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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' Answer to Petitioner's Emergency Motion to Stay

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I. Introduction

Petitioner State of Washington purports that a dire emergency exists warranting a stay of the Cowlitz County Superior Court order granting Respondent-Defendants' Gator's Custom Guns, Inc., and Walter Wentz (collectively, "Gator's") motion for summary judgment which invalidated Engrossed Substitute Senate Bill 5078 ("ESSB 5078"). The State's hyperbole is marked with its claim that "SB 5078 literally saves lives." State's Motion at 2, 27. However, this is belied by the actions of the legislature in passing ESSB 5078; the legislature allowed so-called "large capacity magazines" ("LCMs") to continue to be possessed by lawful owners in the hundreds of thousands in Washington State. The bill was signed a full three months before it took effect. The failure of the legislature to confiscate or destroy all LCMs and the lack of an emergency provision in the bill evinces the fact

that LCMs are not the dastardly destructive device the State purports them to be.

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 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 result in preventing mass shootings. 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 13 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.”

Further, the State mischaracterizes the nature of the trial court’s decision as an “extreme outlier” and that a delay of a

year means that harm will not befall Gator's, and Washington citizens generally, from the stay. Even if the case was such an outlier, which it is not, such an existence does not constitute debatable issues as such a claim offers no substantive challenge to the trial court's ruling.

The State's motion for stay misapprehends the nature and purpose of constitutional protections; 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 – mere minutes passed between the filing of the State's motion and issuance of a stay, despite a trial court determining that a fundamental right had been unconstitutionally infringed.

II. Relief Sought

Gator's declined to agree to a stay of any trial court order invalidating the law because a fundamental constitutional

right is at issue. Dissolution of the stay would preserve the *status quo ante* in place prior to the enactment of ESSB 5078. Detachable magazines with capacity of more than 10 rounds have been in existence for more than a century. Even assuming, *arguendo*, that so-called LCMs were not “widely available for civilian use until the 1980s” as posited by the State, App. 819, they have been widely available for 40 years, and the preservation of the *status quo ante* would necessitate a dissolution of the stay. Conversely, ESSB 5078 was enacted less than two years ago, and is not the proper *status quo ante* to be preserved.

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 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.¹

IV. Grounds for Relief

While Petitioner correctly cites the grounds which a reviewing court evaluates when deciding whether to stay

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

enforcement of a trial court decision, Petitioner mischaracterizes or misapprehends both grounds.

A. The Issues are Not Debatable

Petitioner asserts that there are “debatable issues” presented on appeal but misconstrues the balance of analysis on the matter; Respondent completely ignores that a sister state has also declared a similar law unconstitutional, *see, Arnold, et al. v. Kotek, et al.*, No. 22CV41008 (Harney Cty. Cir. Ct., Oregon (2023)) Preliminary Injunction on Ballot Measure 114, App. 36-60 (preliminary injunction made permanent on November 21, 2023, final order entered December 8, 2023). Petitioner also misconstrues the analysis conducted by the court in *Brumback, et al. v. Ferguson, et al.*, Case No. 1:22-cv-03093-MKD (E.D. Wash. 2023) vis-à-vis the Washington Constitution, which simply noted in denying a motion for preliminary injunction, that “the lack of briefing

on article I, section 24, the Court finds it would be inappropriate to issue a preliminary injunction at this stage.” 2023 U.S. Dist. LEXIS 170819, at *26.

“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.)”). At this juncture, a similar statute has been declared unconstitutional by the state which Washington based her own constitution upon; the balance of analysis regarding the state constitutional claim is in favor of Gator’s.

Tellingly, the State either misses the mark or intentionally obfuscates as to what constitutes “debatable issues.” The State does little more than regurgitate its arguments made in its cross motion for summary judgment, which was denied in its entirety. The State cites the trial court opinion exactly twice in the Argument section of its motion, and only in passing. Instead, the State engages in circular reasoning that because there is an instant suit, there is a debatable issue. This would mean that every case which necessarily involves a controversy, presents debatable issues which could necessitate a stay. This is not so.

Moreover, the State cannot make a showing of a likelihood of prevailing on appeal. As discussed *supra*, a similar statute has been declared facially unconstitutional in Oregon. This is noteworthy, because the analysis of Oregon’s Constitution has been used by this Court and has also been

cited favorably by the U.S. Supreme Court. 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.” 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).

Petitioner attempts 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” but fails to engage in meaningful analysis; that is because its position was roundly rejected by the trial court, which coincidentally was the trial court in *Jorgenson*, and which was affirmed by this Court. Gator’s is likely to succeed on the merits.

