NO. 100482-6

SUPREME COURT OF THE STATE OF WASHINGTON

STEVENS COUNTY,

Petitioner,

v.

STEVENS COUNTY SHERIFF'S DEPARTMENT, NORTHEAST WASHINGTON ALLIANCE COUNSELING SERVICE, AND STATE OF WASHINGTON,

Respondents.

RESPONDENT STATE OF WASHINGTON'S ANSWER TO PETITIONER STEVENS COUNTY'S PETITION FOR REVIEW

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I. INTRODUCTION

The Court of Appeals correctly concluded that Stevens County's claims are not justiciable. Stevens County filed a lawsuit against its subdivisions, seeking a declaratory judgment that a state law is unconstitutional. It relied on speculative and hypothetical future violations of the rights of third parties. The Court of Appeals decision affirming the dismissal of Stevens County's claims is an unremarkable application of this Court's longstanding precedent, which has consistently required that parties satisfy the basic justiciability requirements of the Uniform Declaratory Judgments Act. Stevens County simply failed to do so. Review by this Court is not warranted.

II. ISSUES PRESENTED FOR REVIEW

1. Stevens County seeks to invalidate a state law based on the individual right to bear arms and the due process clause. Municipal corporations generally do not have rights under these constitutional provisions. Did the Court of Appeals correctly

conclude that Stevens County failed to present a justiciable controversy?

2. RCW 71.05.182 temporarily restricts possession of firearms by those who present, as the result of mental illness, a likelihood of causing serious harm to themselves or others. This restriction occurs only after a judicial determination or, in emergent situations, after an investigation and evaluation by a trained and licensed professional. Has Stevens County failed to satisfy its heavy burden of establishing that RCW 71.05.182 is facially unconstitutional?

III. STATEMENT OF THE CASE

A. Washington's Involuntary Treatment Act

Washington's Involuntary Treatment Act (ITA), RCW 71.05, was enacted in 1973. As relevant to this case, the ITA allows for the involuntarily detention of an individual in two circumstances. *First*, a designated crisis responder (who qualifies as a "mental health professional" under RCW 71.05.020(16)) can file a petition in superior court. RCW 71.05.150. *Second*, in an

emergency, a designated crisis responder (DCR) or a peace officer confronting a person presenting "an imminent likelihood of serious harm" or a person who "is in imminent danger because of being gravely disabled" may take the person into emergency custody. RCW 71.05.153(1), (2). The critical difference is that of timing. If the likelihood of serious harm is "imminent," the need for judicial oversight is excused.

In 2019, the Legislature adopted RCW 71.05.182, which temporarily restricts access to firearms by persons who have been detained pursuant to RCW 71.05.150 or RCW 71.05.153. Laws of 2019, ch. 247, § 1. RCW 71.05.182 provides that such a person "may not have in his or her possession or control any firearm for a period of six months after the date that the person is detained." RCW 71.05.182(1). The person's firearms rights are automatically restored after six months, and a person may petition the superior court for earlier restoration at any time after discharge from detention. RCW 71.05.182(2)(c), (d), (3)(a).

B. Procedural History

Stevens County filed this declaratory judgment action in Stevens County Superior Court in August 2019. CP 1. The litigation challenged the constitutionality of RCW 71.05.182, alleging that the statute, on its face, violated procedural due process and the right to keep and bear arms.[1]

The defendants were the Stevens County Sheriff's Department (the Sheriff) and Northeast Washington Alliance Counselling Services (NEWACS), both of which have professional responsibilities associated with the ITA. Both defendants were, and are, represented by the same attorney (CP 2); all three parties were, and are, represented by the Stevens County Prosecuting Attorney. The State of Washington (the State) formally intervened in this action. CP 8, 13, 23.

[1]The original Complaint included a claim under the Takings Clause (CP 1), but Stevens County later sought—and the superior court granted—leave to file an Amended Complaint which abandoned this claim. CP 27, 52; CP 48.

In February 2020, the superior court denied Stevens County's Motion for Summary Judgment and granted that portion of the State's cross motion for summary judgment which sought to affirm the constitutionality of the statue. CP 47.[2] The superior court, however, denied that portion of the State's cross motion which asserted that Stevens County's claims did not present a justiciable controversy. CP 47.

