The Honorable Edirin O. Okoloko
Dept. Roving
September 5, 2019 at 9:30AM
With Oral Argument

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH

BRETT BASS, an individual; SWAN SEABERG, an individual; THE SECOND AMENDMENT FOUNDATION, INC., a Washington non-profit corporation; and NATIONAL RIFLE ASSOCIATION OF AMERICA, INC., a New York non-profit association, Plaintiffs, v. CITY OF EDMONDS, a municipality; DAVE EARLING, Mayor of the City of Edmonds, in his official capacity; EDMONDS POLICE DEPARTMENT, a department of the City of Edmonds; and AL COMPAAN, Chief of Police, in his official capacity, Defendants.	CASE NO. 18-2-07049-31 DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND CROSS-MOTION FOR SUMMARY JUDGMENT

I. RELIEF REQUESTED

In July 2018, the City of Edmonds enacted an ordinance requiring responsible storage of firearms. In enacting Edmonds Ordinance Number 4120 ("the Ordinance"), the City Council relied upon research from the Washington State Department of Health, the University of Washington School of Public Health, the U.S. Centers for Disease Control and Prevention, and independent

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research studies about the severity of gun violence in Washington State and the efficacy of responsible storage laws. The Ordinance—which imposes civil penalties only—contains two principal provisions. The first provision requires that every firearm be stored in a locked container or with a locking mechanism (such as a trigger or cable lock), unless it is being carried by or otherwise under the control of the owner or other authorized user (the "storage provision"). The second provision imposes civil penalties if a firearm owner stores the weapon in a manner that they know or reasonably should know will allow a minor or a prohibited or at-risk person to gain access to the weapon, and such a person in fact obtains the weapon (the "unauthorized access provision").

The National Rifle Association and the Second Amendment Foundation, along with two Edmonds residents, brought this lawsuit. They sought to invalidate the Ordinance, arguing that it violates Washington's firearms preemption statute, which is codified at RCW 9.41.290 and 9.41.300.

On the defendants' motion to dismiss, Judge Anita Farris held that the plaintiffs had standing to challenge the storage provision of the Ordinance but did not have standing to challenge the unauthorized access provision. After Judge Farris' decision, the National Rifle Association and the Second Amendment Foundation voluntarily dismissed their claims, leaving only the individual plaintiffs, including a third Edmonds resident who joined as a plaintiff, in the lawsuit.

This Court should grant the defendants' motion for summary judgment for two reasons.

First, the individual plaintiffs lack standing to challenge the unauthorized access provision of the ordinance. Following discovery, the individual plaintiffs point to nothing in the record that suggests they have standing to challenge this part of the Ordinance. To the contrary, in their depositions, each plaintiff confirmed that they do not store their firearms in a place where a minor, prohibited person, or at-risk person is likely to access them. There is thus no reason to disturb this

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Court's prior ruling that no party had standing to challenge the unauthorized access provision of the Ordinance.

Second, the lawsuit fails on the merits, because local laws about firearm storage are not preempted by state law. Although RCW 9.41.290 contains broad language regarding the "field of firearms regulation," that language is limited by a list of topics that describes the bounds of the preempted field, namely any local regulation of "registration, licensing, possession, purchase, sale, acquisition, transfer, discharge, and transportation of firearms." Notably absent from this list is the topic of the Ordinance: storage of firearms (or any term that might encompass storage). Though the plaintiffs urge this Court to adopt a broad reading of RCW 9.41.290—in which this lengthy list is deemed merely illustrative—the Washington Supreme Court and the Courts of Appeals have issued decisions that have limited the scope of RCW 9.41.290. Under these decisions and well-established canons of statutory construction, the Ordinance does not fall within the bounds of Washington's firearms preemption law.

Nor does the Ordinance conflict with a recently enacted state statute governing unauthorized access to firearms. Critically, the conduct required by both the state statute and the Ordinance is identical—storing one's gun in a manner such that it cannot be accessed by an unauthorized person. And, while the Ordinance varies slightly from the new state statute, Washington law governing conflict preemption permits such minor variations.

For these reasons, the defendants' cross-motion for summary judgment should be granted and the plaintiffs' motion for summary judgment should be denied.

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II. STATEMENT OF GROUNDS

A. The Enactment of Edmonds Ordinance No. 4120

On July 24, 2018, the Edmonds City Council enacted the Ordinance, which requires city residents to store firearms responsibly when not being carried by or under the owner's control. Declaration of Jessica Goldman ("Goldman Decl."), Ex. A. There are only civil penalties for violating the Ordinance. *Id.*

The Ordinance was the product of deliberative democratic process and debate. Before enacting the Ordinance, the Edmonds City Council listened to its residents and heard public comment. *Id.*, Ex. B at 8-10. At the public meeting held to discuss the proposed ordinance, city residents expressed concerns about the effects of irresponsible storage, including unintentional shootings by children, the possibility of school shootings by disturbed teenagers who access their parents' guns, and adolescent suicide. *Id*. Edmonds Councilmember Dave Teitzel commented that thirty years previously, his younger brother had accessed his father's unlocked firearm and died by suicide. *Id*. at 18. He told the other members of the Council and members of the public that he liked to think that if his father's firearm had been securely stored, his younger brother might still be alive. *Id*.

