No. 99870-1
Court of Appeals No. 80949-1-I

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

KARYNN PAULEY,

Respondent,

v.

SCOTT HODGES,

Petitioner.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Karynn Pauly[1] petitioned for a protection order against her ex-boyfriend Scott Hodges under the Domestic Violence Prevention Act. The court granted her petition and entered a domestic violence protection order and an order to surrender weapons against Hodges. On May 24, 2021, the Court of Appeals upheld the Superior Court's decision, in its entirety. *Hodges v. Pauly*, 17 Wn. App. 2d 1056 (2021) (***unpublished***).[2]

This Court should deny review for three reasons. First, the Division I opinion is not in conflict with any Supreme Court or published appellate case. Second, there is no substantial public interest because the unpublished decision has no precedential value and is limited to its facts. Third, it does not involve a significant question of constitutional law. The

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[1] The Division 1 caption includes the correct spelling of Ms. Pauly's name.

[2] Pinpoint citations are to the Slip Opinion page numbers; attached to Petition at Ex. A.

appellate court found that existing precedent resolved Hodges' constitutional arguments.

The only novel claim raised in the Petition is that domestic violence treatment compels speech in violation of the First Amendment. However, there is no evidence before this Court of Hodges ever attempting to engage in treatment, or being compelled to say something he objects to. Certainly, nothing in the record shows that Hodges was punished, or threatened with punishment, for refusing to participate in treatment. Hodges' compelled speech claim, therefore, is not ripe for review.

Hodges also asserts a facial challenge but fails to meet his burden for such a claim. Facial challenges "run contrary to the fundamental principle of judicial restraint that courts should neither anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Washington State Grange v.*

Washington State Republican Party, 552 U.S. 442, 450, 128 S. Ct. 1184, 170 L. Ed. 2d 151 (2008) (internal quotations, citations omitted). The Supreme Court has described facial challenges as "strong medicine," which should be applied "only as a last resort." *Broadrick v. Oklahoma*, 413 U.S. 601, 613, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973). Hodges' compelled speech argument is premised on a speculative scenario that did not actually happen in his case or any other case that he can point to. This Court should not prescribe such "strong medicine" to a law that is not infirm.

II. RESTATEMENT OF THE CASE

A. The Domestic Violence Prevention Act

The Domestic Violence Prevention Act (DVPA) establishes a procedure for victims of domestic violence to petition the court for an order for protection (DVPO). RCW 26.50. To obtain a DVPO, a petitioner must prove they are a victim of domestic violence. RCW 26.50.020. "A protection order issued under the DVPA does not protect merely the

private right of the…petitioner... Rather, the Act reflects the legislative determination that the public has an interest in preventing domestic violence…" *State v. Karas*, 108 Wn. App. 692, 699-701, 32 P.3d 1016 (2001) (internal citation omitted). Washington courts have consistently upheld the DVPA against constitutional challenges. See e.g. *Aiken v. Aiken*, 187 Wn.2d 491, 501-504, 387 P.3d 680 (2017).

1. Domestic Violence Perpetrator Treatment

The DVPA authorizes courts to "[o]rder the respondent to participate in a domestic violence perpetrator treatment program" (DVPT). RCW 26.50.060 (1)(e). The primary purpose of DVPT is to increase victim safety. WAC 388-60B-0025; RCW 26.50.150.

> Holding batterers accountable for their domestic violence and for changing their behavior is the hallmark of effective perpetrator intervention. **People do not change problems they do not think they have.**

Administrative Office of the Courts, *Domestic Violence Bench Guide for Judicial Officers*, Appendix B-18 (updated Feb 2016) (emphasis added).[3]

DVPT providers are certified by the Department of Social and Health Services (DSHS) and regulated by the Washington Administrative Code. WAC 388-60B. In 2018, the chapter governing DVPT was repealed and replaced. *Id.* The WACs now require a comprehensive behavioral screening and assessment for anyone referred to treatment. WAC 388-60B-0400. The purpose is to determine the appropriate "level of treatment" and to develop "[b]ehaviorally focused individualized treatment goals or objectives for an initial treatment plan." *Id*. The program must write a summary of the assessment, including its recommendation regarding the level of treatment indicated. *Id.* at (19). The WACs permit a program to determine that a participant is not an appropriate candidate

[3] www.courts.wa.gov/content/manuals/domViol/Complete%20Manual%202015.pdf

for DVPT provided it documents "a reasonable and valid rationale for a recommendation of an alternative service or no treatment at all..." *Id.* at (19)(f).

