No. 79350-1-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON, DIVISION I

OMAR ABDUL ALIM, an Individual, et al.,

Appellants,

v.

CITY OF SEATTLE, a Municipality, et al.,

Respondents.

Appeal from the Superior Court of Washington
for King County
No. 18-2-18114-3 SEA

APPELLANTS' OPENING BRIEF

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I. INTRODUCTION

Plaintiffs—two individuals and two organizations—brought this lawsuit to determine the legality of Seattle Ordinance 12560 ("the Ordinance"). Plaintiffs contend that the Ordinance is preempted by state law, and is thus void and unenforceable. Plaintiffs asked for a declaratory judgment of preemption so that the legality of the Ordinance could be determined before it was enforced against either of the individual plaintiffs, or any members of the organizational plaintiffs.

The City of Seattle moved to dismiss the declaratory judgment claim on standing and ripeness grounds. The trial court granted the motion, and dismissed the complaint. And that is not all: the trial court could not envision any facts that Plaintiffs could allege to state a justiciable claim, and so dismissed the original, un-amended complaint with prejudice.

The trial court erred by granting the motion to dismiss. Plaintiffs' lawsuit is a justiciable dispute regarding the pure legal question of preemption by state law of the Ordinance. The complaint alleges facts that, at minimum, readily permits the inference that Plaintiffs' firearms are stored in violation of the Ordinance and that Plaintiffs have direct, substantial interests at stake.

The trial court also erred by dismissing the complaint with

prejudice. Dismissal of Plaintiffs' claims with prejudice was contrary to the directive in the Civil Rules to freely permit amendment. The trial court based its dismissal with prejudice on the assumption that any possible amendment would be futile, but Plaintiffs were not provided an opportunity to allege additional facts or to respond to the trial court's stated justiciability concerns. The trial court's ruling on futility is incorrect as a matter of law, as demonstrated by the proposed amended complaint that Plaintiffs submitted along with a motion for reconsideration. In addition to misapplying the legal standard for dismissal with prejudice, the trial court deprived Plaintiffs of their substantial rights and prematurely terminated this lawsuit. Plaintiffs should be permitted, on remand, to allege facts directed towards control of stored firearms, and Defendants cannot and will not suffer any prejudice. In fact, a trial court in Snohomish County—ruling on substantially similar issues, arguments, and allegations regarding an almost-identical ordinance—denied the City of Edmonds's motion to dismiss after permitting amended pleadings.

The trial court's dismissal with prejudice is particularly inappropriate here because it is based on the justiciability of a declaratory judgment claim. Facts, such as whether the Ordinance is being enforced or the storage practices of individuals, may change over time and further ripen into a clearly-justiciable declaratory judgment claim. Dismissal with

prejudice was especially incorrect in this case because the Ordinance is now enforceable and there is no longer any hypothetical discussion over whether or not Plaintiffs' storage practices will change as a result of the Ordinance.

Plaintiffs ask this Court to vacate the trial court's dismissal with prejudice, and to remand Plaintiffs' declaratory judgment claim in order to allow discovery and a prompt ruling on the pure legal issue of preemption.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in entering its Order Granting Motion to Dismiss. Clerk's Papers ("CP") 134–36.

2. To the extent the trial court made such a finding, the trial court erred when finding that amending the pleadings would be futile. Verbatim Report of Proceedings ("VRP") 30–31.

3. The trial court erred in entering its Order Denying Plaintiffs' Motion for Reconsideration. CP 240–41.

III. STATEMENT OF ISSUES

1. Did the trial court err in granting Defendants' motion to dismiss by failing to consider the allegations in the complaint, along with all reasonable and direct inferences, and concluding that Plaintiffs' preemption claim is not justiciable?

2. Did the trial court err by ruling that it would be futile to amend Plaintiffs' original, un-amended complaint to state a justiciable case (1) without permitting Plaintiffs to submit proposed pleadings

or proffer additional facts; (2) where Plaintiffs' proposed First Amended Complaint addresses the trial court's reasoning and states a justiciable claim; and (3) because even if non-justiciable, declaratory judgment claims may ripen and such dismissals should seldom be with prejudice?

3. Did the trial court abuse its discretion by denying Plaintiffs' motion to reconsider the order granting the motion to dismiss the complaint with prejudice where Plaintiffs' proposed First Amended Complaint was not futile?

IV. STATEMENT OF THE CASE

A. State Law Preempts Local Regulation of Firearms

Washington law provides that the authority to regulate firearms rests exclusively with the state. Washington law expressly states:

> The state of Washington hereby fully occupies and preempts the entire field of firearms regulation within the boundaries of the state, including the registration, licensing, possession, purchase, sale, acquisition, transfer, discharge, and transportation of firearms, or any other element relating to firearms or parts thereof, including ammunition and reloader components. Cities, towns, and counties or other municipalities may enact only those laws and ordinances relating to firearms that are specifically authorized by state law, as in RCW 9.41.300, and are consistent with this chapter.

RCW 9.41.290. The statute references RCW 9.41.300, which permits cities and other municipalities to enact only laws and ordinances

restricting the discharge of firearms in certain locations and restricting the possession of firearms in a municipality-owned stadium or convention center. RCW 9.41.300(2).

