No. 80755-2-I

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

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/Counter-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.

APPELLANT'S REPLY IN SUPPORT OF ITS OPENING BRIEF AND RESPONSE TO RESPONDENT/CROSS-APPELLANTS' BRIEF

Jessica L. Goldman,
WSBA #21856
SUMMIT LAW GROUP, PLLC
315 Fifth Avenue S., Suite 1000
Seattle, WA 98104
(206) 676-7000
JessicaG@SummitLaw.com

Molly Thomas-Jensen,
Admitted *pro hac vice*
Eric A. Tirschwell,
Admitted *pro hac vice*
EVERYTOWN LAW
450 Lexington Avenue, Suite 4184
New York, NY 10017
(646) 324-8222
mthomasjensen@everytown.org
etirschwell@everytown.org

Attorneys for Defendant/Appellant CITY OF EDMONDS

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I. INTRODUCTION

The plaintiffs—gun owners and individual members of the National Rifle Association and Second Amendment Foundation—seek to extinguish all local democratic authority to enact regulations that relate to firearms. Despite precedent narrowing the scope of preemption under RCW 9.41.290, the plaintiffs would like state preemption to be limitless, such that municipalities, like the City of Edmonds, have no power to implement basic health and safety laws regarding firearms, like the Ordinance mandating responsible storage practices at issue here. The Washington Legislature took pains to delineate nine areas in the preempted "field of firearms regulation," but the plaintiffs still argue that "storage"—which is neither one of the preempted categories nor directly related to one—should be incorporated into RCW 9.41.290's scope. The Court should reject these arguments. While RCW 9.41.290, by its plain language, has a broad preemptive scope, it does not prevent all local laws that relate to firearms. The City's narrowly crafted Ordinance lies beyond that scope.

This brief both responds to the plaintiffs' cross appeal and replies to their arguments as to the City's appeal. First, in the cross-appeal, the plaintiffs assert that they should be able to challenge a provision of the City's Ordinance even though it has no impact on them. The Ordinance's unauthorized access provision (codified at Edmonds Mun. Code § 5.26.030,

and referred to herein as the "unauthorized access provision" or § 5.26.030) provides civil penalties for firearms owners who engage in conduct that a reasonable person would know is likely to result in a minor, at-risk person, or prohibited person obtaining the owner's firearm—and such an unauthorized person does obtain the owner's gun. Yet the plaintiffs do not state that they now, or in the future will, engage in any practice where an unauthorized person is likely to obtain their firearms. Though one plaintiff has children in his home, he expressly testified that he takes no such irresponsible action and alleged no circumstances demonstrating that his children were likely to obtain his weapons. The trial court, therefore, correctly held that the plaintiffs lacked standing to challenge that provision. Nonetheless, the plaintiffs have pressed it again on cross-appeal. Recognizing the weakness of any suggestion that § 5.26.030 causes them harm, they ask the Court to strike the provision anyway under the public importance exception to justiciability. But the trial court rejected that too, and for good reason. In accordance with Washington Supreme Court precedent, the matter can wait until a proper plaintiff who will be impacted by the unauthorized access provision chooses to challenge it.

Second, the plaintiffs attempt to defend the trial court's erroneous decision that RCW 9.41.290 preempts the Ordinance's storage provision (codified at Edmonds Mun. Code § 5.26.020, and referred to herein as the

"storage provision" or § 5.26.020), which requires firearms owners to keep their firearms locked when they are not in their control. But even the plaintiffs chose not to defend much of the trial court's reasoning as to why the language of RCW 9.41.290—which conspicuously omits any reference to storage—preempts the storage provision. While the plaintiffs push a broad reading of preemption, they fail to demonstrate that RCW 9.41.290 is unambiguous as to whether local firearm storage ordinances fall within the "field of firearms regulation." And because of that ambiguity, the Court must construe the statute in favor of local authority and uphold the Ordinance here.

Accordingly, the Court should reject the plaintiffs' cross appeal as to justiciability of the unauthorized access provision and should reverse the trial court's decision that the storage provision is preempted.

II. ISSUES PERTAINING TO CROSS-APPELLANTS' ASSIGNMENTS OF ERROR

1. Whether the trial court correctly held that the plaintiffs failed to demonstrate that their challenge to the unauthorized access provision of the Ordinance was justiciable when no plaintiff alleged that he intended to engage in any conduct prohibited by that provision.

