IN THE COURT OF APPEALS OF THE STATE OF OREGON

Joseph Arnold; Cliff Asmussen; Gun Owners of America, Inc.;
and Gun Owners Foundation,
Plaintiffs-Respondents,

v.

Tina Kotek, Governor of the State of Oregon, in her official capacity; Ellen Rosenblum, Attorney General of the State of Oregon, in her official capacity; and Casey Codding, Superintendent of the Oregon State Police, in his official capacity,
Defendants-Appellants.

Harney County Circuit Court No. 22CV41008

Court of Appeals No. A183242

ORDER DENYING STAY; EXPEDITING APPEAL

Ballot Measure 114 (2022), which makes several statutory changes pertaining to firearms, was passed by a majority of Oregon voters in November 2022 and scheduled to go into effect in December 2022. At the trial court, respondents challenged the measure as unconstitutional under Article I, section 27, of the Oregon Constitution. The court concluded that the measure unconstitutionally burdens the right to bear arms under the Oregon Constitution and entered a general judgment permanently enjoining appellants (collectively, "the state") from enforcing Measure 114. The state filed this appeal from the general judgment. Now, the state seeks a stay from this court, pursuant to ORS 19.350, requesting the court allow Measure 114 to go into effect pending completion of the appeal. In the event the court denies the motion to stay, the state requests the court expedite the appeal. Amici curiae–the Brady Center to Prevent Gun Violence, Oregon Alliance for Gun Safety, Lift Every Voice Oregon, and Ceasefire Oregon–file a brief in support of the state's motion to stay and motion to expedite the appeal. Respondents object to a stay and to an expedited appeal schedule. For the reasons explained below, the court denies the state's motion to stay and grants the motion to expedite the appeal.

Measure 114 makes it a crime if a person "manufactures, imports, possesses, uses, purchases, sells or otherwise transfers any large-capacity magazine," defined as a magazine "that has an overall capacity of, or that can be readily restored, changed, or converted to accept, more than 10 rounds of ammunition * * * without having to pause to reload[.]" Section 11(2); section 11(1)(d). The measure also contains a permit-to-purchase provision, which requires individuals seeking to purchase a firearm in Oregon to obtain a permit. Under the measure, the sale or transfer of a firearm to a person with knowledge that the person does not possess a valid permit is a misdemeanor. Section 6(14). The provision requires "permit agent[s]" (municipal police

agencies or county sheriffs) to review all applications and determine whether an applicant is qualified to receive a permit. A permit agent "shall issue" a permit within 30 days when presented with a valid application that establishes the applicant is "qualified to be issued a permit-to-purchase;" that is, that the applicant (1) is not prohibited from obtaining a firearm under state or federal law; (2) is not prohibited from firearm possession as a result of a protective order; (3) "[d]oes not present reasonable grounds for a permit agent to conclude that the applicant has been or is reasonably likely to be a danger to self or others, or the community at large, as a result of" the person's "mental or psychological state or as demonstrated by" the person's "past pattern of behavior involving unlawful violence or threats of unlawful violence"; (4) has completed an approved firearm safety course (including an in-person demonstration of the applicant's ability to lock, load, fire and store a firearm before an instructor certified by a law enforcement agency); and (5) has paid any applicable fee. Section 4(1); section 4(3)(a).

As a part of that process, a permit agent "shall fingerprint and photograph the applicant" and "shall conduct any investigation necessary to determine whether the applicant meets the qualifications" described above. Section 4(1)(e). That requires the permit agent to request the Oregon Department of State Police to "conduct a criminal background check, including but not limited to a fingerprint identification, through the Federal Bureau of Investigation" (FBI). *Id.* Then, the department "shall report the results, including the outcome of the fingerprint-based criminal background check, to the permit agent." *Id.* The provision also requires a permit agent to report the issuance of a permit-to-purchase to the Department of State Police and, in turn, requires the department to "maintain an electronic searchable database of all permits issued." Section 4(5). If issued, a permit is valid for five years. Section 4(7)(a). If an application is denied, or if no decision is issued within 30 days, the applicant "may petition the circuit court in the petitioner's county of residence to review the denial, nonrenewal or revocation" within 30 days. Section 5(1), (5). The court reviews the application anew to determine whether the applicant meets the criteria for a permit and must issue its decision "within 15 judicial days of filing or as soon as practicable thereafter." Section 5(6), (8). The decision of the trial court is subject to appeal in this court. Section 5(11).

Following the passage of Measure 114, and before it was scheduled to go into effect, respondents filed the underlying action against the state, seeking a judgment under ORS 28.020 declaring the measure unconstitutional and permanently enjoining the state from enforcing it. Respondents asserted that Measure 114 is facially unconstitutional under Article I, section 27, which provides that ''[t]he people shall have the right to bear arms for the defen[s]e of themselves, and the State, but the Military shall be kept in strict subordination to the civil power.''

