No. 79350-1-I

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

OMAR ABDUL AMIR, et al.,

Appellants,

v.

CITY OF SEATTLE, et al.,

Respondents.

RESPONSE BRIEF OF RESPONDENTS

Orrick, Herrington & Sutcliffe LLP
Daniel J. Dunne (WSBA 16999)
701 Fifth Ave., Suite 5600
Seattle, WA 98104-7097
ddunne@orrick.com
(206) 839-4300

Everytown for Gun Safety Support Fund
Eric A. Tirschwell (*Pro Hac Vice*)
Molly Thomas-Jensen (*Pro Hac Vice*)
132 East 43rd Street, #657
New York, NY 10017
etirschwell@everytown.org
mthomasjensen@everytown.org
(646) 324-8222

Peter S. Holmes (WSBA 15787)
Seattle City Attorney
Gary Smith (WSBA 29718)
Assistant City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104
peter.holmes@seattle.gov
gary.smith@seattle.gov
(206) 684-8207

Attorneys for Respondents

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

I. Introduction

In July 2018, the City of Seattle enacted an ordinance requiring responsible storage of firearms. In passing Seattle Ordinance 125620 ("the Ordinance"), the City Council relied upon extensive and reliable evidence that responsible storage laws save lives. The Ordinance—which imposes civil penalties only—contains two principal provisions. The first requires that every firearm be stored in a locked container unless it is being carried by or otherwise under the control of the owner or other authorized user. The second imposes civil penalties if a firearm owner stores the weapon in a manner they know or reasonably should know will allow a minor or a prohibited or an at-risk person to gain access to the weapon, and such a person in fact obtains the weapon.

The National Rifle Association and Second Amendment Foundation, along with two city residents, initiated this lawsuit to invalidate the Ordinance, notwithstanding the fact that both organizations state publicly that they support and recommend responsible firearms storage. Moreover, their complaint lacked even the barest factual allegations necessary to establish a justiciable dispute. Notably absent from the complaint was any allegation that the individual Plaintiffs intended to engage in a storage practice that violated the Ordinance. Plaintiffs merely alleged that for self-defense reasons they did not, and in the future did not

want to, store their firearms in a locked container. But those allegations failed to answer the critical threshold question of whether their storage practices would violate the Ordinance—which allows a gun owner to keep their weapon outside a locked container so long as it is in their possession or control. Plaintiffs also failed to allege *any* facts suggesting the likelihood that a minor, a prohibited, or an at-risk person would access their guns. Because Plaintiffs did not allege that they wanted to store their firearms outside a safe *and* outside of their control, and they did not allege that it was likely an unauthorized person would access their firearms, there was no basis to conclude that their conduct would violate the Ordinance.

Defendants moved to dismiss, citing these pleading deficiencies. In opposing that motion, Plaintiffs requested leave to amend, but they still made no proffer alleging that they sought to store their firearms unsecured and outside of their control. At oral argument on the motion to dismiss, after counsel for Defendants suggested several ways Plaintiffs could amend their complaint to cure this defect, Plaintiffs' counsel again declined to proffer any additional facts.

Plaintiffs were on notice that their complaint was insufficient to establish standing and ripeness, but they made the strategic decision to neither file a proposed amended complaint nor to proffer to the court at oral argument what facts an amended complaint might contain. And when they

finally—in a motion for reconsideration—proffered facts that *might* demonstrate standing, it was too late. In effect: they chose to gamble that the superior court would not hold them to their pleading burden, and they lost. Now they seek a do-over.

The Superior Court of King County correctly held that there was no justiciable dispute and properly denied Plaintiffs' motion to amend their pleadings and subsequent motion for reconsideration. This Court should affirm the Superior Court's ruling dismissing Plaintiffs' claims with prejudice. To do otherwise would encourage gamesmanship and waste of judicial resources.

II. Restated Assignments of Error

The Superior Court did not err in granting Defendants' motion to dismiss and did not abuse its discretion in denying Plaintiffs' motion to amend pleadings and motion for reconsideration.

III. Statement of Issues

(1) Whether the Superior Court properly granted Defendants' motion to dismiss, where the individual Plaintiffs failed to allege how their storage practices violated the Ordinance, the organizational Plaintiffs had not alleged any facts that suggested that opposing the Ordinance is germane to their organizational purpose, and no Plaintiff alleged facts that suggested a likelihood that the law would be enforced against them;

(2) Whether the Superior Court properly exercised its discretion in denying Plaintiffs' request for leave to file an amended complaint, where no proposed amended complaint was proffered and where Plaintiffs withheld from the Superior Court facts relevant to their ability to successfully amend; and

(3) Whether the Superior Court properly exercised its discretion in denying Plaintiffs' motion for reconsideration, where Plaintiffs relied upon new facts and failed to identify any error of law.

IV. Statement of the Case

On July 9, 2018, the Seattle City Council enacted the Ordinance, which requires responsible firearm storage practices and imposes civil fines for noncompliance.

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 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.

SEATTLE MUN. CODE § 10.79.020. 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. § 10.79.030.

A violation of Section 10.79.020 is a civil infraction and will result in a fine of not more than $500 or community service, so long as no unauthorized person has accessed the gun (civil fines increase if a gun is accessed or used as a result of irresponsible storage). *Id*. § 10.79.040. 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 civil fine is $10,000. *Id*. Any fine imposed under the Ordinance can be challenged in Municipal Court and appealed to Superior Court. *Id*. § 10.79.060.

In passing the Ordinance, the Seattle City Council sought to address the serious public health problem of gun deaths and injuries. The City Council relied upon findings that "guns are stolen from homes and cars, including at least 250 guns that were reported stolen in the City of Seattle in 2017" and that "an estimated 150,000 adults in King County reported keeping a firearm unlocked in their homes in 2015." SEATTLE ORDINANCE 125620, at preamble. The City Council also cited to a meta-analysis of available studies which indicated that "child access prevention laws or safe

storage laws reduce self-inflicted fatal or nonfatal firearm injuries among youth and reduce unintentional firearm injuries or unintentional firearm deaths among children." *Id.*[1]

The National Rifle Association and the Second Amendment Foundation (together, "Organizational Plaintiffs"), along with city residents Omar Abdul Alim and Michael Thyng (together, "Individual Plaintiffs"), sued the City of Seattle, the Seattle Police Department, Mayor Jenny Durkan and Chief of Police Carmen Best, seeking a declaration that the Ordinance violated Washington's preemption law[2] and the Washington Constitution.[3] Clerk's Papers ("CP") 1-8.

---

[1] *The Effects of Child-Access Prevention Laws*, RAND CORP. (Mar. 2, 2018), available at https://perma.cc/B25C-H9CD.

[2] Though the issue is not presently before this Court, Defendants note that the Ordinance was carefully drafted to avoid violating Washington's preemption statute, which is codified at RCW 9.41.290. In that section, the Washington Legislature listed the categories it intended to preempt: any local ordinance relating to "registration, licensing, possession, purchase, sale, acquisition, transfer, discharge, and transportation of firearms." The Ordinance regulates storage of the firearm only when the firearm is *not* in the gun owner's possession or control. Unlike firearms preemption laws in other states, *see, e.g.*, Ariz. Rev. Stat. Ann. § 13-3118(A), storage is not one of the enumerated topics of preemption, and the Ordinance excludes from its reach any practices related to possession.