In November 2018, the voters approved Initiative No. 1639 ("I-1639"), which includes a "secure storage" provision. The secure storage provisions go into effect on July 1, 2019, codified at RCW 9.41.360. The initiative establishes standards related to the use of secure gun storage, trigger locks, or similar devices designed to prevent unauthorized use or discharge. The initiative does not require that a firearm be stored in a particular place or in a particular way. RCW 9.41.360(6). Instead, I-1639 imposes penalties if a firearm was not secured and it is used in a particular way by a prohibited person. RCW 9.41.360(1), (3).

B. The City of Seattle Purports to Regulate Firearm Storage

On July 9, 2018, the Seattle City Council passed Council Bill 119266, titled "An Ordinance relating to the safe storage of and access to firearms." CP 36–47. On July 18, 2018, Mayor Durkan approved and signed the Ordinance, making the Ordinance effective on August 17, 2018. The Ordinance states that the substantive provisions would be imposed as of February 2019, and administrated by the Seattle Police Department.

The Ordinance added Chapter 10.79 to the Seattle Municipal Code ("SMC"), which states, in pertinent part:

> **10.79.020 Safe 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 in a locked container, 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 10.79.020, 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.
>
> **10.79.030 Unauthorized access prevention**
>
> 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.

CP 41–42.

Regarding SMC 10.79.020 ("Section 20"), the requirement to secure the firearm in a locked container does not apply if the firearm is carried by or under the control of an authorized user. The Ordinance does not define control. An infraction is subject to a fine of up to $500 or community service. SMC 10.79.040(A). An infraction of Section 20 or SMC 10.79.030 ("Section 30") is subject to a fine of up to $1,000 if an at-risk person, a minor, or a prohibited person obtains the firearm, and up to $10,000 if the firearm is used in connection with a crime. SMC 10.79.040(B), (C). CP 42. The Ordinance defines a "prohibited person" as any person who is not a lawfully authorized user, which includes not only individuals prohibited from possessing a firearm under state or federal law

but also any person without express permission to possess and use the firearm. SMC 10.79.010(C), (F). CP 41.

C. Plaintiffs Petition For Declaratory Relief

Based on the anticipated and current harm to citizens, who are hindered in their ability to exercise their basic constitutional right of owning and storing a firearm by the City of Seattle's unlawful Ordinance, Plaintiffs filed this declaratory judgment action. Plaintiffs contend that the state of Washington has the exclusive right to regulate the possession and storage of firearms, that the Ordinance is unmistakably preempted by RCW 9.41.290, and that the City of Seattle does not have the authority to regulate Plaintiffs' possession and storage of firearms or to compel Plaintiffs to purchase gun safes as part of that regulation. CP 1–2, 5–6. At the time of filing, Plaintiffs wanted a judicial determination of the legality of the Ordinance before it went into effect. CP 6.

Plaintiffs Omar Alim and Michael Thyng are individuals residing in Seattle. CP 2. Both Mr. Alim and Mr. Thyng currently own firearms that they keep unlocked in their homes for self-defense and defense of their families. CP 2–3. Both Mr. Alim and Mr. Thyng have extensive firearm experience and training, and both have a strong desire to continue having their firearms in an unlocked and usable state because a person cannot be reasonably expected to access a locked firearm under the time and pressure imposed by a home invasion. CP 2–3. In fact, Mr. Alim has previously used his firearm to scare off an intruder during a home invasion. CP 3. The Complaint alleges that Mr. Alim and Mr. Thyng store

firearms in a manner that violates the Ordinance, and that they fear enforcement. CP 2–3, 6. Mr. Alim alleged that he would need to purchase a gun safe to comply with the Ordinance. CP 2.

The organizational plaintiffs, the National Rifle Association, Inc. ("NRA") and the Second Amendment Foundation, Inc. ("SAF"), are non-profit organizations who represent members located in the City of Seattle that are affected by the Ordinance. CP 3. The rights of their members to possess and store firearms, and to pursue lawful methods of self-defense, are core organizational interests for the organizational plaintiffs. CP 3.

D. The Trial Court Dismisses the Lawsuit With Prejudice

Defendants filed a Motion to Dismiss on August 30, 2018. Defendants argued that Plaintiffs lacked standing and that their claims were not ripe because Plaintiffs did not allege an intent to violate the Ordinance. CP 23. The trial court heard argument on October 19, 2018, and ruled that Plaintiffs had not alleged a justiciable claim under the Uniform Declaratory Judgment Act ("UDJA"). VRP 28. The trial court ruled that "[t]here's no allegation of an intent or a desire to allow the firearm to be anything other than under the control of the owner or other lawfully-authorized user." VRP 28–29. The trial court specifically relied upon the second sentence of SMC 10.79.020, remarking that "this would be a different ruling today but for that second sentence. And that's very

critical to the Court's ruling here that there is not a justiciable controversy." VRP 29. Finally, the trial court dismissed the complaint with prejudice, ruling that the trial court could not "envision a pleading that would cure this, and so it's with prejudice." VRP 30–31; CP 134–36.

E. Plaintiffs Propose an Amended Complaint

On October 29, 2018, Plaintiffs submitted a motion for reconsideration. Plaintiffs asked the trial court to reconsider the order granting the motion to dismiss, and to reconsider dismissing the complaint with prejudice. CP 139–53. Along with the motion for reconsideration, Plaintiffs submitted a proposed First Amended Complaint ("FAC") to demonstrate that leave to amend would not be futile. CP 203–11. In the FAC, Plaintiffs alleged the following facts to demonstrate that the dispute over whether Plaintiffs' storage practices violate the Ordinance was not hypothetical or uncertain. For example, Mr. Alim alleged that:

- Mr. Alim stores firearms in his home when no lawfully authorized user is present. CP 208.
- Mr. Alim stores unlocked, accessible firearms in his bedroom, so that the firearms are not under the control of a lawfully authorized user when there is no user present in or around that room (*e.g.*, when lawfully authorized users are in the kitchen, or downstairs, or in the garage). CP 208.
- Mr. Alim stores an unlocked, accessible firearm on a different floor from his bedroom, and on the same floor and in closer

proximity to one of his minor children's bedroom, so that the firearm is not under his possession or control when he is asleep. CP 208.