2. Whether the trial court correctly held that the plaintiffs' standing to challenge the storage provision of the Ordinance did not

automatically give it standing to challenge the unauthorized access provision.

3. Whether the trial court properly exercised its discretion not to apply the public importance exception to justiciability because the unauthorized access provision of the Ordinance could be brought by a plaintiff with "actual standing."

III. SUPPLEMENTAL STATEMENT OF THE CASE PERTAINING TO THE CROSS-APPEAL

As explained in the City's opening brief, the City of Edmonds passed the Ordinance to address the "grave harm" that can occur when someone other than the rightful owner, or another authorized user, gets hold of a firearm. Appellant's Opening Brief ("App. Br.") at 5. The tragic effects of unauthorized persons obtaining firearms are not hard to imagine: children may unintentionally shoot other children or adults, disturbed teenagers have easier ability to carry out school shootings, and persons young and old can more easily act on suicidal impulses. Clerk's Papers ("CP") 90-91, 109-11, 118. The Ordinance the City enacted to address these concerns had two distinct parts. First: the storage provision that was at issue in the City's opening brief. That provision requires that firearms be stored in a locked container when not in the immediate control of an authorized

user. *See* App. Br. at 7-8. In their cross-appeal, the plaintiffs take aim at the second part of the Ordinance—the unauthorized access provision

A. The Unauthorized Access Provisions

The unauthorized access provision penalizes irresponsible storage of firearms that actually leads to access by a minor, at-risk or other prohibited person. It 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.

Section 5.26.030 (the Ordinance is available at https://www.codepublishing.com/WA/Edmonds/#!/Edmonds05/Edmonds0526.html#5.26) (last visited June 1, 2020). The Ordinance defines "prohibited person" as "any person who is not a lawfully authorized user," which means he must have "express permission of the owner to possess and use the firearm" and is not prohibited from possessing a firearm by state or federal law. *Id.* §5.26.010.

This provision, by its terms, does not require any specific storage practice. A firearm owner can only be penalized under this provision if his storage practices are so negligent that he "knows or reasonably should know" that a minor, at-risk or other prohibited person is likely to get access to the owner's firearm—and then such person does obtain it. If that occurs,

there are no criminal penalties associated with the Ordinance. The civil penalties range from $1,000 if an unauthorized person obtains a firearm to a maximum of $10,000 if that unauthorized person kills or injures someone with the firearm. *Id.* §5.26.040.

B. The Plaintiffs' Storage Practices

None of the plaintiffs alleged that they store or leave their firearms in a manner such that any minor, at-risk, or prohibited person would likely obtain them. Each of the three plaintiffs are Edmonds residents and gunowners who have expressed a desire to store some of their firearms in an unlocked state when the firearms are outside of their control. CP 285-87. But each of these plaintiffs testified that, though some of their firearms are left unlocked, they did not—and would not—leave their firearms where it is likely that a child, at-risk person, or prohibited person could ever access their guns. CP 349-51, 367-69, 375-77.

Plaintiff Brett Bass testified that he generally stores all of his firearms in a gun safe, with the exception of one gun that he carries on his person and a gun that he keeps by his bedside at night when he is asleep. CP 355-64. Mr. Bass further testified that he sometimes leaves his gun safe unlocked when he is at home because it is convenient, and he does not "see a compelling reason to close [the gun safe]." CP 366. He testified to no

circumstances that would likely lead to an unauthorized person obtaining his firearms. CP 367-69.

Plaintiff Swan Seaberg testified that he keeps some of his guns in a small gun safe, and that he stores two rifles and a shotgun unlocked in a hidden location. CP 373-74. He likewise testified to no circumstances that would likely lead to an unauthorized person obtaining his guns. CP 357-77.

Plaintiff Curtis McCullough was the only plaintiff who testified to having minors in his home, as he has two children under the age of three. CP 349. He stores all but three of his firearms in a gun safe. CP 346. Two other firearms he stores in a concealed place in his home and the other he generally carries. CP 346-47. As he testified unequivocally, he does not leave his guns "where it is likely that a child would access" them, and he even "takes steps to make sure" that his children and any other visiting children would not access them. CP 349.

C. Procedural History Pertaining to the Cross-Appeal

The plaintiffs have already had three chances to demonstrate standing to challenge the unauthorized access provision. The lower court concluded that they failed to do so at every step.

