80755-2-I

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

BRETT BASS, an individual; SWAN SEABERG, an individual; CURTIS McCULLOUGH, an individual; THE SECOND AMENDMENT FOUNDATION, INC., a Washington non-profit corporation; and NATIONAL RIFLE ASSOCIATION OF AMERICA, INC., a New York non-profit association

Plaintiffs/Respondents/Cross-Appellants

v.

CITY OF EDMONDS, a municipality; DAVE EARLING, Mayor of the City of Edmonds, in his official capacity; EDMONDS POLICE DEPARTMENT, a department of the City of Edmonds; and AL COMPAAN, Chief of Police, in his official capacity.

Defendants/Appellants/Cross-Respondents

RESPONDENT/CROSS-APPELLANT'S ANSWERING BRIEF AND OPENING CROSS-APPEAL BRIEF

1001 Fourth Avenue, Suite 3900
Seattle, Washington 98154-1051
Tel (206) 625-8600
Fax (206) 625-0900

CORR CRONIN LLP

Steven W. Fogg, WSBA No. 23528
Eric A. Lindberg, WSBA No. 43596

Attorneys for Plaintiffs/Counter-Appellants

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I. INTRODUCTION

This appeal concerns the supremacy of state law under the Washington State Constitution and what happens when a municipality intrudes into a field that the legislature has expressly occupied. While the Washington State Constitution grants regulatory authority to municipalities, when the state legislature enacts laws on the subject, that authority ceases—and if the legislature occupies the field, a municipality may no longer enact any ordinances at all on that subject. This Court's constitutional role is to examine the statutory text to determine the intent of the legislature, and give effect to that intent.

Washington's State Legislature has enacted RCW 9.41.290, which declares that the state "fully occupies and preempts the entire field of firearms regulation within the boundaries of the state." The Washington Supreme Court has interpreted this statute and its legislative history in previous cases, and has recognized that "RCW 9.41.290 is concerned with creating statewide uniformity of firearms regulation of the general public." *Cherry v. Mun. of Metro. Seattle*, 116 Wn.2d 794, 802, 808 P.2d 746 (1991).

When enacting Ordinance Number 4120 (the "Ordinance"), the City of Edmonds (the "City") was well-aware of state preemption over local firearm regulation. Even so, the City included two regulatory provisions: one that regulates firearms by requiring locked storage, and one that

regulates firearms by penalizing storage that leads to unauthorized access. At the same time, the City of Seattle enacted an Ordinance with provisions that are almost identical. The regulatory provisions in the Ordinance were in effect in March 2019, when the individual plaintiffs moved for summary judgment and requested declaratory and injunctive relief. The trial court found that the clear statutory language in RCW 9.41.290 preempted the City's attempt to regulate firearms. By invalidating the provision regulating firearms through storage requirements, the trial court upheld the constitutional structure and the intent of the legislature. This Court should affirm.

On appeal, Appellants recurrently avoid the central, unavoidable, determinative fact: the operative provisions in the Ordinance are **firearms regulations**. Appellants never attempt to claim that the Ordinance does not regulate firearms, because this is plain and unavoidable. But once the state has "fully occupie[d] and preempt[ed] the entire field of firearms regulation," municipalities may no longer enact any direct regulations of firearms.

To try to escape the clear statutory language, Appellants focus on the illustrative list of topics included in RCW 9.41.290. Without any textual or historical support, Appellants quixotically argue that the list of topics is exhaustive, and that any topic of firearms regulation not expressly

mentioned in the list is excluded from the entire field of firearms regulation. In doing so, Appellants read "fully" and "entire" out of the statutory language, and attempt to re-define what "field" means in field preemption.

Contrary to Appellants' cramped interpretations, field preemption is understood to be expansive, all-inclusive, and synonymous with prohibiting even un-enumerated examples or direct conflicts. Moreover, accepted canons of statutory interpretation—adopted and endorsed by the Washington Supreme Court—recognize that a statute that uses the term "includes" before a list of categories indicates that the legislature intended to enlarge the category, and not to limit or to exclude un-enumerated categories.

Appellants also repeatedly invoke two recent cases—*Watson v. City of Seattle* and *Kitsap County v. Kitsap Rifle & Revolver Club*—to argue that local governments may regulate firearms, but this misrepresents the holdings of those cases. Rather than limit the field of firearms regulation to the categories listed in RCW 9.41.290, both cases held that the local law would not be preempted because the local law **did not regulate firearms**. In *Watson*, the City of Seattle instituted firearms taxes, not regulation. 189 Wn.2d 149, 156, 401 P.3d 1, 4 (2017). In *Kitsap County*, the challenged provision was a regulation of shooting ranges, not a "firearms regulation." 1 Wn. App. 2d 393, 1034, 405 P.3d 1026 (2017). Upon review of the

reasoning and holdings in each case, Appellants' arguments collapse like a house of cards.

In addition to being invalid due to field preemption, the Ordinance is also invalid because it conflicts with state law. Under RCW 9.41.290, "[l]ocal laws and ordinances that are inconsistent with, more restrictive than, or exceed the requirements of state law" are invalid. Under a new law, RCW 9.41.360, the State regulates access to stored firearms with requirements, elements, and penalties that differ from the Ordinance. The State law in this area is the result of the initiative process. The issues in this case—defining the respective roles for the state and multiple local governments in firearms regulation, along with conflict with a recent initiative—have great public importance and significance.

In light of the public importance of these constitutional issues, this Court should declare the entire Ordinance invalid. Although the trial court invalidated the provision in the Ordinance requiring locked storage, the trial court erroneously refused to reach the merits on the provision penalizing access to firearms in the same Ordinance. The Plaintiffs presented a justiciable case to the trial court, raising constitutional issues of public importance, but the trial court concluded that Plaintiffs lacked standing to challenge that specific provision of the Ordinance. Because the question of the entire Ordinance's validity requires no further factual development,

presents identical legal questions among the two provisions that has been well-briefed, and has parties with standing and clear adversity, this Court should reverse the trial court and reach the merits on the entire Ordinance. The constitutional rules and precedents permit it, and judicial economy would be served. This Court should affirm the trial court's invalidation of one provision of the Ordinance, reverse the trial court's finding of no justiciability as to the other provision, and declare the entire Ordinance preempted and invalid.

II. ISSUES PERTAINING TO APPELLANTS' ASSIGNMENTS OF ERROR

1. Did the trial court correctly decide that ECC 5.26.020 is a firearms regulation of firearms storage that is preempted and invalid because the State of Washington has "fully preempt[ed] and occupie[d] the field of firearms regulation"?
2. Did the trial court correctly decide that ECC 5.26.020 is preempted and invalid because it is "inconsistent with, more restrictive than, or exceed[s] the requirements of state law"?

III. ASSIGNMENTS OF ERROR ON CROSS-APPEAL

1. The trial court erred—when denying the motion to dismiss Plaintiffs challenge to the entire Ordinance—in ruling that Plaintiffs did not

have standing to raise a claim to invalidate ECC 5.26.030 and ruling that the claim to invalidate ECC 5.26.030 was justiciable.

2. The trial court erred in declining to rule on the declaratory judgment claim to invalidate ECC 5.26.030 based upon the order denying Appellants' motion to dismiss.

3. The trial court erred in declining to consider or apply the "issues of broad overriding public import" exception to the justiciability test and to rule on the declaratory judgment claim to invalidate ECC 5.26.030.

IV. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR ON CROSS-APPEAL

1. Did the trial court incorrectly decide that Plaintiffs did not have standing to raise a claim to invalidate ECC 5.26.030 and ruling that the claim to invalidate ECC 5.26.030 was justiciable because each Plaintiffs' firearms storage practice objectively violates the Ordinance and Plaintiffs fear application of the Ordinance if any unauthorized person obtains access to their firearms?

2. Did the trial court incorrectly decline to rule on the declaratory judgment claim to invalidate ECC 5.26.030 based upon the order denying Appellants' motion to dismiss because the claim challenging the Ordinance was not dismissed, and because

independent standing is not required in order to rule on a declaratory judgment under Washington Supreme Court precedent?

3. Did the trial court incorrectly decline to consider or apply the "issues of broad overriding public import" exception to the justiciability test and to rule on the declaratory judgment claim to invalidate ECC 5.26.030 because Plaintiffs have standing to challenge ECC 5.26.020, the legal issues are identical and require no additional factual development, the state and another municipality have also recently regulated the storage of firearms, and a decision would contribute to both the public interest and judicial economy?

