No. 994366

From Washington Court of Appeals, Div. II No. 53245-0-II

SUPREME COURT
OF THE STATE OF WASHINGTON

FORT DISCOVERY CORP., A WASHINGTON CORPORATION; STEPHEN ANDERSON; STEVEN GILSTROM; AND JAY TOWNE,

Petitioners,

v.

JEFFERSON COUNTY, A WASHINGTON MUNICIPALITY,
Respondent.

RESPONDENT'S ANSWER TO PETITION FOR REVIEW

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I. SUMMARY OF ARGUMENT

Petitioners ask this court to review this case as an opportunity to reconsider the test of constitutional reasonableness[1] that Washington courts have traditionally applied to the state constitutional right to bear arms based on holdings from "the maturing federal jurisprudence on the range training right and Second Amendment rights in general."[2] But this court recently rearticulated that standard in *State v. Jorgenson*, 179 Wn.2d 145, 312 P.3d 960 (2013), a case decided five years after the U.S. Supreme Court decision in *District of Columbia v. Heller*,[3] three years after the U.S. Supreme Court decision in *McDonald v. City of Chicago*[4] and two years after the Seventh Circuit's decision *Ezell v. City of Chicago*, 651 F. 3d 684 (2011) (*Ezell I*). By the time *Jorgensen* was decided, the Ninth Circuit in *U.S. v. Chovan*, 735 F.3d 1127 (2013),[5] already had adopted the same standard for Second Amendment challenges as *Ezell I*. Petitioners say *Ezell I* and similar federal cases provide the basis for reconsideration of the state constitutional standard. Petitioners' narrative of an older state constitutional analysis requiring revision in light of a new

[1] The court of appeals in *Second Amendment Found. v. City of Renton*, 35 Wn. App. 583, 586, 668 P.2d 596, 597 (1983) called this standard the "judicial test of reasonableness."
[2] Petition for Review, 14 n. 13.
[3] 554 U.S. 570, 636, 128 S. Ct. 2783, 2822, 171 L.Ed.2d 637, 684 (2008).
[4] 561 U.S. 742, 744, 130 S. Ct. 3020, 3023, 177 L.Ed.2d 894, 901 (2010).
[5] *Chovan* was decided on February 18, 2013, eight months before *Jorgenson* was decided on November 21, 2013.

federal constitutional analysis fails to comport with the actual chronology of the cases.

This case does not merit review for the related reason that the review Petitioners seek would have not affect the outcome of this case. Petitioners ask this court to adopt an "intermediate scrutiny" standard of review in applying the state constitutional right to bear arms. But the ordinance at issue already survived scrutiny under an intermediate scrutiny standard when the lower courts disposed of Petitioners' Second Amendment claims. *Fort Discovery Corp. v. Jefferson County*, 14 Wn. App. 2d 1030 *23-31 (2020). The result was the same in Division II's 2017 published decision in *Kitsap Cty. v. Kitsap Rifle & Revolver Club*, 1 Wn.App.2d 393, 416-18, 405 P.3d 1026, 1037-38 (2017) (*Kitsap Rifle*), which this court declined to review.[6] The constitutional reasonableness test approved in *Jorgenson* and used by the court of appeals in *Kitsap Rifle* and the court of appeals' decision in this case is similar to the "intermediate" tier scrutiny used by the Seventh Circuit in *Ezell I* and by the Ninth Circuit in *Chovan*. This means that Petitioners essentially ask this court for an advisory ruling, seeking a change in the established state standard of review, when that change would not alter the outcome of this case.

[6] 190 Wn.2d 1015, 415 P.3d 1198 (2018).

This court should deny review.

II. COUNTERSTATEMENT OF THE CASE

The Jefferson County Board of Commissioners (Commissioners) adopted the ordinance (CP, 606-46), to require an operating permit for commercial shooting facilities in unincorporated Jefferson County. JCC 8.50.230. The ordinance was patterned after a Kitsap County ordinance (CP, 415-16), which Division II of the court of appeals upheld in a published decision in *Kitsap Rifle*, 1 Wn.App.2d 393, 419, 405 P.3d 1026, 1038. This court denied reviw of *Kitsap Rifle*. 190 Wn.2d 1015, 415 P.3d 1198 (2018).

A. The Ordinance Regulates Only Commercial Shooting Facilities, Not the Core Right of Law-abiding, Responsible Citizens to Use Arms in Defense of Hearth and Home.