Although the WACs require *treatment providers* to measure participant progress, and establish standards providers are expected to hold their participants to, the code does not authorize DSHS to directly regulate or take action against *participants*. WAC 388-60B-0345-0370; 388-60B-0025.

2. The Weapons Surrender Statute

The risk that an intimate partner will be killed by an abusive partner is significantly higher when the abuser has access to a gun.[4] Federal law has long prohibited individuals who are subject to civil domestic violence protection orders from purchasing or possessing firearms. 18 U.S.C. § 922(g)(8).[5]

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[4] Jacquelyn C. Campbell, et al., *Risk Factors for Femicide in Abusive Relationships: Results From a Multisite Case Control Study*,93 AM. J. PUBLIC HEALTH 1089, 1092 (2003).

[5] Federal law does not apply to a dating relationship where the parties never cohabitated. 18 U.S.C. § 921(a)(32).

The federal law has been repeatedly upheld against constitutional challenge. See e.g. *United States v. Reese*, 627 F.3d 792, 802–04 (10th Cir. 2010). However, a shortcoming of the federal law is that it contains no provision for the *surrender* of firearms a restricted person may already possess. 18 U.S.C. § 922.

In 2014, to better address this lethal combination—guns and domestic violence—Washington enacted laws that require certain respondents to *surrender* dangerous weapons and concealed pistol licenses (CPL). RCW 9.41.800(3). Now, when a court enters a DVPO, it must also enter an Order to Surrender Weapons ("OSW") if all of the following are true: 1) the DVPO was issued after a hearing of which the respondent had "actual notice" and "an opportunity to participate;" 2) the order "restrains the respondent from harassing, stalking, or threatening an intimate partner;" and 3) the court finds "that the respondent represents a credible threat to the physical safety" of the protected party and the order prohibits "the use, attempted

use, or threatened use of physical force against the intimate partner…that would reasonably be expected to cause bodily injury." *Id*.; see also *Braatz v. Braatz*, 2 Wn. App. 2d 889, 895-96, 413 P.3d 612, *review denied*, 190 Wn.2d 1031 (2018).

B. Facts and Procedural Background

Ms. Pauly (age 31) and Mr. Hodges (age 45) started dating in February 2017. CP 1; 99-100. During their relationship, Hodges engaged in violent outbursts that scared Pauly. CP 5-9; RP[6] 9-14. Pauly described an incident from April 2018 as follows:

> "[F]rom midnight to 7 am he yelled at me and broke dishes and glasses. After finally allowing me to go to bed, an hour later, I was woken by the respondent yelling and throwing his beer bottle across the room… I was so scared and overwhelmed that time that I could not go to work for several days." CP 5; RP 9.

She ended the relationship shortly after this incident. RP 11.

A week later, as she was coming home from work at night, Pauly "felt fear" upon seeing Hodges waiting for her. RP

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[6] RP citations refer to the July 18, 2019 hearing unless otherwise noted.

11. She told him she "didn't want to see him again." *Id.* Hodges came to her building uninvited several more times over the next ten months, leaving handwritten letters outside her door. *Id.*; CP 7, 15-74. In one letter, Hodges wrote:

> I had a panic attack which exhibited itself in me without proper self control, irratically [sic] kicking furniture and throwing things across the room, as well as screaming loudly, directing words at you in a screaming voice…also lashing out at you, blaming, finding fault and generally exhibiting emotional instability…I now know that you felt threatened by my behavior…To have a large man in your house, whom you already were feeling uncomfortable with yelling and screaming must be a painful, fraught, and difficult experience… CP 56, 58-59.

