Hearing Date: 3/11/2024

Hearing Time: 9:00am
Judge/Calendar: Bashor

STATE OF WASHINGTON
COWLITZ COUNTY SUPERIOR COURT

STATE OF WASHINGTON, Plaintiff, v. GATOR'S CUSTOM GUNS, INC., a Washington for-profit corporation; and WALTER L. WENTZ, an individual; Defendants.	Case No.: 23-2-00897-08 DEFENDANTS' REPLY IN SUPPORT OF THEIR AMENDED MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Not every court to date that has considered a post-*Bruen* challenge to bans of so-called "large capacity magazines" ("LCMs") has rejected the challenge or been overruled; Oregon Measure 114 was ruled unconstitutional and the final order was entered January 9, 2024. As stated by the Washington Supreme Court, "Washington's article I, section 24 was drawn from Oregon's article I, section 27[.]" *City of Seattle v. Evans,* 184 Wn.2d 856, 868, 366 P.3d 906 (2015).

Ultimately, the string cites of district courts which have upheld LCM bans or regulations are persuasive authority, and unpersuasive from an analytical perspective. It is noteworthy that the State relegates *Duncan v. Bonta,* 83 F.4th 803 (9th Cir. 2023) and its unique

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procedural posture to a footnote. Vigorous dissents have been entered at each stage of the *Duncan* appeal process highlighting the "irregularities created" by the *en banc* "unusual move" to take the appeal as a comeback case. *See, En Banc* Order dated Sep. 28, 2023 accepting case as a comeback, *Duncan v. Bonta*, 2023 U.S. App. LEXIS 25723, at *4 (VanDyke, J., dissenting); *Duncan v. Bonta*, 83 F.4th 803, 809 (Bumatay, J., dissenting). In fact, the order granting the emergency partial stay pending appeal directed the parties to brief the "novel questions about whether [the 9th Circuit's] en banc rules are consistent with 28 U.S.C. § 46(c)." *Duncan*, 83 F.4th at 807. Part of the oral argument on March 19, 2024 will address this issue as to the very propriety of the appeal itself.

Defendants do not in fact "appear[ ] to agree that LCMs themselves are not 'arms," as briefed in Defendants' Amended Motion for Summary Judgment, p.13-16. Furthermore, the analysis of the right to bear arms has never been bifurcated or otherwise separated into *subsets* of protected arms; the analysis is whether the arms "facilitate armed self-defense" as conceded by the State. State's Opposition to Amended Motion for Summary Judgment, p.2. Magazines obviously facilitate armed self-defense, as they are an integral component of a firearm.

The State further mischaracterizes the findings of the legislature that ESSB 5078 *will* save lives; the legislature in fact made no such finding, only that it is "likely" to reduce gun deaths and injuries. S.B. 5078, 67th Leg., Reg. Sess., § 1 (Wash. 2022). While Defendants certainly hold the common sense position that people intent on breaking the law will continue to do so, it is the State's own expert who rebutted their position; "a person set on inflicting mass casualties will get around any clip prohibitions by having additional clips on his person (as Loughner [Arizona shooter targeting Gabrielle Giffords] did anyway) or by carrying more than one fully loaded weapon (as Virginia Tech shooter Seung-Hui Cho did)." Louis Klarevas,

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Closing the Gap, The New Republic (Jan. 13, 2011).[1] It is already illegal to murder. It is already illegal to bring a firearm into a "gun free" school zone. Yet, it happens. It is tragic, it is terrible. But infringing or impairing the right of lawful firearms owners to bear the arms they deem necessary is not the answer, nor is it constitutional.

The late Justice Antonin Scalia once stated that federal judges should have a rubber stamp that says: 'STUPID BUT CONSTITUTIONAL.' Jennifer Senior, In Conversation: Antonin Scalia, New York Magazine, Oct. 4, 2013. That means that even ill-advised, foolish, or pointless laws like ESSB 5078 are not necessarily unconstitutional just because they will not accomplish their desired ends. However, the inverse is also true – even laws which are potentially beneficial are not necessarily constitutional. Let's say the events portrayed in the movie *Red Dawn* (either the original movie from 1984, or the remake from 2012 – the original was a better movie, but the remake is set in Spokane, Washington) played out in real life; a foreign army has invaded the United States following the weakening of NATO and an economic crisis. It would perhaps be beneficial to quarter military personnel in the homes of U.S. citizens to both protect the populace and prevent direct strikes against massed military personnel. However, that would not be constitutional, if war was not officially declared and a law passed allowing such a course of action, or if the owner did not consent if it was still a "time of peace." U.S. Const. amend. III. Of course, even that drastic step might not be necessary if Washingtonians had ample magazines facilitating armed defense of themselves and the state.