V. STATEMENT OF THE CASE

A. Washington State Law Fully Occupies and Preempts the Entire Field of Firearms Regulation

In 1935, the Washington Legislature adopted laws regulating firearms based on the Uniform Firearms Act.[1] Subsequently, the Legislature repeatedly amended state law in order to ensure uniformity and preempt local regulation. In 1983, the Legislature enacted Chapter 9.41 RCW to prevent municipalities from adopting inconsistent laws and ordinances

[1] *Chan v. City of Seattle*, 164 Wn. App. 549, 551–52, 265 P.3d 169, 171 (2011) (citing Laws of 1935, ch. 172 & *Cherry v. Mun. of Metro. Seattle*, 116 Wn.2d 794, 800, 808 P.2d 746 (1991)).

regulating firearms.[2] In 1985, the Legislature amended former RCW 9.41.290 to "fully occup[y] and preempt[] the entire field of firearms regulation within the boundaries of the state, ..."[3] And in 1994, the Legislature amended former RCW 9.41.290 to preempt municipalities from regulating firearms unless "specifically authorized by state law, as in RCW 9.41.300" and to harmonize the penalties for violations of municipal ordinances and state law.[4]

B. The City of Edmonds Regulates Firearms Storage & Access

On July 24, 2018, the Edmonds City Council enacted the Ordinance, which regulates firearms by imposing penalties for non-compliant storage of firearms within the City of Edmonds. CP 89–103. During discussions prior to the City's enactment of the Ordinance, the councilmembers and members of the public questioned whether state law would preempt local regulation of firearms storage. *Id.* at 120–122. Also discussed at the meeting was a pending initiative that, among other provisions, would regulate access to stored firearms in a manner that differed from the Ordinance. *Id.* Thus, even before passage, the Edmonds City Council was aware of RCW

[2] *Id.* at 552 (citing Laws of 1983, ch. 232, § 12; *Cherry*, 116 Wn.2d at 801).

[3] *Id.* (quoting Laws of 1985, ch. 428, § 1).

[4] *Id.* at 553, 553 n.2 (citing Laws of 1994, 1st Spec. Sess., ch. 7, §§ 428–29).

4.91.290, aware that state law imposed limits on the type of firearms regulation available to a municipality as compared to the State, and aware that the Ordinance may be preempted by state law.

Also mentioned before enactment was an ordinance passed by the City of Seattle, which was substantially similar to the Edmonds Ordinance, and which Councilmembers knew was substantially likely to be challenged in court.[5] *Id.* A number of other municipalities across the county are enacting similar ordinances, too. *Id.* at 120–121, 649. After passage, the City amended the Ordinance by, among other changes, setting the date that enforcement could begin as March 21, 2019. *Id.* at 124–129.

The Ordinance established Chapter 5.26 in the Edmonds City Code. The Ordinance contains two firearms storage regulations. The first provision requires firearms to be secured by a properly-engaged locking device when not in the possession or control of the owner or authorized user. The "Storage Provision" states:

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

[5] *See* Seattle Municipal Code, Chapter 10.79.

> or other lawfully authorized user.

ECC 5.26.020.

The second provision penalizes storage that leads to unauthorized access. The "Access Provision" states:

> 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.

ECC 5.26.030. The Access Provision applies penalties if a minor, at-risk person, or "prohibited person" obtains access to a firearm, the Ordinance defines "prohibited person" as "any person who is not a lawfully authorized user." ECC 5.26.010(F).[6] Thus, the Access Provisions penalizes access by **any** unauthorized person.

The City of Edmonds imposes penalties for violations of the Ordinance. A violation of the Storage Provision is an infraction subject to a fine not to exceed $500. ECC 5.26.040(A). If any unauthorized user obtains a firearm in violation of the Storage Provision or the Access Provision, the penalty rises to $1,000, or up to $10,000 if the firearm is used in a crime. ECC 5.26.040(B) & (C).

C. Washington State Regulates Firearms Storage & Access

Months after the City enacted the Ordinance, Washington State voters approved Initiative No. 1639 ("I-1639"), which made a number of

[6] State law regarding access to firearms, conversely, defines "prohibited person" as minors or people who are "prohibited from possessing a firearm under state or federal law." RCW 9.41.360(5).

changes to Washington's firearms laws. One of the additions to state law concerned provisions related to "secure gun storage," and establishes standards related to the use of trigger locks or similar devices designed to prevent unauthorized use or discharge. *Id.* at 212–214. As codified in RCW Chapter 9.41, I-1639 does not require that a firearm be stored in a particular place or in a particular way. RCW 9.41.360 (effective July 1, 2019). In contrast, the Ordinance requires locking mechanisms. Also, while the new state law imposes penalties if a firearm was not secured and is subsequently used in a particular way by a prohibited person, the Ordinance imposes penalties for failure to use locking devices, or if any unauthorized user simply obtains a firearm.

D. The Individual Plaintiffs Store Firearms in Their Homes

Each of the individual plaintiffs in this case live in the City of Edmonds and keep firearms in their homes for self-defense. All three individual plaintiffs continue to store firearms without a locking device and outside their possession and control, even though the Ordinance is now in effect. CP 74–85. Each individual was concerned, based on their firearms storage practices, that the City of Edmonds could enforce provisions in the Ordinance against them. For example, Plaintiff Curtis McCullough has a concealed pistol license and stores firearms in a concealed place in his home, unsecured and ready for self-defense, at all times—even when not at home or in a different room in his home. *Id.* at 78–81. The firearms are not in a safe and do not have trigger locks or other locking mechanisms. *Id.* Mr.

McCullough and his wife have two minor children in their home. *Id.* at 78–81, 284–285. Mr. McCullough believes that keeping firearms unlocked and ready to use is necessary in order to be able to access his firearms in case of, for example, a home invasion. *Id.* at 78–81.

E. Procedural History

Individual Plaintiffs Bass and Seaberg, along with organizational plaintiffs the National Rifle Association and Second Amendment Foundation, initially filed this lawsuit against the City, the Police Department, and the Mayor and Police Chief in their official capacities ("Appellants"). . CP 293–300. Plaintiffs sought declaratory judgment that the Ordinance was preempted and invalid, and sought to enjoin enforcement. *Id.*

Appellants filed a motion to dismiss, arguing that the entire case was not justiciable. *Id.* at 649–745. The trial court permitted Plaintiffs to submit an amended complaint to allege additional facts. Plaintiffs submitted a verified amended complaint, adding Mr. McCullough as an additional individual plaintiff. *Id.* at 280–292.

Appellants filed a renewed motion to dismiss, arguing that Plaintiffs had still not presented a justiciable case. *Id.* at 548–564. On March 19, 2019, the trial court rejected Appellants' motion to dismiss. The trial court ruled that all of the individual and organizational plaintiffs had standing to

challenge the Storage Provision. *Id.* at 405–406. The trial court ruled, in pertinent part: "Plaintiffs all have standing to challenge Edmonds City Code 5.26.020 and the Plaintiffs' claim that the ordinance is preempted by state statute is ripe for determination." *Id.* The trial court ruled, however, that none of the individual and organizational plaintiffs had standing to challenge the Access Provision. *Id.* The trial court declared, in pertinent part: "Plaintiffs all do not have standing to challenge Edmonds City Code 5.26.030. However, as Plaintiffs have standing to raise preemption to at least one portion of the ordinance and such challenge is ripe, it is further ORDERED that defendants' Motion to Dismiss is denied." *Id.*

The trial court rejected Appellants' renewed motion to dismiss around the same time that the Ordinance became enforceable. In order to expedite the case, and in light of extensive discovery requests relating to the organizational plaintiffs, both organizational plaintiffs voluntarily dismissed their declaratory judgment claims without prejudice.

On July 3, 2019, Plaintiffs submitted a motion for summary judgment. *Id.* at 251–268. At the summary judgment hearing, counsel for Appellants argued that in order to have standing regarding justiciability to challenge the Access Provision, there would need to be a threat of enforcement, an intent to violate the provision, or allege additional facts in order to have standing.