Respondents sought temporary and preliminary relief from the trial court during the pendency of the trial. The trial court granted the requested relief, restraining the state from enforcing the Measure 114 until the court determined the constitutionality of the measure. The state then requested the Oregon Supreme Court grant relief from the

restriction in the form of a writ of mandamus directing the trial court vacate the preliminary and temporary relief. *Arnold v. Kotek*, 370 Or 716, 524 P3d 955 (2023). If granted, the state's request for relief would have allowed Measure 114 to go into effect during the trial court proceedings. The court denied the state's requested relief. *Id.* at 719. By operation of that ruling, the state remained unable to implement the measure during the trial court proceedings.

Following a six-day trial, the trial court concluded that respondents' challenge to the constitutionality of Measure 114 was well taken. In its letter opinion, as to the large-capacity magazine ban, the court explained that "[m]agazines * * * are protected arms" under Article I, section 27, and that "the large capacity magazine ban does not enhance public safety to a degree necessary to burden the right to bear arms." The trial court reasoned that it "cannot sustain a restraint on a constitutional right based upon a mere speculation the restriction could promote public safety." In particular, the court stated that it could "find no scientific or analytical reasoning on this record that a ten-round limitation will increase public safety in any meaningful way" and, further, that "[t]he limited number of mass shootings in the country weighed against the massive criminalization of lawful firearm possession in Oregon does not allow for the burden caused the imposition of the large capacity magazine ban * * *."

As to the permit-to-purchase provision, the trial court stated that "Ballot Measure 114 delays the purchase of firearms for a minimum of 30 days" and the right protected under Article I, section 27, "is the ability to respond to the imminent threat of harm which is unduly burdened by the 30-day delay." Specifically, the trial court reasoned that Oregonian's have the right to use "deadly physical force under the appropriate circumstances" and that the waiting period created as a result of the permit scheme–including the time it takes for a permit agent to review the application–along with the fact that there is no guarantee that the FBI will conduct the required background check, unconstitutionally burdens that right.

Based on its conclusions, the court entered a general judgment on January 9, 2024, declaring Measure 114 "facially unconstitutional" and permanently enjoining the state from enforcing all provisions of the measure. It is from that general judgment that the state has filed its appeal. As noted, the state requests this court grant a stay of the trial court's general judgment and allow Measure 114 go into effect pending completion of the appeal. The state asserts that the factors in ORS 19.350(3) support its motion. Respondents oppose the state's motion.

As an initial matter, respondents "move to strike [the state's] motion in its entirety because it is untimely" and request the court not grant the state leave to file a late motion. Respondents argue that the state's motion to stay is untimely because the state orally moved for a motion to stay at the trial court on January 2, 2024, and the trial court denied that motion orally on the same day. Respondents contend that the court should not entertain the state's motion because the state failed to file its motion for review of the denial within 14 days as required by ORS 19.360, which provides that any

"party aggrieved by the trial court's * * * grant or denial of a stay * * * may seek review of the trial court's decision by filing a motion in the appellate court to which the appeal is made * * * within 14 days after the entry of the trial court's order."

The state does not contest the fact that it orally requested a stay at the trial court on January 2, 2024, and that it did not file its motion in this court until February 12, 2024, more than a month after the trial court orally denied the motion to stay. The state argues, however, that ORS 19.360 "is inapt" and, instead, because the court orally indicated that it would not grant a stay, ORS 19.350 and the court's "inherent discretion[ary] authority" provide the appropriate basis for the state's request. *See* ORS 19.350(5) (granting the Court of Appeals authority to rule on a motion to stay in the first instance, if the moving party establishes that the "filing for a stay with the trial court would be futile or that the trial court is unable or unwilling to act on the request within a reasonable time"). The court notes that, at the time that the state orally moved to stay the trial court's decision, and when the court orally denied the motion, the judgment had not yet been entered and so, at that time, the state could not have filed a "motion in the appellate court." ORS 19.360(1). And, despite the fact that the judgment was entered, and the notice of appeal filed thereafter, the court further agrees with the state that it would be inappropriate to strike the motion to stay, and that ORS 19.360 does not apply in this circumstance. Instead, because the trial court orally indicated, prior to entry of judgment, that it would not grant a stay, the court agrees that it has authority to rule on the motion to stay pursuant to ORS 19.350(5).