In addition, and as noted above, the Ordinance does not impose criminal penalties. *See Pac. Nw. Shooting Park Ass'n v. City of Sequim*, 158 Wn.2d 342, 356, 144 P.3d 276 (2006) ("[T]he central purpose of RCW 9.41.290 was to eliminate *conflicting municipal criminal codes* and to advance uniformity in *criminal* firearms regulation.") (internal quotation marks and citations omitted); *see also Watson v. City of Seattle*, 189 Wn.2d 149, 172, 401 P.3d 1 (2017) ("Essentially, Watson argues that the legislature has occupied the entire field of gun-related laws and ordinances unless specifically authorized by state law. We disagree.") (internal citations omitted).

[3] Because it was unclear whether Plaintiffs sought to challenge the Ordinance under the Washington Constitution's guarantee of a right to bear arms or under the Constitution's home rule provision, Defendants filed a motion for a more definite statement. Plaintiffs have since clarified that their challenge is brought exclusively under the home rule provisions of the Washington Constitution. CP 108.

In their complaint, the Individual Plaintiffs did not explain how they presently stored their firearms or even allege that they intended to store them in the same, or a different, manner once the Ordinance went into effect. CP 2-3. Thus, it was not evident from the face of the complaint whether the Individual Plaintiffs' storage practices (at the time the operative complaint was filed) violated the Ordinance, or if they intended to engage in storage practices that would violate the Ordinance at some future time. The Organizational Plaintiffs' allegations were even more sparse: they did not allege whether they even had members in Seattle who were likely to be affected by the Ordinance, and they alleged no facts suggesting that the Ordinance implicated an issue germane to their organizational purposes. CP 3.

Defendants moved to dismiss under Washington Superior Court Civil Rule ("CR") 12(b)(1), arguing that the complaint did not allege facts sufficient to show a justiciable dispute. CP 18-34. In conferring over the motion to dismiss, counsel for Defendants was puzzled by the failure to attempt to allege facts sufficient to confer standing and asked Plaintiffs' counsel whether they intended to amend their complaint. The answer was no; Plaintiffs would stand on their original complaint's allegations. CP 229-30. In Plaintiffs' opposition to the motion to dismiss, however, they sought leave to amend their pleadings, citing CR 15. CP 108 ("If the Court finds

merits in Defendants' arguments, Plaintiffs respectfully request leave to amend the complaint."). But Plaintiffs made no argument as to how an amended complaint would differ from the operative complaint and failed to proffer *any* additional facts that would remedy the complaint's deficiencies.

Following extensive oral argument from all parties, the Superior Court ruled from the bench that it would grant Defendants' motion to dismiss because Plaintiffs had failed to plead a justiciable dispute. Report of Proceedings ("RP") 28-31. The Superior Court found that the Individual Plaintiffs had not alleged "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." RP 28:25-29:3. The Superior Court emphasized that the second sentence of Section .020 of the Ordinance was crucial, because it permits storage of firearms outside of a locked container or gun safe, so long as they are under control of the owner (or an authorized user). RP 28:16-29:8 ("That's a very different ordinance than it would be if it stopped after the first sentence. This would be a different ruling today but for that second sentence."). With respect to the Organizational Plaintiffs, the Superior Court concluded they did not allege their mission was in conflict with the Ordinance, and in consequence, any interest they had was "not direct and substantial." RP 29:18. In sum, the Superior Court's decision was premised on its conclusion that "the pleadings fail with respect to

identifying an actual, present, existing dispute, as distinguished from a possible, dormant, hypothetical, speculative disagreement." RP 30:9-12.

Following the Superior Court's bench ruling, Plaintiffs asked the Court to clarify whether dismissal was with prejudice, but they still made no proffer as to what facts their amended complaint might include; counsel asked simply, "[I]s this dismissal with leave to amend, or is this with prejudice?" RP 30:21-22. In response, the Superior Court emphasized Plaintiffs' failure to proffer any facts suggesting that amendment would not be futile: "I haven't heard anything that would suggest to me that there is an amendment that would cure these issues, and so it's not without prejudice to there being another lawsuit at some point with—that would meet this test. But I have not heard, nor can I envision a pleading that would cure this, and so it's with prejudice." RP 30:23-31:3.

Plaintiffs subsequently filed a motion for reconsideration of the order granting Defendants' motion to dismiss and order denying Plaintiffs' motion to amend their pleadings. CP 139-51. For the first time, Plaintiffs proffered purported new facts they would add to cure deficiencies in their case's justiciability, in the form of a proposed amended complaint. CP 192-201. The Superior Court directed Defendants to respond. CP 212. Following full briefing, the Superior Court denied Plaintiffs' motion for reconsideration. CP 240-41.

V. Argument

At issue in this appeal are three decisions by the Superior Court: (1) its decision to grant Defendants' motion to dismiss; (2) its decision to deny Plaintiffs' request for leave to amend their pleadings; and (3) its decision to deny Plaintiffs' motion for reconsideration. In each instance, the Superior Court reached the right result. *First*, the Superior Court properly granted Defendants' motion to dismiss the original complaint after concluding that the complaint did not present a justiciable dispute because Plaintiffs had failed to make sufficient factual allegations that they intended to engage in practices that would violate the Ordinance. *Second*, the Superior Court properly exercised its discretion in denying Plaintiffs' requests for leave to amend their pleadings, because they made no proffer of facts indicating amendment would not be futile. *Finally*, the Superior Court properly denied Plaintiff's motion for reconsideration, because they provided no excuse for their delay in supplying a proposed amended complaint.

A. Standard of Review

When a party moves to dismiss a complaint under CR 12(b)(1), this Court reviews *de novo* the lower court's decision. *Corona v. Boeing Co.*, 111 Wn. App. 1, 5, 46 P.3d 253 (2002); *Dougherty v. Dep't of Labor & Indus.*, 150 Wn.2d 310, 314, 76 P.3d 1183 (2003) ("Whether a court has subject matter jurisdiction is a question of law reviewed de novo.").

Plaintiffs argue for application of the CR 12(b)(6) standards articulated in *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 120, 744 P.2d 1032 (1987). Appellants' Opening Brief ("App. Br.") 11-12.[4] But Plaintiffs cite no cases applying the *Haberman* standard to motions to dismiss filed under CR 12(b)(1). Where, as here, a defendant moves to dismiss a complaint for lack of jurisdiction based on the face of the complaint, "a trial court must assume the factual allegations in the complaint are true, construing them liberally in favor of the plaintiff, and will not look beyond the face of the complaint to determine jurisdiction." *Wright v. Colville Tribal Enter. Corp.*, 159 Wn.2d 108, 118-19, 147 P.3d 1275 (2006) (citations omitted) (Madsen, J., concurring).[5]

This Court reviews a trial court's decision to deny or grant a motion for leave to amend pleadings by applying the manifest abuse of discretion test. *Wilson v. Horsley*, 137 Wn.2d 500, 505, 974 P.2d 316 (1999). "The

---

[4] Although Plaintiffs argued below that justiciability could not be raised under CR 12(b)(1), and that instead Defendants should have filed a CR 12(b)(6) motion, they do not raise this argument here.

