

The Honorable David G. Estudillo

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

GABRIELLA SULLIVAN, et al.,

Plaintiffs,

v.

BOB FERGUSON, in his official capacity as
Washington State Attorney General, et al.,

Defendants,

ALLIANCE FOR GUN RESPONSIBILITY,

Intervenor-Defendant.

NO. 3:22-cv-05403-DGE

MOTION TO STAY

NOTE ON MOTION CALENDAR:
October 27, 2023

I. INTRODUCTION

Defendants Bob Ferguson, John Batiste, Patti Cole-Tindall, Leesa Manion, and Intervenor-Defendant Alliance for Gun Responsibility (Moving Defendants) move to stay this proceeding pending the *en banc* court's resolution of *Duncan v. Bonta*, Case No. 23-55805 (9th Cir.). No party opposes a stay except for Plaintiffs.

Duncan, like this case, concerns the constitutionality of a state law restricting large-capacity magazines (LCMs).¹ In 2019, a federal district court struck down California's LCM restriction, but the *en banc* Ninth Circuit reversed, upholding California's law against a

¹ California Penal Code section 32310 is more restrictive than Washington's SB 5078 because California's law bans the purchase and possession of LCMs, in addition to the manufacture, import, and sale prohibited by Washington's law.

1 Second Amendment challenge. *Duncan v. Bonta*, 19 F.4th 1087 (9th Cir. 2021) (*en banc*). As
 2 Plaintiffs acknowledged in their Complaint in this matter, that ruling effectively disposed of this
 3 suit. Dkt. # 1 ¶ 5. However, in 2022, the Supreme Court vacated the *Duncan en banc* ruling and
 4 remanded for further proceedings in light of *New York State Rifle and Pistol Association, Inc. v.*
 5 *Bruen*, 142 S. Ct. 2111 (2022). *Duncan v. Bonta*, 142 S. Ct. 2895 (2022); *Duncan v. Bonta*, 49
 6 F.4th 1228 (9th Cir. 2022) (remanding to the district court for further proceedings).

7 On remand, the same district court once again struck down California’s law and issued a
 8 permanent injunction against its enforcement. *Duncan v. Bonta*, No. 17-cv-1017-BEN, 2023 WL
 9 6180472 (S.D. Cal. Sept. 22, 2023). Plaintiffs relied heavily on this ruling in their opposition to
 10 the Defendants’ motions for summary judgment. Dkt. # 133 at 4, 9, 16. But on September 28,
 11 the original *en banc* court² issued an order “elect[ing] to accept [*Duncan*] as a comeback [case],”
 12 pursuant to Ninth Cir. Gen. Order 3.6(b), and on October 10, the *en banc* court stayed the
 13 California district court’s order pending appeal, concluding that California was likely to succeed
 14 on the merits. *Duncan v. Bonta*, No. 23-55805, Order (Dkt. # 3) (9th Cir. Sept. 28, 2023);
 15 *Duncan v. Bonta*, --- F. 4th ---, 2023 WL 6588623 (9th Cir. Oct. 10, 2023).

16 The forthcoming *en banc* opinion will almost certainly bear directly on this case. The
 17 Moving Defendants therefore believe a stay is appropriate pending a ruling by the *en banc* Court
 18 of Appeals.

19 II. ARGUMENT

20 A. Legal Standard

21 “[T]he power to stay proceedings is incidental to the power inherent in every court to
 22 control the disposition of the causes on its docket with economy of time and effort for itself, for
 23 counsel, and for litigants.” *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). In exercising its
 24 discretion to enter a stay, a court should balance the competing interests of the parties, including
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26 ² One of the judges on the original *en banc* panel has since resigned, and a new judge was drawn to replace him. Dkt. # 3 at 1 n.1, *Duncan v. Bonta*, Case No, 23-55805