Even taking the legislature's "findings" and accepting, *arguendo*, that ESSB 5078 would prevent gun deaths and injuries, it is still unconstitutional.

II. FACTS

[1] Available at: https://newrepublic.com/article/81410/us-gun-law-reform-tucson

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Defendants incorporate by reference the fact section of their Response to the State of Washington's Renewed Motion for Summary Judgment ("State's MSJ") filed February 29, 2024.[2]

III. ARGUMENT

A. Legal standard of a generally applicable statute which pertains to a fundamental right.

The State evinces the disfavor that the right to bear arms has both in the legislature and the Attorney General's Office by asserting that it is not fundamental in a constitutionally relevant sense. This is simply not so; "the 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). Strict scrutiny is in fact the standard; "[w]here the State interferes with a fundamental right, we apply strict scrutiny; such an infringement must be 'narrowly tailored to serve a compelling state interest.'" *Nielsen v. Dep't of Licensing*, 177 Wn. App. 45, 53, 309 P.3d 1221 (2013) (quoting *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 220, 143 P.3d 571 (2006)). All of the rights enumerated in the Washington Constitution Declaration of Rights are fundamental. The last section of the Declaration of Rights, as originally ratified, explicitly states as much: "[a] frequent recurrence to fundamental principles is essential to the security of individual right and the perpetuity of free government." Wash. Const. art. I, § 32.

The State again tries to shoehorn the limited holding of *Jorgenson*, which was limited to a particular class of people and also predicated on the presumptively lawful regulations

[2] No record "correction" is necessary; the State sought dismissal of Defendants' Petition for Declaratory and Injunctive Relief and to Set Aside the CID under several grounds, including timeliness, failure to meet and confer, lack of good cause, and under constitutional analysis. State's Motion to Dismiss, p.1. Defendants' Petition was consolidated with the State's enforcement action, it was not dismissed.

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mentioned in *Heller*, as the constitutional test for a ban. *Jorgenson* is not the proper test for a generally applicable law.

The State cannot simply wish away the fundamental right to bear arms.

B. Defendants' Motion for Summary Judgment should be granted as to the facial claim.

Magazines are an essential component of a firearm which is designed to function with a detachable magazine inserted. They are not in the same category as "silencers, bump stocks, laser sights, and any number of other firearm accessories[.]" State's Oppo., p.6. A firearm can function as designed and intended without any of those optional accessories. A firearm cannot function properly without a magazine inserted. Attempting to create *subsets* of firearms and their components is not how the analysis proceeds under either the federal or the Washington constitutions.

The State's proposed standard of creating *subsets* of firearms and firearm components invites the danger of judicially or legislatively created and arbitrary determinations as to what is necessary for self-defense or defense of the state. Today it is 10 rounds, tomorrow, five rounds. After those magazines are used in heinous crimes, three rounds is deemed all that is "necessary" by the state. Detachable magazines with capacity of more than 10 rounds have been in existence as long as semiautomatic firearms have been in existence. The very purpose of a firearm is self-defense. Magazines which facilitate this purpose by increasing the number of rounds available to the wielder are quintessentially protected by the right to bear arms.

C. ESSB 5078 violates Wash. Const. art. I, § 24.

Most tellingly, the State entirely ignores the "traditional" aspect of whether an arm is "*traditionally or commonly* used by law-abiding citizens for the lawful purpose of self-defense." *Evans*, 184 Wn.2d at 869 (emphasis added). As briefed by Defendants, LCMs are commonly

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used, as they are the most common type of detachable magazine possessed by law-abiding citizens. Additionally, they have been traditionally used since before the founding of this state, and as long as semiautomatic firearms have been used with detachable magazines. Throughout history, increasing ammunition capacity has been a primary driver of technological advances in the firearm industry.

Succinctly, it is a *right* to bear arms, not a privilege. Moreover, the right "protects instruments that are designed as weapons[.]" *Id.* This is a very broad scope, which should properly sweep components of weapons into the penumbra of the right to bear arms. LCMs do not serve "combat-specific" ends, otherwise law enforcement officers would not need them.

The State additionally appears to make an argument that the explicit text of Wash. Const. art. I, § 24 does not address "magazines" and they are therefore not protected; one could just as easily make the argument that rifled barrels are not explicitly addressed in the text, and are therefore not protected. This Court should stop the unconstitutional attacks on the right to bear arms which the state is intent on eviscerating by death through a thousand cuts.