As it memorialized in the preamble to the Ordinance, the City of Edmonds "recognize[d] the grave harm that could occur when an unlocked firearm is used by someone other than the firearm's rightful owner." *Id.* Ex. A at 2. "[I]n 2015, 714 Washington State residents died from a firearm injury" and, tragically, "suicide is the leading cause of firearm death in Washington State." *Id.* at 1. Moreover, the City Council relied upon evidence that "63% of firearm-owning households in Washington state do not store their firearms locked and unloaded," and noted that a study demonstrated that safe storage laws could be effective in reducing firearm deaths and injuries:

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"[A]ccording to [a] 2018 RAND corporation analysis of firearm policies throughout the United States available evidence supports the conclusion that safe storage laws, reduce self-inflicted fatal or nonfatal firearm injuries among youth, as well as unintentional firearm injuries or deaths among children." *Id.*

The Ordinance contains two prescriptive provisions. The first requires responsible storage of firearms:

> It shall be a civil infraction for any person to store or keep any firearm in any premises unless such weapon is secured by a locking device, properly engaged so as to render such weapon inaccessible or unusable to any person other than the owner or other lawfully authorized user. Notwithstanding the foregoing, for purposes of this Section 5.26.020, such weapon shall be deemed lawfully stored or lawfully kept if carried by or under the control of the owner or other lawfully authorized user.

Edmonds, Wash. Mun. Code § 5.26.020. A locking device is defined to include cable locks, trigger locks, gun safes, and other locked containers that meet certain safety standards. *Id.* § 5.26.010(D). The second penalizes irresponsible storage that leads to access by minors and other unauthorized persons:

> It shall be a civil infraction if any person knows or reasonably should know that a minor, an at-risk person, or a prohibited person is likely to gain access to a firearm belonging to or under the control of that person, and a minor, an at-risk person, or a prohibited person obtains the firearm.

Id. § 5.26.030.

A violation of Section .020 is a civil infraction and will result in a fine of not more than $500 or community service, so long as no authorized person has accessed the gun. *Id.* § 5.26.040. The maximum fine for a violation of either provision that results in a prohibited person (someone who is prohibited from owning or possessing a firearm), minor, or at-risk person (someone who is

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at risk of harming themselves or another person) obtaining access to a gun increases to $1,000. *Id.* Finally, if a violation of either provision results in a prohibited person, minor, or at-risk person obtaining the firearm and using it to injure or cause death or in connection with a crime, the maximum fine is $10,000. *Id.* Any fine imposed under the Ordinance can be challenged in Municipal Court and appealed to Superior Court. *Id.* §§ 5.26.060, 5.26.070.

B. Procedural History

Within days of the Ordinance's passage into law, the National Rifle Association and the Second Amendment Foundation, along with two individual Edmonds residents, Brett Bass and Swan Seaberg, brought this lawsuit against the City of Edmonds, the Edmonds Police Departments, the Mayor of Edmonds, and the Edmonds Chief of Police, seeking declaratory and injunctive relief.[1] Compl. 1. The lawsuit was brought as a pre-enforcement challenge; the Ordinance had not been enforced against the individual plaintiffs or against any of the organizational plaintiffs' members, but they sought to have this Court declare it preempted by state law before it went into effect. *Id*. at 2-3.

The defendants moved to dismiss all claims for lack of justiciability, arguing that no plaintiff had alleged facts suggesting that they had standing to challenge the Ordinance and also that the claims were not yet ripe. Defs.' Mot. to Dismiss (Sep. 18, 2018). After briefing and oral argument, Judge Farris issued an Order permitting the plaintiffs to submit "further facts to support their opposition to the Motion to Dismiss . . . in either an amended verified complaint or in a sworn declaration." Order Granting Pls.' Mot. to Amend or Supplement (Nov. 8, 2018). The Court's

[1] The plaintiffs subsequently stipulated to a dismissal of claims against the two individual defendants—Mayor Dave Earling and Chief Al Compaan—leaving only the City of Edmonds and the Edmonds Police Department as defendants. Stip'd Order to Drop Certain Defs (June 3, 2019).

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Order permitted either party to submit supplemental briefing on the defendants' motion to dismiss, if the plaintiffs elected to submit further facts. *Id*.

The plaintiffs filed a verified amended complaint, which included additional facts about the plaintiffs and added a third individual plaintiff, Curtis McCullough. VAC ¶¶ 18-44. The defendants renewed their motion to dismiss, which Judge Farris denied. Defs.' Supp'l Memo (Jan. 9, 2019); Order Denying Defs.' Mot. to Dismiss (Mar. 19, 2019). In that ruling, Judge Farris concluded that the plaintiffs had "standing to challenge Edmonds City Code 5.26.020," but determined that the plaintiffs did "not have standing to challenge Edmonds City Code 5.26.030." Order Denying Defs.' Mot. to Dismiss (Mar. 19, 2019).

Following this decision, the NRA and Second Amendment Foundation stipulated to the voluntary dismissal of their claims against the defendants, leaving only the individual plaintiffs. Stip'd Mot. and Prop. Order for Vol. Dismissal (Jun. 3, 2019). According to a news article, the organizational plaintiffs "characterized their withdrawal as a strategic decision" and told reporters that the "organizations will continue to conduct and fund the legal fight." Goldman Decl., Ex. C.

C. Plaintiffs' Storage Practices

The remaining plaintiffs in this case are three Edmonds residents and gunowners who have expressed a desire to store some of their firearms in an unlocked state when they are outside of their control. VAC ¶¶ 21-22, 31-32, 41-42.

Plaintiff Curtis McCullough is a gun owner who estimates the size of his collection to be between 20 and 50 firearms, though he is not sure of the exact number. Goldman Decl., Ex. D (McCullough Dep. Tr. 10:15-22). Mr. McCullough testified that, when he is not carrying them, he stores three handguns in an unlocked and loaded state, including one handgun that he stores on top of his nightstand while he sleeps. When he and his family are away from home and when he is not

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carrying them, he does not lock these handguns. *Id.* (McCullough Dep. Tr. 29:20-22). He stores the remainder of his firearms collection in a gun safe. *Id.* (McCullough Dep. Tr. 21:9-24, 39:3-24).

