

**CORR
CRONIN
MICHELSON
BAUMGARDNER
FOGG & MOORE** LLP

STEVEN W. FOGG
Attorney at Law

(206) 274-8669
sfogg@corrchronin.com

1145.00003

September 21, 2017

VIA E-FILING

Ms. Molly C. Dwyer
Clerk of the Court
United States Court of Appeals
For the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103-1526

Re: *Northwest School of Safety, et al. v. Ferguson, et al.*
Case No. 15-35452
October 2, 2017 Oral Argument

Dear Ms. Dwyer:

Plaintiffs submit this response to the Court's September 6, 2017 request for a supplemental letter brief on the effects of the Washington State Legislature's recent amendments to Initiative 594 and any other enforcement actions or interpretations of Initiative 594 that affect the standing inquiry. The recent amendments to Initiative 594 appear to moot the claims of some Plaintiffs, but consequently clarify previously

Ms. Molly C. Dwyer
September 21, 2017
Page 2

vague provisions to categorize Plaintiffs' historical and desired acts as unquestionably criminal.

Claims Mooted by the I-594 Amendments Passed in S.B. 5552

Two of the recent amendments to I-594 appear to moot the claims of Plaintiffs Northwest School of Safety, Puget Sound Security, Inc., and Pacific Northwest Association of Investigators, Inc.

Regarding Plaintiff Northwest School of Safety, the amendments added an exception to the requirement of background checks for the “temporary transfer of a firearm . . . under circumstances in which the transferee and the firearm remain in the presence of the transferor.” *See* RCW 9.41.113. The Northwest School of Safety originally brought suit because it provides foundational firearm safety classes to women in the instructor’s residence to ensure a non-threatening environment for beginning students and I-594 rendered the classes impossible because there was no way to provide background checks for the myriad temporary exchanges of firearms between the instructor and her students while they learn about the fundamentals of grip, safe handling, loading, and addressing malfunctions. As these temporary transfers all take place while the transferee and the firearm remain in the presence of

Ms. Molly C. Dwyer
September 21, 2017
Page 3

the transferor, it is Northwest School of Safety's understanding that the amendments now exempt these activities from I-594's requirement for background checks.

Regarding Plaintiffs Puget Sound Security, Inc., and Pacific Northwest Association of Investigators, Inc., the amendments redefined "transfer" so that it "does not include the delivery of a firearm owned or leased by an entity licensed or qualified to do business in the state of Washington to, or return of such a firearm by, any of that entity's employees or agents, defined to include volunteers participating in an honor guard, for lawful purposes in the ordinary course of business." *See* RCW 9.41.010. Both Puget Sound Security and Pacific Northwest Association of Investigators originally brought suit because they are statutorily required to own or lease the firearms used by their employees and I-594 rendered this arrangement impossible where firearms were exchanged between the company and the employees on a regular basis. As these exchanges between employer and employee are no longer considered "transfers" under I-594, it is the understanding of Puget Sound Security and Pacific Northwest Association of Investigators that the amendments now exempt these activities from I-594's requirements for background checks.

Northwest School of Safety, Puget Sound Security, Inc., and Pacific Northwest Association of Investigators, Inc. are prepared to concede that their claims are mooted

Ms. Molly C. Dwyer
September 21, 2017
Page 4

because of the recent amendments to I-594. Plaintiffs request, however, that there be a specific finding by the Court or an admission by the Defendants that these Plaintiffs' specific claims are mooted because they are no longer subject to I-594's background check requirements. One of Plaintiffs' primary arguments has been that Defendants possess an unconstitutionally broad amount of discretion over the exercise of a fundamental right because I-594 was open to multiple interpretations. Northwest School of Safety, Puget Sound Security, Inc., and Pacific Northwest Association of Investigators, Inc. do not wish to forfeit their rights to establish standing on that issue if this Court or the Defendants believe that the threat of prosecution may remain despite the amendments.

Remaining Plaintiffs' Claims are not Mooted by the I-594 Amendments Passed in S.B. 5552

The recent amendments to I-594 do not address the claims by the remaining Plaintiffs and there appears to be no indication that their claims are mooted. In fact, the amendments demonstrate that, contrary to Defendants' arguments, Plaintiffs' historical and desired acts are squarely criminalized by the statute.