Pauly did not respond to any of these letters. RP 11-12. She felt "unsafe in [her] home," like she "was being watched." *Id.*

In February 2019, Pauly heard a knock at her door. RP 11; CP 6. She saw it was Hodges, and felt "a sense of dread." RP 12. She told him to leave and that it was "inappropriate" for him to keep coming to her home because their relationship ended over a year ago. *Id.* A few weeks later, Pauly was home with her partner when someone knocked at the door. CP 5; RP

13. Her partner answered it, and Pauly heard Hodges asking to speak to her. *Id.* When she again told him their relationship was over, Hodges said that "he didn't think [they] had concluded the subject." *Id*. She told him to leave or she would call the police. *Id.* When he left, Pauly was "shaking, crying, and terrified." *Id.* She filed a police report. CP 115.

1. The Superior Court Proceedings

Pauly filed a petition for a DVPO and attached copies of the letters from Hodges. CP 1-74. Hodges appeared with counsel. CP 94-96. He submitted an 11-page declaration in which he wrote "admittedly I did kick and break a wicker chest in frustration and a dish did fall off and break;" and "I found myself running into a locked door with my shoulder and head." CP 103-104.

A full hearing was held on July 18, 2019, before a Superior Court commissioner. Both parties testified. RP 5-33. The commissioner found that a preponderance of the evidence supported entry of a DVPO. *Id.* at 26-31; CP 117-125. The

court found that Hodges' violent outbursts, which he admitted to, caused Pauly to fear imminent harm. RP 27-28. Further, it found that when Hodges came to her home uninvited in February and April, Pauly's "fear of what might follow was reasonable." *Id.* The court confirmed the credible threat finding and noted that an OSW was mandatory under the statute, as the parties were former intimate partners. RP 28-30; CP 117, 120.

The court also ordered Hodges to participate in a certified DVPT program. RP 29. The court "considered [the treatment requirement] carefully" in light of the fact that Hodges was already working with a therapist. *Id.* It noted that Hodges' therapist was not specifically working with him on the issue of domestic violence and further, that the events with Pauly happened in spite of his ongoing therapy. *Id.* Hodges sought revision of the commissioner's decision, which was denied. CP 133-139, CP 268-270; RP 12/6/19 at 18-21.

The OSW set a review hearing for July 24. CP 123-24. Hodges did not appear at that hearing and was found "not in

compliance" with the order. CP 129-30. The court noted that Hodges has an active CPL and found he "failed to surrender the CPL as ordered." CP 129.

III. AUTHORITY & ARGUMENT

A. Review of Mr. Hodges' Compelled Speech Claim is Limited to the Facts of his Case.

Hodges argues the statutory provisions regarding DVPT are unconstitutional facially and as applied to him. He has not met the required showing for a facial challenge because he cannot challenge the statute on the ground that "might be unconstitutional" in some "conceivable situation which might possibly arise." *United States v. Raines*, 362 U.S. 17, 21, 80 S. Ct. 519, 4 L. Ed. 2d 524 (1960) (citations omitted); see also *Broadrick*, 413 U.S. at 610. There is a limited exception in the First Amendment context, whereby a person whose own constitutional rights are not violated may raise a facial "overbreadth" challenge. *State v. Immelt*, 173 Wn.2d 1, 8, 267 P.3d 305, 308 (2011) (quoting *Virginia v. Hicks*, 539 U.S. 113, 115–16, 123 S.Ct. 2191, 156 L.Ed.2d 148 (2003)) ("The First

Amendment doctrine of overbreadth is an exception to our normal rule regarding the standards for facial challenges."). But the overbreadth exception applies to claims based on speech restriction, not compulsion.[7]

Outside the overbreadth context, "a successful facial challenge is one where no set of circumstances exists in which the statute, as currently written, can be constitutionally applied." *City of Redmond v. Moore,* 151 Wn.2d 664, 669, 91 P.3d 875 (2004) (internal citations omitted). "In determining whether a law is facially invalid, [courts] must be careful not to go beyond the statute's facial requirements and speculate about hypothetical or imaginary cases." *Washington State Grange*, 552 U.S. at 449-450 (internal quotations omitted).