[5] The most extensive discussion of the contrasting governing standards under CR 12(b)(1) and CR 12(b)(6) can be found in a concurrence authored by Justice Madsen:

> Dismissal under CR 12(b)(1) and CR 12(b)(6) are analytically distinct, implicating different principles, burdens of proof, and legal consequences. The former involves whether the court has the power to adjudicate the claim, while the latter is a disposition on the merits. . . . The procedural safeguards that attach to a CR 12(b)(6) motion are of limited application to a CR 12(b)(1) motion.

Wright, 159 Wn.2d at 118-19 (internal citations omitted) (Madsen, J., concurring). Justice Madsen's emphasis on the analytical difference between these two motions strongly suggests that *Haberman* is of limited applicability to a CR 12(b)(1) motion.

trial court's decision will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Id*. (internal quotation marks and citations omitted).[6]

The same standard—manifest abuse of discretion—governs this Court's review of a trial court's decision on a motion for reconsideration. *Wilcox v. Lexington Eye Inst.*, 130 Wn. App. 234, 241, 122 P.3d 729 (2005).

B. The Superior Court Properly Granted Defendants' Motion to Dismiss Because the Operative Complaint Did Not Present a Justiciable Dispute.

The Superior Court did not err in dismissing the complaint for failing to allege facts sufficient to demonstrate either that the Individual Plaintiffs intended to violate the Ordinance or that the Organizational Plaintiffs' purpose was germane to the lawsuit at hand.

Plaintiffs sought relief under Washington's Uniform Declaratory Judgments Act ("UDJA"). When a plaintiff seeks declaratory relief, Washington courts scrutinize whether the case presents a justiciable dispute

[6] Plaintiffs argue that a federal case, *Katyle v. Penn Nat'l Gaming, Inc.*, 637 F.3d 462, 470-71 (4th Cir. 2011), supports *de novo* review of the Trial Court's denial of their motions for leave to amend. App. Br. 28-29. They are wrong. First, *Katyle* does not suggest that the proper standard of review of a post-judgment motion to amend is *de novo* (the words "*de novo*" appear nowhere in that decision); federal courts review denials of motions for leave to amend a complaint for an abuse of discretion. *Jackson v. Bank of Haw.*, 902 F.2d 1385, 1387 (9th Cir. 1990). More importantly, Washington appellate courts review trial court decisions on motions for leave to amend pleadings using the manifest abuse of discretion standard. *Wilson*, 137 Wn.2d at 505.

because there is a risk that a declaratory judgment may stray into the realm of advisory opinions. The earliest cases interpreting the UDJA have emphasized the danger that a lawsuit seeking declaratory relief presents. *See, e.g.*, *Wash. Beauty Coll., Inc. v. Huse*, 195 Wash. 160, 164-65, 80 P.2d 403 (1938) ("It should be remembered that this court is not authorized to render advisory opinions or pronouncements upon abstract or speculative questions under the declaratory judgment act."); *Acme Fin. Co. v. Huse*, 192 Wash. 96, 73 P.2d 341 (1937) (providing an overview of the history of litigation in federal and state courts on issue of whether declaratory judgments present a case or controversy).

A case brought under the UDJA presents a justiciable case or controversy if it satisfies four requirements. It must involve:

> (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). "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). The Superior Court applied the *Diversified Industries* test in granting the motion to dismiss. RP 28:10-29:22.

As a part of the standing analysis under the *Diversified Industries* four-part test, Washington courts look to see whether there is an "injury in fact, economic or otherwise, to the party seeking standing" and whether the plaintiff is "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Grant Cty. Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 802, 83 P.3d 419 (2004) (internal quotation marks and citations omitted); *see also To-Ro Trade Shows*, 144 Wn.2d at 414 ("To have standing to challenge the constitutionality of a statute, a party must show, in addition to sufficient factual injury, that the interest sought to be protected is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.") (internal quotation marks and citations omitted).

For this inquiry, federal cases on standing and justiciability are instructive and often cited by Washington courts. *See Forbes v. Pierce Cty.*, 5 Wn. App. 2d 423, 434 n.2, 427 P.3d 675 (2018) ("Federal standing doctrine, although distinct, can be instructive."); *see also High Tide Seafoods v. State*, 106 Wn.2d 695, 701-02, 725 P.2d 411 (1986) (citing

Allen v. Wright, 468 U.S. 737, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984), *Craig v. Boren*, 429 U.S. 190, 193-94, 97 S. Ct. 451, 50 L. Ed. 2d 397 (1976), and *Grove v. Mead Sch. Dist. 354*, 753 F.2d 1528 (9th Cir. 1985)); *Walker v. Munro*, 124 Wn.2d 402, 419, 879 P.2d 920 (1994) (citing federal authority in discussing whether plaintiffs had standing to seek declaratory and injunctive relief); *Save a Valuable Env't (SAVE) v. City of Bothell*, 89 Wn.2d 862, 866, 576 P.2d 401 (1978) (citing *Ass'n of Data Processing Servs. Org., Inc. v. Camp*, 397 U.S. 150, 152-53, 90 S. Ct. 827, 25 L. Ed. 2d 184 (1970), regarding organizational standing).

1. Individual Plaintiffs Lack Standing.

Individual Plaintiffs brought this lawsuit to challenge a law they dislike—not one that has injured them (or that is likely to injure them in the future). What they want is an advisory opinion; the Superior Court wisely declined to offer one.

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 at 436-37. In the absence of a present threat of criminal prosecution, the Court of Appeals held that a plaintiff has standing to bring a pre-enforcement challenge to a statute only

if they can show they intend 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 this challenge as nonjusticiable because plaintiffs did not make "any allegation that they intend to engage in conduct prohibited by [the law] in the future." *Id.* The Court reached this conclusion, even though plaintiffs had already received a "notice and order to correct," which: (1) identified violations of the law; (2) stated "that failure to comply may result in further enforcement action"; and (3) cited the imposition of fines as an example of possible enforcement. *Id*. at 429, 435-37.

Because the Individual Plaintiffs did not allege a current threat of enforcement, they were required to establish "risk of future, potential . . . enforcement based on their anticipated conduct" to have standing. *Id*. at 436. To do so, they were required to allege some sort of plan to engage in future conduct proscribed by the Ordinance. *See id.* (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 302, 99 S. Ct. 2301, 60 L. Ed. 2d 895 (1979) ("By showing that they intended to engage in future conduct, the plaintiffs demonstrated that 'fear of criminal prosecution . . . is not imaginary or wholly speculative.'"). The touchstone in *Forbes*, as in *Diversified Industries*, is whether the risk of enforcement is "speculative"—

that is, whether there are concrete factual allegations that describe Plaintiffs' intent to violate the law, a fact that bears on the likelihood of future enforcement. Those were lacking here.