> For pre-enforcement review, a plaintiff must show either a current threat [of] enforcement or a risk of future enforcement. None of the plaintiffs have given us any facts upon which we see any risk, let alone no possibly of enforcement. Second, we do not contend that no party will ever have standing to challenge the validity of section 030. So, for instance, someone who wants their teenage children to have access to a firearm to use in self-defense in the event of an intruder, that person would probably have standing. Or somebody who gave their gun safe code to their – to children in their house, that person would have standing.

RP 20. After argument, the trial court granted-in-part and denied-in-part Plaintiffs' motion for summary judgment. RP 25–40.

First, the trial court incorporated the ruling denying Appellants' motion to dismiss, and rejected Plaintiffs' request to invalidate the Access Provision. *Id.* The trial court indicated that the prior order, which had actually denied Appellants' motion to dismiss, was a final ruling on standing that precluded Plaintiffs from raising claims regarding the Access Provision. *Id.* As such, the trial court viewed Plaintiffs' motion for summary judgment as to the Access Provision as a motion for reconsideration—which it was not—instead of as motion for summary judgment for claims that had not been dismissed, or as a motion to invoke the public interest exception for standing.

Turning to the Storage Provision, the trial court ruled that RCW 9.41.290 "unambiguously preempts the field of firearm regulation including firearms storage," and ruled the Storage Provision preempted and invalid.

Id. at 28–37. The trial court explained "the basic 101 tenets of the rules of statutory preemption" prohibited a local jurisdiction from passing a law in a field occupied by the state. *Id.* at 29, 33. The trial court did not view the validity as a "close issue." *Id.* at 39.

Despite Appellants' initial request to permit the City to continue enforcing the Storage Provision, RP 37, the trial court enjoined enforcement of the Storage Provision pending appeal. The Access Provision is still in force. This appeal, along with Plaintiffs' cross-appeal, followed.

VI. ARGUMENT

A. Standard of Review

Under the Uniform Declaratory Judgments Act, RCW Ch. 7.24, courts are authorized to "declare rights, status[,] and other legal relations." RCW 7.24.010; RCW 7.24.020 (municipal ordinances); *Nollette v. Christianson*, 115 Wn.2d 594, 598, 800 P.2d 359, 362 (1990).

The justiciability of a declaratory judgment claim is a question of law reviewed de novo. *Am. Traffic Sols., Inc. v. City of Bellingham*, 163 Wn. App. 427, 432, 260 P.3d 245, 247 (2011). Courts may decline to render a declaratory judgment if it would not terminate the controversy. RCW 7.24.060. In such circumstances, "an appellate court may be called upon to determine whether the trial court erroneously exercised its discretion either to consider or refuse to consider such an action." *Nollette*, 115 Wn.2d at 599. Otherwise, conventional appellate standards of review apply. RCW

7.24.070; *Nollette*, 115 Wn.2d at 599-600.

This Court reviews a trial court's order granting summary judgment de novo. *Kitsap Cnty. v. Kitsap Rifle & Revolver Club*, 405 P.3d 1026, 1030 (Wash. Ct. App. 2017). This Court reviews conclusions of law involving the interpretation of statutes and municipal ordinances under the declaratory judgment act de novo. *Nollette,* 115 Wn.2d at 600; *Chan*, 164 Wn. App. at 559.

B. Plaintiff's Declaratory Judgment Challenge to the Storage Provision Is Justiciable

For the courts to exercise jurisdiction under the Declaratory Judgment Act, RCW Chapter 7.24, in most cases there usually must be a justiciable controversy. The Washington Supreme Court in *Diversified Industries* described a justiciable case as a controversy:

> (1) which is 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, 139 (1973). The courts may also exercise jurisdiction over cases with "issues of broad overriding public import. *Id.* at 814 & n.2 (citing cases).

Appellants concede that Plaintiffs have standing to challenge the Storage Provision, and that Plaintiffs' declaratory judgment claim regarding that provision is justiciable. The trial court rejected Appellants' motion to dismiss on these grounds, and granted Plaintiffs relief on the merits.

The justiciability of Plaintiffs' challenge to the Storage Provision is straightforward. Each of the individual plaintiffs maintain firearm storage practices that violate the Storage Provisions by keeping firearms in their homes, not secured by a locking device or in a safe. CP 280–292. The firearms are often in different rooms or on different floors than the individual plaintiffs, and the firearms remained unsecured when the individual plaintiffs left their homes. *Id.* Because the Ordinance was effective at the time Plaintiffs moved for summary judgment, Plaintiffs were subject to enforcement and fines up to $500 (or would be forced to obtain locking devices and change their storage practices).

C. RCW 9.41.290 Preempts Local Regulation of Firearms Storage

As described above, the state of Washington has expressly preempted the field of firearms regulation for decades in order to ensure statewide uniformity regarding firearms regulation. *Chan*, 164 Wn. App. at 551–53. In this case, there is no dispute that the Ordinance regulates firearms through provisions requiring storage practices and penalizing storage that leads to unauthorized access. Appellants' Brief ("App. Br.") 7–8. Under the plain language of RCW 9.41.290, the City of Edmonds cannot regulate in the field of firearms and the Ordinance is subject to preemption.

1. Field Preemption Under RCW 9.41.290

The Washington State Constitution grants municipalities the authority to make and enforce only such "police, sanitary[,] and other regulations as are **not in conflict with general laws**." Wash. Const. Art. 11, § 11 (emphasis added). Thus, whatever plenary police powers in regulatory matters the Washington State Constitution grants municipalities, that authority "ceases when the state enacts a general law upon the particular subject, unless there is room for concurrent jurisdiction." *Lenci v. City of Seattle*, 63 Wn.2d 664, 669, 388 P.2d 926 (1964) *abrogated on other grounds by Yim v. City of Seattle*, 194 Wn.2d 682, 451 P.3d 694 (2019). Despite the presumption of validity and of liberal construction, a municipal ordinance is invalid if a general statute preempts municipal regulation of the subject. *Heinsma v. City of Vancouver*, 144 Wn.2d 556, 561, 29 P.3d 709, 712 (2001). A city is preempted from enacting ordinances on a given subject "if the legislature has expressly or by implication stated its intention to preempt the field. When the legislature has **expressly stated its intent to preempt the field**, a city **may not enact any ordinances affecting the given field**." *Id.* (citations omitted) (emphasis added).

To determine the legislature's intent to preempt the field of a given subject, we start with the text of the statute. RCW 9.41.290 provides:

> 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. Such local ordinances shall have the same penalty as provided for by state law. Local laws and ordinances that are inconsistent with, more restrictive than, or exceed the requirements of state law shall not be enacted and are preempted and repealed, regardless of the nature of the code, charter, or home rule status of such city, town, county, or municipality.

While RCW 9.41.290 does not preempt everything and anything to do with firearms, the statute is crystal clear when it comes to field preemption over firearms regulation. "The purpose of statutory interpretation is to determine and give effect to the intent of the legislature." *Gray v. Suttell & Assocs.*, 181 Wn.2d 329, 339, 334 P.3d 14 (2014) (citation and internal quotation marks omitted). To interpret a statute, courts look first to the plain language. If the plain language has only one reasonable interpretation, the statute is unambiguous and courts apply the plain meaning. *Jametsky v. Olsen*, 179 Wn.2d 756, 762, 317 P.3d 1003 (2014). Here, because the state legislature has expressly stated its intent to "fully occup[y] and preempt[] the entire field of firearms regulation," RCW 9.41.290, "a city [like Edmonds] may not enact any ordinances affecting the given field." *Heinsma*, 144 Wn.2d at 561; *see also Lenci*, 63 Wn.2d at 670 ("There is no room for doubt" regarding whether the city may regulate once the legislature affirmatively expresses its intent to occupy the field.). The plain language also emphasizes that the full preemptive effect of the statute "regardless of the nature of the code, charter, or home rule status of such

city, town, county, or municipality," and whatever constitutional presumptions of validity are generally applied.

The Legislature's sweeping occupation of the entire field of firearms regulation leaves no room to build exceptions for specific aspects of firearm regulation. *See Chan v. City of Seattle*, 164 Wn. App. 549, 562, 265 P.3d 169, 176 (2011) (finding preemption under the unambiguous plain language of RCW 9.41.290 and RCW 9.41.300). It does not matter if the regulation concerns possession or storage—as long as the regulation pertains to firearms, and not shooting ranges or convention center permitting, municipalities may not regulate firearms.