ESSB 5078 is not a "reasonable regulation" but rather an outright prohibition on the means of facilitating effective self-defense. It is limited in neither scope or duration. It is so expansive in fact, that it includes provisions bringing it within the ambit of the Consumer Protection Act. Furthermore, the interplay between the federal constitution and the state constitution does not mean you simply throw out the baby with the bathwater; it simply does not make sense that a state constitution, which provides greater or more expansive protections, can utilize an interest-balancing approach while the federal constitutional analysis forbids such. Additionally, the U.S. Supreme Court "ha[s] made clear that the individual rights enumerated in the Bill of Rights and made applicable against the States through the Fourteenth Amendment

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have the same scope as against the Federal Government." *Bruen*, 597 U.S. at 37. Therefore, at minimum, there is no means-end scrutiny available when analyzing the right to bear arms under either constitution.

Regardless, even if the Court wishes to indulge the State's arguments, then intermediate analysis is not appropriate, as the Washington Supreme Court was careful to note in *Jorgenson*, which applied that standard only because of the limited nature of the statute at issue. Where, as here, a fundamental right is burdened by a generally applicable statute, strict scrutiny at minimum should be utilized.

D. ESSB 5078 violates U.S. Const. amend. II.

"The right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. That is the simple and straightforward operative clause. It codifies a preexisting, fundamental right – one rooted in the "natural right of resistance and self-preservation." *Heller*, 554 U.S. at 594 (internal quotations omitted). It is "deeply rooted in this Nation's history and tradition[.] *McDonald*, 561 U.S. at 767 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721, 117 S. Ct. 2258 (1997)). It 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*, 561 U.S. at 780).

When the "plain text covers an individual's conduct, the Constitution presumptively protects that conduct." *Id.* at 17. The 'people' protected by the Second Amendment include "ordinary, law-abiding, adult citizens[.]" *Id.* at 31. The 'arms' that are protected does not mean "only … those arms in existence in the 18th century." *Id.* at 28 (quoting *Heller*, 554 U.S. at 582). Rather, it "covers modern instruments that facilitate armed self-defense." *Id.*; *Cf.*

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Caetano, 577 U.S. at 411-412 (*per curiam*) (stun guns are protected; Ms. Caetano did not actually charge her stun gun in the underlying case).

Keeping and bearing LCMs in their attendant firearms is within the 'course of conduct' contemplated in *Bruen*. Accordingly, the U.S. Constitution "presumptively protects that conduct." *Id.* at 24. While true that the inquiry "requires only that the government identify a well-established and representative historical *analogue*, not a historical *twin*[,]" the government may not rely on "outliers[.]" *Id.* at 30. The State does so here. The Supreme Court in *Bruen* mentioned "unprecedented societal concerns or dramatic technological changes" but that does not change the analysis; those grounds simply "may require a more nuanced approach." *Id.* at 27. A court must still "guard against giving postenactment history more weight than it can rightly bear." *Id.* at 35. "[T]o the extent later history contradicts what the text says, the text controls." *Id.* at 36.

The State attempts to point to carry restrictions of Bowie knives and revolvers, but outright bans were exceedingly rare. The State goes further off the rails with comparisons to Prohibition-era and interstitial period between World Wars regarding machine guns. Machine guns were never popular with the general public, instead being preferred by rumrunners, bootleggers, and the like. The National Firearms Act of 1934 aimed to address the problem of "gangster weapons" that had been used in the violence of the Prohibition Era. Nicholas J. Johnson, The Power Side of the Second Amendment Question: Limited, Enumerated Powers and the Continuing Battle over the Legitimacy of the Individual Right to Arms, 70 Hastings L.J. 717, 751 (2019). The United States Attorney General at the time, Homer Cummings, doubted whether machine guns could be banned under the Second Amendment. *Id.* at 753. Assistant U.S. Attorney General Joseph Keenan reiterated that position. *Id.* Similarly, there are no

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historical restrictions on the number of rounds a person could carry on his or her person, whether that be in a cartridge pouch, bandolier, or other ammunition repository.

In short, there is no sufficiently analogous restriction prohibiting the most commonly owned component of semiautomatic firearms that can justify ESSB 5078. For that reason, it violates U.S. Const. amend. II and must be declared unconstitutional.

IV. CONCLUSION

For the foregoing reasons, Defendants' Motion for Summary Judgment should be granted, as there is no material fact in dispute that ESSB 5078 is facially unconstitutional under either Wash. Const. art. I, § 24 or U.S. Const. amend. II.

Dated this 6th of March, 2024.

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CERTIFICATE OF SERVICE

I certify that I caused to be filed with the Court and electronically served a copy of this document on all parties on the date below as follows:

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 6th day of March, 2024, at Spokane, WA.

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