The operative complaint was devoid of factual allegations showing that Individual Plaintiffs intend to violate either the responsible storage provision or the child access prevention provision of the Ordinance. With respect to Section 10.79.020 (responsible storage), neither Individual Plaintiff alleged that, once the Ordinance took effect, he intended to leave his firearm unsecured (not in a locked container) when he is not carrying the firearm and does not otherwise have it under his control. Instead, the Individual Plaintiffs merely alleged that they would like to continue keeping their firearms unlocked to defend themselves. CP 2-3. But this is insufficient; keeping firearms unlocked for self-defense *complies* with the Ordinance so long as the firearms remain under one's control. And—understandably given the implications of admitting such irresponsible conduct in a court filing—Plaintiffs never alleged that they intended to store firearms both unlocked *and* out of their control.

The complaint also lacked any allegations from which the Superior Court could have determined whether the Individual Plaintiffs' plans were sufficiently definite to establish a future likelihood of future violations. Again, understandably, the Individual Plaintiffs declined to state their

intention to violate the Ordinance. All they alleged was a "strong desire" (CP 2 ¶ 1, 3 ¶ 2) to engage in conduct that might violate the law; that is not sufficient. *See, e.g.*, *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000) ("A general intent to violate a statute at some unknown date in the future does not rise to the level of an articulated, concrete plan."); *Diversified Indus. Dev. Corp.*, 82 Wn.2d at 815 (requiring "interests that must be direct and substantial, rather than potential, theoretical, abstract or academic").

The Superior Court properly recognized these deficiencies in concluding that the Individual Plaintiffs did not have standing. *See* RP 28:21-29:8 ("There'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."). There was no error.

The complaint alleged even less of a concrete plan to violate Section 10.79.030 (unauthorized access prevention) because the Individual Plaintiffs did not allege they intended to store their firearms in a manner in which "a minor, an at-risk person, or a prohibited person is likely to gain access to a firearm" that belongs to them. SEATTLE MUN. CODE § 10.79.030. The most that the Individual Plaintiffs alleged is that they "desire" to store their firearms in an "unlocked and usable state." CP 2-3. Crucially, there were no allegations that minors, at-risk persons, or

prohibited persons lived in or were likely to visit the Individual Plaintiffs' homes, much less that the Individual Plaintiffs were aware that such a person was likely to gain access to an improperly stored firearm but recklessly intended to do so anyway.

Contrary to Plaintiffs' argument (App. Br. 19), the fact that the Ordinance is now in effect does not change the record that was before the Superior Court. Plaintiffs did not allege how their storage practices violate the Ordinance, and therefore the Superior Court correctly concluded, on the record before it, that Plaintiffs failed to allege facts sufficient to demonstrate a justiciable dispute.

Plaintiffs also now argue that the Superior Court erred in not making "reasonable inferences" based on the complaint. App. Br. 16-17. This argument fails for two reasons. First, Plaintiffs' argument relies on applying the *Haberman* standard to CR 12(b)(1) motions to dismiss. As discussed above at page 11, *Haberman* is not applicable to a CR 12(b)(1) motion. Plaintiffs cite to *Bravo v. Dolsen Companies*, 125 Wn.2d 745, 750, 888 P.2d 147 (1995), but that case also relies on *Haberman* and its reasoning is limited to 12(b)(6) motions (permitting introduction of "[h]ypothetical facts" for the first time on appeal where they can "assist the court in establishing the 'conceptual backdrop' against which the challenge to the legal sufficiency of the claim is considered"). There is good reason to think

that the consideration of such "hypothetical facts" and inferences is particularly inappropriate where the question of justiciability is at issue. *See Diversified Industries*, 82 Wn.2d at 815 (courts may not adjudicate "hypothetical, speculative" disputes).

Second, even on its own terms, Plaintiffs' argument contorts the *Haberman* standard so much that it becomes unrecognizable. Essentially, Plaintiffs are asking this Court to endorse a standard that would require trial courts to imagine factual scenarios without any mooring to the complaint. The Individual Plaintiffs did not say what their storage practices were—whether, for instance, they leave their firearm under a pillow or in plain view on the kitchen table or otherwise leave it unsecured when they leave their home. The court then could have drawn reasonable inferences about Plaintiffs' intent to violate the Ordinance with respect to control and possession of firearms. In other words, Plaintiffs sought more than the hypothetical "conceptual backdrop" referenced in *Bravo*, 125 Wn.2d at 750. The facts they asked the Superior Court to hypothesize went to the very core of their case. But without basic allegations about how they store their firearms, the Superior Court is squarely in the "hypothetical, speculative" realm of a nonjusticiable dispute. *Diversified Industries*, 82 Wn.2d at 815. To adopt the Plaintiffs' reading of *Haberman* would be to task trial courts with inventing facts out of whole cloth, unmooring claims from the facts

alleged and improperly extending jurisdiction to speculative disputes not even pleaded by a plaintiff.

In sum, the Individual Plaintiffs' personal opposition to a law mandating responsible control and safe storage of firearms does not make their complaint justiciable. They seek precisely the sort of advisory opinion that Washington courts may not issue.

2. The Organizational Plaintiffs Lack Standing.

The Organizational Plaintiffs failed to allege basic facts about their membership and purpose. The Superior Court properly held that because they had not alleged the Ordinance was at odds with their "purpose and interest and values," the Organizational Plaintiffs did not have standing to sue. RP 29:10.

An organization may have standing to sue on its own behalf (direct organizational standing) if it can show that it falls within the zone of interests of the challenged law and that it has suffered an injury-in-fact. *Am. Legion Post #149 v. State Dep't of Health*, 164 Wn.2d 570, 593-94, 192 P.3d 306 (2008). An organization may also sue on behalf of its members (representational standing) if it can show: "'(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of

individual members in the lawsuit.'" *Id.* at 595. (quoting *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977)); *see also Five Corners Family Farmers v. State*, 173 Wn.2d 296, 304, 268 P.3d 892, (2011).[7] The National Rifle Association and the Second Amendment Foundation both failed to allege sufficient facts to establish either direct or representative standing.

With respect to *representational standing*, the Organizational Plaintiffs failed to allege in the operative complaint that they have members affected by the Ordinance who live in Seattle and who intended to store their guns irresponsibly in violation of the Ordinance. They rely, instead, on the Individual Plaintiffs to satisfy this prong of representational standing. But the Individual Plaintiffs, for the reasons stated above, lack standing. Thus, they have failed to allege that they have members who "otherwise have standing to sue in their own right"; this failure is dispositive. *Am. Legion Post #149*, 164 Wn.2d at 595.

[7] In a similar case in Edmonds, Washington—where the same organizational plaintiffs challenged a very similar local ordinance with a complaint that was virtually identical—the National Rifle Association and the Second Amendment Foundation recently moved to voluntarily dismiss all their claims in advance of briefing on summary judgment. *See* Stipulated Mot. and Proposed Order for Voluntary Dismissal Pursuant to CR 41, at 2, *Bass v. City of Edmonds*, Case No. 18-2-07049-31 (Snohomish Cty. Super. Ct. June 6, 2019), Dkt. No. 60 ("Here, at the request of the Plaintiffs NRA and SAF, the parties have stipulated to have Plaintiffs NRA and SAF voluntarily dismiss the claims against Defendants, which will leave only Brett Bass, Curtis McCullough, and Swan Seaberg as plaintiffs in this matter.").