Plaintiff Brett Bass testified that he generally stores his eleven firearms in a gun safe, with the exception of one gun that he carries on his person and a gun that he keeps by his bedside at night when he is asleep. *Id.*, Ex. E (Bass Dep. Tr. 21:22-30:13). Mr. Bass further testified that he sometimes leaves his gun safe unlocked when he is at home because it is convenient, and he does not "see a compelling reason to close it [the gun safe]." *Id.*, (Bass Dep. Tr. 33:25-34:8)

Plaintiff Swan Seaberg testified that he keeps two pistols in a small gun safe and he stores two rifles and a shotgun unlocked, but in a hidden location. *Id.*, Ex. F (Seaberg Dep. Tr. 28:15-20, 30:17-20). He testified that he does not lock or otherwise secure the long guns (the rifles and shotgun), when he leaves the house. *Id.*

All three plaintiffs testified that they do not and would not leave their guns where it is likely that a child, prohibited person, or at-risk person could ever access their guns. *Id.*, Ex. D (McCullough Dep. Tr. 45:16-47:2); Ex. E (Bass Dep. Tr. 35:12-37:14); Ex. F (Seaberg Dep. Tr. 42:8-44:2).

III. STATEMENT OF ISSUES

1. Whether any plaintiff has standing to challenge the validity of Edmonds, Wash. Mun. Code §5.26.030; and

2. Whether the Ordinance is a proper exercise of local police power that is not preempted by state law.

IV. EVIDENCE RELIED UPON

The defendants rely upon the Declaration of Jessica Goldman, exhibits attached thereto, and the filings and record in this case.

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V. LEGAL AUTHORITY

A. Summary Judgment Standard

Under Civil Rule 56(c), "[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." "[T]he moving party bears the initial burden of showing the absence of an issue of material fact." *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989).

B. No Plaintiff Has Standing to Challenge the Validity of Section .030 of the Ordinance.

The Superior Court previously held in this case that no plaintiff had standing to challenge the validity of Section .030 of the Edmonds Ordinance. Order Denying Defs.' Mot. to Dismiss (Mar. 19, 2019). Yet, in their motion for summary judgment, the plaintiffs again argue that they have standing to challenge Section .030's validity, without acknowledging that the Court has previously ruled against them on this issue. Pls.' Br. 15 (quoting the Court's decision but omitting the portion of the order that concludes that the plaintiffs do not have standing to challenge Section .030). They do not get a second bite at the apple on summary judgment; *see also id.* at 15 n.3.[2] In any event, the plaintiffs point to no new evidence that would provide any sort of basis for reversing Judge Farris's ruling.

The plaintiffs sought relief under Washington's Uniform Declaratory Judgments Act ("UDJA"). A case brought under the UDJA presents a justiciable case or controversy if it satisfies four requirements. It must involve:

[2] Nor is a summary judgment motion a proper vehicle to challenge the Court's standing decision on the motion to dismiss. If the plaintiffs thought that decision was incorrect, they could have moved for reconsideration under Civil Rule 59 or they could have sought discretionary review under Rule of Appellate Procedure 2.3. They did neither of these things, and now attempt to sidestep the Court's decision.

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> (1) . . . an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive.

Diversified Indus. Dev. Corp. v. Ripley, 82 Wn.2d 811, 815, 514 P.2d 137 (1973). The *Diversified Industries* test requires that all the elements must be satisfied. "All four elements must coalesce, otherwise the court steps into the prohibited area of advisory opinions." *DiNino v. State ex rel. Gorton*, 102 Wn.2d 327, 331, 684 P.2d 1297 (1984). This test incorporates "the traditional limiting doctrines of standing, mootness, and ripeness, as well as the federal case-or-controversy requirement." *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 411, 27 P.3d 1149 (2001).

Pre-enforcement standing requires a party to allege that they intend to engage in conduct that violates the statute. In *Forbes v. Pierce County*, the Court of Appeals considered the question of whether a party has standing to challenge a local ordinance, where the ordinance had not yet been enforced against them. 5 Wn. App. 2d 423, 436-37, 427 P.3d 675 (2018). In the absence of a present threat of enforcement, the Court of Appeals held that a plaintiff has standing to bring a pre-enforcement challenge to a statute only if she can show that she intends to engage in conduct prohibited by the statute. *Id.* ("Because there is not a current threat of criminal penalty, the appellants' standing to challenge [the law] must be based on future violations."). The court therefore dismissed the challenge as nonjusticiable because the plaintiffs "have not made any allegation that they intend to engage in conduct prohibited by [the law] in the future." *Id.*

The plaintiffs before this Court fail that test. Judge Farris previously held that, on the pleadings, the plaintiffs lacked standing to challenge Section .030—the second provision of the Ordinance. And now, with the benefit of discovery, the lack of standing is further confirmed. The

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three plaintiffs each testified that they do *not* intend to engage in any conduct that is proscribed by Section .030. *Compare* Goldman Decl., Ex. D (McCullough Dep. Tr. 45:16-47:2); Ex. E (Bass Dep. Tr. 35:12-37:14); Ex. F (Seaberg Dep. Tr. 42:8-44:2), *with* Edmonds, Wash. Mun. Code § 5.26.030. Under *Forbes* and *Diversified Industries*, they have thus failed to present to this Court a justiciable dispute about the validity of Section .030.