In response, Defendants argued that Plaintiffs had to include the proposed FAC along with its opposition to the motion to dismiss, and that Plaintiffs must plead intent to violate the Ordinance to have standing. CP 223, 226–27.

The trial court denied the motion for reconsideration on November 20, 2018. CP 240–41. Plaintiffs timely appealed on December 12, 2018.

F. The Ordinance Goes Into Effect

The Ordinance went into effect as enforceable on February 13, 2019, after Plaintiffs filed this appeal. *See* CP 47 (stating that the Ordinance shall take effect 180 days after the effective date). The individual plaintiffs maintain their storage practices as described in the Complaint and the FAC. *See* CP 1–8, 203–11.[1]

V. ARGUMENT

A. Standard of Review

Defendants moved to dismiss based on Civil Rule 12(b)(1) and (6). CP 26, 127–28. Likewise, the trial court referenced both Civil Rule

[1] This Court is permitted to consider additional facts on review. RAP 9.11; *Lawson v. State*, 107 Wn.2d 444, 447–48, 730 P.2d 1308, 1310 (1986); *see also Bravo v. Dolsen Companies*, 125 Wn.2d 745, 750, 888 P.2d 147, 150 (1995) (holding that a court may consider non-record facts alleged for the first time on appellate review of a 12(b) dismissal). *See infra* n.4.

12(b)(1) and (6) when ruling on the motion. VRP 28.

This Court reviews *de novo* motions to dismiss under Civil Rule 12(b)(1). *Evergreen Washington Healthcare Frontier LLC v. Dep't of Soc. & Health Servs.*, 171 Wn. App. 431, 444, 287 P.3d 40, 46 (2012). When the trial court rules on a Civil Rule 12(b)(1) challenge based on the allegations in the complaint and other undisputed facts, this Court reviews *de novo*. *Outsource Servs. Mgmt., LLC v. Nooksack Bus. Corp.*, 172 Wn. App. 799, 807, 292 P.3d 147, 151–52 (2013) (citing federal practice treatise).

Likewise, this Court reviews *de novo* the trial court's ruling on a motion to dismiss under Civil Rule 12(b)(6). *Cutler v. Phillips Petroleum Co.*, 124 Wn.2d 749, 755, 881 P.2d 216, 219 (1994). Factual allegations of the complaint, along with any reasonable inferences, must be accepted as true. *Reid v. Pierce Cnty.*, 136 Wn.2d 195, 201, 961 P.2d 333 (1998); *Wright v. Jeckle*, 104 Wn. App. 478, 481, 16 P.3d 1268, 1269 (2001). The Court may also consider hypothetical facts not part of the formal record. *Cutler*, 124 Wn.2d at 755.

The Washington Supreme Court has repeatedly held that a motion to dismiss must be denied unless "it appears beyond doubt that the plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief." *Haberman v. WPPSS*, 109 Wn.2d 107,

120, 744 P.2d 1032 (1987) (citation omitted); *Corrigal v. Ball & Dodd Funeral Home, Inc*., 89 Wn.2d 959, 961, 577 P.2d 580, 582 (1978) (citation omitted). For these reasons, a motion to dismiss should be granted only "sparingly and with care." *Bravo v. Dolsen Companies*, 125 Wn.2d 745, 750, 888 P.2d 147, 150 (1995) (quoting *Haberman*, 109 Wn.2d at 120).

This Court reviews a trial court's denial of a motion for reconsideration for abuse of discretion. *River House Dev. Inc. v. Integrus Architecture, P.S.*, 167 Wn. App. 221, 231, 272 P.3d 289, 294 (2012). "A trial court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law." *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054, 1075–76 (1993).

The trial court denied Plaintiffs' motion for reconsideration of its order to dismiss with prejudice. If an issue on reconsideration concerns an error of law, "no element of discretion is involved," and the inquiry focuses on "whether the grounds relied on by the trial court are supported by the applicable legal principles and decisions." *Detrick v. Garretson Packing Co.*, 73 Wn.2d 804, 812–13, 440 P.2d 834, 839 (1968).

B. The Complaint States a Justiciable Claim

Plaintiffs set out a classic dilemma in the complaint: either comply

involuntarily with an invalid law, or subject themselves to enforcement and penalties for firearms storage practices that are contrary to the Ordinance. "To afford relief to parties in such a situation is the very purpose of the Declaratory Judgment Act." *Acme Fin. Co. v. Huse*, 192 Wash. 96, 108, 73 P.2d 341, 346 (1937). As such, UDJA cases often proceed before any enforcement occurs, and before fines or penalties are imposed.

A justiciable claim under the UDJA meets the following four prongs:

> (1) [A]n 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 first prong of the test concerns ripeness and mootness, and the third prong encompasses standing. *Lee v. State*, 185 Wn.2d 608, 617–18, 374 P.3d 157 (2016). The UDJA is remedial in nature and subject to liberal construction and administration. *Arnold v. Dep't of Ret. Sys.*, 74 Wn. App. 654, 660, 875 P.2d 665, 669 (1994), *rev'd on other grounds*, 128 Wn.2d 765, 912 P.2d 463 (1996) (citing RCW 7.24.120 & RCW

7.24.050).