The amendments fail to directly address Firearms Academy of Seattle, Inc.'s concern that the statute only exempts shooting ranges that are "authorized by the governing body of the jurisdiction in which such range is located" where the county

Ms. Molly C. Dwyer
September 21, 2017
Page 5

in which Firearms Academy is located has disclaimed any process for authorizing or permitting shooting ranges. The amendments appear to narrow the exposure of Firearms Academy of Seattle, exempting those transfers made with employees of the range or where the transferee and firearm remain in the presence of the transferor. However, so long as Lewis County does not affirmatively authorize shooting ranges, I-594 appears to criminalize transfers that occur at the shooting range outside the scope of the new amendments.

The amendments also fail to provide any relief to Darryl Lee, Xee Del Real, Joe Waldron, Gene Hoffman, Andrew Gottlieb, Alan Gottlieb, the Gottlieb Family Revocable Living Trust, or similarly situated members of the Second Amendment Foundation. In particular, while the amendments expand the exceptions for transfers between family members by including loans and expanding “family” to include in-laws, it still has no exception for cohabitating couples that have neither married nor sought domestic partnerships.¹ Further, no amendment addresses the inability of an

¹ Plaintiffs take this opportunity to notify the Court of a recent change to the cohabitating relationship of Darryl Lee and Xee Del Real. The couple is currently separated and not living together. Plaintiffs do not believe this moots their claims however, as the claims are capable of repetition yet evading review. See, e.g., *Wolfson v. Grammer*, 616 F.3d 1045, 1054 (9th Cir. 2010) (permits actions where the challenged action is too short to be fully litigated prior to its cessation or expiration and there is a reasonable expectation that the same complaining party would be subject to the same action again). Cohabitation between unmarried couples, although sometimes a lifelong choice, is often a short prelude to marriage or dissolution. That

Ms. Molly C. Dwyer
September 21, 2017
Page 6

out-of-state resident to check a firearm in their luggage during a trip to Washington or the legal impossibility of borrowing a firearm from a Washington resident where federal law prohibits a licensed dealer from transferring a handgun to a non-resident. Finally, no amendment addresses the ability of a trust and its trustees to engage in exchanges of trustee property where trusts are not qualified to do business in Washington, leaving trustees without the ability to handle firearms that are trust property.

While the amendments do not directly address the actions of these remaining Plaintiffs, they indirectly confirm that Plaintiffs' historical and desired actions are now illegal. While there was previously some vagueness to the statute that could arguably be strained to avoid prosecution, the amendments have removed that vagueness for most plaintiffs. Primarily, the addition of the exemption for "temporary transfer of a firearm . . . under circumstances in which the transferee and the firearm remain in the presence of the transferor" definitively criminalizes the historical and desired temporary transfers of Darryl Lee, Xee Del Real, Joe Waldron, Gene Hoffman, Andrew Gottlieb, and Alan Gottlieb in which a firearm has and would

the cohabitation of Darryl Lee and Xee Del Real did not survive the three years that has passed since the complaint was filed does not bar their claims when they maintain their firearms and conceal pistol licenses and are likely to find themselves in a similar position with respect to the application of I-594.

Ms. Molly C. Dwyer
September 21, 2017
Page 7

be taken out of the presence of the transferor and to which no other express exemption applies. *See* RCW 9.41.113. Similarly, the Gottlieb Family Revocable Living Trust and its trustees are now definitively breaking the law if they transfer trust firearms among themselves without a background check since only transfers by and between an entity's agents are exempted if the entity is licensed or qualified to do business in the state of Washington, neither of which is true of a traditional Washington trust. *See* RCW 9.41.010. Thus the Defendants can no longer argue that Plaintiffs are "develop[ing] their own reading of the law in an attempt to manufacture a dispute", not that the Defendants' offhand and glib dismissal of Plaintiffs' claims was ever correct.

Accordingly, there continues to be non-mooted issues regarding the standing of these remaining Plaintiffs whose historical and desired actions have now been confirmed as illegal without a background check even though it is practically or legally impossible for these Plaintiffs to comply. These facts demonstrate the concrete, particularized, and immediate injuries required by Art. III standing. *See, e.g., Babbitt v. United Farm Workers National Union*, 442 U.S. 289 (1979) (standing in pre-enforcement First Amendment challenge to union election procedures which "frustrate rather than facilitate democratic selection of bargaining representatives.