At its "core," the U.S. Supreme Court has explained, the Second Amendment protects the "right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Heller*, 554 U.S. at 635, 128 S.Ct. at 2821-22. The Second Amendment codified a pre-existing "individual right to possess and carry weapons in case of confrontation." *Id.*, 554 U.S. at 592, 128 S.Ct. at 2797. The Jefferson County ordinance does not regulate the core individual right to possess and carry weapons in case of confrontation; it regulates "commercial shooting facilities." JCC 8.50.230(1). Excluded from the definition of "commercial shooting

facility" is "[a]ny portion of a privately owned property used for lawful shooting practice solely by its owner or the owner's guests without payment of any compensation to the owner of the privately owned property or to any other person." JCC 8.50.220(10)(b).

B. The Commissioners Relied on their Police, Health, and Safety Powers in Enacting an Ordinance Tailored to the Local Concerns of Jefferson County.

"[Petitioners] agree that ensuring safety at gun ranges is an important government purpose and this issue is not in dispute." *Fort Discovery*, 14 Wn. App. 2d 1030 *34. In adopting the ordinance, the Commissioners expressly relied upon their substantial police, health and safety powers reflected in the Washington Constitution, Article XI, Section 11, RCW 36.32.120(7), and RCW 9.41.300. CP, 606.

The Commissioners found, among other things: (1) "[I]t is in the public interest to protect and preserve the continued viability of commercial shooting facilities in Jefferson County in the face of increasing population pressure and density of conflicting land uses;" and, (2) "Jefferson County has rural areas where commercial shooting facilities may be appropriate, but where emergency services are scarce and adopting a commercial shooting ordinance would promote public safety and preserve precious emergency services." CP, 606-07.

The ordinance has three minimum standards for public health and safety at commercial shooting facilities: (1) Deter unauthorized entry to any shooting range; (2) Keep all projectiles from leaving any shooting range or the commercial shooting facility; and, (3) Create no public nuisance. JCC 8.50.250.

JCC 8.50.230 requires an operating permit. JCC 8.50.230(1). The operating permit is based on an application, which includes, among other requirements: (1) A professional evaluation; (2) A safety component; (3) An operations component; (4) A sound suppression component; and, (5) An environmental health component. JCC 8.50.240(1). "The Professional Evaluation shall be the responsibility of the county under the direction of the director [of the county public health department's division of environmental public health] and shall be performed by a qualified shooting range evaluator." JCC 8.50.240(6)(a). "'Qualified Shooting Range Evaluator' means a person who has been an NRA range technical team advisor or who is a professional engineer with expertise in the design of shooting ranges." JCC 8.50.220(41). The professional evaluation must discuss safety issues not addressed in the operating permit application and discuss any proposed uses that are inconsistent with the NRA Range Source Book. JCC 8.50.240(6).

C. The NRA Range Source Book Says Shooting Ranges Require Protection for the Safety of Both those Utilizing a Shooting Range and the General Public.

The NRA publishes a manual called "The Range Source Book." CP, 545-604. The purpose of the NRA Range Source Book is to provide "guidance to assist in the planning, design, construction and maintenance of shooting range facilities." CP, 547. "A shooting range should satisfy a number of goals, including the following: . . . reasonable accommodations for the safety of both those utilizing the range and the general public." *Id.* "A safety plan links each aspect of the process - planning, design, construction and use - into an integrated program. This program is designed to reduce risks associated with the use of firearms either on or off the range." CP, 599. Further, the plan "protects the safety and health of those who live nearby." *Id.*

III. ARGUMENT

A. Hitting "the Refresh Button" Is Not Necessary.

Petitioners basis for review is their "suggestion" that "the Court 'hit the refresh button' on its holdings from before the maturing federal jurisprudence on the range training right and Second Amendment rights in general." Petition for Review, 14 n. 13. The Petition for Review makes clear that Petitioners believe the "holding" the court should "refresh" is the 2013 decision in *State v. Jorgenson,* 179 Wn.2d 145, 312 P.3d 960

(2013). But as the court of appeals pointed out,[7] *Jorgenson* was decided after the U.S. Supreme Court's decision in *District of Columbia v. Heller*, which held for the first time that the Second Amendment included an individual right to possess guns for "self-defense in the home." *Heller*, 554 U.S. 570, 636, 128 S. Ct. 2783, 2822, 171 L.Ed.2d 637, 684 (2008). *Jorgenson* also was decided after:

- The Supreme Court's 2010 decision in *McDonald v. City of Chicago*, which applied the holding of *Heller* to the states through the Fourteenth Amendment. *McDonald v. City of Chicago*, 561 U.S. 742, 744, 130 S. Ct. 3020, 3023, 177 L.Ed.2d 894, 901 (2010).
- The Seventh Circuit's 2011 decision in *Ezell I* (2011), which adopted a two-step framework: "First, we ask whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee. . . . If it does not, our inquiry is complete. If it does, we evaluate the law under some form of means-end scrutiny." *Ezell I*, 651 F.3d at 704. For a ***prohibition*** on range training (not the case with the Jefferson County ordinance), *Ezell I* applied a form of intermediate scrutiny.

[7] *Fort Discovery Corp. v. Jefferson County*, 14 Wn. App. 2d 1030 *21 (2020).

Ezell I, 651 F.3d at 708-09. ("The City must establish a close fit between the range ban and the actual public interests it serves, and also that the public's interests are strong enough to justify so substantial an encumbrance on individual Second Amendment rights.")

- The Ninth Circuit's 2013 decision in *U.S. v. Chovan*, 735 F.3d 1127 (2013), which first held the Ninth Circuit would join the two-step framework for Second Amendment challenges adopted by the Seventh Circuit in *Ezell I*. *U.S. v. Chovan*, 735 F.3d 1127, 1136 (2013). This two-step framework had been adopted ***before*** *Jorgenson* by the First, Second, Third, Fourth, Fifth, Sixth, Tenth and D.C. Circuits. *United States v. Booker*, 644 F.3d 12, 23-25 (1st Cir. 2011); *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 95-97 (2d Cir. 2012); *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010); *United States v. Chester*, 628 F.3d 673, 680-683 (4th Cir. 2010); *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012); *Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 194 (5th Cir. 2012); *United*

States v. Reese, 627 F.3d 792, 800-04 (10th Cir. 2010); and,

Heller v. D.C., 670 F.3d 1244, 1252-53 (D.C. Cir. 2011).

By 2012—before *Jorgenson* was decided—the two-step framework had become the prevailing view. *Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d at 195. Petitioners point to no subsequent federal case that does not apply the two-step framework to the "range training right." Thus, Petitioners' claim that *Jorgenson* was decided "before the maturing federal jurisprudence on the range training right and Second Amendment rights in general" does not withstand scrutiny. Accordingly, the court should deny the petition.

B. The Review Sought is Limited to the State Constitutional Standard-of-Review Question.

"Petitioners seek review ***only*** of the state constitutional standard-of-review question." Petition for Review, 2, n 2 (emphasis added). That Petitioners only are seeking review on the state constitutional issue is made clear by their further statement that they "are not seeking review of the RCW 9.41.290 pre-emption or Second Amendment grounds because, while those claims are valid, in all candor they do not believe they meet the RAP [13.4](b) grounds for granting a petition for review." Petition for Review, 2, n 2. And, whether a *Gunwall* analysis would result in "greater

protections" under Article I, Section 24 of the Washington Constitution than the Second Amendment also is not presented in the petition for review. Petition for Review, at 16-17. Because *Jorgenson, Kitsap Rifle* and the court of appeals' decision in this case all apply the long-standing constitutional reasonableness test, the petition for review should be denied.

C. The Limited Review Sought by Petitioners Will Not Matter to the Petitioner's Attempt to Invalidate the Ordinance.

The limited review sought by Petitioners will not matter to their attempt to invalidate the Jefferson County ordinance. The ordinance already passed muster using a form of "intermediate scrutiny," when the court of appeals upheld Jefferson County's ordinance using the two-step analysis required by the Ninth Circuit for Second Amendment challenges. *Fort Discovery Corp. v. Jefferson County*, 14 Wn. App. 2d 1030 *23-31 (2020). The court of appeals considered the *Ezell* cases, and then held:

- "[Petitioners] agree that ensuring safety at gun ranges is an important government purpose and this issue is not in dispute." *Fort Discovery*, 14 Wn. App. 2d 1030 *34.
- "But [Petitioners] argue, relying heavily on *Ezell*, that the County lacked sufficient 'empirical evidence' to establish that the restrictions imposed here were substantially related

to the important purpose of ensuring safety at commercial shooting facilities." *Fort Discovery*, 14 Wn. App. 2d 1030 *34-35.