Even though they do not present a justiciable controversy as to Section .030, the plaintiffs argue that this Court should opine on its validity because they have standing to challenge Section .020. But that is not how Washington standing law works. Although the defendants do not contest that the plaintiffs have standing to challenge Section .020, the plaintiffs' standing to challenge one section of a law is not determinative of whether they can challenge other sections. *See Forbes*, 5 Wn. App. 2d at 435, 437 (holding that the plaintiffs had standing to challenge one provision of the ordinance at issue but not another). The plaintiffs cite no authority for their bold contention that the Court can reach the question of Section .030's validity, even though no plaintiff has argued that it is likely that section will ever be enforced against him. The plaintiffs previously made this same argument to Judge Farris in their opposition to the defendants' supplemental motion to dismiss, and Judge Farris rejected it when she ruled that the plaintiffs did not have standing to challenge Section .030. Pls.' Supp. Memo. 10-11 (Jan. 15, 2019); Order Denying Defs.' Mot. to Dismiss (Mar. 19, 2019).

In effect, the plaintiffs' request that this Court rule on Section .030's validity is a request for an advisory opinion. While Washington courts do issue advisory opinions on rare occasions, they do not do so in cases, such as this, where the question involves "a hypothetical or speculative controversy, where concrete harm has not been alleged." *Walker*, 124 Wn.2d at 415 (reviewing cases where the Supreme Court issued advisory opinions and where the Supreme Court declined to

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do so and concluding that, with few exceptions, courts must not issue declaratory judgments as to "abstract or speculative questions."). Thus, in *Forbes*, the Court of Appeals determined that the plaintiffs had standing to challenge one provision of the ordinance at issue but had not presented the court with a justiciable dispute as to a separate section of the same ordinance. 5 Wn. App. 2d at 435, 437. Other parties with standing can contest the validity of Section .030, but not *these* plaintiffs, who have not alleged any likelihood that the second part of the Ordinance will be enforced against them.

C. The Edmonds Ordinance Is Not Preempted by State Law.

The City of Edmonds enacted the Ordinance in an attempt to create a local solution to the problem of firearm injuries and deaths that could be prevented if gunowners take a few basic steps to responsibly store their firearms. This was a proper exercise of the City of Edmonds' police power. Although the plaintiffs argue that RCW 9.41.290 preempts the Ordinance, the Ordinance was crafted to target only firearm storage practices and thus falls outside of the scope of the types of local firearms laws that the Legislature has preempted. The text, structure, and history of the preemption statute all weigh in favor of finding that the Ordinance is not preempted.

1. The Washington Constitution Grants Municipal Governments Broad Police Power to Enact Laws to Protect Public Safety.

The Washington Constitution grants broad powers to cities: "Any county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws." Const. art. XI, § 11. This section "is a direct delegation of the police power, as ample within its limits as that possessed by the Legislature itself." *Cont'l Baking Co. v. City of Mt. Vernon*, 182 Wash. 68, 72, 44 P.2d 821 (1935) (citing *Detamore v. Hindley*, 83 Wash. 322, 145 P. 462 (1915)). "The scope of police power is broad, encompassing all

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those measures which bear a reasonable and substantial relation to promotion of the general welfare of the people." *State v. City of Seattle*, 94 Wn.2d 162, 165, 615 P.2d 461 (1980).

Local ordinances enacted pursuant to municipal police power carry a presumption of validity. *Second Amendment Found. v. City of Renton*, 35 Wn. App. 583, 589, 668 P.2d 596 (1983) ("Municipal ordinances enacted in the exercise of the municipality's police power are presumed to be valid enactments."); *accord Heinsma v. City of Vancouver*, 144 Wn.2d 556, 561, 29 P.3d 709 (2001) ("Municipal ordinances are presumed to be valid, and grants of municipal power are to be liberally construed."); *City of Seattle v. Wright*, 72 Wn.2d 556, 559, 433 P.2d 906 (1967). For this reason, "a statute will not be construed as restricting a municipality's authority to enact an ordinance if the ordinance and the statute can be harmonized." *Heinsma*, 144 Wn.2d at 564.

A local ordinance that was properly enacted under municipal police powers may be preempted if the Legislature has expressly or implicitly preempted a field of regulation that includes the local ordinance or if the local ordinance irreconcilably conflicts with a state statute. *Id*. at 561; *Watson v. City of Seattle*, 189 Wn.2d 149, 171, 401 P.3d 1 (2017) ("A state statute preempts an ordinance if the statute occupies the field or if the statute and the ordinance irreconcilably conflict."). It is the challengers' burden to prove that an ordinance is preempted. *See Edmonds Shopping Ctr. Assocs. v. City of Edmonds*, 117 Wn. App. 344, 355, 71 P.3d 233 (2003). The plaintiffs have argued both that the Ordinance is unlawful based on the field preemption language contained within RCW 9.41.290 and because it conflicts with the newly enacted state law governing unauthorized access to firearms. Both arguments are wrong.

2. RCW 9.41.290 Does Not Preempt Regulation of Firearm Storage.

The plaintiffs' main argument is that RCW 9.41.290 preempts the Ordinance. But while that statute does contain broad language, it is not so broad as to cover local firearm storage laws.

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Specifically, it preempts the "entire field of firearms regulation," and then describes with greater precision the categories included in this field: any local ordinance relating to "registration, licensing, possession, purchase, sale, acquisition, transfer, discharge, and transportation of firearms." RCW 9.41.290. Conspicuously absent from that list is storage. "Legislative silence is a poor foundation on which to build a case for express field preemption." *Watson*, 189 Wn.2d at 172. The text and structure of the statute, taken as a whole, make plain that its scope is limited by the list of enumerated topics. "Storage" is not listed, and it is not for a court to add a word – indeed, an entire category – when the Legislature has not done so. *State v. Larson*, 184 Wn.2d 843, 851, 365 P.3d 740 (2015) ("It is beyond our power and function to add words or clauses to an unambiguous statute when the legislature has chosen not to include that language.") (internal quotation marks omitted). But, even should this Court find that the scope of RCW 9.41.290 is ambiguous, the presumption in favor of municipal enactments requires this Court to find the Ordinance not preempted. *See Heinsma*, 144 Wn.2d at 561.