Stevens County filed a timely notice of appeal, CP 53, and the State filed a timely notice of cross appeal, CP 54. In November 2021, in an unpublished opinion, the Court of Appeals denied Stevens County's appeal and granted the State's cross-appeal, concluding that the case failed to present a justiciable controversy that can be decided under the Uniform Declaration Judgment Act (UDJA), ch. 7.24 RCW. *Stevens County v. Stevens County Sheriff's Dep't*, ___ Wn. App. ___, 499 P.3d 917, 921 (2021). One judge dissented. *Id.* at 924–

[2]Unfortunately, the February 13, 2020, hearing was not recorded.

51. Later, the Court of Appeals *sua sponte* issued an order publishing the decision. On December 16, 2021, Stevens County filed its Petition for Review, before the Court of Appeals ordered its decision published.

IV. ARGUMENT

A. Under Settled Case Law, Stevens County Failed to Present a Justiciable Controversy

Relying on this Court's precedent, both new and old, the Court of Appeals reached the unremarkable conclusion that Stevens County failed to establish a justiciable controversy. The Court of Appeals decision is not in conflict with a decision of this Court, nor does the petition present a significant question of constitutional law or an issue of substantial public interest that should be determined by this Court.

It is well established that Washington courts "steadfastly adhere[]" to the rule that declaratory judgment is available only where there is a "justiciable controversy." *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 411, 27 P.3d 1149 (2001) (quoting *Diversified Indus. Dev. Corp. v. Ripley*, 82 Wn.2d 811, 814–15,

514 P.3d 137 (1973)). A justiciable controversy requires (1) "an actual, present and existing dispute, or the mature seeds of one . . . , (2) between parties having genuine and opposing interests, (3) which involves interests that much be direct and substantial . . . , and (4) a judicial determination of which will be final and conclusive." *Id.* (quoting *Diversified Indus. Dev. Corp.*, 82 Wn.2d at 815).

In holding that Stevens County had not established a direct and substantial injury, the Court of Appeals correctly relied on this Court's recent decision in *Lakehaven Water and Sewer District v. City of Federal Way*, 195 Wn.2d 742, 466 P.3d 213 (2020). In *Lakehaven*, this Court held that "[g]enerally, municipal corporations do not have rights under the equal protection or due process clauses of the state and federal constitutions." *Id.* at 770. Stevens County's complaint is based on the due process and right-to-bear-arms clauses of the state and federal constitutions. But those are individual rights; Stevens County has no such rights and, accordingly, cannot

demonstrate a "direct or substantial financial harm" to such a right, as required to establish a justiciable controversy. *To-Ro Trade Shows*, 144 Wn.2d at 414; *see also Kitsap County v. City of Bremerton*, 46 Wn.2d 362, 366, 281 P.2d 841 (1955) ("It is elementary that one attacking the validity of an act must show that its enforcement operates as an infringement on the complaining party's constitutional rights.").

Put differently, Stevens County is not within the "zone of interests to be protected or regulated by the statute or constitutional guarantee[s] in question." *Lakehaven*, 195 Wn.2d at 769 (internal citations omitted). Stevens County is neither protected by the constitutional guarantees it invokes nor regulated by RCW 71.05.182, as Stevens County has no firearm rights that could be temporarily suspended. The Court of Appeals correctly applied these principles from this Court's decisions in *Lakehaven* and *To-Ro Trade Shows*.

All of the cases cited by Stevens County are consistent with the Court of Appeals decision here. In *Benton County v.*

Zink, 191 Wn. App. 269, 279–80, 361 P.3d 801 (2015), the county had standing because it was within the zone of interests regulated by the Public Records Act. In *Seattle School District No. 1 of King County v. State*, 90 Wn.2d 476, 493–94, 585 P.2d 71 (1978), a school district had standing because it was within the zone of interests regulated by both the statutory school financing system and article IX, §§ 1 and 2 of the Washington Constitution. In both cases, the plaintiff was directly subject to regulation by the relevant statutes. By contrast, Stevens County is not directly regulated by RCW 71.05.182, as it has no firearms rights subject to regulation.[3]

Stevens County's appeal to representational standing also does not establish a basis for review. Stevens County attempts to