Hodges has not even attempted to argue that "no set of circumstances exist" where the law can be constitutionally

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[7] "The policy reasons for such an exception arise out of concern that the threat of enforcement of an overbroad law may deter or chill constitutionally protected speech…" *Immelt*, 173 Wn.2d at 8 (internal quotations and citation omitted).

applied. Clearly, not everyone who is ordered to participate in DVPT objects to it as strenuously as Hodges does. In fact, some people participate in DVPT without being ordered to do so.[8] His claim that he would be compelled to say something he disagrees with is based entirely on conjecture. Notably, Hodges voluntarily spoke by submitting a sworn declaration and testifying in court. His declaration and letters admit to abusive behaviors. CP 28, 56, 58-59, 102-104. Hodges does not explain why he believes DVPT would require him to admit to anything beyond what he already has. He argues that *if* the law were applied in a way that required the endorsement of a specific view that one objects to, and *if* refusal were punished through contempt proceedings, *then* it would be unconstitutional. But to entertain such a claim would plainly require this Court to "speculate about hypothetical or imaginary cases."

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[8] "These programs provide…treatment to perpetrators of intimate partner violence, **including participants who are self-referred** or those who are court-ordered… WAC 388-60B-0025(4) (emphasis added).

Even under an overbreadth analysis, Hodges fails to meet the required showing. In determining whether a law is overbroad, the first question is whether it "reaches a substantial amount of constitutionally protected conduct." *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494, 102 S. Ct. 1186, 71 L. Ed. 2d 362 (1982). If not, then the overbreadth challenge fails. *Id.* "A statute regulating behavior and not pure speech will not be overturned unless the overbreadth is both real and substantial in relation to the statute's legitimate sweep." *State v. Lee*, 135 Wn.2d 369, 388-89, 957 P.2d 741 (1998) (citing *Broadrick*, 413 U.S. 601) (internal quotations omitted).

Hodges has not shown that the law burdens a "substantial amount" of constitutionally protected conduct. The DVPA and the WACs primarily regulate conduct. The WACs do not even regulate participants directly; they govern treatment providers. On its face, the law does not compel participants to adopt a particular viewpoint, or espouse a message they object to.

Hodges cannot show how the *possibility* of compelled speech is "real and substantial" in relation to the plainly legitimate sweep of the statute. Thus, he can only challenge the constitutionality of the statute as applied to him.

B. Mr. Hodges' Compelled Speech Claim is Not Ripe for Review.

Hodges argues that ordering him to participate in DVPT is unconstitutional because, he believes, it would require him to endorse ideas he does not agree with. But he has not actually been compelled to say anything at this point, or to endorse a viewpoint he disagrees with. He voluntarily spoke in the court proceedings, admitted to some abusive behaviors, failed to deny others, and was ordered to participate in treatment. CP 28, 56, 58-59, 102-104; RP 20-22. The record before this Court ends there.

Comparing Hodges' hypothetical to cases where courts have found "compelled speech" illustrates the distinction. In *W. Virginia State Bd. of Educ. v. Barnette*, the Supreme Court held that a school regulation requiring students to salute the flag,

where failure to comply was considered "insubordination" and dealt with by expulsion, was unconstitutional. 319 U.S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943). In *Wooley v. Maynard*, the Court struck down a New Hampshire statute that required all state license plates to contain the motto "Live Free or Die," and imposed criminal sanctions, including jail time, on anyone who obscured or concealed those words. 430 U.S. 705, 97 S. Ct. 1428, 51 L. Ed. 2d 752 (1977). In both cases, the state action *directly compelled speech*, provided *no reasonable way to avoid speaking*, and *imposed real punishment* for those who refused.

Hodges, in contrast, was simply ordered to participate in treatment. CP 119. Although violating certain provisions of the order implicate criminal consequences, the treatment provision is not one of those. RCW 26.50.110(1). Hodges was and is free to outright refuse. The statute does not contemplate, much less require, any consequence. He could theoretically face a civil motion for contempt, but that issue is not before this Court and

is, at best, a remote possibility. Further, the DVPA allows Hodges to seek modification of the order. RCW 26.50.130(1). Under the statute, he could ask that the treatment requirement be changed, or eliminated, if living with even the possibility of contempt is untenable for him. *Id.*

1. *Walker v. City of Birmingham* is inapposite.