- "We disagree with the [Petitioners] and hold that the ordinance and the shooting after dark restriction are substantially related to the important government purpose of ensuring safety at commercial shooting facilities ***and withstand intermediate scrutiny***." *Fort Discovery*, 14 Wn. App. 2d 1030 *35 (emphasis added).

Petitioners admit this holding that the ordinance withstands intermediate scrutiny under the Second Amendment does not meet the requirements for discretionary review. Petition for Review, 2, n 2. Accordingly, the court should not grant review.

D. *Jorgenson* Does Not Suffer "Internal Inconsistency."

After sifting through the Petition for review, it becomes clear that the Petitioner's complaint about *Jorgenson* boils down to the erroneous argument that *Jorgenson* has an "internal inconsistency." Petition for Review at 4 and 17. The petition for review claims to quote *Jorgenson* and says: "In 2013, this Court held, 'Firearms rights under [Wash. Const. art. I, § 24] are subject to reasonable regulation pursuant to the State's police power.' *State v. Jorgenson*, 179 Wn.2d 145, 155, 312 P.3d 960 (2013)

(citation and internal quotation marks omitted)." Petition for Review, 4. Then, Petitioners claim that "another passage of *Jorgenson* ***contradictorily holds*** that the standard of review is "intermediate scrutiny." *Id.* at 162." *Id.* (Emphasis added.) Finally, Petitioners present their *coupe de grace*:

> A very low standard like "reasonableness" and "police power" is inconsistent with a mid-level protection like intermediate scrutiny. This presents ***an internal inconsistency***—and on a very important topic such as the constitutional standard of review. ***After all, the standard of review usually determines the outcome of a constitutional case.***

Id. (Emphasis added.) But Petitioners' alleged "quote" from *Jorgenson* is both inaccurate and taken out of context. Quoted correctly and in context, *Jorgenson* says:

> We have long held that the ***firearm rights guaranteed by the Washington Constitution are subject to reasonable regulation pursuant to the State's police power***. *State v. Krantz*, 24 Wash.2d 350, 353, 164 P.2d 453 (1945); *see also Montana*, 129 Wash.2d at 593, 919 P.2d 1218; *Morris*, 118 Wn.2d at 144, 821 P.2d 482; *State v. Rupe*, 101 Wn.2d 664, 707 n. 9, 683 P.2d 571 (1984). *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. 554 U.S. at 626– 27 & n. 26, 128 S.Ct. 2783. And while *Heller* rejected the use of a "freestanding 'interest-balancing' approach" to determine the scope of Second Amendment rights, *id.* at 634, 128 S.Ct. 2783, we read the Washington Constitution's provisions independently of the Second Amendment pursuant to *Gunwall*.
>
> Under this court's precedent, ***a constitutionally reasonable regulation is one that is "reasonably necessary to protect***

> ***public safety or welfare, and substantially related to legitimate ends sought.***" *Montana*, 129 Wash.2d at 594, 919 P.2d 1218 (citing *State v. Spe*ncer, 75 Wash.App. 118, 121, 876 P.2d 939 (1994); *Second Amendment Found.*, 35 Wash.App. at 586–87, 668 P.2d 596). We "balanc[e] the public benefit from the regulation against the degree to which it frustrates the purpose of the constitutional provision." *Id.* The Court of Appeals applied this test to the statute at bar in *State v. Spiers*, 119 Wash.App. 85, 79 P.3d 30 (2003).

Jorgenson, 179 Wn.2d at 155-56 (emphasis added). Thus, *Jorgenson* suffers no internal inconsistency. A regulation satisfies the test of constitutional reasonableness if it is "reasonably necessary to protect public safety or welfare, and substantially related to legitimate ends sought." *Jorgenson*, 179 Wn.2d at 156, 312 P.3d at 964. The standard used in *Jorgenson* requires balancing the public benefit from the regulation against the degree to which it frustrates the purpose of the constitutional provision—to ensure self-defense or defense of state. *Id.* That is not the rational basis test, which requires only that "the law being challenged must rest upon a legitimate state objective, and the law ***must not be wholly irrelevant to achieving that objective***." *State v. Coria*, 120 Wn.2d 156, 169, 839 P.2d 890, 898 (1992) (emphasis added). Neither is it "strict scrutiny," which requires that State's purpose must be compelling and the law must be narrowly tailored to accomplish that purpose. *Coria*, 120

Wn.2d at 169, 839 P.2d at 898; *State v. Sieyes*, 168 Wn.2d 276, 294, 225 P.3d 995, 1004 (2010).