[3]Stevens County also cites *Kendall v. Douglas, Grant, Lincoln and Okanogan Counties Public Hospital District No. 6*, 118 Wn.2d 1, 820 P.2d 497 (1991) and *Heavens v. King County Rural Library District*, 66 Wn.2d 558, 562, 404 P.2d 453 (1965). *Kendall* provides no support, as it held that the case was *not* justiciable due to the failure to join a necessary party. 118 Wn.2d at 11. *Heavens* addressed the UDJA in the context of ripeness, not the zone of interests. 66 Wn.2d at 562.

rely on alleged hypothetical injuries to persons not even named in its declaratory judgment action—those who *may be* detained under RCW 71.05.182. Third-party standing, however, is only available when the injured party is unable "to protect [their] own interests." *Ludwig v. Wash. State Dep't of Ret. Sys.*, 131 Wn. App. 379, 385, 127 P.3d 781 (2006). Stevens County fails to establish that those subject to RCW 71.05.182 will be unable to protect their own interests. In the absence of a personal injury or an injury to a third party that cannot protect its own interests, Stevens County's dislike of or objection to RCW 71.05.182 is insufficient to establish standing.[4]

[4]Stevens County relies on *Grant County Fire Protection District No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 83 P.3d 419 (2004), for the categorical proposition that "[m]unicipalities acting on behalf of their residents have standing to raise constitutional issues." Pet. for Rev. at 10–11 (quoting *Grant County*, 150 Wn.2d at 803). But this is not categorically true, as illustrated by the fact that the Court in *Grant County* held that the fire districts did *not* have representational standing. 150 Wn.2d at 804.

When litigation involves parties who are only hypothetically implicated by a statute, it is neither a controversy nor is it ripe for review. *See To-Ro Trade Shows*, 144 Wn.2d at 415–16. In *To-Ro Trade Shows*, the Court refused to consider claims by an RV trade show sponsor that a statute's licensing requirement burdened the First Amendment rights of unlicensed dealers because To-Ro could not show that there were any unlicensed dealers who were "waiting in the wings" to display their vehicles. *Id.* at 415. Because the "event at issue ha[d] not yet occurred" and "remain[ed] a matter of speculation," the Court dismissed the matter for lack of a justiciable controversy. *Id.* at 415–16.

So, too, here. Stevens County has not identified a specific instance where a person detained pursuant to RCW 71.05.182 suffered an infringement, rendering its claims a matter of speculation.

B. An Advisory Opinion Is Not Warranted Under the Overriding Public Import Exception

The Court of Appeals also correctly rejected Stevens County's contention that it should issue an advisory opinion. *Stevens County*, 499 P.3d at 923–24. Stevens County provides no meaningful argument that the Court of Appeals decision conflicts with any other decision; instead, it offers the conclusory assertion that the Court of Appeals decision is "patently absurd." Pet. for Rev. at 26–27.

Advisory opinions to resolve hypothetical disputes are "rare occasions," for example when the public's interest in a resolution is "overwhelming," a circumstance not present here. *To-Ro Trade Shows*, 144 Wn.2d at 416; *Diversified Indus. Dev. Corp.*, 82 Wn.2d at 814. Unlike here, cases that have applied this rare exception involve questions of government structure, legislative process, or election integrity. *See, e.g.*, *City of Seattle v. State*, 103 Wn.2d 663, 668, 694 P.2d 641 (1985) (addressing statute governing municipal annexation of territory); *State ex rel.*

Distilled Spirits Inst., Inc. v. Kinnear, 80 Wn.2d 175, 178, 492 P.2d 1012 (1972) (addressing constitutional provision limiting legislative session); *State ex rel. O'Connell v. Dubuque*, 68 Wn.2d 553, 559, 413 P.2d 972 (1966) (addressing eligibility of legislators to run for re-election). In this case, no such question is presented.

An alleged impairment of constitutional rights does not necessarily render the allegation one of overwhelming public interest. In *To-Ro Trade Shows*, for example, the Court declined to apply this exception even though To-Ro alleged infringement of its First Amendment rights. 144 Wn.2d at 416–17; *see also Walker v. Munro*, 124 Wn.2d 402, 879 P.2d 920 (1994) (declining to apply the public importance exception when both constitutional claims were involved); *League of Educ. Voters v. State*, 176 Wn.2d 808, 820, 295 P.3d 743 (2013) (same). Stevens County's constitutional challenge does not merit an exception to the well-established doctrine of justiciability.