In *Clallam County Deputy Sheriff's Guild v. Board of Clallam County Commissioners*, the Board had an employment and salary dispute with the county deputy sheriffs and their guild. 92 Wn.2d 844, 846, 601 P.2d 943, 944 (1979). The Board had enacted ordinances to supervise county employees and set salary levels. *Id.* at 846–47. The Board offered the deputy sheriffs jobs and salaries set at levels defined in the ordinances. The guild filed a declaratory judgment lawsuit, arguing that the ordinances conflicted with the Civil Service for Sheriffs' Office Act, RCW 41.14. *Id.* at 847. The Board argued that the dispute was speculative and potential, and not justiciable, because the ordinance provisions had not been enforced against any deputy sheriffs. *Id.* at 848–49 ("[The Board] claims that, as long as those provisions are not enforced, no real dispute about the overlap exists and thus no justiciable controversy exists under the Uniform Declaratory Judgments Act."). The Washington State Supreme Court rejected the Boards not-justiciable-until-enforcement argument. The Court held that "[a] real dispute is readily germinating from" the conflict between the ordinances and the state statute, and that the plaintiffs "**have a direct and substantial interest in securing relief from the uncertainty of their legal rights and obligations**." *Id.* at 849 (emphasis added). The court also noted that a declaratory judgment was proper because the issue of conflict preemption raised an "important constitutional question about the supremacy of state law." *Id.*

Like the plaintiffs in *Clallum County*, Plaintiffs here satisfy the four-part test.

1. The Mature Seeds of an Actual Dispute

First, the dispute between Plaintiffs and Defendants regarding the legality of the Ordinance is the mature seed of an actual dispute. Plaintiffs alleged that they store firearms in a manner that violates the Ordinance. Plaintiffs alleged that they did not use locked containers to store certain firearms, and that those firearms were kept at all times unlocked and ready for self-defense. CP 2–3. Plaintiffs alleged that they fear enforcement of the Ordinance, and that it may force them to change their firearms-storage and self-defense practices or risk enforcement and incurring fines. CP 2–3, 6.[2] Defendants enacted the Ordinance, it is now enforceable, and Defendants have not disclaimed an intent to enforce it. CP 47. The allegations in the Complaint are analogous to *Clallam County*, where plaintiffs instituted a declaratory judgment action before enforcement, but after enactment, of the preempted ordinance. *Clallam Cty.*, 92 Wn.2d at 848–49 (pre-enforcement dispute regarding legality of an ordinance in light of overlapping state statute).

Defendants argued below that the Complaint does not contain any facts to support a conclusion that Plaintiffs' storage practices violate the

[2] For this prong, the organizational plaintiffs rely upon the impact on the individual plaintiffs and on the others similarly-situated members who live in Seattle. *American Legion Post #149 v. Washington State Dep't of Health*, 164 Wn.2d 570, 595, 192 P.3d 306, 319 (2008).

Ordinance. Defendants argue that Plaintiffs must plead facts showing that Plaintiffs' firearms are stored such that the firearms are not under the control of an authorized user in order to establish storage practices that violate the Ordinance. CP 129. But the allegations in the Complaint permit reasonable and direct inferences that Plaintiffs store firearms outside the control of authorized users in violation of the Ordinance. *Reid*, 136 Wn.2d at 201. Plaintiffs allege that they store firearms unlocked, *i.e.* not in a locked container. CP 2–3. Mr. Alim alleges that he would need to purchase a locked container to store his firearms. CP 2. Thus, under Section 20 of the Ordinance, such firearms must be under the control or possession of an authorized user **at all times** in order to avoid violating the Ordinance. *See* SMC 10.79.020 (permitting firearms to be stored outside a locked container only "if carried by or under the control of the owner or other lawfully authorized user.").

As Defendants concede, there can be no authorized user in control of the stored firearm when no authorized user is at home. CP 23 (leaving a firearm unsecured when the owner is not at home violates the Ordinance). There is also no authorized user in control or possession when all authorized users are in a different part of the house. *See Com. v. Patterson*, 79 Mass. App. Ct. 316, 319–20, 946 N.E.2d 130 (2011) (examining location, proximity, and "ability to immediately reach" to determine that a firearm in an upstairs closet when defendant was downstairs was outside the defendant's control). This Court should draw the reasonable inference that Plaintiffs will often not be in the same room or portion of the house as

the firearm stored outside a locked container. This Court should also draw the obvious inference that Plaintiffs will often and regularly leave their home—any time that Mr. Alim and his spouse are not at home, firearms stored in the house are not secured in a locked container and not under the control of an authorized user. Under these sets of facts, which are practically inevitable and entirely consistent with the Complaint, Plaintiffs' allegations are sufficient to show that they violate the Ordinance with their storage practices. *Haberman*, 109 Wn.2d at 120.

