*, at I., currently, and although stayed, the most recent decision by a district court in the Ninth Circuit held that a ban on so-called LCMs violates U.S. Const. amend. II. *See, Duncan v. Bonta*, 83 F.4th 803 (2023).

Second, no court has made a merits-based ruling under Wash. Const. art. I, § 24. In the parallel federal case, the court simply stated that "[g]iven the lack of briefing on article I, section 24, the Court finds it would be inappropriate to issue a preliminary injunction at this stage… To grant Plaintiffs' requested relief at this stage would amount to a *sua sponte* injunction on a scant record. The Court

declines to do so." *Brumback v. Ferguson*, 1:22-CV-03093-MKD, 2023 U.S. Dist. LEXIS 170819, at *26-27. The closest analysis comes from Washington's sister state, Oregon, whose constitutional provision protecting the fundamental right to bear arms served as the basis for Washington's fundamental constitutional protection of that right. There, a ban on so-called LCMs was declared unconstitutional, and the Oregon Court of Appeals denied a request for a stay of that decision. *See, Arnold v. Kotek*, Or. Ct. App. No. A183242 (2024).

The Appellant also continues to rely on *State v. Jorgenson*, 179 Wn.2d 145, 312 P.3d 960 (2013) for the proposition that the right to bear arms is subject to "reasonable regulation pursuant to the State's police

power" without acknowledging the limitations on that power. Appellant's Answer, p.15 n.1. This Court in *Jorgenson* recognized that the U.S. Constitution does bear on the Washington Constitution: "*Heller* and *McDonald* left this police power largely intact. *Heller* explicitly recognized "presumptively lawful" firearm regulations, such as those banning felons and the mentally ill from possessing guns." *Jorgenson*, 179 Wn.2d at 156. While it is true that this Court "read[s] the Washington Constitution's provisions independently of the Second Amendment pursuant to *Gunwall*[,]" the U.S. Constitution still protects the rights of Washingtonians. *Id.* That's because "Supreme Court application of the United States Constitution establishes a floor below which state

courts cannot go to protect individual rights." *State v. Sieyes*, 168 Wn.2d 276, 292, 225 P.3d 995 (2010).

Surely Appellant does not suggest that the U.S. Constitution has *no* bearing on the analysis of the scope of the right to bear arms, as the "Second Amendment right to bear arms applies to the states through the due process clause of the Fourteenth Amendment." *Id.* at 296. So, while the Washington Constitution is "distinct and should be interpreted separately from the Second Amendment to the federal constitution[,]" *Jorgenson*, 179 Wn.2d at 153, that analysis is strictly whether *more* or *greater* protections are afforded. "[S]tates of course can raise the ceiling to afford greater protections under their own constitutions. Washington retains the 'sovereign

right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution.'" *Sieyes*, 168 Wn.2d at 292 (quoting *State v. Gunwall*, 106 Wn.2d 54, 59, 720 P.2d 808 (1986)).

Additionally, as briefed in the Motion to Modify, this Court in *Jorgenson* utilized intermediate scrutiny as the statute at issue was limited in scope, duration, and persons affected. Intermediate scrutiny is not the proper standard for universally applicable statutes which burden a fundamental right. *Jorgenson* is inapposite.

Appellant failed to show analogous arms restrictions. Appellant cannot show that ESSB 5078 fits within the 'presumptively lawful' restrictions

pursuant to the police power, nor that there is a historical tradition of restricting ammunition capacity. The Appellant is unlikely to succeed on its defense of the challenged statutes which were declared unconstitutional.

B. The balance of harms dictates dissolution of the stay as the stay violates Appellees' fundamental rights.

The only concrete harm suffered by the imposition of the stay is suffered by Appellees. Even assuming, *arguendo*, that the legislative finding that ESSB 5078 would "likely" save lives is correct, it is itself speculative in nature. Laws of 2022, ch. 104, § 1. Appellant cannot show that any harm will befall any Washingtonians if the stay is dissolved. Even assuming, God forbid, that a mass shooting occurs

during the pendency of this case, the stay would not prevent such an event from occurring.

Further, the stay would only prevent a would-be mass shooter from legally obtaining a so-called LCM during the pendency of this case; as conceded by the Appellant, hundreds were sold a few weeks ago, and tens of thousands are owned by law-abiding citizens and other persons in this state, yet no mass shooting was perpetrated in Washington since those magazines were sold. Additionally, as conceded by the Appellant, so-called LCMs only potentially enable would-be mass shooters to inflict *more* casualties than they would otherwise. As briefed by Appellees, mass shooting events in Washington have most commonly been perpetrated by shooters with non-LCMs.

Appellants have speculation on top of guesswork as their purported harm.

In contrast, Appellees are suffering a concrete and irreparable harm. The injury to a fundamental right is irreparable. Appellant attempts to rely on a differentiation of the First Amendment from other fundamental rights, citing to *Great N. Res. V. Coba*, 3:20-CV-01866-IM, 2020 WL 6820793 (D. Or. Nov. 20, 2020). Not only is that non-binding, but, as the U.S. Supreme Court recently articulated in *Bruen*, "[t]his Second Amendment standard accords with how we protect other constitutional rights. Take, for instance, the freedom of speech in the First Amendment, to which *Heller* repeatedly compared the right to keep and bear arms." *N.Y. State Rifle & Pistol Ass'n v.*

Bruen, 597 U.S. 1, 24, 142 S. Ct. 2111 (2022). *Bruen* was decided two years *after* the *Coba* case relied upon by Appellant. In no uncertain terms, the U.S. Supreme Court concluded that the "constitutional right to bear arms in public for self-defense is not 'a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees,'" this protecting the fundamental right to bear arms. *Id.* at 70 (quoting *McDonald v. City of Chicago*, 561 U.S. 742, 780, 130 S. Ct. 3020 (2010)).

Washington's 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). Even rights which were not included in the original Declaration of Rights are fundamental: two sections pertaining to the process of recalling public officials were added via Amendment 8, 1911 p.504 Section 1, and approved in 1912. Just a year later, this Court had occasion to hold that "[w]e conclude that the amendment was lawfully submitted to and adopted by the people of the state, and thereby became a part of our *fundamental* law." *Cudihee v. Phelps*, 76 Wash. 314, 329, 136 P. 367 (1913) (emphasis added). The right to bear arms is not a second-class right. The impairment of that right, to Appellees, which includes both a gun store and an individual, and by extension

to Washingtonians generally, is irreparable. This Court should dissolve the stay.

III. 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. Possibly preventing an event which may or may not occur is not a concrete harm which would be suffered by Appellant. Impairing a fundamental right is an injury suffered by Appellee.

This document contains 2,111 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 June 18, 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 18th day of June, 2024, at Pasco, Washington.

/s/ S. Peter Serrano

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