The Organizational Plaintiffs also failed to allege that this lawsuit raised claims germane to their organizational purpose—a necessary element for their standing here. *See Five Corners Family Farmers*, 173 Wn.2d at 304. The Second Amendment Foundation alleges that its purpose is to protect "the constitutional right to own and possess firearms," while the National Rifle Association alleges that its purpose is "protection of the right of citizens to have firearms for lawful defense, hunting, and sporting use, and to promote public safety." CP 3. Neither Organizational Plaintiff has pleaded that its purpose is to preserve a right of their members to leave firearms unsecured in their homes when those members are not carrying their firearms and do not otherwise have them under their control. *See Am. Legion Post #149*, 164 Wn.2d at 596 (organization lacked standing because challenging a smoking ban was not germane to the organizational purpose of maintaining a social hall center for veterans).

Nor did they allege a cognizable organizational mission. In the Organizational Plaintiffs' own public pronouncements, they instruct their members to store firearms responsibly in a manner that is ***consistent*** with what the Ordinance requires, namely that gun owners should keep their firearms secured whenever they are not under the owners' control so that

unauthorized persons cannot gain access. CP 29.[8] For instance, the National Rifle Association directs members "to store your guns so that they are inaccessible to any unauthorized users, especially your children and the children that visit your home." *Id*. The Second Amendment Foundation participates in a coalition that directs people to "[l]ock up all firearms" when they are not in use, so as to prevent suicide by firearm. *Id*.

In their brief, the Organizational Plaintiffs argue that their "constitutional right to self-defense" (and the Individual Plaintiffs' right) gives rise to standing. App. Br. at 20. But Plaintiffs have not raised a claim under the Second Amendment of the U.S. Constitution or Article I, Section 24 of the Washington Constitution; such an allegation is nowhere to be found in the complaint. Even if they had, such a claim would fare poorly. *See D.C. v. Heller*, 554 U.S. 570, 632, 128 S. Ct. 2783, 2820, 171 L. Ed. 2d 637 (2008) ("Nor, correspondingly, does our analysis suggest the invalidity of laws regulating the storage of firearms to prevent accidents."); *Jackson v. City and Cty. of San Francisco,* 746 F.3d 953, 966 (9th Cir. 2014) (finding

[8] In their proposed amended complaint, the Organizational Plaintiffs confirmed "[t]he storage methods proscribed by the Ordinance does [sic] not comport with the best practices for safe storage as outlined and recommended by the NRA and SAF." CP 198. Defendants pointed this out in their opposition to the motion for reconsideration. CP 226. Plaintiffs did not rebut this in their reply and instead went on to file an amended complaint in the Snohomish County litigation that contained the same sentence. Verified Am. Compl., ¶ 45 *Bass v. City of Edmonds*, Case No. 18-2-07049-31(Snohomish Cty. Super. Ct. Dec. 7, 2018), Dkt. No. 38. On appeal, they now suggest their use of "proscribe" was an error, but the several instances when they have affirmed and repeated this statement belie a mistake. App. Br. 21, n. 5.

gun owners unlikely to succeed on merits of Second Amendment challenge to San Francisco responsible storage ordinance).

With respect to *direct* organizational standing, the Organizational Plaintiffs have not alleged injury-in-fact. Washington law requires that an organization suing on its own behalf allege "concrete and demonstrable injury to its activities caused by a drain on the organization's resources." *Glob. Neighborhood v. Respect Washington*, 7 Wn. App. 2d 354, 387, 434 P.3d 1024 (2019). The Organizational Plaintiffs point to nothing in the complaint that suggests that they have, themselves, been injured by this Ordinance.

3. Plaintiffs Have Not Presented a Ripe Dispute.

If Plaintiffs established standing they would still fall short. To present a justiciable dispute they must also show that it is ripe for resolution. *Diversified Indus. Dev. Corp.*, 82 Wn.2d at 815. Plaintiffs failed to allege facts demonstrating that this lawsuit—which sought pre-enforcement review of the Ordinance—was ripe for decision. Therefore, ripeness provides an independent ground to uphold the superior court's decision.

To decide whether a claim is ripe, "Washington courts have largely applied the federal test of balancing the fitness of the issues for judicial decision against the hardship to the parties in not deciding a matter." Philip A. Talmadge, *Understanding the Limits of Power: Judicial Restraint in*

General Jurisdiction Court Systems, 22 SEATTLE U. L. REV. 695, 718 (1999); *see also First Covenant Church of Seattle, Wash. v. City of Seattle*, 114 Wn.2d 392, 400, 787 P.2d 1352 (1990), *cert. granted, judgment vacated on other grounds sub nom, City of Seattle v. First Covenant Church of Seattle, Wash.*, 499 U.S. 901, 111 S. Ct. 1097, 113 L. Ed. 2d 208 (1991) (citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 149, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967); *Standard Alaska Prod. Co. v. Schaible*, 874 F.2d 624, 627 (9th Cir. 1989)).

The first prong—"fitness of the issues for judicial decision"—is satisfied "if the issues raised are primarily legal, do not require further factual development, and the challenged action is final." *First Covenant Church of Seattle, Wash.*, 114 Wn.2d at 399-400 (1990) (citations omitted). This test is encapsulated in the first prong of the *Diversified Industries* test. *Lee v. State*, 185 Wn.2d 608, 617, 374 P.3d 157(2016) ("The first prong of this test concerns ripeness and mootness"). As noted above, the operative complaint did not allege that Plaintiffs' storage methods would violate the ordinance. This alone is enough to sustain the Superior Court's determination that the complaint did not present issues fit for resolution.

As to the second prong—"the hardship to the parties of withholding court consideration"—Plaintiffs alleged no facts suggesting a hardship if they must wait to challenge the law until (and, more importantly, *if*) it is

enforced against them. *First Covenant Church of Seattle, Wash.*, 114 Wn.2d at 399-400. In the event Plaintiffs do violate the Ordinance, they could face a civil fine of no more than $500 or community service so long as no unauthorized person accesses the firearm. SEATTLE MUN. CODE § 10.79.040. The theoretical potential of incurring a fine no greater than $500 (for which community service may be substituted upon a showing of good cause) is not a threat of imminent substantial harm sufficient to warrant judicial intervention in the pre-enforcement stage. Importantly, there is no possibility of criminal prosecution for a violation of the Ordinance. Plaintiffs therefore face no real hardship if they wait until enforcement of the Ordinance.[9]

Plaintiffs rely on *Clallam County Deputy Sheriff's Guild v. Board of Clallam County Commissioners*, 92 Wn.2d 844, 846, 601 P.2d 943 (1979), but that case involved a significant risk of serious hardship if Plaintiffs had to wait for enforcement. In *Clallam County*, a labor union sought a declaratory judgment to clarify which law (a state law or a county ordinance) governed the pay scales for public sector workers. *Id*. at 845. The potential harm that the plaintiffs risked by waiting for court

[9] Contrary to Plaintiffs' argument (App. Br. 19), whether the Ordinance is in effect does not answer the question of whether waiting for enforcement constitutes a hardship. To be sure, it impacts the likelihood of enforcement, but the question of pre-enforcement ripeness does not turn on that. The question is whether a litigant will face hardship if required to wait to challenge a statute until after enforcement.

enforcement was significant, and the uncertainty itself—not knowing one's salary—was an independent harm. In *Clallam County*, every deputy sheriff in the county would have been in salary limbo: unsure what amount they earned, unable to budget accordingly, and lacking adequate information that might enable them to decide whether to stay in county employment or seek employment elsewhere. Here, the most Plaintiffs risk is that they may have to either pay a fine or perform community service. Plaintiffs have alleged no facts that show that waiting until the Ordinance is enforced would create a meaningful hardship, and thus have no basis for overcoming the presumption against reviewing a law before it is enforced.