Nothing better illustrates this point than Plaintiffs' proposed FAC. The allegations in the FAC are entirely consistent with the ready inferences and possible facts in the Complaint, and demonstrate how Plaintiffs store firearms in a manner that violates the Ordinance. For example, Mr. Alim makes clear that he stores firearms in his home when no lawfully authorized user is present, and the firearms are not in a locked container. CP 208. Further, Mr. Alim stores firearms in his bedroom, so that when there is no user present in or around that room (*e.g.*, when lawfully authorized users are in the kitchen, or downstairs, or in the garage), the firearms are not under the control of a lawfully authorized user. CP 208. *See Patterson*, 79 Mass. App. Ct. at 319–20 (determining that a firearm in an upstairs closet when defendant was downstairs was outside the defendant's control). During the evening when Mr. Alim is asleep, one of his firearms is stored on a different floor and in closer proximity to a minor child. CP 208. Under any definition of control, Mr. Alim's storage practices do not comply.

Plaintiffs have also alleged the mature seeds of an actual dispute regarding Section 30 of the Ordinance. Section 30 applies whenever a firearms owner should know that a prohibited person—*i.e.*, anyone without express permission—is likely to gain access to a firearm. At minimum, the FAC alleges that Mr. Alim stores a firearm in a manner that may violate Section 30, where at night a firearm is on a different floor and in closer proximity to a minor child. CP 208.[3]

Defendants argue, citing *Forbes v. Pierce County*, 5 Wn. App. 2d 423, 435, 427 P.3d 675, 682 (2018), that Plaintiffs do not state a justiciable claim because Plaintiffs do not specifically allege intent to violate the Ordinance. CP 221–22. But *Forbes* does not state a bright-line rule that "intent to violate" is required, and Plaintiffs' allegations are strikingly different than the allegations in *Forbes*. In *Forbes*, the court examined plaintiff's failure to allege any adverse effect from the challenged statute. *See Forbes*, 5 Wn. App. 2d at 435. Further, the court relied upon plaintiffs' failure to allege that they engaged in conduct that violated the ordinance, and failure to allege any desire to engage in such

[3] Even if the facts alleged are not sufficient, on their own, to state a justiciable case regarding Section 30, the Court should nonetheless vacate the order dismissing the lawsuit in its entirety. Both Section 20 and Section 30 rise and fall on the same legal theory of preemption under RCW 9.41.290. The Court should consider both provisions together based on judicial economy and in light of the broad overriding public importance of the issue. *See Diversified Indus.*, 82 Wn.2d at 814 (permitting review of issues of broad overriding public import). The justification for ruling on the preemption of Section 30 is especially acute because the recently-enacted I-1639 specifically regulates potential and actual access by prohibited persons to stored firearms, but unlike the Ordinance does not mandate how or where a firearm must be stored.

conduct in the future. *Id.* at 436–37. Here, Plaintiffs have alleged prohibited conduct and adverse effects: Plaintiffs have described their conduct and established that the Ordinance prohibits such conduct; and Plaintiffs have stated their desire to continue that conduct in the future. CP 208. Plaintiffs' allegations describe a discernable dispute—nothing like the "unpredictable contingency" in *Diversified Industries*, where the described conduct (a visiting child's injury on the property) had never happened and the plaintiff did not provide facts showing that it could happen in the future. 82 Wn.2d at 812–15.

In fact, the Ordinance is now in effect and enforceable against Plaintiffs and other individuals in the City of Seattle. CP 47. Plaintiffs have not changed any of their storage practices and they are now subject to enforcement.[4] If the Court grants remand, Plaintiffs will be able to allege current violation of the Ordinance, bringing the dispute indisputably within the ambit of the UDJA.

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[4] *See Bravo*, 125 Wn.2d at 750 (permitting appellate courts to consider new facts when reviewing order granting motion to dismiss). This Court is also permitted to consider additional facts on review under RAP 9.11. *Lawson*, 107 Wn.2d at 447–48. Confirmation that Plaintiffs' firearms storage practices are the same as in the Complaint and FAC is additional evidence that the Court may consider because: (1) Plaintiffs' current practices are needed to fairly resolve the question of whether Plaintiffs state a justiciable UDJA claim; (2) Plaintiffs' current violation of the Ordinance would probably compel the Court to vacate the trial court's dismissal; (3) Plaintiffs could not have presented this evidence to the trial court; (4) filing a motion with the trial court during the pendency of this appeal would be completely duplicative and unnecessarily expensive; (5) remand to the trial court on this fact alone would risk causing unnecessary delay; and (6) it would be inequitable to affirm the trial court's dismissal without considering Plaintiffs' current practices.

2. Between Parties Having Genuine and Opposing Interests

Second, the dispute is genuine and the parties have opposing interests. Individual plaintiffs and members of the organizations own and store firearms in Seattle, and fear enforcement of the Ordinance. CP 2–3, 5–6. Plaintiffs, both individuals and organizations, have well-established interests in their constitutional right to self-defense, especially in their own homes. *See D.C. v. Heller*, 554 U.S. 570, 630 (2008) (holding that firearms storage requirements implicate Constitutional rights).