2. Regulation of Firearms Storage Is Preempted

Preliminarily, Appellants concede that the statute preempts the entire field of firearms regulation. App. Br. 18. Appellants also concede that RCW 9.41.290 applies to civil regulation of firearms. *Id.* at 42. And at the trial court, Appellants conceded that the Ordinance is "regulation of firearms storage." CP 263. Nor can there be any dispute that the Ordinance is a "law or ordinance" of general application. *See Chan*, 164 Wn. App. at 565 & n.13 (discussing wide impact of the City of Seattle's "Firearms Rule").

In light of these concessions and the clear preemption principles, Appellants are reduced to arguing that RCW 9.41.290 is ambiguous regarding regulation of firearms storage, notwithstanding the extremely broad, sweeping language. App. Br. 18. Essentially, Appellants argue that

the "field" preempted by RCW 9.41.290 is somehow less-than-a-field, and excludes all regulation not mentioned in the statute despite the use of the terms "fully," "entire," and "field." *See* App. Br. 26 n.6 (arguing that "fully," "entire," and "field" does not permit preemption of any aspect of regulation not already enumerated in the statute).

Appellants argue that by including a list of specific categories, the legislature restricts "field preemption" to those categories alone. This is wrong. First, this argument undermines the well-known concept of field preemption. The entire point of field preemption is to remove the authority of municipalities from any regulation at all in the category. By preempting the field and removing concurrent authority, the legislature does not have to determine **and enumerate** all of the specific items within the field to specifically preempt, and avoids problems with municipalities trying to regulate in the field in an unanticipated or artful manner. Appellants also argue that if the Legislature wanted to preempt regulation of firearms storage, it could have specified "storage" among the enumerated list. But this is a red herring—because the statute preempts the entire field of firearms regulation, the regulation of firearms storage is already included within the scope of the statute. Purported, speculative legislative silence is never sufficient to overcome plain meaning.

Second, the list of categories of firearms regulation does not define or limit the field. Appellants' argument of a 'lesser-field' directly contradicts the plain language of RCW 9.41.290, which "fully" preempts the "entire" field. Moreover, under Washington case law and accepted

canons of statutory construction, the list of categories is illustrative and does not limit the field. The statute uses the word "**including**" before the list of categories, which under the "presumption of non-exclusive 'include' interpretive canon" means that the list of categories are discrete parts of a larger group of unnamed categories. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 132 (2012) (discussing the "Presumption of Nonexclusive 'Include"'). The Washington Supreme Court also interprets the word "includes" as a term of enlargement, not limitation. *See, e.g.*, *Brown v. Scott Paper Worldwide Co.*, 143 Wn.2d 349, 359, 20 P.3d 921, 926 (2001) ("RCW 49.60.040(3) contains the word 'includes,' which is a term of enlargement."); *Douglass v. Shamrock Paving, Inc.*, 189 Wn.2d 733, 740, 406 P.3d 1155, 1159 (2017) ("The second clause begins with 'including,' which is generally construed as a term of enlargement, not limitation."); *Town of Ruston v. City of Tacoma*, 90 Wn. App. 75, 84, 951 P.2d 805, 810 (1998) ("Generally, the statutory use of 'including' does not exclude entities that are not specifically enumerated thereafter.").

For example, when the description of the city limits of Tacoma begins with the word "including" and then lists some, but not all, of the sections contained within the city limits, the court of appeals held that the absence of a specific reference to the tidelands section did not indicate an intent to exclude it. *Town of Ruston*, 90 Wn. App. at 84. Likewise, the definition of portable sign under Kitsap County Code 17.110.620 "includes" a raincoat mounted with an advertising message—even though

the ordinance only listed "A-frame, pole attachment, banners and reader board signs"—because the raincoats served the same function and "the list of portable signs in the code is expressly nonexclusive." *Kitsap Cnty. v. Mattress Outlet/Gould*, 153 Wn.2d 506, 509, 511, 104 P.3d 1280, 1283 (2005). Here, because the Legislature modified express field preemption of firearms regulation with a list "including" specific examples, the Legislature's intent to enlarge the field beyond the list is clear.

Appellants cling to the modifier "generally" and claim that it has an alternate, opposite meaning in this statute because the statute has a list. But every statute that uses the term "including" will have a list following that term. In the absence of any actual, textual evidence, the natural conclusion is that RCW 9.41.290 "include[s]" a list for illustrative purposes. Moreover, even in criminal cases cited by Appellants, the narrow criminal statutes (subject to the rule of lenity) are <u>not exhaustive</u> and allow for un-enumerated examples that are within the scope of the statutory language. *E.g., State v. Larson*, 184 Wn.2d 843, 853, 365 P.3d 740, 744 (2015) (holding that 'wire cutters' were outside of statutory scope but explicitly "preserving the illustrative and nonexclusive nature of the examples").

Likewise, to the extent that it matters, regulation of firearms storage is entirely consistent with the other categories of firearms regulation listed in the statute. Storage of firearms is similar to categories such as possession, transfer, and transportation. In an analogous case, a soil processing company challenged the Department of Ecology's ("DOE") authority to impose fines for filling wetlands based on its contention that RCW

90.48.020 "does not expressly include wetlands in its definition of 'waters of the state.'" *Pac. Topsoils, Inc. v. Washington State Dep't of Ecology*, 157 Wn. App. 629, 640, 238 P.3d 1201, 1207 (2010). "In defining 'waters of the state,' RCW 90.48.020 provides that the phrase 'shall be construed to include lakes, rivers, ponds, streams, inland waters, underground waters, salt waters and all other surface waters and watercourses within the jurisdiction of the state of Washington.'" *Id.* at 642. The DOE argued that wetlands were included as "other surface waters." The court applied the canon of nonexclusive "include" and held that the plain language of the statute included wetlands, even though un-enumerated in RCW 90.48.020. *See id.* at 644 ("The legislature indicated the broad scope of this intent by its choice of the enlarging term 'include' which modifies the phrase 'all other surface waters' in its definition of 'waters of the state.'").

3. Washington Courts Have Not Limited the Scope of Field Preemption of Firearms Regulation

Appellants rely heavily on recent court decisions to argue that the courts have limited the scope of field preemption to the particular categories listed in RCW 9.41.290. But these cases did no such thing. Instead, while Washington courts have declined to extend the preclusive effect of RCW 9.41.290 beyond the field of firearms regulation, Appellants have not cited a single case that limited the scope of preemption within the field of firearm regulation or limited the field of firearm regulation to the illustrative list.

In *Watson v. City of Seattle*, the Washington Supreme Court upheld an ordinance that imposed a "Firearms and Ammunition Tax" because the

ordinance was a tax and not a regulation. 189 Wn.2d at 155–56. The *Watson* Court recognized that firearms *regulations*, as opposed to taxes, are facially preempted by state law. *Id.* at 165. The Court held that there was no preemption over the tax because "RCW 9.41.290 preempts only municipal gun regulation, not taxation." *Id.* at 156; *see also id.* at 155 ("RCW 9.41.290 forbids the local regulation of guns."); *id.* at 172 (RCW 9.41.290 expressly occupies the field of "firearms regulations"). *Watson* actually makes it clear that if the "Firearms and Ammunition Tax" ***was*** a regulation, "it is facially preempted by RCW 9.41.290 and our analysis ends." *Id.* at 159.

Likewise, in *Kitsap County v. Kitsap Rifle and Revolver Club*, the court of appeals upheld an ordinance regulating shooting facilities, not because "shooting facilities" were missing from the list of categories in RCW 9.41.290, but because the ordinance was outside the field and was "not a 'firearms regulation.'" 1 Wn. App. 2d at 406. While the court did mention that "shooting facilities" were not listed in RCW 9.41.290, and did remark that case law has limited the scope of preemption under RCW 9.41.290, Appellants mischaracterize these references and misrepresent the court's holding in that case. *See* App. Br. 21, 34. The clear holding of *Kitsap Rifle* is that RCW 9.41.290 did not apply because the ordinance did not regulate firearms; "licensing of shooting facilities [] should not be viewed as a firearms regulation under RCW 9.41.290." 1 Wn. App. 2d at 408. Although the court did mention that regulation of shooting facilities indirectly relates to regulating firearms discharge, *id.* at 407, the scope of preemption of RCW 9.41.290 was limited to regulation of firearms, not any

regulation that indirectly affects firearms.[7] But that is not the scenario here: the Storage Provision directly regulates firearms.