Perhaps sensing their allegations of justiciability are weak, Plaintiffs repeatedly argue that the Superior Court erred in not issuing an advisory opinion because this case presents an issue of "broad overriding public import." App. Br. 18 n.3, 24, 31. But Washington cases limit the public import exception to *Diversified Industries*' justiciability requirements. Critically, it may not be used to circumvent the first prong of that test. In *Walker v. Munro*, 124 Wn. 2d 402, 415, 879 P.2d 920 (1994), the Washington Supreme Court reviewed cases where it had issued opinions on matters of great public import from those where it had declined to do so, concluding: "An examination of the numerous cases cited for this claim reveals . . . that even if we do not always adhere to all four requirements of

the justiciability test, this court will not render judgment on a hypothetical or speculative controversy, where concrete harm has not been alleged." Thus, the Court emphasized that in cases where it did not strictly enforce each element of justiciability under *Diversified Industries* it only relaxed the standard where a party had suffered actual harm and was precluded from review for some *other* reason. *Id.* at 418-419. Here, as the Superior Court concluded, no plaintiff alleged "concrete harm," an essential element of justiciability even for cases of great public import.

C. The Superior Court Properly Denied Plaintiffs' Requests for Leave to Amend their Pleadings.

Plaintiffs made a summary request for leave to amend their pleadings in their opposition to Defendants' motion to dismiss, which was filed on October 8, 2018. CP 108 ("Alternatively, the Court Should Grant Plaintiffs Leave to Amend."). Plaintiffs neither attached a proposed amended complaint, nor proffered in their brief what amendments they sought leave to make. When Plaintiffs asked at oral argument whether the court's order of dismissal was with prejudice, Plaintiffs again did not proffer even a general description of what additional facts they might allege to avoid a futile amendment. RP 30:21-22. This failure to proffer was crucial to the Superior Courts' decision to deny their motion for leave to amend:

> I haven't heard anything that would suggest to me that there is an amendment that would cure these issues, and so [the decision is] not

> without prejudice to there being another lawsuit at some point with—that would meet this test. But I have not heard, nor can I envision a pleading that would cure this, and so it's with prejudice.

RP 30:23-31:3. Though Plaintiffs quote the Superior Court's decision in their brief, they omit (App. Br. 9) a crucial part of that decision; namely, that the court based its decision to deny Plaintiffs' requests for leave to amend on the fact that no proffer of facts had been made ("I haven't heard anything" and "I have not heard, nor can I envision"). And contrary to Plaintiffs' suggestion (App. Br. 9, 25) that the Superior Court could not conceive of *any* plaintiff that could have justiciable grounds to challenge the Ordinance, the Superior Court expressly left open the possibility that *other* plaintiffs may ultimately succeed in bringing a lawsuit that presents a justiciable dispute. It just was not willing to invent unalleged facts here that might give *these* plaintiffs standing. Thus, there was no abuse of discretion.

1. The Superior Court Properly Exercised Its Discretion To Deny Leave to Amend Because Plaintiffs Failed to Proffer Facts that Would Cure the Complaint's Deficiencies.

The Superior Court followed the rule governing motions for leave to amend when it orally denied Plaintiffs' requests for leave to amend. Civil Rule 15 requires that any such motion or request be accompanied by the proposed amended pleadings. CR 15(a) ("If a party moves to amend a pleading, a copy of the proposed amended pleading, denominated 'proposed' and unsigned, shall be attached to the motion."). Proffering

proposed amendments is mandatory. *Hook v. Lincoln Cty. Noxious Weed Control Bd.*, 166 Wn. App. 145, 159, 269 P.3d 1056 (2012) ("The word 'shall' is presumptively imperative and operates to create a duty."). This requirement exists because "[b]oth the opposing party and the court have a legitimate need to see the proposed amended pleading in order to address and assess relevant issues of prejudice and futility." *Id.* In other words, CR 15's requirement that a party proffer a proposed amended pleading is motivated by judicial efficiency: it is a waste of superior court resources to grant leave to amend pleadings only to later discover that the amended complaint is insufficient as a matter of law or is unduly prejudicial.

Failure to attach a proposed amended complaint is "a sufficient basis for denying the motion." *Id.* at 160. This is so even where the motion for leave to amend a compliant is raised as a part of briefing on a dispositive motion.

In addition to their failure to comply with CR 15, Plaintiffs failed to proffer *any* new or revised factual allegations that would have allowed the Superior Court to "address and assess relevant issues of prejudice and futility." *Hook,* 166 Wn. App. at 159. On this record, the Superior Court's conclusion that amendment would be futile—"I haven't heard anything that would suggest to me that there is an amendment that would cure these

issues," RP 30:23-24—was not an abuse of discretion. *Hook*, 166 Wn. App. at 159.

Plaintiffs now appear to argue that, despite CR 15's plain language, there is no actual requirement that a party moving for or seeking leave to amend proffer what facts they would change in their amended pleadings *at the time they move or request*. App. Br. 27. This is wrong: failure to attach a proposed amended complaint, or at least proffer the additional facts in some form after multiple opportunities to do so (here, in both a written opposition and at oral argument), is an independent basis for denying a CR 15 motion. *Hook*, 166 Wn. App. at 160; *Parsons v. Estate of Parsons*, 192 Wn. App. 1073 (2016).

The cases cited by Plaintiffs are unavailing. For instance, while *Katyle*, 637 F.3d 462 at 470-71, discusses a federal standard for evaluating leave to amend as part of a post-judgment motion for reconsideration, it does not reflect Washington law and has no bearing on whether the Superior Court properly relied upon Plaintiffs' repeated failures to proffer a proposed amended complaint (or the facts that would support such an amended complaint) as an independent basis for denying the plaintiffs' initial request for leave to amend their pleadings.

Plaintiffs argue (App. Br. 25) they were "not afforded an opportunity to proffer additional facts or submit a single amended pleading

before the trial court ruled" on their request for leave to amend, but that assertion is belied by the record. When counsel for the parties conferred in September 2018, Defendants asked Plaintiffs whether they intended to amend their pleadings in view of Defendants' motion to dismiss; counsel for Plaintiffs stated they intended to stand on their pleadings. CP 229-30. Plaintiffs inarguably had an opportunity to submit a proposed complaint or proffer additional facts when they filed a brief in opposition to Defendants' motion to dismiss (which included a bare and unsupported request to amend)[10] and again at oral argument on that motion.