The organizational plaintiffs also have genuine interests in opposition to the Ordinance. Part of each organizations' core purpose is the protection of the right of individuals to own and possess firearms for lawful purposes. CP 3. The organizational plaintiffs have an interest in ensuring that only lawful firearms regulation is enforced against its members. All Plaintiffs, including the organizations and its members, assert their right to be free from unlawful local interference with the possession of firearms. CP 208–09. The organizations have a strong interest in keeping its members free from the nightmare scenario: a patchwork of conflicting local storage and firearms possession laws by counties and cities across the state. *See* Attorney General Opinion 1983 No. 14, at 1 (1983) (discussing a confusing patchwork of provisions across the state). Finally, the broad-brush requirements in the Ordinance to keep firearms locked away with reduced accessibility impedes the self-defense choices by Plaintiffs, and the organizations do not support a legal mandate

to require storage methods, much less the "locked container" obligation in the Ordinance. CP 209.[5]

3. Direct and Substantial Interests

Third, Plaintiffs have a direct and substantial interest in whether or not the Ordinance is enforceable against them. Plaintiffs have an interest in a determination of the Ordinance's legality, rather than being subject to enforcement and fines, or being compelled to spend money on locked containers and alter their preferred self-defense practices in anticipation of enforcement. CP 2–3, 6. As in *Clallum County*, where the deputy sheriffs had "a direct and substantial interest in securing relief from the uncertainty of their legal rights and obligations" before enforcement of the employment ordinance against them, Plaintiffs here have an interest in a legal determination before enforcement of the Ordinance. *Clallam Cty.*, 92 Wn.2d at 849.

Plaintiffs' interests now are even more direct and substantial than before because the Ordinance is now enforceable. Based on the facts alleged in the Complaint and FAC, Plaintiffs are potentially subject to fines of $500, $1,000, or up to $10,000. Defendants cannot dispute that a $500 fine (or even the hours of community service necessary to account for the fine) is a significant hardship to most citizens. The purpose of the

[5] The proposed FAC ¶ 23 mistakenly states that the organizational plaintiffs disagree with the storage methods "proscribed" (sic) in the Ordinance. CP 209. To be clear, the organizational plaintiffs oppose the required storage mandate in the Ordinance.

UDJA is to permit plaintiffs to challenge unlawful ordinances before being faced with the dilemma of what action to take or the hardship of enforcement. And if Plaintiffs are compelled to alter their preferred self-defense practices, that sort of compelled choice involving constitutional rights is an injury supporting standing. *E.g.*, *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988) (permitting pre-enforcement challenge by plaintiffs who alleged a fear of enforcement—"Further, the alleged danger of this statute is, in large measure, one of self-censorship; a harm that can be realized even without an actual prosecution."); *Holder v. Humanitarian Law Project*, 561 U.S. 1, 15-16 (2010) (plaintiff stated a claim by alleging the desire to engage in the prohibited conduct, but for the statute). Finally, locked containers can be very expensive, especially concerning long guns or rifles, giving Plaintiffs a clear economic injury-in-fact. *See Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 802–03, 83 P.3d 419 (2004) (finding that the property owners had alleged injury-in-fact because they would suffer different tax rates before and after the annexation).

Some courts analyze standing to bring a UDJA claim separately from the third prong of the justiciability test. *See Spokane Entrepreneurial Center v. Spokane Moves to Amend Constitution*, 185 Wn.2d 97, 106–07, 369 P.3d 140, 145 (2016) (requiring petitioners to (1) be within the zone of interests and (2) show injury). Plaintiffs meet the UDJA standing test. No one doubts that individual firearms owners like Mr. Alim and Mr. Thyng are within the "zone of interests" regulated by the Ordinance's

requirements. Mr. Thyng is injured because he will be compelled to decide between forgoing his constitutional right to self-defense in his home or being subject to enforcement if the Ordinance is not declared unlawful. Mr. Alim will suffer the same injuries, and will additionally suffer financial injury as a target of the ordinance if he is forced to purchase a locked container.

In *Spokane Entrepreneurial Center*, the petitioners had standing to challenge an initiative for similar reasons. There, the initiative affected property rights and created barriers to zoning. *Id.* Like Mr. Thyng and Mr. Alim will suffer harm by curtailing their freedom to engage in home self-defense by storing their firearms ready to use, the petitioners in *Spokane Entrepreneurial* had standing because, among other reasons, they would suffer the non-economic harm of additional zoning approval processes. *Id.* In both cases, "[r]egardless of whether these harms might be justified or offset by other societal benefits, these petitioners will suffer harm." *Id.*

Likewise, both organizational plaintiffs have standing. An organization has representational standing when (a) its members would otherwise have standing to sue, (b) the interests at stake are germane to the organization's purpose, and (c) the lawsuit does not require the participation of the individual members. *American Legion Post #149,* 164 Wn.2d at 595. Mr. Thyng is a member of both SAF and the NRA. CP 3. Further, each organization represents a number of other similarly situated members in the City of Seattle who will be adversely impacted by the Ordinance, but whose participation in this lawsuit is not required. And the

interests at issue are germane to each organizations' purpose. The broad-brush storage mandate impedes the self-defense choices by members living in Seattle and is not consistent with the organizational plaintiffs' recommendations. CP 3, 5, 205, 208–09. Further, the organizational plaintiffs have an interest in protecting the right of individuals to own and possess firearms for lawful purposes and to ensure that only lawful firearms regulations are enforced against its members. CP 3.

Last, this Court can also find that Plaintiffs have standing because the preemption of a local firearms ordinance is an important question of public importance. The Washington Supreme Court provides that courts should "adopt[] a more liberal approach to standing when a controversy is of substantial public importance, immediately affects significant segments of the population, and has a direct bearing on commerce, finance, labor, industry, or agriculture." *Am. Legion*, 164 Wn.2d at 595. The question of whether a generally-applicable firearms ordinance is preempted by state law is a classic issue of substantial public importance, affecting a significant segment of the population, and has a direct bearing on commerce. *See Chester Twp. v. Panicucci*, 116 N.J. Super. 229, 234, 281 A.2d 811, 814 (N.J. Super. Ct. App. Div. 1971), *aff'd*, 62 N.J. 94, 299 A.2d 385 (1973) (holding that a question of whether township gun ordinance was preempted by state statutes "involve[d] a matter of public importance").