Similar to the test of constitutional reasonableness applied in *Jorgenson*, *Ezell I* also required "a fit between the legislature's ends and the means chosen to accomplish those ends, ... a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served." *Ezell I*, 651 F.3d at 708. The Ninth Circuit described the test for Second Amendment analysis as: (1) The government's stated objective to be significant, substantial, or important; and, (2) A reasonable fit between the challenged regulation and the asserted objective. *Chovan*, 735 F.3d at 1139. This is the test of constitutional reasonableness—the same standard used by this court in *Jorgenson*.

The test of constitutional reasonableness was used to evaluate claims of unconstitutionality under Article I, Section 24 many years before *Jorgenson* was decided. *City of Seattle v. Montana*, 129 Wn.2d 583, 594, 919 P.2d 1218, 1224 (1996); *Morris v. Blaker*, 118 Wn.2d 133, 144, 821 P.2d 482, 488 (1992); *State v. Spiers*, 119 Wn.App. 85, 93, 79 P.3d 30, 34 (2003); *Second Amendment Found. v. City of Renton*, 35 Wn. App. 583, 586, 668 P.2d 596, 597 (1983). In this case, the court of appeals wisely declined to compare the test of constitutional reasonableness to the federal

tiers of scrutiny. *Fort Discovery*, 14 Wn. App. 2d 1030 *23 (2020). The Supreme Court in *Heller* explicitly declined to establish a level of scrutiny for evaluating Second Amendment restrictions. *State v. Sieyes*, 168 Wn.2d 276, 294, 225 P.3d 995, 1004 (2010) (citing *Heller*, 128 S.Ct. at 2821.) Although courts have used various terminology to describe the "intermediate scrutiny" tier, all forms of the standard require: (1) the government's stated objective to be significant, substantial, or important; and, (2) a reasonable fit between the challenged regulation and the asserted objective. *Chovan*, 735 F.3d at 1139. Thus, the ***language*** of the test of constitutional reasonableness matters much more than what its ***label*** would be in the federal tiers of scrutiny.

The court of appeals followed the framework of its own published 2017 decision in *Kitsap Rifle*. *Kitsap Rifle*, which evaluated whether regulation of a shooting range violates Article I, Section 24 of the Washington Constitution. Review of *Kitsap Rifle* was sought—and denied by this court. *Kitsap Rifle*, 190 Wn.2d 1015, 415 P.3d 1198 (2018). *Kitsap Rifle* applied the test of constitutional reasonableness to evaluate whether regulations violate Article I, Section 24 of the Washington Constitution to uphold similar the Kitsap County firearms operating permit ordinance:

> Firearm Rights under article I, section 24 of the Washington Constitution "are subject to reasonable regulation pursuant to the State's police power."

> *Jorgenson*, 179 Wn.2d at 155. ***a firearm regulation is reasonable if it is*** "'***reasonably necessary to protect public safety or welfare, and substantially related to legitimate ends sought.***'" *Id.* at 156 (quoting *Montana*, 129 Wn.2d at 594). courts balance "'the public benefit from the regulation against the degree to which it frustrates the purpose of the constitutional provision.'" *Jorgenson*, 179 Wn.2d at 156 (quoting *Montana*, 129 Wn.2d at 594). We first consider the regulation's public benefit and then determine whether the regulation "unduly frustrates" the purpose of article I, section 24. *Jorgenson*, 179 Wn.2d at 157.

Kitsap Rifle, 1 Wn.App.2d 393, 418, 405 P.3d 1026, 1038 (2017) (emphasis added). Thus, the standard for evaluation of regulation of shooting ranges under Article I, Section 24 of the Washington Constitution has been clearly stated in both *Kitsap Rifle* and the court of appeals decision in this case. This is the long-standing test of constitutional reasonableness. Accordingly, review should be denied.

IV. CONCLUSION

The court should pass on Petitioners' invitation to "hit the refresh button" and should deny the petition for review.

RESPECTFULLY SUBMITTED this 11th day of February 2021.

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