Indeed, at oral argument, Plaintiffs' counsel did in fact offer to proffer *certain* facts, just none germane to this issue.[11] For instance, counsel offered to submit a declaration and amend the complaint to specify that Mr. Alim is a member of the National Rifle Association, to cure the Organizational Plaintiffs' failure to allege they had any members who resided in Seattle. RP 23:9-12. Counsel for Plaintiffs thus knew they could—and should—proffer facts to fix the complaint's shortcomings. Yet

[10] To the extent Plaintiffs argue that they did not *actually* move to amend their complaint in their opposition to the motion to dismiss and only moved to amend as a part of their motion for reconsideration, their failure to formally move does not cure this problem. They sought leave to amend, did not follow the requirements of CR 15, and the Trial Court did not err in denying their request for leave to amend and subsequent motion for reconsideration.

[11] At oral argument, counsel for Defendants even suggested a series of amendments that, if made, would cure the defects in the complaint. E.g. RP 7:5-14, 8:15-22, 12:7-10.

Plaintiffs chose not to do so with respect to the issues at the core of this lawsuit; namely, whether the Individual Plaintiffs' storage practices would violate the Ordinance and whether the lawsuit is germane to the Organizational Plaintiffs' interests. That choice was deliberate; for obvious reasons, Plaintiffs tried to skirt admitting in open court that they engage in, encourage, or condone reckless gun handling and storage practices that fail to comply with best practices and put safety at risk. So they attempted to skate by with the vaguest of allegations on standing and justiciability. The Superior Court properly found those allegations inadequate.

2. The Applicability of CR 15 Does Not Vary Based on the Grounds on Which the Complaint Was Dismissed.

In a last-ditch effort, Plaintiffs present a novel theory for asserting that the Superior Court erred in denying their request for leave to amend. They argue that "justiciability dismissals should be without prejudice." App. Br. 30-31. But the cases they cite provide no support for their argument. While it is true the Washington Supreme Court in *Diversified Industries* ordered dismissal of the case without prejudice, that opinion does not discuss the standard for granting leave to amend or how that standard might interact with the arguments about justiciability. 82 Wn.2d at 814. *Lewis County v. State* is likewise unhelpful because it also does not address this issue. 178 Wn. App. 431, 315 P.3d 550 (2013).

Nor is there merit to Plaintiffs' argument that "the very nature of a ripeness test allows for the possibility that a claim may eventually ripen." App. Br. 31. If followed to its logical conclusion, this argument could require superior courts to always hold unripe cases in abeyance—occupying space on their dockets and providing little certainty to litigants—until some future date when they might become ripe. The very suggestion demonstrates this dispute was not ripe when dismissed.

Plaintiffs elected to withhold information that went to the heart of their case; information that was in their possession and that they had ample opportunity to proffer to the Superior Court. This was no mere technicality, and this Court should not reward their dilatory and wasteful tactics. CP 229-30. *U.S. Bank Nat'l Ass'n v. Stanton*, No. 77638-0-I, 2019 WL 1245654, at *5 (Wash. Ct. App. Mar. 18, 2019) (courts "may also consider 'undue delay, bad faith or dilatory motive on the part of the movant'") (citation omitted). That they now regret their decision not to make a full proffer in their briefing or at oral argument is of no import. The Court should not favor such gamesmanship—it wastes judicial resources and leads to unnecessary and duplicative briefing. The Superior Court's broad discretion was well exercised here.

D. The Superior Court Did Not Err in Denying Plaintiffs' Motion for Reconsideration.

Plaintiffs moved for reconsideration under CR 59(a)(8) on October 29, 2018, challenging the Superior Court's decision to grant the motion to dismiss with prejudice. CP 139-151. With their motion for reconsideration, Plaintiffs for the first time proffered a proposed amended complaint and added relevant factual allegations and legal theories with respect to justiciability.

Motions for reconsideration under CR 59 must meet a high bar:

> By bringing a motion for reconsideration under CR 59, a party may preserve an issue for appeal that is closely related to a position previously asserted and does not depend upon new facts. But while the issue is preserved, the standard of review is less favorable. CR 59 provides that on the motion of an aggrieved party the court "may" vacate an interlocutory order and grant reconsideration. The trial court's discretion extends to refusing to consider an argument raised for the first time on reconsideration absent a good excuse.

River House Dev. Inc. v. Integrus Architecture, P.S., 167 Wn. App. 221, 231, 272 P.3d 289 (2012) (internal citations omitted). Thus, while a motion for reconsideration may raise a new legal theory, the movant must explain why that theory was not raised earlier. Additionally, the motion may not depend on new facts. *See Wilcox*, 130 Wn. App. at 241 ("But here, the motion for reconsideration arguments were based on new legal theories with new and different citations to the record. Wilcox offers no explanation for why these arguments were not timely presented. *CR 59 does not permit a*

plaintiff to propose new theories of the case that could have been raised before entry of an adverse decision." (emphasis added)).

In their motion for reconsideration, Plaintiffs introduced new arguments and new facts (a proposed amended complaint) without offering any explanation for why they could not have raised this in their earlier request for leave to amend their pleadings. Because Plaintiffs had made no proffer of facts when they initially requested leave to amend—let alone a proffer that would have complied with CR 15(a)'s basic requirements—Plaintiffs' motion for reconsideration identified no error in law in the Superior Court's decision denying their motion for leave to amend.

To the extent Plaintiffs argue that their motion for reconsideration included a separate motion for leave to amend (App. Br. 26), the Superior Court was well within its discretion to deny that motion. First, regardless of whether it seeks leave to amend, a CR 59 motion may be denied if it relies upon "new facts" or "new and different citations to the record." *River House Dev. Inc.*, 167 Wn. App at 231; *Wilcox*, 130 Wn. App at 241.

Again, the cases cited by Plaintiffs fail to support their argument that their motion for leave to amend was properly made as a motion for reconsideration. Indeed, the case on which Plaintiffs principally rely, *Rose ex rel. Estate of Rose v. Fritz*, actually undermines their argument. There, the plaintiff had failed to probate his wife's estate and have himself named

as the estate's representative until after the dismissal of an action that he had brought in the name of the estate. 104 Wn. App. 116, 118, 15 P.3d 1062 (2001). The plaintiff *then* moved for reconsideration of a final judgment under CR 59 and CR 60. *Id.* at 119. The Court of Appeals concluded that the lower court properly denied the motion for reconsideration when it concluded that the plaintiff's neglect of the case was not excusable. *Id*. at 121. Thus, *Rose* does not support Plaintiffs' contention in this case but instead joins a line of cases that require a plaintiff seeking leave to amend provide a justification for any delay. *See, e.g., U.S. Bank Nat'l Ass'n*, 2019 WL 1245654, at *5 (noting that "US Bank offered no justification for the delay in its motion). Plaintiffs give no such justification here.

Plaintiffs made a strategic decision not to include in their pleadings any details of their storage methods (or, in the case of the Organizational Plaintiffs, their policy positions on safe storage). Their proposed amendments shed light on that strategy. The belatedly-proffered amended complaint (provided for the first time with Plaintiffs' motion for reconsideration) demonstrates that Mr. Thyng does not intend to engage in conduct proscribed by the Ordinance; indeed, his allegations remain virtually unchanged from the original, operative complaint. CP 193-94. Similarly, even with their last-ditch effort to proffer an amended complaint, the National Rifle Association and Second Amendment Foundation were

still unwilling to state that they support irresponsible storage methods. CP 193-94, 198. Those allegations come too late and remain inadequate to cure the deficiencies in the operative complaint. *U.S. Bank Nat'l* 2019 WL 1245654, at *5.