4. Final and Conclusive Determination

And Fourth, declaratory judgment would finally and conclusively resolve the legality of the Ordinance. Like in *Clallum County*, once the Court reaches the merits, summary judgment regarding preemption will determine whether the Ordinance is null and void due to preemption and whether Defendants are permitted to enforce the Ordinance. *E.g.*, *Chan v. City of Seattle*, 164 Wn. App. 549, 568, 265 P.3d 169, 179 (2011).

C. The Trial Court Erred By Dismissing the Case With Prejudice

After granting Defendants' motion to dismiss, the trial court compounded its error by dismissing Plaintiffs' lawsuit with prejudice. Plaintiff was not afforded an opportunity to proffer additional facts or submit a single amended pleading before the trial court ruled—without basis—that any possible amendment would be futile. The trial court's dismissal with prejudice was an abuse of discretion based on an erroneous and unsupported application of the legal standards. *Detrick*, 73 Wn.2d at 812–13.

1. Dismissal With Prejudice Was Legal Error

Dismissal with prejudice of an initial complaint is a harsh legal ruling. Amendments to pleadings are governed by Civil Rule 15(a), which provides, in pertinent part, that "a party may amend his pleading only by leave of court . . . and leave shall be freely given when justice so requires." The purpose of the pleadings are to "facilitate a proper decision on the merits." *Caruso v. Local Union No. 690 of Int'l Bhd. of Teamsters*,

Chauffeurs, Warehousemen & Helpers of Am., 100 Wn.2d 343, 349, 670 P.2d 240, 243 (1983) (quoting *Conley v. Gibson*, 355 U.S. 41, 48 (1957)). And the purpose of Rule 15 is to "facilitate the amendment of pleadings except where prejudice to the opposing party would result." *Id.* (quoting *United States v. Hougham*, 364 U.S. 310, 316 (1960)).

Plaintiffs submitted a motion for reconsideration under Civil Rule 59, requesting that the trial court set aside the ruling dismissing the lawsuit with prejudice and permitting Plaintiffs to file the proposed First Amended Complaint, which Plaintiffs attached to the motion. *See Rose ex rel. Estate of Rose v. Fritz*, 104 Wn. App. 116, 121, 15 P.3d 1062, 1065 (2001) (permitting the trial court to reconsider denial of leave to amend under CR 59). Federal courts follow the same procedure: after dismissal with prejudice and denial of leave to amend, the moving party may submit a Civil Rule 59 motion and attach a proposed amended complaint. *See Katyle v. Penn Nat. Gaming, Inc.*, 637 F.3d 462, 470–71 (4th Cir. 2011) (district court may vacate judgment under Rule 59 and then grant motion to amend the complaint).

In *Hook v. Lincoln County Noxious Weed Control Board*, the trial court granted summary judgment to defendants, and then denied plaintiff's motion for reconsideration based on new legal theories. 166 Wn. App. 145, 158–59, 269 P.3d 1056, 1063 (2012). Plaintiff did not provide a proposed amended complaint. The court of appeals affirmed the trial court's denial of plaintiff's motion for reconsideration. *Id.* at 159 n.1 (observing that the new theories were likely futile). Here, in contrast,

Plaintiffs submitted a proposed amended complaint along with the motion for reconsideration, and the proposed amended complaint raises no new legal theories, only more specific factual allegations. *Hook* demonstrates that Plaintiffs' motion for reconsideration and proposed amended complaint are procedurally correct, subject to the issues of whether or not amending the complaint will be futile. *See Katyle*, 637 F.3d at 470–71.

In response to Plaintiffs' motion for reconsideration, Defendants argued that vacating the dismissal with prejudice and permitting amendment of the pleadings was improper because Plaintiffs did not propose an amended complaint and follow Civil Rule 15 when opposing Defendants' motion to dismiss. CP 223. Defendants' argument is contrary to common practice, common sense, and the civil rules. Non-moving parties routinely and reasonably request that they be allowed "leave to amend" the pleadings if a court should disagree with its legal arguments and order dismissal of claims. For sound practical reasons, litigants are not required to submit a proposed amended pleading every time they oppose a motion to dismiss in order to avoid dismissal with prejudice.[6]

In any event, Defendants cannot identify any prejudice if Plaintiffs

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[6] Federal cases provide examples of this in practice. *See, e.g., Contreras v. Toyota Motor Sales U.S.A. Inc.*, 484 Fed. App'x 116, 118 (9th Cir. 2012) (holding that the district court should have allowed plaintiffs the opportunity to submit an amended complaint, even though plaintiffs had not proffered any additional facts on economic harm, because it "might not be futile"); *M.M.T. v. United States*, 337 F. Supp. 3d 1099, 1107 (W.D. Wash. Aug. 30, 2018) (granting plaintiffs leave to amend after plaintiff summarily requested at the end of their brief "leave to amend in the event the Court grants either motion for judgment on the pleadings." (Dkt. 36 at 35–36)).

are permitted to amend the pleadings. *Herron v. Tribune Pub. Co., Inc.*, 108 Wn.2d 162, 166, 736 P.2d 249 (1987) ("The touchstone for the denial of a motion to amend is the prejudice such an amendment would cause to the nonmoving party." (internal quotation omitted)). This is especially true here, where Defendants have not answered and no discovery has been undertaken. *See Culpepper v. Snohomish Cnty. Dep't of Planning & Cmty. Dev., Cmty. Dev. Div.*, 59 Wn. App. 166, 176, 796 P.2d 1285, 1291 (1990) (allowing plaintiff to amend the complaint after dismissal).