Ms. Molly C. Dwyer
September 21, 2017
Page 8

And the [union] has declined to pursue those procedures, not for lack of interest in representing Arizona farmworkers in negotiations with employers, but due to the procedures' asserted futility."); *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1016 (9th Cir 2013) (standing in pre-enforcement due process challenge where plaintiff intended to continue performing acts she had historically performed that were now outlawed on the face of a new statute, despite no threat of prosecution and the government arguing that she was not subject to prosecution); *Mobil Oil Corp. v. A.G. of Virginia*, 940 F.2d 73, 75 (4th Cir. 1991) (standing in pre-enforcement preemption challenge: "Public policy should encourage a person aggrieved by laws he considers unconstitutional to seek a declaratory judgment against the arm of the state entrusted with the state's enforcement power, all the while complying with the challenged law, rather than to deliberately break the law and take his chances in the ensuing suit or prosecution.").

Other Enforcement Actions or Interpretations of Initiative 594

Plaintiffs are aware of only one enforcement action of the measures adopted in I-594, albeit related to the restrictions on sales of firearms rather than on non-commercial transfers. It is Plaintiffs' understanding that Island County, Washington has charged a man with illegally selling a .22-caliber pistol to a minor (in violation

Ms. Molly C. Dwyer
September 21, 2017
Page 9

of federal law) who later used the firearm in a homicide. A warrant of arrest was issued in late 2016, but Plaintiffs are not aware of any further developments in that prosecution. *See State v. Mercado*, 16-1-00233-2 (Island Cnty Oct. 17, 2016) (issuing warrant). This thin prosecution history is neither unexpected nor particularly useful given that the statute is relatively new and the legislature is continuing to add to the law. *See, e.g., Doe v. Bolton*, 410 U.S. 179, 188 (1973) (lack of prosecution less important to standing analysis for recently passed statutes than for moribund statutes); *Mobil*, 940 F.2d at 76 (“It would be unreasonable to assume that the General Assembly adopted the 1985 amendment without intending that it be enforced.” (quotation and citation omitted)). However, Plaintiffs do not believe this particular prosecution will provide much guidance on the prosecution of non-commercial transfers and, in particular, the types of temporary non-commercial transfers sought to be performed here. Accordingly, Plaintiffs have no choice but to continue refraining from their historical, desired, and constitutionally protected conduct—especially where it is factually or legally impossible to comply with the statute—or roll the dice that the next transfer they make will garner the attention of a prosecutor.

As to any additional interpretations of I-594 that would assist this Court, Plaintiffs are not aware of any but would certainly welcome any guidance the State

Ms. Molly C. Dwyer
September 21, 2017
Page 10

can provide. One of the central concerns with the State's enforcement of I-594 is that it has been almost entirely hands-off. It has not prosecuted actions that appeared to clearly violate the law at the time (and have since only been expressly excluded from I-594 by the recent amendments) and yet has been silent on what citizens can do to ensure that they do not run afoul of the law. In fact, Defendants have conspicuously failed to disclaim the intent to prosecute the specific temporary transfers sought by Plaintiffs despite accusing them of manufacturing a dispute. Defendants could go a long way to resolving this dispute if it would simply issue an interpretation rather than expend resources attempting to prevent Plaintiffs from seeking clarification and relief.

Very truly yours,

CORR CRONIN MICHELSON
BAUMGARDNER FOGG & MOORE LLP

s/ Steven W. Fogg

Steven W. Fogg

cc: All Counsel of Record

Ms. Molly C. Dwyer
September 21, 2017
Page 11

CERTIFICATE OF SERVICE

The undersigned declares as follows:

1. I am employed at Corr Cronin Michelson Baumgardner Fogg & Moore LLP, attorneys of record for Appellants herein.

2. I hereby certify that on September 21, 2017, I electronically filed the foregoing document with the Ninth Circuit Court of Appeals Clerk using the CM/ECF system, which will send notification of such filing to all counsel of record for the parties.

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

Dated this 21st day of September, 2017.

s/ Christy A. Nelson _____
Christy A. Nelson