C. The Petition Does Not Present a Significant Question of Constitutional Law or an Issue of Substantial Public Interest

Stevens County does not present a significant question of constitutional law. Because its claims are not justiciable, the constitutional questions are not actually presented. Even if they were presented, they would not be significant for two reasons. *First*, the standard applicable to facial challenges is an insuperable bar in this case. *Second*, the weight of authority strongly supports the constitutionality of RCW 71.05.182. Stevens County does not present even a *plausible* constitutional challenge, let alone a *significant* question of constitutional law.

Stevens County's facial constitutional challenge is implausible in light of the heightened standard applicable to facial challenges. That standard requires that a party establish that "there exists *no set of circumstances* in which the statute can constitutionally be applied." *Tunstall ex rel. Tunstall v. Bergeson*, 141 Wn.2d 201, 220, 5 P.3d 691 (2000) (quoting *In re Det. of Turay*, 139 Wn.2d 379, 417 n.27, 986 P.2d 790 (1999)).

It is not enough to allege that a statute might "be unconstitutional 'as applied' to the facts of a particular case." *Id.* At least some circumstances will involve clearly constitutional applications of RCW 71.05.182, such as those involving the threatened use of a firearm to harm one's self or others that results in detention pursuant to court order under RCW 71.05.150. These circumstances, standing alone, are sufficient to defeat Stevens County's facial challenge.[5]

Stevens County's constitutional claims are implausible for additional reasons as well. For one, it is well-established that similar procedural safeguards are sufficient to protect against an individual's interest in physical liberty. *See In re Det. of June Johnson*, 179 Wn. App. 579, 588, 322 P.3d 22 (2014). Stevens County provides no argument as to why the right to possess firearms should receive greater procedural protections

[5]This does not, of course, preclude individuals subject to RCW 71.05.182 from bringing as-applied constitutional challenges.

than physical liberty. In addition, the intrusion on the right to bear arms is minimal. An individual's firearms right is automatically restored after six months, and a person can petition for restoration at any earlier date. Moreover, the public interest in public safety is overwhelming. *See Morris v. Blaker*, 118 Wn.2d 133, 150, 821 P.2d 482 (1992) (recognizing a "compelling state interest in the safety of the public . . . .").

Stevens County's assertion that the State's "interest is . . . nonexistent" or "nearly nonexistent" misunderstands the significance of the decision to no longer detain a person. Pet. for Rev. at 18, 19. A decision to no longer detain a person is *not* a decision that a person no longer has a mental disorder or that such a person will not present a likelihood of serious harm at a future date. Sadly, individuals sometimes relapse into substance abuse or their mental health condition deteriorates; while stabilized during detention, both of these circumstance sometimes occur after their release. To disregard these risks, given a prior

determination that such a person has posed a likelihood of serious harm, would be both unreasonable and irresponsible.

Stevens County's constitutional arguments are also implausible in light of the fact that laws like RCW 71.05.182 are increasingly common and have been repeatedly upheld. *See, e.g.*, *People v. Jason K.*, 188 Cal. App. 4th 1545, 116 Cal. Rptr. 3d 443 (2010) (addressing California's version of the ITA, with its five year suspension of the right to bear arms for those subject to emergency detention); *Doe I v. Evanchick*, 355 F. Supp. 3d 197 (E.D. Pa. 2019) (upholding Pennsylvania's version of the ITA).

In short, Stevens County does not present any significant question of constitutional law nor any question that should be determined by this Court.

V. CONCLUSION

Stevens County has failed to satisfy any of the RAP 13.4(b) standards. This Court should deny review.

This document contains 2,771 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 18th day of January 2022.

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CERTIFICATION

I certify that Respondent State of Washington's Answer to Petitioner Stevens County's Petition for Review was served on all Parties on this date through the Court's electronic filing system. I declare under penalty of perjury under the laws of the State of Washington that this statement is true and correct.

DATED this 18th day of January 2022.

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