In the alternative, respondents request that, if the court does not strike the entire motion to stay, the court instead strike the entire record provided by the state in support of its motion, "including all arguments and materials [the state] did not make a part of the record when [it] moved the trial court to stay the General Judgment on January 2, 2024." Respondents argue that, when the Court of Appeals reviews the trial court's denial of a stay pursuant to ORS 19.360, the appellate court is limited to the record before the trial court on the motion to stay, so that the appellate court can only consider the arguments and evidence presented to the trial court for the purpose of deciding the motion to stay. As noted, here the court considers the motion to stay under ORS 19.350(5) and, therefore, ORS 19.360 does not apply and respondents' request on this point is not well taken.

If the court does not strike the record in its entirety, respondents request that the court strike the specific "materials which themselves were either not presented or stricken by the trial court." Specifically, respondents request the court not consider "Def. Att-1132–33, 1138–39, 1685–91 and the conclusions of Dr. Siegel" attached to the state's motion to stay. While the state, in its reply, contends that the evidence is relevant to the reasonableness of the relationship between the challenged provision and the harms the measure seeks to address–and that trial court erred in excluding this evidence–the state does not directly respond to respondents' request to strike the particular materials set forth above. It is not clear to the court that those materials are properly considered in evaluating the motion to stay. However, even if the court

considers those materials, it still concludes, for the reasons set forth below, that the state has not demonstrated that a stay should be granted under the circumstances presented here.

ORS 19.350(3) provides that a court shall consider the following factors in determining whether to grant or deny a motion to stay:

> "(a) The likelihood of the appellant prevailing on appeal.
>
> "(b) Whether the appeal is taken in good faith and not for the purpose of delay.
>
> "(c) Whether there is any support in fact or in law for the appeal.
>
> "(d) The nature of the harm to the appellant, to other parties, to other persons and to the public that will likely result from the grant or denial of a stay."

The state asserts that the ORS 19.350(3) factors support its motion to stay. Particularly, the state contends that its likelihood of success on appeal and "the equities," weigh in favor of granting a stay. *See* ORS 19.350(3)(a), (d). Respondents argue that, upon weighing the ORS 19.350(3) factors, the court should conclude that a stay is inappropriate under the circumstances of this case.

Respondents point out, and the court agrees that, in this case, unlike the usual case where a party seeks a stay to maintain the status quo while an appeal is pending, the "stay" sought by the state would do the opposite. As respondents say, stays of judgments "are favored for maintaining the status quo, not upending it," and the status quo here is the "pre-Ballot Measure 114 state of the law," which has been maintained to date. There has been no period of time in which the state could implement Measure 114. Before the measure could go into effect on the scheduled date, the measure was rendered unenforceable by operation of the trial court's temporary and preliminary relief. Following that temporary and preliminary relief, the trial court issued the permanent injunction that is on appeal in this case. Instead of maintaining the status quo, the state asks this court to permit it to proceed with implementing Measure 114, which has never been in effect and despite the fact that, at this point, it has been determined to be unconstitutional by the trial court. *See* ORS 19.350(3) (in determining whether to grant a discretionary stay, the factors listed in (a) through (d) are to be considered "in addition to such other factors as the * * * court considers important").

As to the likelihood of success on appeal, *see* ORS 19.350(3)(a), the parties make lengthy and in-depth arguments regarding the various parts of the measure and why, in their respective views, the trial court was or was not correct in concluding that the measure is facially unconstitutional under Article I, section 27, and the case law interpreting that provision. *See State v. Christian*, 354 Or 22, 307 P3d 429 (2013);

State v. Hirsch/Friend, 338 Or 622, 114 P3d 1104 (2005), *overruled on other grounds by State v. Christian*, 354 Or 22; *State v. Delgado*, 298 Or 395, 692 P2d 610 (1984); *State v. Kessler*, 289 Or 359, 614 P2d 94 (1980); *Oregon State Shooting Assn. v. Multnomah County*, 122 Or App 540 (1993), *rev den*, 319 Or 273 (1994). The court, having reviewed all of those arguments, is persuaded that both sides make reasonable and legally supported arguments in support of their positions, and that each side, therefore, has a legitimate likelihood of success on the merits. The court concludes that this factor does not weigh in support of a stay, especially given the nature of the requested stay, as described above. That is, given that the "stay" would change the existing state of affairs and that the state has not shown that it is overwhelmingly likely to obtain a reversal of the judgment, the court is not persuaded that the state's likelihood of success supports allowing Measure 114 to go into effect while this appeal is pending in the face of the trial court's determination that the measure is unconstitutional.