The plaintiffs contend that the categories listed by RCW 9.41.290 are non-exhaustive, and that the omission of "storage" from that list does not exclude the Ordinance from the scope of its preemption. *See* Pls.' Br. at 6-8. The plaintiffs point to two phrases—"entire field of firearms regulation" and "any other element relating to firearms or parts thereof"—in asserting that the storage of firearms is "necessarily" included within the reach of the statute. Pls.' Br. at 7. But reading RCW 9.41.290 in its entirety and in the context of the legislative history and intent, as required, leads to the opposite conclusion—for several reasons.

First, RCW 9.41.290 is subject to the doctrine of *ejusdem generis*, which is the "well-established principle of statutory interpretation. . . that specific words modify and restrict the meaning of general words when they occur in a sequence." *State v. Flores*, 164 Wn.2d 1, 13, 186

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P.3d 1038 (2008). This is true where, as here, "general and specific words [are] clearly associated in the same sentence in a pattern such as '[specific], [specific], or [general]' or '[general], including [specific] and [specific].'" *Id*. In *State v. Flores*, the Supreme Court interpreted a statute that provided that "'[i]t is unlawful to compensate, threaten, solicit, or in any other manner involve'" a minor in a drug transaction. *Id*. at 10 (quoting former RCW 69.50.401(f)). The Court determined that the specific verbs "compensate, threaten, solicit" restrict the scope of the general phrase "in any other manner involve" and thus make clear that "the legislature did not intend [the statute] to encompass the act of exposing a child to an unlawful drug transaction" without attempting to actively involve the child in the transaction. *Id*. at 13; *see also Larson*, 184 Wn.2d at 849-50 (holding that the "illustrative examples" in the phrase "an item, article, implement, or device designed to overcome security stems including, but not limited to, lined bags or tag removers" were "intended to *limit* the scope of the statute" and therefore determining that the statute was not intended to cover wire cutters, because they were not "an article created by a thief for the specific purpose of committing retail theft," unlike lined bags or tag removers).

So too here. The phrase "entire field of firearms regulation" is modified and restricted by the specific categories listed in sequence with it: "registration, licensing, possession, purchase, sale, acquisition, transfer, discharge, and transportation." RCW 9.41.290. These categories concern either firearms transactions ("registration, licensing, . . . purchase, sale, acquisition, transfer") or possession and use ("possession, . . . discharge, and transportation"). Conspicuously absent from this list is the *storage* of firearms when they are not involved in a transaction or otherwise in the owner's possession, being carried, or being used, which is precisely—and only—what the Ordinance covers. It is therefore evident from the plain text of the statute that the Legislature did not intend RCW 9.41.290 to preempt local regulation of firearms storage. Indeed, the plaintiffs

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agree that "[t]he examples in the text of the statute. . . are the best indication of the legislature's intent." Pls.' Br. at 7.

The language and context of the statute also indicate that the latter phrase relied on by the plaintiffs ("any other element relating to firearms or parts thereof") is not a separate category, but modifies the word "firearms" that appears immediately before it. As such, it is not material to the question of the scope of the provision's preemption.

Second, when the Legislature wants to address and preempt local ordinances relating to firearms storage, it knows how to do so. *See Flores*, 164 Wn.2d at 13 (reasoning that the Legislature's failure to specifically address a topic meant that it was not covered, especially given that similar statutes expressly addressed the topic, which indicated that "when the legislature wants to protect children from the harmful effects of exposure to criminal activity, it knows how to say so"). Numerous states across the country have expressly included storage in their firearms preemption statutes.[3] The Legislature could have done the same here, but it did not. Indeed, it has amended the preemption statute several times precisely to make it specific to all the areas that would be preempted. Accordingly, the absence of storage (or any equivalent) in the statute must be given meaning: it is not preempted.

[3] *Compare* RCW 9.41.290 *with, e.g.*, Ariz. Rev. Stat. Ann. § 13-3118(A) ("Except for the legislature, this state and any agency or political subdivision of this state shall not enact or implement any law, rule or ordinance relating to the possession, transfer or *storage* of firearms other than as provided in statute.") (emphasis added); Idaho Code § 18-3302J ("Except as expressly authorized by state statute, no county, city, agency, board or any other political subdivision of this state may adopt or enforce any law, rule, regulation, or ordinance which regulates in any manner the sale, acquisition, transfer, ownership, possession, transportation, carrying or *storage* of firearms . . . .") (emphasis added); Ind. Code § 35-47-11.1-2 ("[A] political subdivision may not regulate . . . the ownership, possession, carrying, transportation, registration, transfer, and *storage* of firearms. . . .") (emphasis added); Ky. Rev. Stat. § 65.870 ("No existing or future city, . . . may occupy any part of the field of regulation of the manufacture, sale, purchase, taxation, transfer, ownership, possession, carrying, *storage*, or transportation of firearms . . . .") (emphasis added); Nev. Rev. Stat. Ann. § 268.418 ("The Legislature hereby declares that . . . [t]he regulation of the transfer, sale, purchase, possession, carrying, ownership, transportation, *storage*, registration and licensing of firearms . . . is within the exclusive domain of the Legislature . . . .") (emphasis added).

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Third, statutes "must be interpreted so that all the language used is given effect, with no portion rendered meaningless or superfluous." *Larson*, 184 Wn.2d at 850 (internal quotation marks omitted). But the plaintiffs' interpretation of the statute renders the entire list superfluous. To the plaintiffs, RCW 9.41.290 encompasses an "extremely broad preemptive scope," (Pls.' Br. at 8), well beyond the topics listed, covering anything that has to do with guns whatsoever. But if that were so, it would have been unnecessary for the legislature to specifically enumerate these categories, and they would be rendered superfluous. As the Supreme Court recently held in interpreting an analogous statute that included a list of examples, that list must be given meaning, otherwise "the examples enumerated by the legislature would be superfluous and provide no additional guidance on the application of the statute." *Larson*, 184 Wn.2d at 850-51.