It is unclear what analysis was conducted as to the debatable nature of these issues, considering Petitioner’s Motion for Stay was filed sometime around 4:15pm, consisting of 33 pages, was filed along with a declaration from counsel consisting of an additional nine pages, and the opinion which Petitioner sought to stay consists of 55 pages of thorough constitutional analysis addressing both the U.S. and Washington constitutions. The only explicit consideration

given was to “the public safety issues concerning the proliferation of large capacity magazines compatible with assault weapons[.]” Ruling dated April 8, 2024. However, as briefed *supra* and conceded by Petitioner, so-called large capacity magazines have been “widely available” to the public since at least the 1980s. This 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)).

No debatable issues have been presented – the State simply attempts to appeal to non-binding authority in a sort of

popularity contest. As discussed *infra*, even utilizing the interest-balancing inquiry rejected for the analysis of the case on the merits, but required under RAP 8.1(b)(3), the State cannot show any harms other than a hypothesis that so-called LCMs will enable a potential mass shooter to inflict more casualties.

B. The Balance of Harms Weighs in Favor of Dissolving the Stay

Comparing the injuries to the parties unequivocally weighs in favor of dissolving the current stay. 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).² The Preamble to the Washington Constitution gives thanks “to the Supreme Ruler of the universe for our liberties[.]” These liberties are preexisting, not granted. “At the heart of the Washington Constitution is the emphasis on protecting individual rights. 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). The conclusion of the Declaration of Rights as originally adopted provides that “frequent

² Justice Utter wrote the referenced article while a Washington Supreme Court Justice.

recurrence to fundamental principles is essential to the security of individual right and the perpetuity of free government.” Wash. Const. art. I, § 32. “[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).

Self-defense is 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). The right to bear arms is a fundamental right. *See, e.g., State v. Sieyes*, 168 Wn.2d 276, 287, 225 P.3d 995 (2010) (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).

Here, however, no presumption was afforded the fundamental right to bear arms or of self-defense. No response was allowed Gator's prior to the issuance of the stay. It is dubious that any comparison of injury to the parties was conducted during the 49 minutes between the filing of Petitioner's Motion for Stay and the Ruling granting the stay.

In addition to the requirement that a movant can show that debatable issues are presented on appeal, the movant must also 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). Here, we have a fundamental right weighed against merely speculative and potential public safety benefits, and, as Petitioner’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; 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.

Not only are the purported dangers to public safety speculative at best, they also would only account for an infinitesimally small percentage of deaths attributed to a shooter with a firearm. This cannot be the basis for staying a decision finding that a statute unconstitutionally impairs a

fundamental right, 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)).

Moreover, Petitioner fails to demonstrate the existence of debatable issues aside from airing its grievances that the trial court disagreed with its analysis. Even if lodging such issues met the threshold of “debatable issues,” Petitioner cannot demonstrate that “the stay is necessary to preserve ... the fruits of a successful appeal” which is clearly evidenced

by the fact that Petitioner has already filed a notice of appeal to the Supreme Court. *Boeing*, 43 Wn. App. at 292. Similarly, the Stay has no effect on the lower court's analysis, nor will it guide this Court's analysis of the issues. 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. On the day of this filing, the Court of Appeals in Oregon denied the stay requested by the State of Oregon in *Arnold v. Kotek*, No.

22CV41008 (Harney Cty. Cic. Ct., Oregon (2023); Decl. of S. Peter Serrano, Ex. A, Order Denying Stay; Expediting Appeal, Court of Appeals 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.”)

The State’s feeble attempt to make an argument based on laches is unavailing as well. Statutes which burden constitutional rights are always ripe for challenge. *See, e.g., Auto. United Trades Org. v. State*, 175 Wn.2d 537, 542, 286 P.3d 377 (2012) (“Even if [a party] wait[s] 22 years to bring their lawsuit, the reasonable time and laches doctrines still

cannot be used as affirmative defenses to bar a constitutional challenge.”). The “interpretation of reasonable time or our common law doctrine of laches should not be used to shirk this court’s responsibilities of constitutional interpretation. *Id.*; see also, *Wash. State Legislature v. Lowry*, 131 Wn.2d 309, 320, 931 P.2d 885 (1997) (“[O]ur mandate as the Supreme Court of Washington [is] to decide whether legislative designation of sections is true to the spirit of the constitution.”).

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).

V. Conclusion

For the foregoing reasons, the Court should dissolve the stay.

This document contains 3,437 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 April 12, 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 12th day of April, 2024, at Spokane, Washington.

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