If there is no prejudice to the opposing party, a plaintiff should be freely allowed to amend the complaint if it appears that the plaintiff will be able to state a claim. For example, plaintiffs who ask the court for leave to amend at an early stage—as here, before the defense has even answered the complaint and discovery undertaken—should be allowed to do so unless the proposed amendment is certain to be futile. *See Culpepper*, 59 Wn. App. at 176. In the absence of prejudice or futility, "[i]f the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits." *Id.* (quoting *Foman v. Davis*, 371 U.S. 178, 182–83 (1962)). This rule helps preserve meritorious claims from premature procedural dismissal and enables decisions on the merits. *Herron*, 108 Wn.2d at 167 ("When an amended complaint pertains to the same facts alleged in the original pleading, denying leave to amend may hamper a decision on the merits.").

Ultimately, this Court reviews the trial court's dismissal with

prejudice *de novo*, even though Plaintiff submitted a post-dismissal motion for reconsideration, because the trial court based the dismissal with prejudice on a legal ruling of futility. *Katyle*, 637 F.3d at 470–71 ("In other words, a court should evaluate a postjudgment motion to amend the complaint under the same legal standard as a similar motion filed before judgment was entered—for prejudice, bad faith, or futility." (internal quotation marks omitted)); *see Detrick*, 73 Wn.2d 812–13 (focusing inquiry on the underlying legal principles when considering motion to reconsider based on legal error). Under the analogous federal rule, "[d]ismissal with prejudice and without leave to amend is not appropriate unless it is clear on de novo review that the complaint could not be saved by amendment." *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003).

2. Amendment Would Not Be Futile

Turning to the essential issue, amendment in this case is not futile. The proposed First Amended Complaint alleges additional facts that demonstrate that Plaintiffs' claims are justiciable, and demonstrates that the trial court's futility ruling was baseless. The proposed First Amended Complaint includes expanded allegations that demonstrate Mr. Alim's current storage practices do not comply with the Ordinance, even when taking into account the carve-out for control in the second sentence of Section 20. As Mr. Alim stated originally, he owns and stores firearms, and he does not own a gun safe or other means of securing firearms. CP 2. Mr. Alim's expanded allegations demonstrate that he stores unlocked

firearms in his home when no lawfully authorized user is present; that he stores unlocked firearms in his home where no lawfully authorized users may be present, even when at home; and that during evenings one of his unlocked firearms is stored on a different floor and in closer proximity to one of his minor children. CP 208. *See Patterson*, 79 Mass. App. Ct. at 319–20 (determining that a firearm in an upstairs closet when defendant was downstairs was outside the defendant's control). Mr. Alim's then-current storage practices, and stated desire to continue those practices, are in direct conflict with both Section 20 and Section 30 of the Ordinance, and Plaintiffs' request for a declaratory judgment was and continues to be justiciable.

And on remand, Plaintiffs will be able to make allegations regarding their storage practices now, while the Ordinance is actually in force, instead of predicting or indicating what their storage practices would be in the future. To the extent Plaintiffs must allege intent to violate the Ordinance, or a present violation of the Ordinance, this Court may vacate and remand to permit Plaintiffs to submit amended pleadings concerning their current storage practices. In fact, the individual plaintiffs' current storage practices are unchanged from the facts alleged in the complaint and FAC.

3. Justiciability Dismissals Should Be Without Prejudice

Additionally, the trial court erred to the extent it dismissed Plaintiffs' lawsuit with prejudice based on justiciability alone. The justiciability test itself recognizes that claims that are not ripe and do not

give rise to standing today may become ripe claims with standing tomorrow. The four-part test contrasts present and almost-present disputes from possible or speculative disputes, and direct interests from potential interests. *Diversified Indus.*, 82 Wn.2d at 815. The very nature of a ripeness test allows for the possibility that a claim may eventually ripen.

Where justiciability concerns are at stake, as here, the trial court erred as a matter of law by dismissing with prejudice when it was possible, if not likely, that the underlying facts could change and eventually present a ripe, justiciable dispute. *See, e.g.*, *id.* (noting that while "the cause [was] not ripe for declaratory relief," dismissal without prejudice was the appropriate result); *Lewis Cnty. v. State*, 178 Wn. App. 431, 441, 315 P.3d 550, 556 (2013) (affirming dismissal without prejudice where trial court found the County's case did not present an issue of major public importance).

The changed circumstances here demonstrate this point. The Ordinance is now in effect, and factual allegations regarding storage practices will either show a present violation of the Ordinance, or no violation. If the trial court determined that Plaintiffs' allegations in 2018, which demonstrated an impending future violation, were not sufficient, the claims should have been dismissed without prejudice to possibly re-allege facts or changed circumstances in the future. There were no finality concerns for the trial court to safeguard, and no judicial economy concerns on this record. The trial court erred by dismissing with prejudice.

VI. CONCLUSION

Plaintiffs respectfully request that this Court vacate the trial court's dismissal with prejudice, and remand this declaratory judgment action for further proceedings.

DATED this 26th day of April, 2019.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies as follows:

1. I am employed at Corr Cronin LLP, attorneys of record for Appellants herein.

2. On this date, I caused a true and correct copy of the foregoing document to be served on the following parties:

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