The Court of Appeals' reasoning in *Kitsap County v. Kitsap Rifle & Revolver Club* is also instructive. 1 Wash. App. 2d 393, 405 P.3d 1026 (2017). In that case, the Court of Appeals interpreted the same passage of RCW 9.41.290 that is now before this Court and concluded that the enumerated list limited the scope of the preempted field. The case involved a challenge to a county ordinance that required that shooting ranges apply for and receive an operating permit. *Id*. at 399. The shooting range argued that the law was preempted by RCW 9.41.290 because the State had preempted "the entire field of firearms regulation." *Id*. at 406. The Court of Appeals held that the county ordinance was not a firearms regulation because, although the preemption statute plainly covered local regulation of the discharge of firearms, the local law did not regulate discharge of firearms—it regulated shooting ranges. *Id*. at 406-07. The Court of Appeals looked to the chapter of the Revised Code in which RCW 9.41.290 is located for context and for evidence of legislative intent:

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> RCW 9.41.290 does not make any reference to the regulation of shooting facilities. In addition, nothing in chapter 9.41 RCW pertains to shooting facilities. The multiple provisions in that chapter primarily focus on the possession, delivery, sale, and use of firearms. There is no indication that the legislature intended to preempt local ordinances requiring shooting facilities to obtain operating permits.

Id. at 406. The Court of Appeals acknowledged that state law preempts the regulation of firearm discharges and that shooting facilities like the Kitsap Rifle & Revolver Club were places "where people can discharge firearms," but this was not enough to bring the regulation of a shooting facility within the bounds of the preemption statute. *Id*. at 407. The language of the statute matters, and *Kitsap Rifle & Revolver Club* reinforces that the statute's list of enumerated topics sets the outer bounds of the preempted field.

Finally, though the word "storage"—or its equivalent—is not included in the statute's list of preempted topics, the plaintiffs try to argue that storage is encompassed within the statute's preemption of local laws regarding "possession." Pls.' Br. at 7. But storage and possession are not the same thing. And, critically, the Ordinance does *not* apply when a gun is in someone's possession—i.e. when a person is carrying a gun or it is under a person's control.[4] *Compare* "Possession", Merriam-Webster.com (accessed July 30, 2019) ("control or occupancy of property without regard to ownership") *with* Section .020 of the Ordinance ("for purposes of this Section 5.26.020, such weapon shall be deemed lawfully stored or lawfully kept if carried by or under the control of the owner or other lawfully authorized user").

The plaintiffs' reliance on the word "possession" is further weakened by an examination of how Title 9, Chapter 41 of the Revised Code of Washington uses the word "possession" in the

[4] The plaintiffs also suggest that "ownership" includes "storage." Pls.' Br. at 7. But the preemption statute does not include "ownership" in its list of preempted topics. And even if it were included, ownership is a question of "who has the legal or rightful title to something"— Owner," Merriam-Webster.com (accessed July 30, 2019), —whereas storage is simply a question of how and where a firearm is kept.

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context of firearms and other weapons — namely, to specify a state in which one carries a weapon on one's person, rather than a general term broad enough to encompass storage. For instance, RCW 9.41.300 prohibits any person from entering certain sensitive places (jails, mental health facilities, airports), if that person "knowingly possesses or knowingly has under his or her control a weapon." That prohibition would make little sense if possession were to include storage at home, because there would be no reason to restrict someone from sensitive places if they did not have their weapon on their person. Similarly, in RCW 9.41.060, the Legislature exempted from the concealed carry statute's limitations "[a]ny person engaged in the business of manufacturing, repairing, or dealing in firearms, or the agent or representative of the person, if *possessing, using, or carrying* a pistol in the usual or ordinary course of the business." (Emphasis added). Again, it would not make sense to limit the applicability of concealed carry regulations when a firearm is stored at home—because a firearm cannot be stored and carried under concealment at the same time.

Thus, the text and structure of the statute make plain that the preempted field is not unbounded but is instead defined by the list of enumerated areas. And storage—or anything related to storage—is conspicuously absent from that list.

3. Legislative History and Washington Precedent Support This Reading of RCW 9.41.290.

In the event that this Court finds that the scope of preemption is ambiguous, it may also look to legislative history and intent. *Larson*, 184 Wn.2d at 854 ("interpretive tools such as legislative history" are appropriate where the plain language of a statute is ambiguous). The legislative history of RCW 9.41.290 supports two conclusions. First, in the past, the Legislature has responded and "corrected" what it viewed as erroneous interpretation of RCW 9.41.290, but it has not amended the statute in response to decisions, such as *Kitsap Rifle & Revolver Club*, that have narrowly

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interpreted the scope of field preemption. Second, the Legislature's primary concern was preempting overlapping municipal criminal codes.

In *Cherry v. Municipality of Metropolitan Seattle*, the Supreme Court explained that where the scope and coverage of preemption was unclear, it was appropriate to look to other sources to glean the Legislature's intent:

> It is not clear from the language of the statute alone whether the Legislature intended RCW 9.41.290 to preempt and invalidate the authority of municipal employers to regulate or otherwise prohibit a municipal employee's possession of firearms while on the job. We therefore look beyond the language and resort to extrinsic aids, such as legislative history, in determining the scope of the Legislature's intended preemption in enacting RCW 9.41.290. We also seek help in interpreting this statutory section by determining legislative intent in the context of the whole statute and its general purpose.