The petition argues this issue is ripe "because Mr. Hodges cannot challenge the constitutionality of the order if he is alleged to have violated it." Petition at p. 5, note 3. In support of this argument, he cites *Walker v. City of Birmingham*, 388 U.S. 307, 87 S.Ct. 1824, 18 L.Ed.2d 1210 (1967). In *Walker*, the Supreme Court upheld a finding of criminal contempt against civil rights activists for peacefully protesting in violation of a court's *ex parte* temporary injunction. *Id. Walker* stands for the proposition that a collateral attack against the lawfulness of a court's order generally cannot be used as a defense against criminal contempt for violating that order. See e.g. *City of Seattle v. May*, 171 Wn.2d 847, 855, 256 P.3d 1161

(2011) ("The collateral bar rule precludes challenges to the validity…of a court order in a proceeding for violation of such an order...").

Imagining Hodges facing contempt proceedings for failing to do DVPT, *Walker* and the collateral bar rule would not prevent him from asserting his constitutional claims at that time. There are two main reasons for this. First, Hodges' invocation of his constitutional rights would not be a collateral attack against the DVPO. Asserting *inability to comply*, based on constitutional grounds, as a *defense* to a contempt motion is not the same as attacking the merits or the validity of the order. See e.g. *Braatz*, 2 Wn. App. 2d at 903, note 9, ("[A] contemnor may assert, as an affirmative defense, that he was unable to comply or that failure to comply is based on the Fifth Amendment right against self-incrimination." citing *King v.*

Dep't of Social and Health Services, 110 Wash.2d 793, 804-05, 756 P.2d 1303 (1988)).[9]

Second, collateral bar does not apply to challenges based the constitutionality of a *statute* after a party is charged with violating it. In a case decided shortly after *Walker*, the Supreme Court reversed a conviction, on constitutional grounds, of a defendant who challenged *the ordinance* that he violated by marching without a permit. *Shuttlesworth v. City of Birmingham, Ala.*, 394 U.S. 147, 150-51, 89 S.Ct. 935, 22 L.Ed.2d 162 (1969). Here, Hodges does not argue that the court's order is legally flawed. Rather, he argues that the statute

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[9] Hodges' Fifth Amendment and privacy claims were not raised at the appellate court level. Those claims are also not ripe, for the same reasons set forth herein. Further, Hodges overstates the significance of the required releases. DVPT is confidential counseling. WAC 388-60B-0360. The releases are "to obtain information for the assessment or treatment," to "facilitate the communication necessary for periodic safety checks and case monitoring," and "to increase the safety of the victim." WAC 388-60B-0365. Moreover, as noted in *Braatz*, Hodges could assert the Fifth Amendment as a defense to contempt.

operates in such a way that compels speech in violation of the First Amendment. *Walker* does not preclude a constitutional challenge to the *law* at the point where Hodges is charged with contempt for not engaging in treatment. Then, the issue would be ripe for review; right now, it is not.

C. The Statute Survives Under Strict Scrutiny Analysis.

Hodges has not shown that his First Amendment rights have been infringed. But even assuming that the issue is justiciable, and that strict scrutiny applies, as the Court of Appeals did (without so deciding), the statute passes muster. *Hodges*, Slip. Op. at 14-15. In order for a law to survive strict scrutiny[10], it must be "narrowly tailored" to serve "compelling

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[10] Before reaching strict scrutiny analysis, a court must first determine that speech (involving expression) is implicated. Slip. Op. at 14 (citation omitted). As the appellate court found, it seems clear that "speech" is implicated here. *Id.* The next inquiry is whether the regulation is "content-based" (one that targets speech based on its "communicative content"). *Id.* (citation omitted). The statute at issue governs domestic violence treatment; its purpose is to increase safety. WAC 388-60B-0025; RCW 26.50.150. The WACs do not require participants to say specific words and treatment is focused on

state interests." See e.g. *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371, 201 L. Ed. 2d 835 (2018). It is well established that the State has a compelling interest in protecting victims of domestic violence.[11] The question then, is