4. The Legislative History Supports Preemption of Local Firearms Regulation

Even if this Court determines that the language in the statute is ambiguous, the legislative history supports finding preemption of firearms storage. The Legislature has made a series of enactments over the years that "highlight the regulatory focus of chapter 9.41 RCW." *Watson*, 189 Wn.2d at 173. "A review of the legislative history makes clear that RCW 9.41.290 is concerned with creating statewide uniformity of firearms regulation of the general public." *Cherry*, 116 Wn.2d at 802.

Appellants argue that the legislative history does not support robust preemptive scope over the field of firearms regulation because "courts have frequently upheld local regulations *related to firearms* against preemption challenges." App. Br. 41 (emphasis added). But each case cited did not relate to *firearms regulation*. *See Watson*, 189 Wn.2d at 156 (taxation, not regulation), *Pac. Nw. Shooting Park Ass'n v. City of Sequim*, 158 Wn.2d 342, 357, 144 P.3d 276, 283 (2006) (convention center permitting, not regulation), *Kitsap Rifle*, 1 Wn. App. 2d at 406 (regulation of shooting facilities, not firearms).[8] Instead, the Washington Legislature has, time and

[7] The court also pointed out that the Club had not challenged the portion of the ordinance that regulated the discharge of firearms. *Id*. at 406 n.3.

[8] Appellants also knowingly violate GR 14.1(a) to cite to *Estes v. Vashon Maury Island Fire Prot. Dist. No. 13*, 129 Wn. App. 1042 (2005)—a case which does not support Appellants' position. In *Estes*, the court found a policy

time again, stated that RCW 9.41.290 is intended to fully and completely occupy the entire field of firearms regulation. *See, e.g.*, *Chan*, 164 Wn. App. at 551–53 (summarizing legislative history of the statute, including removal of 'Notwithstanding RCW 9.41.290' from former RCW 9.41.290 "to make clear its intent to fully occupy and preempt municipalities from regulating firearm possession.").

Likewise, there is no support to apply a different scope of field preemption to civil or criminal regulations. First, the scope of field preemption pertains to "the entire field of firearms regulation within the boundaries of the state." The plain language includes both civil and criminal regulation. There is nothing in the text of RCW 9.41.290 that distinguishes between civil and criminal regulation. This accords with the strong legislative policy behind uniform firearms regulation. *Cherry*, 116 Wn.2d at 802. Second, even the cases relied upon by Appellant refuse to distinguish between civil and criminal regulation. In *Watson*, the Washington Supreme Court held that a civil "Firearms and Ammunition Tax" was not preempted by RCW 9.41.290. *Watson*, 189 Wn.2d at 156. Although the tax is entirely civil and not criminal, the Court made it clear that if the "Firearms and Ammunition Tax" was a regulation, "it is facially preempted by RCW

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prohibiting bringing a firearm into a fire station was not preempted by RCW 9.41.290 because it was not a regulation or ordinance, it was a policy.

Appellants have previously cited *Estes*. *See* CP 67–69. Plaintiffs move to strike this citation. *Crosswhite v. Washington State Dep't of Soc. & Health Servs.*, 197 Wn. App. 539, 544, 389 P.3d 731, 733 (2017) (granting motion to strike after failure to comply with GR 14.1).

9.41.290 and our analysis ends." *Id.* at 159.

Finally, Appellants place significance in the illustrative lists from statutes concerning firearms from other states, some of which include "storage." The fact that some other states may have included storage, while Washington did not include it in a non-exhaustive list, is not persuasive. For example, an Ohio court examining similar state statutes made no distinction between preemption statutes which included "storage" and those that did not—instead simply noting that Washington (along with Arizona, Indiana, Kentucky, Nevada, and Wyoming) is among the "[t]hirty-eight states [that] currently have statutes that expressly preempt the field of firearms." *Cincinnati v. Baskin*, 112 Ohio St. 3d 279, 292, 859 N.E.2d 514, 525 (2006). These statutes expressly preempt regulation of firearms. Minor distinctions in language or included terms between RCW 9.41.290 and statutes in other states cannot result in a substantially-different interpretation of the term "the entire field of firearms regulation." To find otherwise would result in the untenable result of forcing legislatures to include every single possible aspect of regulation in order to preempt a field.

5. Even if RCW 9.41.290 Preempts Less Than the Entire Field of Firearms Regulation, the Storage Provision Is Not Valid

Even if the field of firearms regulation is modified and limited by the illustrative list in RCW 9.41.290—and it is not—regulation of firearms storage would fit comfortably within the bounds of that list. Appellants misapply the doctrine of *ejusdem generis* first by arguing that such a list of

specific terms nullifies the Legislature's express statement of field preemption. Second, Appellants misapply the doctrine by arguing that a list of specific categories restricts field preemption to those categories alone. App. Br. 26–27. *Ejusdem generis* does not mean that general terms suggest only items **identical** to the specific terms, merely only other terms that are alike.

Last, even if preemption is limited to the listed categories alone, firearms storage is within the bounds of these categories, inseparable from firearms possession. Storage of firearms is simply non-possessory ownership, and is necessarily included within "the entire field of firearms regulation" and "any other element relating to firearms or parts thereof." The Ordinance is inextricably tied to issues of possession, non-possession, and ownership. *See* ECC 5.26.020 (regulating how a person "store[s] or keep[s]" any firearm, and deeming it lawful storage "if carried by or under the control of the owner" or authorized users); ECC 5.26.030 (regulating access to firearms). There is no way to interpret the Ordinance, as written and enacted, as outside the scope of RCW 9.41.290.

6. The Storage Provision Is Invalid Because it Conflicts With State Law

A municipal ordinance is also invalid if the ordinance directly conflicts with a state statute. *Heinsma*, 144 Wn.2d at 561; *Lawson v. City of Pasco*, 168 Wn.2d 675, 679, 230 P.3d 1038, 1040 (2010). Generally, in the absence of a specific statutory rule, conflicts arise "when an ordinance permits what state law forbids or forbids what state law permits" and thus

"directly and irreconcilably conflicts with the statute." *Lawson*, 168 Wn.2d at 682 (citation and internal quotation marks omitted).

But here, with respect to firearms regulation, RCW 9.41.290 explicitly states that local laws that are "inconsistent with, more restrictive than, or exceed the requirements of state law" are "preempted and repealed." Appellants' argument that this narrower test does not apply is essentially the same argument regarding field preemption: regulation of firearms storage is not within the entire field of regulation of firearms, so RCW 9.41.290 does not apply. App. Br. 46. For the reasons set out above, Appellants are incorrect, and the conflict preemption test in RCW 9.41.290 applies.

The Storage Provision is unquestionably "inconsistent with, more restrictive than, or exceed[s] the requirements of state law." RCW 9.41.290. Specifically, the firearms storage provisions in I-1639, codified at RCW 9.41.360, conflict with the Storage Provision.

First, "[n]othing in [RCW 9.41.360] mandates how or where a firearm must be stored." RCW 9.41.360(6). But the Storage Provision requires the use of specific locking devices for firearms that are not carried by or under the control of an authorized user. ECC 5.26.010(D). Under the Storage Provision, a person failing to use a locking device may be subject to a $500 penalty. Failure to use a locking device, standing alone, does not violate state law.

Second, under RCW 9.41.360, someone other than a lawfully-authorized user obtaining an unsecured firearm, standing alone, does not

violate state law. Instead, a person violates the state statute if they store the firearm in a location where they should reasonably know that a prohibited person may gain access, they did not use a trigger lock or secured storage, the prohibited person obtains access, **and** the prohibited person takes some further act (e.g., use the firearm to commit a crime, discharge the firearm, display the firearm as a threat to others). RCW 9.41.360(1). But no subsequent act by a prohibited person is required to violate ECC 5.26.020. If someone other than a lawfully-authorized user obtains a firearm that did not have a locking device in violation of ECC 5.26.020, the owner is subject to a penalty of up to $1,000.