116 Wn.2d 794, 799, 808 P.2d 746 (1991) (citations omitted).

RCW 9.41.290 has been amended repeatedly in response to court decisions and other issues. As other states have expressly preempted storage and in the context of an ongoing debate about the proper scope of preemption in Washington, the Legislature has not amended RCW 9.41.290 to include storage as one of the enumerated topics that is expressly covered by that statute. And even after the *Kitsap Rifle & Revolver Club* decision – which endorsed an interpretation of the preempted field that is cabined by the list of enumerated topics – the Legislature has stayed conspicuously silent.

As the plaintiffs concede in their briefing, the Legislature *has* corrected court interpretations of other aspects of the preemption law. Pls.' Br. at 8-9. But the plaintiffs' brief misconstrues the legislative record—and overstates its impact. They now argue that "every time a court has sought to restrict the preemptive field of regulation, the Legislature has forcefully struck back and reaffirmed or expanded the all-inclusive scope of RCW 9.41.290," Pls.' Br. at 9, but this is plainly

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not true.[5] Washington courts repeatedly have upheld local regulations related to firearms against preemption challenges. *Watson*, 189 Wn.2d 149; *Estes v. Vashon Maury Isl. Fire Protection Dist. No. 13*, 129 Wash. App. 1042 (2005) (unpublished); *Pac. Nw. Shooting Park Ass'n v. City of Sequim*, 158 Wn.2d 342, 144 P.3d 276 (2006); *Kitsap Rifle & Revolver Club*, 1 Wash. App. 2d 1026. The Legislature did not amend or clarify the preemption statute in response to any of these decisions. Given the Legislature's willingness to correct other court rulings—such as the Court of Appeals' decisions in *City of Seattle v. Ballsmider*, 71 Wn. App. 159, 856 P.2d 113 (1993) and *Second Amendment Foundation v. City of Renton*, 35 Wn. App. 583, 668 P.2d 596 (1983)—the Legislature's silence in the face of decisions endorsing a narrow reading of the scope of field preemption is instructive.

The legislative history of RCW 9.41.290 provides another basis for finding that the Ordinance is not among the local laws that the Legislature intended to preempt. Washington courts have held that the Legislature's primary intent in passing Section 290 was to "reform that situation in which counties, cities, and towns could each enact conflicting local *criminal* codes regulating the general public's possession of firearms." *Cherry*, 116 Wn.2d at 801 (emphasis added); *Estes*, 129 Wn. App. at 1042; *Pac. Nw. Shooting Park*, 158 Wn.2d at356. The plaintiffs argue that *Cherry* is inapplicable here because it was concerned with whether internal employment policies are "laws and ordinances" and thus covered by RCW 9.41.290. Pls.' Br. at 2. But that reading oversimplifies *Cherry*. To be sure, *Cherry* was concerned, in part, with whether workplace rules fell within the category of municipal ordinances subject to the preemption law, but its reasoning relied upon an analysis of the legislative history, and determined that, in enacting RCW 9.41.290, the Legislature

[5] The plaintiffs' argument was used verbatim in an appellate brief field by the NRA, represented by the same counsel as here, in *Kitsap County*. Goldman Decl., Ex. G (NRA Brief at 9, n.4). That argument did not prevail before the Court of Appeals.

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had "sought to eliminate a multiplicity of local laws relating to firearms and to advance uniformity in criminal firearms regulation." 116 Wn.2d at 801.

Plaintiffs argue that "[a] distinction between civil and criminal regulation would lead to absurd and unworkable results." Pls.' Br. at 10. But this is a strawman argument. Washington courts have been making precisely that distinction for nearly three decades without incident, by recognizing that local criminal regulations will automatically be suspect (and scrutinized accordingly), while requiring a stronger showing from plaintiffs who seek to invalidate local civil ordinances. *See, e.g. Estes*, 129 Wash. App. 1042 (holding that the district's policy was not preempted by state law, because "the fire district policy here . . . does not fall within the scope of the criminal firearms regulations that the *Cherry* court viewed as governed by RCW 9.41.290"); *Pac. Nw. Shooting Park*, 158 Wn.2d at 356 & n.6 (citing *Cherry* for conclusion "that the central purpose of RCW 9.41.290 was to eliminate *conflicting municipal criminal codes* and to 'advance uniformity in *criminal* firearms regulation'" and further finding "the penal nature of the Uniform Firearms Act, chapter 9.41 RCW, to be particularly significant," and noting "that the legislature placed the preemption clause in Title 9 of the Washington criminal code rather than in Title 35, which governs activities of cities and towns, or Title 36, which governs activities of counties" (emphasis in original)). Even *Chan v. City of Seattle*, 164 Wash. App. 549, 265 P.3d 169 (2011), which Plaintiffs rely so heavily upon, upholds this reasoning. Instead of disputing *Cherry* and its progeny, the Court of Appeals in *Chan* relied upon the fact that the local ordinance, while civil, could result in criminal penalties for trespass. *Id*. at 565-66.[6] This makes sense: a civil regulation

[6] Here, there is no possibility of criminal sanction for violation of the Edmonds ordinance – despite plaintiffs' vague protestations that there might be a criminal effect, Pls.' Br. at 10 n.1, they point to no method by which a resident who violated the Ordinance could find themselves in criminal proceedings.

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that can result in criminal penalties is – to the person against whom the law is enforced – no different from a criminal law and should therefore be scrutinized closely.