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"measurable behavioral changes." WAC 388-60B-0430; 388-60B-0310. As treatment takes place in confidential small-group settings, it's difficult to see how this speech could be considered targeted "based on its communicative content." WAC 388-60B-0315. However, the Supreme Court has defined "content based" expansively. *Reed v. Town of Gilbert*, 576 U.S. 155, 163-165,135 S. Ct. 2218, 192 L. Ed. 2d 236 (2015) (speech regulation targeted at a "specific subject matter" will be deemed "content-based."). Based on *Reed*, the appellate court moved to strict scrutiny analysis. Slip. Op. at 14-15. But *Reed* involved a law that broadly restricted posting outdoor signs; it clearly targeted speech. Should the same rule apply to laws that are not targeted primarily at speech? The implications of such application are seemingly endless. *Reed's* "broad test for what counts as a content-based regulation of speech risks destabilizing vast swaths of the regulatory state by requiring more regulations to stand up to strict scrutiny when faced with a First Amendment challenge." Free Speech Doctrine After *Reed v. Town of Gilbert*, 129 Harv. L. Rev. 1981, 1987 (2016).

[11] See e.g. *Karas*, 108 Wn. App. At 699; see also *Danny v. Laidlaw Transit Servs., Inc.*, 165 Wn.2d 200, 214, 193 P.3d 128 (2008) ("The legislature has repeatedly and unequivocally declared that domestic violence is an immense problem that impacts entire communities.").

whether the treatment requirements are "narrowly tailored" to serve the State's interest.

Hodges had a contested hearing where he testified and was represented by counsel. The court considered his declaration, his testimony, and a letter from his therapist. RP 29. Though Hodges does not see his behaviors as abusive and does not believe Pauly's fear of him is warranted, the underlying facts in this case were largely undisputed. The treatment requirement was not simply a box checked on a pattern form without due consideration. The court considered the matter "carefully" and gave a clear justification for its decision: Hodges' therapist was not addressing the issue of domestic violence and the events that gave rise to the DVPO happened in spite of his ongoing therapy. *Id.* Further, the WACs require a treatment provider to conduct a comprehensive assessment to determine the appropriate level of treatment and to develop individualized treatment goals. WAC 388-60B-0400. This limits the likelihood that a person would be required

to undergo treatment that is not appropriate for their circumstances.

Finally, the lack of any coercion or punishment narrows the scope of the law even further. The Court need not decide, for example, whether there would be a compelling justification for punishing a recalcitrant respondent for refusing treatment that he adamantly is against. Treatment was only ordered after the court found that Hodges committed domestic violence against Pauly, that he constituted a credible threat to her safety, and that treatment was indicated and appropriate. Combined with the fact that any treatment would be individualized based on Hodges' specific circumstances, the statute is narrowly tailored to achieve the State's interest in protecting domestic violence victims.

D. The Order to Surrender Weapons Does Not Violate the Second Amendment.

"The rights guaranteed by the Second Amendment are neither absolute nor unconditional." *State v. Jorgenson,* 179 Wn.2d 145, 159, 312 P.3d 960 (2013). The State has "an

important interest in restricting potentially dangerous persons from using firearms." *Jorgenson,* 179 Wn.2d at 162. The provisions of RCW 9.41.800 "reflect a legislative determination that it is in the public interest to prohibit persons subject to specific domestic violence restraining orders from possessing firearms and other dangerous weapons." *Braatz,* 2 Wn. App. 2d at 898.[12] In *Jorgenson,* this Court held that "intermediate scrutiny" was the appropriate standard to evaluate a statute similar to the one at issue. *Jorgenson,* 179 Wn.2d at 161-62. "A law survives intermediate scrutiny if it is substantially related to an important government purpose." *Id.* at 162. Again, Hodges does not dispute that there is a compelling state interest in protecting victims of domestic violence from lethal harm. Instead, he argues that the OSW impermissibly infringes on his Second Amendment rights because firearms were not involved in the incidents against Pauly. This argument is not persuasive.

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[12] See also note 11, *supra*.