Third, under state law, reporting within five days to local law enforcement that a firearm was stolen as a result of an unlawful entry provides a complete defense to violation of RCW 9.41.360(1), even if the owner did not employ secure gun storage or a trigger lock. RCW 9.41.360(3)(d). The Ordinance contains no safe harbor for reporting theft of a firearm. Rather, the Ordinance requires firearms owners to report stolen firearms within 24 hours in order to avoid civil infraction and a fine of up to $1,000. ECC 5.24.070.

State law entitles firearms owners to store firearms in a manner that they see fit. RCW 9.41.360(6). State law also entitles firearms owners to avoid being penalized for subsequent acts after their firearms were stolen by incentivizing them to promptly report stolen firearms to local law enforcement. RCW 9.41.360(3)(d). By imposing infractions for any storage of firearms without a locking device, and by providing no safe harbor from

further liability for prompt reporting of a stolen firearm, the Ordinance irreconcilably conflicts with state law. *See, e.g.*, *Entertainment Industry Coalition v. Tacoma-Pierce County Health Department*, 153 Wn.2d 657, 661–63, 105 P.3d 985 (2005) (striking down local ordinance prohibiting smoking areas that were permitted under state law).

VII. ARGUMENT RELATED TO CROSS APPEAL

At issue in the direct appeal is whether the Storage Provision is invalid and preempted, as the trial court determined upon cross-motions for summary judgment. The trial court did not reach the merits of the Access Provision. Instead, the trial court incorporated its earlier ruling that none of the Plaintiffs had standing to challenge the Access Provision. But the trial court erred, and should have reached the merits on the entire Ordinance.

First, Plaintiffs have sufficient standing to challenge the Access Provision.

Second, the trial court should have considered whether to apply a lower standard for justiciability given the circumstances of this case. Plaintiffs unquestionably have standing to challenge the Ordinance. The merits of the Access Provision preemption are closely intertwined with legal issues already being considered for the Storage Provision, and no additional factual development is needed. A decision on the merits would not be advisory, and would conclusively clarify a legal question that affects residents in Edmonds, as well as Seattle and other municipalities that attempt to regulate in this manner.

Third, after determining that the challenge to the Access Provision is justiciable under all circumstances, this court should conclude that the Access Provision is also preempted and invalid for the same reasons that the Storage Provision is preempted and invalid. In fact, the issue of whether the Access Provision is preempted is even more straightforward, especially after the court renders a decision on the Storage Provision. For these reasons, Plaintiffs request that this court reverse the trial court, hold that the Access Provision is also preempted and invalid, and remand to the trial court for further proceedings.

A. Standard of Review

The justiciability of a declaratory judgment claim is a question of law reviewed de novo. *Am. Traffic Sols.*, 163 Wn. App. at 432. This Court reviews a trial court's order granting a motion to dismiss de novo. *Cutler v. Phillips Petroleum Co.*, 124 Wn.2d 749, 755, 881 P.2d 216 (1994); *Evergreen Washington Healthcare Frontier LLC v. Dep't of Soc. & Health Servs.*, 171 Wn. App. 431, 444, 287 P.3d 40 (2012). This Court reviews conclusions of law involving the interpretation of statutes and municipal ordinances under the declaratory judgment act de novo. *Nollette*, 115 Wn.2d at 600; *Chan*, 164 Wn. App. at 559.

B. Plaintiff's Declaratory Judgment Challenge to the Access Provision Is Justiciable

This Court should reverse the trial court and conclude that Plaintiffs' challenge to the Access Provision is justiciable. First, Plaintiffs meet the test for declaratory judgment standing regarding the challenge to the Access

Provision. Second, the settled public importance exception—which relaxes the justiciability rules—applies under circumstances like these and permits this Court to render a binding decision on the merits.

1. The Challenge to the Access Provision Is Justiciable

While courts may exercise jurisdiction over cases with "issues of broad overriding public import," declaratory judgment claims must generally meet the 4-part *Diversified Industries* test. 82 Wn.2d at 814–15 & n.2; *supra* Section VI.B. Plaintiffs meet the test here.

First, the mature seeds of an actual dispute are present on the current record. The Access Provision is enforceable, and Plaintiffs all store weapons unlocked and ready for use in self-defense. Although Plaintiffs do not subjectively intend for minors or others to obtain access to their firearms, the Access Provision is an objective test. Because Plaintiffs' storage practices violate the corresponding Storage Provision, the individual plaintiffs reasonably fear that the authorities will determine (if some other person obtains access to their firearms) that the individuals should have known that it was possible. Second, the parties have genuine and opposing interests—Plaintiffs already have standing to challenge the Ordinance, and have succeeded in invalidating one provision already. Third, confronted with potential penalties if anyone gains access to their firearms, Plaintiffs have "direct and substantial interest in securing relief from the uncertainty of their legal rights and obligations." *Clallam Cnty. Deputy Sheriff's Guild v. Bd. of Clallam Cnty. Comm'rs*, 92 Wn.2d 844, 849, 601

P.2d 943, 945 (1979). Fourth, a judicial determination regarding the validity of the Access Provision will conclusively resolve this dispute.

Appellants argue that a putative plaintiff must intend to give a minor or at-risk individual access to a firearm in order to have standing to challenge the Access Provision. CP 56. Although Appellants slightly narrowed this position during oral argument to include "someone who wants their teenage children to have access to a firearm to use in self-defense in the event of an intruder. . . [o]r somebody who gave their gun safe code to . . . children in their house," RP 20, this test exceeds what is required for justiciability. The justiciability test does not require intent to violate an ordinance in order to challenge its availability, especially regarding a provision that requires a third-party to take an independent action (e.g., acquire a firearm without permission). Here, at least one Plaintiff (Mr. McCullough) has minor children who live in his home, where he keeps firearms in a manner prohibited by the Ordinance. It is hardly a stretch to see how the circumstances outlined by Appellants could meet Mr. McCullough's specific circumstances. Similarly, because the Ordinance penalizes access by any other non-authorized person, it is hardly speculative for each of the Plaintiffs to be in a scenario where they face enforcement.

2. The Major Public Importance Exception Applies Here

Even if Plaintiffs do not meet the justiciability test, this Court may still render declaratory judgment. "If the four justiciability elements are not met, a court may still enter declaratory judgment if the issue is one of major

public importance." *Lewis Cnty. v. State*, 178 Wn. App. 431, 439–40, 315 P.3d 550, 555 (2013).

The Washington Supreme Court has been willing to take a "less rigid and more liberal" approach to standing when a controversy (1) is of substantial public importance, (2) immediately affects significant segments of the population, and (3) has a direct bearing on commerce, finance, labor, industry, or agriculture. *Grant Cnty. Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 803, 83 P.3d 419, 424 (2004); *Washington Nat. Gas Co. v. Pub. Util. Dist. No. 1 of Snohomish Cnty.*, 77 Wn.2d 94, 96, 459 P.2d 633, 635 (1969).

The "less rigid and more liberal" approach comports with the general prohibition for the courts to avoid advisory opinions. Advisory opinions can arise where additional factual development is required, and where a judicial decision would not resolve the dispute. For example, in *DiNino v. State ex rel. Gorton*, 102 Wn.2d 327, 684 P.2d 1297 (1984), the Washington Supreme Court declined to render a declaratory judgment. *Id.* at 332. The case did not present a justiciable controversy. *Id.* Further, even though the case involved constitutional rights, the record was not sufficiently developed and any judicial decision would have been advisory. *Id.* Likewise, in *Pasado's Safe Haven v. State*, 162 Wn. App. 746, 259 P.3d 280 (2011), the court declined to render a declaratory judgment. There, the party requested partial invalidation of the law, which the court ruled "would effect a result not intended by the legislature." *Id.* at 761–62. Because judicial determination would not conclusively resolve the dispute, the claim

was not justiciable. *Id.* Here, unlike *DiNino* and *Pasado's Safe Haven,* there is no further factual development that is required to establish the validity of the Access Provision, and a declaratory judgment would conclusively resolve the dispute.