The only allegations that changed substantially were with respect to Mr. Alim. Whereas previously Mr. Alim had only alleged "a strong desire to continue having his firearm in an unlocked and usable state in his home," allegations entirely consistent with the Ordinance, the proposed amended complaint now contains paragraphs describing his storage practices at different times of day and with illustrative examples. CP 193, 197. *None* of this information was unknown to Plaintiffs at the time they filed the original complaint. To be sure, Plaintiffs might have decided not to include these allegations because they are a public admission that Mr. Alim uses dangerous storage methods. But whatever the reason, Plaintiffs: (1) failed to include this information in their complaint; (2) failed to proffer this information with their request to amend; and (3) failed to proffer this information at oral argument. The Superior Court thus did not err in holding that Plaintiffs had failed to demonstrate "anything that would suggest . . . that there is an amendment that would cure" Plaintiffs' justiciability deficiencies. RP 30:23-24.

Failing to proffer known facts to support leave to amend in briefing or oral argument wastes judicial resources. CR 15 requires litigants to make timely proffers of their best case to sustain a complaint and discourages parties from holding back information in hopes they can avoid embarrassing disclosures, only to disclose additional facts after the Court has spent considerable time and resources determining the allegations as pleaded are inadequate. Under Plaintiffs' proposed construction of the rules governing amendments, to avoid public disclosures of important relevant information, Plaintiffs could continually dribble out additional facts in successive motions until they finally cleared the pleading hurdle.

The Superior Court was well within its discretion to deny both motions.

E. The Proposed Amended Complaint Also Fails to Present a Justiciable Dispute.

Assuming, *arguendo*, that Plaintiffs were allowed to amend their pleadings, the proposed amended complaint would still fail the *Diversified Industries* test.

The proposed amended complaint does nothing to alter the fatal problem for the Organizational Plaintiffs that the Superior Court identified in its ruling: they support responsible firearms storage and do not recommend that their members leave firearms stored in such a way that they

could be easily accessed by minors or that they leave unlocked guns outside of their control. The National Rifle Association and the Second Amendment Foundation are—unsurprisingly—unwilling to say that they support the sort of irresponsible storage the Ordinance proscribes. In their brief on appeal, the Organizational Plaintiffs describe a previously undisclosed organizational purpose, that they "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." App. Br. 20. But they failed to state this interest previously (not even in the proposed amended complaint submitted on reconsideration) and provide no excuse now for their dilatory practices. It is therefore waived. *State v. Jones*, 185 Wn.2d 412, 426-27, 372 P.3d 755 (2016). Additionally, for the Second Amendment Foundation's claim of representational standing, the proposed amended complaint cites only one member in Seattle, Mr. Thyng, who may be affected by the Ordinance. CP 194. Yet the plaintiffs have dropped any serious argument that Mr. Thyng has standing—he does not. He does not allege that he now stores or in the future intends to store his firearms in a manner that violates the Ordinance. When an organization seeks to establish representative standing but does not allege that any of their members have individual standing, they do not have standing. *Five Corners Family Farmers*, 173 Wn.2d at 304.

As for Mr. Alim, even if he were to allege facts sufficient to support standing now, there is nothing in the proposed amended complaint that could not have been raised in the original complaint, in Plaintiffs' opposition to the motion to dismiss (which included a request to amend their complaint), in a declaration attached thereto, or at oral argument. As discussed above, raising it at such a late stage is precisely the type of dilatory practice disallowed by Rule 15(a) and presents "new theories of the case that could have been raised before entry of an adverse decision." *Wilcox*, 130 Wn. App. at 241.

More crucially, though: Mr. Alim still has not alleged there is any hardship to him if he must wait for enforcement before challenging the law. *See, e.g. State v. Massey*, 81 Wn. App. 198, 199-200, 913 P.2d 424 (1996) (holding that a challenge to a condition of community supervision that required parolee to submit to searches of his person, residence, and vehicle was premature because he had not yet been subjected to a search and that "[t]he unconstitutionality of a law is not ripe for review unless the person is harmfully affected by the part of the law alleged to be unconstitutional"); *State v. Phillips*, 65 Wn. App. 239, 243, 828 P.2d 42 (1992) ("[A]ny constitutional issues that might be raised with regard to the other penalties imposed are not presently ripe for review. It is only when the State attempts to collect Scott's $50 monthly payment ordered by the trial court that such

issues might arise."). In the absence of a proffer of personal hardship, the trial court properly declined to undertake speculative pre-enforcement adjudication concerning the Ordinance.

VI. Conclusion

For the foregoing reasons, this Court should affirm the Superior Court's decisions granting Defendants' motion to dismiss, denying Plaintiffs' motion to amend, and denying Plaintiffs' motion for reconsideration.

RESPECTFULLY SUBMITTED this 25th day of June, 2019.

s/Daniel J. Dunne
Orrick, Herrington & Sutcliffe LLP
Daniel J. Dunne (WSBA 16999)
701 Fifth Ave., Suite 5600
Seattle, WA 98104-7097
ddunne@orrick.com
(206) 839-4300

s/Eric A. Tirschwell
s/Molly Thomas-Jensen
Everytown for Gun Safety Support Fund
Eric A. Tirschwell (*Pro Hac Vice*)
Molly Thomas-Jensen (*Pro Hac Vice*)
132 East 43rd Street, #657
New York, NY 10017
etirschwell@everytown.org
mthomasjensen@everytown.org
(646) 324-8222

s/Peter S. Holmes
s/Gary Smith
Peter S. Holmes (WSBA 15787)
Seattle City Attorney
Gary Smith (WSBA 29718)
Assistant City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104
peter.holmes@seattle.gov
gary.smith@seattle.gov
(206) 684-8207

Attorneys for Respondents

CERTIFICATE OF SERVICE

The undersigned certifies that he caused the foregoing document to be served on all counsel of record via the court's e-service application.

Dated this 25th day of June, 2019.

s/Daniel J. Dunne
Daniel J. Dunne

ORRICK, HERRINGTON & SUTCLIFFE LLP

June 25, 2019 - 3:54 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	79350-1
Appellate Court Case Title:	Omar Abdul Alim, Appellant v. City of Seattle, Respondent
Superior Court Case Number:	18-2-18114-3

The following documents have been uploaded:

- 793501_Briefs_20190625155330D1643034_7397.pdf
  This File Contains:
  Briefs - Respondents
  The Original File Name was 2019 06 24 Response Brief.pdf

A copy of the uploaded files will be sent to:

- cnelson@corrcronin.com
- dpatterson@corrcronin.com
- elindberg@corrcronin.com
- etirschwell@everytown.org
- gary.smith@seattle.gov
- lise.kim@seattle.gov
- mthomasjensen@everytown.org
- sfogg@corrcronin.com

Comments:

Sender Name: Malissa Tracey - Email: mtracey@orrick.com
Filing on Behalf of: Daniel J. DunneJr. - Email: ddunne@orrick.com (Alternate Email: sea_wa_appellatefilings@orrick.com)

Address:
701 Fifth Avenue, Suite 5600
Seattle, WA, 98104
Phone: (206) 839-4309

Note: The Filing Id is 20190625155330D1643034