The OSW was entered after a full hearing where Hodges was represented by counsel. The court found he had committed domestic violence against his former intimate partner and that he posed a credible threat to her. RP 29 ("I find that the Respondent represents a credible threat to the physical safety of the Petitioner…").[13] RP 28. On revision, the judge explicitly agreed with the commissioner's decision. RP, 12/6/19, at 21. The court's credible threat finding is well-supported: Hodges had violent outbursts in front of Pauly, he repeatedly came to her home uninvited after the relationship had ended, and Pauly credibly testified that she was afraid of him. CP 5, 7, 119; RP 9-12, 26-33. Given those findings, RCW 9.41.800(3) specifically and deliberately requires entry of an OSW in cases involving intimate partners, regardless of whether the abuse included threats with weapons. *Id.* If the parties were not intimate

[13] The court was not required to find that Hodges posed a credible threat to Pauly, rather, *if* it made that finding, *then* it *was required* to enter an OSW. The oral ruling shows the court correctly applied the law. RCW 9.41.800(3).

partners, entry of an OSW would only be permitted "upon a showing…that a party has: [u]sed, displayed, or threatened to use a firearm or other dangerous weapon in a felony, or is ineligible to possess a firearm…" RCW 9.41.800(1)-(2).[14] The statute's differentiated treatment, based on the parties' relationship, reflects the State's policy goal of protecting victims of domestic violence. This is bolstered by a robust body of social science evidence that proves access to firearms significantly increases the risk that an intimate partner will be killed by her former partner.[15]

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[14] An OSW is required if this finding is based on clear and convincing evidence, and permitted if based on a preponderance standard. *Id.*

[15] See *supra,* notes 4 and 11. See also *Reese*, 627 F.3d at 802–04. For detailed analysis and additional references, see also *United States v. Skoien*, 614 F.3d 638, 643–44 (7th Cir. 2010) ("Domestic assaults with firearms are approximately twelve times more likely to end in the victim's death than are assaults by knives or fists. (citation omitted). Part of this effect stems from the fact that some would-be abusers go buy a gun, (citation omitted), and much from the fact that guns are more lethal than knives and clubs once an attack begins. (citation omitted).").

Applying an intermediate scrutiny standard, the OSW entered against Hodges, after a judicial determination that he committed domestic violence and poses a credible threat to his ex-girlfriend, is substantially related to the important government objectives of protecting victims of domestic violence and keeping firearms out of the hands of potentially dangerous individuals. Given the established link between access to firearms and lethality in intimate partner violence cases, the law is substantially related to the State's interest, even in cases where weapons were not involved with the abuse.[16] While the Second Amendment guarantees the right of "law-abiding, responsible citizens" to keep a handgun in the home for self-defense, "the Constitution leaves ... a variety of tools for combating" gun violence including "presumptively valid gun regulations" aimed at keeping guns out of the hands of dangerous individuals. *District of Columbia v. Heller,* 554

[16] See *supra* note 15.

U.S. 570, 626-30, 636, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008). Here, a law that temporarily prohibits Hodges from possessing weapons, after he was afforded due process, and specific findings were adjudicated, is a valid regulation that serves an important government interest.[17] Hodges' Second Amendment claim necessarily fails.

IV. CONCLUSION

The Division I decision, affirming the trial court's orders in all respects, was correct. Because Mr. Hodges has not made a compelling argument as to why this Court should accept review, Ms. Pauly requests that review be denied.

Respectfully submitted this 8th day of November 2021.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this document contains **4982** words, exclusive of the title sheet, the table of contents,

[17] The firearm prohibition in RCW 9.41.800(3) is temporary. ("During any period of time that the person is subject to a court order…) and only requires temporary *surrender*; respondents need not permanently transfer ownership of their firearms. *Id.*

the table of authorities, this certificate of compliance, the certificate of service, and the signature blocks.

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I certify, under penalty of perjury under the laws of the State of Washington, that on November 8, 2021 I caused the foregoing document to be filed with the Supreme Court of the State of Washington and to be served on all participants via the Washington State Appellate Courts' Portal.

DATED this 8th day of November, 2021.

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