“[(1)] the possible damage which may result from the granting of a stay, [(2)] the hardship or inequity which a party may suffer in being required to go forward, and [(3)] the orderly course of justice measured in terms of the simplifying or complicating of issues, proof, and questions of law which could be expected to result from a stay.” *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1110 (9th Cir. 2005) (quoting *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962)); *see also Gates v. King Cnty.*, No. C19-1185-JCC-MLP, 2021 WL 6494798, at *1 (W.D. Wash. Dec. 2, 2021); *Enriquez v. U.S. Citizenship & Immigration Servs.*, No. 2:23-CV-00097-TL, 2023 WL 2873885, at *2 (W.D. Wash. Mar. 15, 2023). Courts in this district routinely grant stays where a decision from a higher court is anticipated to provide guidance on a pending issue. *E.g., Borden v. eFinancial, LLC*, No. C19-1430JLR, 2020 WL 7324815, at *2 (W.D. Wash. Oct. 16, 2020); *Rittmann v. Amazon.com Inc.*, No. C16-1554-JCC, 2017 WL 1079926, at *2 (W.D. Wash. Mar. 22, 2017); *Centeno v. Inslee*, 310 F.R.D. 483, 491 (W.D. Wash. 2015). Here, because *Duncan* is likely to decisively resolve key issues that bear directly on this suit, the stay factors tip sharply toward staying this case pending the *en banc* court’s resolution of *Duncan*.

B. Only Plaintiffs Oppose a Stay

No party opposes a stay except Plaintiffs.³ But in rejecting Moving Defendants’ offer of a stipulated stay, Plaintiffs declined to provide any rationale for their objection. Hughes Decl. Ex. A.

C. A Stay Will Promote the Orderly Course of Justice Because *Duncan* Will, at a Minimum, Narrow and Clarify the Issues this Court Needs to Decide

A stay is warranted for straightforward reasons: because the pending *en banc* decision will be binding on this Court, the resources of the Court and parties would not be well spent in continuing to litigate this case without the benefit of the Ninth Circuit’s forthcoming decision. *Duncan* raises largely the same issues as this suit (although California’s LCM prohibition is

³ The Grays Harbor Defendants do not oppose a stay on the merits, but do oppose a stay of their motion for summary judgment regarding Plaintiffs’ claim for damages under § 1983. Hughes Decl. Ex. A. Because that issue is not likely to be affected by *Duncan*, the Moving Defendants agree that a stay of that issue is unnecessary.

1 somewhat broader than Washington’s insofar as it bans possession of LCMs). The *Duncan en*
 2 *banc* court will be asked to decide whether LCMs are arms or accessories. *See Duncan*, 2023
 3 WL 6180472, at *7. If arms, the *en banc* court will need to decide whether LCMs are otherwise
 4 covered by the text of the Second Amendment, including whether they are arms that are
 5 commonly used for self-defense and that are not most useful in military service or dangerous
 6 and unusual. *See id.* at *10, *16. And if the *en banc* court concludes that the *Duncan* plaintiffs
 7 have met their burden under *Bruen*’s first step, it will need to conduct the analogical historical
 8 analysis called for by *Bruen*’s second step. *Id.* at *20. These are, of course, the key questions
 9 this Court will need to address as well.

10 Nested within these tentpole questions are numerous ancillary questions about, for
 11 example, who bears the burden to show whether a weapon is “dangerous and unusual,” what it
 12 means to “use” a weapon in self-defense, and what weight to give to historical analogues post-
 13 dating the Fourteenth Amendment. *See id.* at *10, 16, 22. These questions are all before this
 14 Court, and *Duncan* will likely decide or give necessary guidance on many, if not all, of them.

15 In short, the *Duncan en banc* opinion will address many of the issues this Court is being
 16 asked to decide. And although it is possible that differences in the factual records assembled by
 17 the parties, or between California’s statute and Washington’s, will mean that *Duncan* might not
 18 directly control, the *en banc* opinion is very likely to at least provide controlling guidance on
 19 how this Court should apply *Bruen* to laws regulating LCMs, and how it should evaluate the
 20 evidence in this record.⁴

21 Plaintiffs’ own pleadings make clear just how important the resolution of *Duncan* will
 22 likely be to deciding this case. Plaintiffs rely heavily on *Duncan* in their opposition to
 23 Defendants’ motions for summary judgment. Dkt. #133 at 4, 9, 16; *see also id.* at 11 (citing
 24

25 ⁴ *Duncan* even involves many of the same experts as this suit, although the *Duncan* expert reports might
 26 not reflect the most up-to-date research. *Id.* at *4 (citing testimony of Prof. Lou Klarevas); *12 (discussing testimony
 of Lucy Allen); *18 n.138 (discussing testimony of Profs. Robert Spitzer and Saul Cornell); *34 n.224 (citing
 testimony of Prof. Dennis Baron).