The plaintiffs further argue that *Cherry* should be discounted because of a 1994 amendment to RCW 9.41.290 which added language that expressly preempts civil zoning regulations that are used to regulate where firearms are sold. Pls.' Br. at 2. But if anything, the 1994 amendment suggests that the Legislature had to make express that civil zoning regulations were also preempted because it was not apparent from the statute, as it was written, that it was intended to preempt civil zoning regulations. If the Legislature was concerned about the *Cherry* Court's analysis, it would have specified that the preemption law was intended to apply equally to both civil regulations—including zoning laws—and criminal regulations. But it did not. And, to the extent that the Legislature added one area to the preemption statute (civil zoning regulations) in 1994, "[e]xpanding preemption in one area does not mean that the legislature intended to extend preemption to other areas." *Watson*, 189 Wn.2d at 173.

In sum, because the language, structure, and history of Chapter 9.41 RCW indicate that the Legislature did not intend to include storage of firearms within the preempted field, and because of the strong line of precedent holding that the Legislature's primary intent in enacting the state preemption law was to ensure uniformity of *criminal* laws, the Ordinance does not fall within the category of laws that the Legislature intended to preempt.

4. The Ordinance Also Does Not Conflict with the Recently Enacted State Child Access Prevention Law.

In 2018, Washington voters overwhelmingly voted to enact Initiative No. 1639. The new state law (the relevant part of which is codified at RCW 9.41.360) includes a section that creates criminal penalties for irresponsible gun owners if they allow children or prohibited persons to

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access their firearms. The plaintiffs argue that Sections .020 and .030 of the Ordinance conflict with the ballot initiative, but their argument fails under the standard that Washington courts use to determine whether a local law conflicts with a state law. Pls. Br. at 11-13.

Both RCW 9.41.290 and the Washington Constitution provide for conflict preemption – that is, they displace local laws that are inconsistent with state law. *Watson*, 189 Wn.2d at 171; *Brown v. City of Yakima*, 116 Wn.2d 556, 559, 807 P.2d 353 (1991). As the Supreme Court announced in *Watson*, the standard in the context of local firearms ordinances is that "[c]onflict preemption occurs when 'an ordinance permits what state law forbids or forbids what state law permits.'" 189 Wn.2d at 171 (quoting *Lawson v. City of Pasco*, 168 Wn.2d 675, 679, 230 P.3d 1038 (2010)).

The plaintiffs may argue that RCW 9.41.290 creates a heightened standard because it states that "local laws and ordinances that are inconsistent with, more restrictive than, or exceed the requirements of state law" are preempted. But *Watson* cites to the general body of cases governing conflict preemption in Washington (*Brown* and *Lawson*), and the *Watson* Court's analysis of the conflict preemption language in RCW 9.41.290 indicates that the standard for conflict preemption is no different in this context than in others. Thus, the standard in *Brown* governs: "Where both the ordinance and the statute are prohibitory, and the difference between them is that the ordinance goes further in its prohibition, they are not deemed inconsistent because of mere lack of uniformity in detail." *Brown*, 116 Wn.2d at 562. In other words, a local ordinance will survive scrutiny, if "[t]he city does not attempt to authorize by this ordinance what the Legislature has forbidden . . . and does [not] . . . forbid what the Legislature has expressly licensed, authorized, or required." *Bellingham v. Schampera*, 57 Wn.2d 106, 111, 356 P.2d 292 (1960).

Under this standard, Section 020 does not conflict with the ballot initiative. The last section of the newly enacted state statute provides that "[n]othing in this section mandates how or where a

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firearm must be stored." RCW 9.41.360(6). Contrary to the plaintiffs' argument, Pls. Br. at 11, this last sentence makes plain that Section 020 of the Ordinance does *not* conflict with the ballot initiative. Under *Schampera* and *Brown*, a prohibitory local ordinance is not in conflict with a prohibitory state law if it does not forbid "what the Legislature has expressly licensed, authorized, or required." *Schampera*, 57 Wn.2d at 111. The plaintiffs point to no state law that expressly authorizes the sort of irresponsible storage that is prohibited by Section 020. Rather, by indicating that the State takes no position on the how and where of gun storage, the ballot initiative expressly leaves this area open for local regulation.

Section 030 of the Ordinance likewise is not in conflict with the ballot initiative because, while there are slight variations in the parameters of what form of unauthorized access violates these two laws, these are "mere lack of uniformity in detail" and do not, under *Schampera* and *Brown*, present a conflict. The differences that the plaintiffs point to are superficial and do not affect the conduct required under either law. To be sure, the trigger for enforcement differs. Under Section 030, unauthorized access or use by a child, prohibited person, or at-risk person will result in enforcement, whereas the ballot initiative will only be enforced against a gunowner if a child or prohibited person accesses *and uses* the firearm. But the underlying conduct that constitutes compliance with each law—storing one's firearms in such a manner that they cannot be accessed by someone who should not have them—is the same. Thus, under *Schampera*, *Brown*, and *Watson*, the Ordinance is substantially similar to RCW 9.41.360 and does not conflict.[7]

[7] In their argument that Section 030 of the Ordinance conflicts with RCW 9.41.360, the plaintiffs now suggest – nearly a year after they filed this case – that Section 070 (which requires local gunowners to report any lost or stolen firearms) is also invalid. Pls. Br. at 12 n.2. They made no reference to that section in either of their complaints and cannot raise it now. CR 8; *Lewis v. Bell*, 45 Wash. App. 192, 197, 724 P.2d 425 (1986) ("Although inexpert pleading has been allowed under the civil rule, insufficient pleading has not. A pleading is insufficient when it does not give the opposing party fair notice of what the claim is and the ground upon which it rests.").

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VI. CONCLUSION

For the foregoing reasons, the City of Edmonds respectfully request that this Court grant summary judgment on behalf of the City and deny the plaintiffs' motion for summary judgment, thereby allowing Edmonds' reasonable and commonsense responsible firearm storage ordinance to remain in effect.

DATED this 2nd day of August, 2019.

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