Many other jurisdictions—which have also adopted the Uniform Declaratory Judgment Act—have adopted the same test as Washington, and permit a "less rigid, more liberal" approach to justiciability in certain cases. *See, e.g.*, *Aged Hawaiians v. Hawaiian Homes Comm'n*, 78 Hawai'i 192, 204, 891 P.2d 279, 291 (1995) (holding that federal justiciability standards are relaxed for "matters of great public importance"); *Boehner v. State,* 122 N.H. 79, 83, 441 A.2d 1146, 1148 (1982) (favoring declaratory judgment claims to determine constitutional issues and important public interests); *Salt Lake Cnty. v. Salt Lake City*, 570 P.2d 119, 121 (Utah 1977) (holding that "the court will be indulgent" in rendering declaratory judgment "where there is a substantial public interest" to be decided); *Brimmer v. Thomson*, 521 P.2d 574, 578 (Wyo. 1974); *King Res. Co. v. Envtl. Imp. Comm'n*, 270 A.2d 863, 870 (Me. 1970) (permitting adjudication of moot cases "when interests of a public character and of importance in the administration of justice generally are involved."); *Jones v. Maine State Highway Comm'n*, 238 A.2d 226, 229 (Me. 1968) (holding that an important public issue is sufficient to establish jurisdiction) (citing Borchard, *Declaratory Judgments* 36); *Lamb v. Perry*, 101 R.I. 538, 541, 225 A.2d 521, 523 (1967) (citing Rhode Island cases that assumed jurisdiction because of compelling public interests); *California Water & Tel. Co. v. Los Angeles Cnty.*, 253 Cal. App.

2d 16, 26, 61 Cal. Rptr. 618, 625 (Cal. Ct. App. 1967) (resolving any doubt over justiciability in favor of adjudication due to public interest in the dispute); *Vill. of Lakeville v. City of Conneaut*, 144 N.E.2d 144, 147, 76 Ohio Law Abs. 36 (Ohio Com. Pl. 1956) (stating the general rule relaxing justiciability requirements where public interests are involved) (citing Anderson, *Declaratory Judgments,* Vol. 3, (2d Ed.) par. 63); *State ex rel. Miller v. State Board of Education*, 56 Idaho 210, 52 P.2d 141 (1935).

Like Washington, other states permit an appellate court to decide to apply the exception upon de novo review. *Brimmer v. Thomson*, 521 P.2d 574, 578 (Wyo. 1974); *Kellner v. District Court In and For City and County of Denver*, 127 Colo. 320, 256 P.2d 887, 888.

This case fits squarely within the Washington cases applying the public interest exception, which have rendered decisions in cases where the issue, left unresolved, would have a direct and substantial public impact.[9] For example, in *Kitsap Cnty. v. Smith*, 143 Wn. App. 893, 180 P.3d 834 (2008), the court reversed the trial court and held that the trial court should have considered the declaratory judgment claim regarding the Privacy Act.

[9] Wyoming, relying on Washington law, has often applied the exception to find standing or justiciability where, like here, an issue of public importance would otherwise have escaped review. *Washakie County School District Number One*, 606 P.2d 310 (constitutionality of school financing); *Memorial Hospital of Laramie County*, 770 P.2d 223 (tax exempt status of hospital); S*tate ex rel. Wyoming Association of Consulting Engineers and Land Surveyors v. Sullivan*, 798 P.2d 826 (Wyo.1990) (constitutionality of the Wyoming Professional Review Panel Act); *Board of County Commissioners of the County of Laramie v. Laramie County School District Number One*, 884 P.2d 946 (Wyo.1994) (entitlement of school district to interest on school district funds held by county treasurer); *Management Council of the Wyoming Legislature*, 953 P.2d 839 (constitutional scope of governor's veto power).

Id. at 908–09. The court reasoned "that the issue of whether conversations with public employees are subject to the Privacy Act" and whether certain conversations are private were of great public importance, even though the conversations were typically merely disputes between neighbors or personnel matters. *Id.* Still, like in *Clallam County*, the plaintiff's uncertainty and the desire to clarify legal rights justified declaratory judgment. Similarly, here the issue of whether municipalities can penalize practices related to firearms storage and the uncertainty as to what type of firearms storage is "reasonable" justifies applying a liberal approach to justiciability and justifies reaching the merits.

Likewise, in *Kightlinger v. Pub. Util. Dist. No. 1 of Clark Cnty.*, 119 Wn. App. 501, 81 P.3d 876 (2003), the court concluded that the issue of a public utility district's authority to engage in appliance repair was an issue of widespread public interest. *Id.* at 505. One reason the court decided that the issue of appliance repair was sufficiently important to relax justiciability was that other utility districts may also be interested in repairing appliances. *Id.* Here, the City of Seattle has already enacted an almost-identical ordinance, and many other cities across the country have attempted to regulate firearms with storage requirements. Next, the issue had made it to the state legislature and the attorney general; here, the issue of firearms storage was one of the subjects of a state-wide initiative and is the subject of local regulation in the cities of Edmonds and Seattle. Last, the court noted that the media had followed the story as it developed; so too here. If the issues in *Kightlinger* are of major public importance, this case compels the

same result.

As another example, in *Farris v. Munro*, 99 Wn.2d 326, 662 P.2d 821 (1983), the Washington Supreme Court considered a challenge to the creation of a state lottery even though the dispute was moot. *Id.* at 328–30. One of the reasons considered by the Washington Supreme Court for reaching the merits was the alleged importance to the public of the new lottery, which was supposed to address a "fiscal and budgetary crisis." Here, by comparison, Appellants recite several public justifications for attempting local regulation of firearms despite state preemption. In each case, the invalid enactments were nonetheless important public issues. *See also Washington State Coal. for the Homeless v. Dep't of Soc. & Health Servs.*, 133 Wn.2d 894, 916, 949 P.2d 1291, 1302–03 (1997) (holding that DSHS's failure to provide housing assistance to homeless children in dependency actions was sufficiently public and important).

Additionally, because this case involves constitutional issues of supremacy of state law and the limits of municipal authority once the state has acted, "the court may exercise its discretion and render a declaratory judgment" (1) where it is adequately briefed and argued and (2) where it appears that an opinion of the court would be beneficial to the public and to the other branches of the government. *Lee v. State*, 185 Wn.2d 608, 618, 374 P.3d 157, 162 (2016); *State ex rel. Distilled Spirits Inst., Inc. v. Kinnear*, 80 Wn.2d 175, 178, 492 P.2d 1012, 1014 (1972). Further, the court may decide cases—even if not justiciable—if the court determines the issues are substantial by looking to "the public interest which is represented by the

subject matter of the challenged statute" and "the extent to which public interest would be enhanced by reviewing the case." *Smith*, 143 Wn. App. at 908.[10]

Here, (1) the merits issues in this case will be adequately briefed and argued, and (2) a decision on the validity of the Access Provision would benefit the public and local municipalities. Because a number of municipalities are attempting to regulate on this subject, affirming the trial court and ruling that the entire field of firearms regulation is preempted would benefit local governments beyond just the City of Edmonds. Likewise, a judicial decision would clarify Plaintiffs' rights and obligations.

This case is entirely unlike *Walker v. Munro*, 124 Wn.2d 402, 879 P.2d 920 (1994), where the petitioners' claim was not justiciable and the Washington Supreme Court declined to render a declaratory judgment. *Id.* at 411. In *Walker*, the petitioners (public advocacy groups, legislators, and citizens) requested the court to issue a writ of mandamus directing respondents not to implement and enforce an initiative limiting expenditures, taxation, and fees. *Id.* at 406–07. Most of the provisions of

[10] Other jurisdictions also permit the courts to render declaratory judgment even in the absence of justiciability. *See Coral Constr., Inc. v. City & Cnty. of San Francisco*, 116 Cal. App. 4th 6, 15 & n.10, 10 Cal. Rptr. 3d 65, 72 (2004) (holding that any doubt as to justiciability should be resolved in favor of adjudication where the public is interested in the dispute); *Nat'l Audubon Soc'y v. Superior Court*, 33 Cal. 3d 419, 433, 658 P.2d 709, 718, 189 Cal. Rptr. 346, 355 (1983) (same). After all, states interpreting the Uniform Declaratory Judgement Act are not bound by constraints on jurisdiction and justiciability like Article III Federal Courts. *Aged Hawaiians v. Hawaiian Homes Comm'n*, 78 Hawai'i 192, 204, 891 P.2d 279, 291 (1995); *Rogers v. City of Cheyenne*, 747 P.2d 1137, 1138–39 (Wyo.1987), *appeal dismissed*, 485 U.S. 1017, 108 S. Ct. 1568, 99 L. Ed. 2d 884 (1988).

the initiative were not yet in force. *Id.* The Washington Supreme Court prominently relied on that fact in its justiciability analysis: "When a statute is not in effect, and when it may be amended by the very persons the Petitioners claim are being harmed, state legislators, we cannot do otherwise than find that this is only a speculative dispute." *Id.* at 412. Further, petitioners' main contention regarding the initiative was that it would be difficult to raise taxes, or funding may be cut; neither harm would have been an injury, or even a violation justifying relief. *Id.* Additionally, at the time of the lawsuit it was not clear how the initiative would be implemented, which could have affected whether or not the initiative would be constitutionally invalid. *See id.* at 412–13. For instance, the manner in which the legislature may not comply with the initiative would be the subject of a future challenge, affecting whether or not the initiative would be invalid. *Id.* at 413.