1 *Duncan v. Bonta*, 970 F.3d 1133, 1142 (9th Cir. 2020), *rev'd on reh'g en banc*, 19 F.4th 1087
 2 (2021), *vacated and remanded in light of Bruen*, 142 S. Ct. 2895, 49 F.4th 1228 (2022)). And in
 3 their Complaint, “Plaintiffs acknowledge[d]” that the prior *en banc* ruling in *Duncan* “rejected”
 4 the very claims they are making in this suit, but nonetheless “believe[d] that case was wrongly
 5 decided,” and so “institute[d] this litigation to ... seek to have *Duncan* overruled by a court
 6 competent to do so.” Dkt. #1 ¶ 5. Plaintiffs’ repeated admissions that *Duncan* impacts—if not
 7 outright controls—the outcome here, belies any argument now that a stay is inappropriate.

8 **D. A Stay Will Benefit the Parties and Will Not Prejudice Any Party**

9 For essentially the same reasons, a stay will benefit the parties. Although summary
 10 judgment is now fully briefed, if a stay is not granted, the parties can expect to devote
 11 considerable resources to preparing for argument on their cross-motions, should this Court order
 12 it. And of course, in the event this Court does not decide the case on summary judgment, trial
 13 will require substantial investments of time and money by the Court and all parties. Without the
 14 benefit of a stay, the parties will inevitably devote significant time to preparing for issues that
 15 will be affected—if not disposed of by *Duncan*. A relatively brief stay pending resolution of
 16 *Duncan* will avoid this waste, and enable the parties to focus their energies on the issues that
 17 remain in dispute following the *en banc* court’s ruling.

18 On the flip side, no prejudice would result from a stay. When Plaintiffs advised
 19 Defendants of their opposition to a stay, they did not provide any reason for this, including
 20 prejudice. Nevertheless, Plaintiffs may argue that they are prejudiced by any delay in having
 21 their claims adjudicated. It is notable, however, that Plaintiffs have never sought preliminary
 22 injunctive relief in this matter after initially filing suit well over a year ago. *Cf. Brumback v.*
 23 *Ferguson*, 1:22-CV-03093-MKD, 2023 WL 6221425 (E.D. Wash. Sept. 25, 2023) (denying
 24 motion for preliminary injunction in a parallel challenge to SB 5078). Indeed, the individual
 25 plaintiffs allege that they already own multiple LCMs, *see* Dkt. # 42 (FAC) ¶¶ 11, 12—and SB
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5078 does not in any way affect their right to possess and use LCMs acquired prior to the law's effective date. Nor would Plaintiffs be prejudiced by any procedural unfairness, because the Moving Defendants are not seeking a stay of the remainder of the summary judgment briefing schedule; rather, they are filing their final summary judgment reply brief concurrently with this motion in the interest of fairness to Plaintiffs.

Moreover, because of the all-but-certain impact *Duncan* will have on this case, it is highly unlikely that denial of a stay will actually result in faster resolution. Practically speaking, one of three things can happen in this case absent a stay: (1) the Court will grant summary judgment to Defendants, preserving the status quo, in which case a stay would have had no effect on Plaintiffs; (2) the Court will grant summary judgment to Plaintiffs, in which case Defendants will be seeking this same stay in the Ninth Circuit that the *Duncan* defendants sought—a stay the Ninth Circuit granted; or (3) the Court will deny both sides' motions for summary judgment, in which case the parties will proceed to trial in the shadow of *Duncan*, and devote *significant* resources to trial prep, on a timeline that will likely take longer than an *en banc* ruling. Thus, even in the unlikely event Plaintiffs prevail in this Court, there is simply no realistic path in which they could obtain any meaningful relief before the Ninth Circuit decides *Duncan*.

III. CONCLUSION

For the foregoing reasons, the Moving Defendants respectfully request that this Court stay these proceedings pending the Ninth Circuit *en banc* court's decision in *Duncan v. Bonta*.

DATED this 16th day of October 2023.

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I certify that this memorandum contains
words, in compliance with the Local
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DECLARATION OF SERVICE

I hereby declare that on this day I caused the foregoing document to be electronically filed with the Clerk of the Court using the Court's CM/ECF System which will send notification of such filing to all counsel of record.

I declare under penalty of perjury under the laws of the State of Washington and the United States of America that the foregoing is true and correct.

DATED this 16th day of October 2023 at Seattle, Washington.

/s/ Andrew R.W. Hughes
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