As to the likelihood of harm if a stay is denied, *see* ORS 19.350(3)(d), the state asserts that "the equities weigh in favor of a stay." According to the state, it "has a sovereign interest in enforcing all laws" and that interest is "particularly acute for laws that seek to protect and promote public safety amidst an epidemic of violence." The state sets out the public safety goal behind the passage of Measure 114; the measure was an effort to protect the public from gun violence and, in particular, mass shootings, and according to the state, the trial court's ruling frustrates that purpose. Although the state acknowledges that it is not possible to predict whether or when a mass shooting in Oregon might occur, in the state's view, "that is precisely the point." Amici, for their part, argue that the measure is intended to protect the public from injury or death from gun violence; in other words, the measure is aimed at protecting the public from a significant harm and, therefore, in their view, the state's request for a stay should be granted.

Respondents assert that the state has identified no nonspeculative harm that is likely to result during the pendency of the appeal if a stay is not granted. They point out that, in light of the fact that the requirements and restrictions contained in the measure are entirely new, and that implementation of the measure has been halted while this case has proceeded, the state does not point to any recent or concrete event in Oregon to support its contention that the "equities" support a stay. Indeed, respondents point out that "a further layer of speculation" is added to the state's "already speculative argument" regarding harm given that the likelihood that a mass shooting event "would occur *in Oregon* with a newly purchased firearm capable of holding more than 10 rounds as opposed to an identical firearm magazine unaffected by the measure is extraordinarily slim." (Emphasis in original.). In other words, respondents asserts that the state's argument is speculative in a couple of ways; first, it rests on the potential for a mass shooting event occurring during the pendency of the appeal, the likelihood of which, as the state acknowledges, it cannot predict; second, the state does not show that implementation of the measure would do anything to prevent such an event.

In contrast, in respondents' view, the harm that would occur as a result of

granting a stay is "concrete, definite, and irreparable." According to respondents, allowing enforcement of the measure "would lead to the immediate deprivation of the right to bear arms with the most effective and popular firearms for self-defense and deprive Oregonians who already own such firearms of their fundamental constitutional right under Article I, section 27." As to the permit-to-purchase provision of Measure 114 in particular, respondents assert that the state "advance[s] no argument explaining what harm, if any, to the public weighs in favor of allowing the enforcement" of the permit-to-purchase scheme. And, as to that portion of the measure, respondents assert that harm to them "and other Oregonians who wish to purchase firearms will be concrete, definite, and immediate" because the measure does not provide sufficient due process protections by which a person can challenge a denial of a permit.

The court concludes that the state has, as respondents assert, pointed only to harm that is entirely speculative in support of its argument. In particular, as the state acknowledges, it is impossible to predict whether, when, or where the type of event the measure seeks to prevent might occur. However, in light of the fact that, were such an event to occur it would be *extremely* harmful, the court considers more important the fact that the state has not persuasively connected the denial of a stay–and, therefore, the continued halting of implementation of the measure–with a likelihood of such harm while the appeal is pending. In turn, neither has the state persuasively connected the grant of a stay–and, therefore, the immediate implementation of the measure–with a significant reduction in the likelihood of such an event occurring while the appeal is pending. And, of course, that is the focus of a stay with respect to harm: harm that is *likely* to occur *while the appeal is pending.* Generally, merely speculative harm is not considered supportive of a party's view that a discretionary stay is warranted under ORS 19.350. *See Armatta v. Kitzhaber, 149 Or App 498*, 501-02, 943 P2d 634 (1997) (evaluating relative hardship to the parties and likelihood of irreparable harm when considering whether to grant a stay pending appeal; concluding that the identified harm, which was "entirely speculative in nature," was not supportive of party's argument regarding whether stay was warranted); *see also Arlington Sch. Dist. No. 3 v. Arlington Ed. Assoc.*, 184 Or App 97, 55 P3d 546 (2002) (considering whether to grant a stay under ORS 183.482; showing of irreparable injury means demonstration that "irreparable injury probably would result if a stay is denied" (emphasis omitted)). 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 court concludes that, under the circumstances, it is appropriate to grant the state's request (also supported by amici) to expedite the case. However, having considered respondents' arguments against that relief, the court adopts longer timelines for the briefs to be filed, as compared to those proposed by the state; the state is, of course, free to take less time to file its briefs than is set out in this order. Therefore, the state's opening brief is due 49 days from the date of this order. Respondents'

answering brief will become due 49 days thereafter, and the state's reply brief will be due 21 days from the filing of the answering brief. The court will not allow any extension of time to file the briefs absent a showing of extraordinary circumstances. Further, the court waives ORAP 7.30 such that no motion filed by the parties will toll the due date for the briefs.

The Appellate Court Administrator is directed to set the appeal for submission to a department of the court as soon as practicable.

Theresa Kidd
Appellate Commissioner
4/12/2024

c: Dustin Beuhler

Robert Koch

Tony Aiello, Jr.

Tyler D Smith

Nadia Dahab