Turning to the public interest exception, the Washington Supreme Court declined to apply it in that case. First, the challenged measure was not yet in effect. Second, some of the petitioners were legislators, who had the ability to alter the manner and timing of implementation. *Id.* at 414–15. Third, the Washington Supreme Court did not have jurisdiction to hear a declaratory judgment action under its original jurisdiction. *Id.* at 418. Under those circumstances, a declaratory judgment action would have been advisory.

The crucial difference in this case is that Plaintiffs' facial challenge to the Access Provision is ripe, and requires no further factual development,

while the challenge in *Walker* was as-applied and required factual development to be ripe. *Id.* at 412–13. "There is a crucial distinction between [a law] that is unconstitutional [or preempted] on its face . . . and an [a law] that is potentially unconstitutional in its application, like the statutory supermajority requirements in *Walker* . . . ." *Lee*, 185 Wn.2d at 617–18.

Further, Plaintiffs' challenge to the Access Provision differs from *Walker* and the cases cited therein because there is already a justiciable case regarding the Ordinance: Plaintiffs already have standing to challenge the Storage Provision. Next, a decision on the Access Provision will not be advisory. While "[a]n advisory opinion is one which adjudicates nothing and binds no one," a decision here will be binding on the City. *Brimmer*, 521 P.2d at 579 (citations omitted). To the contrary, this is a "hotly contested current controversy," *Nat'l Audubon Soc'y*, 33 Cal. 3d at 433, which "will effectively resolve the controversy, as the [Ordinance] will be declared either valid or void." *Cox v. City of Cheyenne*, 79 P.3d 500, 507 (Wyo. 2003) (noting that each party has advanced their positions with "sufficient militancy to engender a thorough research and analysis of the major issues.").

Finally, a declaratory judgment to resolve the "important constitutional question about the supremacy of state law," clarifying Plaintiffs' uncertain legal rights and the authority of municipalities from Edmonds, to Seattle and beyond, is "proper." *Clallam Cnty.*, 92 Wn.2d at 849. As set out *infra*, Section VII.C, the facial invalidity of the Access

Provision is a final, pressing reason for this Court to reach the merits. *City of Yakima v. Huza*, 67 Wn.2d 351, 360, 407 P.2d 815, 820 (1965) (holding that where "the validity or invalidity [of a law] is apparent and obvious in the wording," the court has a duty to render a declaratory judgment).

C. RCW 9.41.290 Preempts Local Regulation of Access to Firearms

Reaching the merits of the Access Provision, it is invalid and preempted for the same reasons that the Storage Provision is invalid and preempted. The Access Provision is a firearms regulation by way of penalizing storage that results in access, and the Legislature has preempted the field of firearms regulation. Further, the Access Provision fundamentally conflicts with state law. In fact, the Access Provision conflicts with state law even under the (incorrect) conflict preemption test proposed by Appellants.

1. The Access Provision Regulates Firearms and Is Invalid

As described in Section VI.C.1, *supra*, RCW 9.41.290 fully preempts the entire field of local firearms regulation. Appellants concede that field preemption applies to civil regulation of firearms. App. Br. 18, 42.

Similarly, like the Storage Provision, the Access Provision is a regulation of firearms. At the trial court, Appellants conceded that the Ordinance (including the Access Provision) is "regulation of firearms storage." CP 59. There can be no dispute that the Ordinance is a "law or ordinance" of general application. *See Chan*, 164 Wn. App. at 565 & n.13 (discussing wide impact of the City of Seattle's "Firearms Rule").

Appellants will likely argue that the Access Provision is merely regulation of "firearms storage," and that the entire category of "firearms storage regulation" is outside the field of "firearms regulation." As described in Section VI.C.2–VI.C.IV, *supra*, Appellants' cramped reading of "fully occupies the entire field" and incorrect interpretation of "including" are incorrect, as is Appellants' misleading description of the holdings in *Watson* and *Kitsap County*.

Finally, during argument before the trial court, Appellants declined to (or were unable to) offer any argument differentiating the Access Provision from the Storage Provision on the merits. *See* RP 8. At least as pertains to field preemption, the two provisions and the entire Ordinance rise and fall on the same arguments.

2. The Access Provision Directly Conflicts With State Law

While the two provisions rise and fall on the same arguments with respect to field preemption, the argument for conflict preemption is significantly stronger regarding the Access Provision because of the recent enactment of I-1639. Under I-1639, RCW 9.41.360 now directly regulates access to firearms, and does so in a way that is inconsistent with the Access Provision.

For example, under RCW 9.41.360, if someone other than a lawfully authorized user obtains an unsecured firearm, that alone does not violate state law. Instead, a person violates the statute if they store the firearm in a location where they should reasonably know that a prohibited person may

gain access, they did not use a trigger lock or secured storage, the prohibited person obtains access, **and** the prohibited person takes some further act (*e.g.*, use the firearm to commit a crime, discharge the firearm, display the firearm as a threat to others). RCW 9.41.360(1). But no subsequent act by a prohibited person is required to violate ECC 5.26.030. If anyone other than a lawfully authorized user (ECC 5.26.010(F)) obtains a firearm and an owner should have known they were likely to gain access, the owner is subject to a penalty of up to $1,000 under the Access Provision, but those facts alone would not necessarily even violate RCW 9.41.360. This is because state law defines a "prohibited person" as a person who is prohibited from possessing a firearm under state or federal law, a much smaller class of individuals. RCW 9.41.360(5). But the Ordinance defines "prohibited person" with respect to the Access Provision and overall penalties as including "any person who is not a lawfully authorized user." ECC 5.26.010(F). Thus, the Access Provision penalizes conduct that is not subject to penalty under state law. Additionally, under state law there is a safe harbor for individuals reporting to law enforcement that a firearm was stolen as a result of an unlawful entry. RCW 9.41.360(3)(d). The Ordinance contains no safe harbor for reporting theft of a firearm. The Access Provisions thus flagrantly "inconsistent with, more restrictive than, [and] exceed[s] the requirements of" RCW 9.41.360. *See* RCW 9.41.290 (narrow conflict preemption test).

Even under Appellants' relaxed test, which ignores the plain language in RCW 9.41.290, the Access Provision irreconcilably conflicts

with state law and is preempted. *See, e.g., Entertainment Industry Coalition*, 153 Wn.2d at 661–63 (striking down local ordinance prohibiting smoking areas that were permitted under state law).

Because preemption of the Access Provision is clear on its face, and due to the recent enactment of conflicting state law using the initiative process, this Court should reach the merits and render declaratory judgment on this constitutional issue of great public importance and interest. *City of Yakima*, 67 Wn.2d at 360.

VIII. CONCLUSION

For these reasons, Plaintiffs respectfully request that the Court affirm the trial court's grant of declaratory judgement that the Storage Provision is invalid and preempted. Plaintiffs also respectfully request that the Court reverse the trial court's decision not to reach the merits on the Access Provision due to justiciability and the trial court's refusal to apply the public interest exception. Last, Plaintiffs respectfully request that the Court reach the merits and hold that the Access Provision is preempted and invalid.

DATED this 6th day of April, 2020.

CORR CRONIN LLP

s/ Eric A. Lindberg

Steven W. Fogg, WSBA 23528
Eric A. Lindberg, WSBA No. 43596
1001 Fourth Avenue, Suite 3900
Seattle, Washington 98154-1051
Tel: (206) 625-8600
Fax: (206) 625-0900
Attorneys for Cross-Appellants

CORR CRONIN LLP

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