1. The trial court gave the plaintiffs a second attempt to allege standing after the City moved to dismiss for lack of justiciability.

As described in the City's opening brief, just days after the Ordinance passed—and months before it went into effect—plaintiffs Bass and Seaberg brought this lawsuit under the Uniform Declaratory Judgments Act, RCW 7.24.010 *et seq.*, contending that both provisions of the Ordinance were preempted by state law and had to be enjoined. They did not claim that the Ordinance violates any of their state or federal constitutional rights.

The City moved to dismiss all claims for lack of justiciability, arguing that no plaintiff had alleged facts suggesting that he engaged in any conduct prohibited by the Ordinance. Because the plaintiffs' allegations of standing were "vague and inadequate," the trial court "continued this case for significant time to allow the plaintiffs to submit additional evidence to establish standing" through either an amended verified complaint or in a sworn declaration. Verbatim Report of Proceedings ("RP") 26; CP 566-67. The trial court warned that it would, upon that supplemental filing, "not consider facts or make inferences from information supplied solely in briefing or oral argument." CP 566.

2. The trial court held that the plaintiffs' verified amended complaint failed to establish standing to challenge the unauthorized access provision.

The plaintiffs filed a verified amended complaint and added a third plaintiff—Mr. McCullough. Although the amended complaint included additional facts about the plaintiffs, not a word in it alleged that any plaintiff engaged in storage practices that would make it likely that a minor, at-risk, or prohibited person would access plaintiffs' firearms. Their allegations instead were that they store firearms, even when unlocked, largely in concealed places or on their person. CP 284-87. None of the plaintiffs said they had at-risk or prohibited persons in their homes where the guns were stored. *Id*. The only plaintiff that even alleged contact with minors was Mr. McCullough, who did not allege that his children were likely to obtain his firearms or describe likely scenarios where they would. CP 285-86.

Accordingly, upon the City's renewed motion to dismiss, the trial court held that the plaintiffs "did not have standing" to contest the unauthorized access provision. RP 26. Therefore, while the case could go forward as to the storage provision, it could not as to the unauthorized access provision.

3. The trial court denied the plaintiffs' further attempts to establish standing to challenge the unauthorized access provision.

Following the trial court's decision on the City's renewed motion to dismiss, the parties engaged in limited discovery. All three plaintiffs testified in depositions that they do not, and would not, leave their guns where it is likely that a child, prohibited person, or at-risk person could access them. CP 53-54.

The plaintiffs moved for summary judgment and again attempted to demonstrate standing to challenge the unauthorized access provision. Despite the fact that the trial court "very clearly found" in its previous decision that "the plaintiffs had not presented facts to establish standing to contest the Ordinance" and "specifically held" that they could not go forward as to the unauthorized access provision, the plaintiffs raised the same arguments as before and pointed to no new facts. RP 26-28.

The trial court treated this renewed effort to argue standing as a motion for reconsideration of its decision to dismiss the claim against the unauthorized access provision. RP 27. And it denied that request. As the trial court explained, reconsideration was improper because there was no "newly discovered" evidence meriting relitigating the question. *Id*. "The plaintiffs had every opportunity to put forward any and all evidence that

they might have on the standing issue" and yet had "not presented facts to establish standing." RP 26.

The trial court also declined the plaintiffs' plea to rule on the issue under the "public importance" exception to justiciability. The trial court explained, "[w]hile it may be an issue of public importance," it was likewise "important that there be a plaintiff with actual standing" because of "the unique factual circumstances [that trigger] that statute." RP 28. The challenge to the unauthorized access provision could wait for an appropriate plaintiff with "real standing." *Id*.

IV. ARGUMENT RESPONDING TO THE CROSS-APPEAL'S CONTENTION THAT PLAINTIFFS HAVE STANDING TO CHALLENGE THE UNAUTHORIZED ACCESS PROVISION

A. Standard of Review for Cross-Appeal

The trial court's decision that the plaintiffs failed to present a justiciable controversy under the Uniform Declaratory Judgments Act, RCW 7.24.010 *et seq.*, is a question of law that this Court reviews de novo. *Am. Traffic Sols., Inc. v. City of Bellingham,* 163 Wn. App. 427, 432, 260 P.3d 245 (2011).

In the absence of a justiciable controversy, the trial court may still exercise its discretion to hear the case if it would resolve an issue of "major public importance," but "only rarely and where the public's interest is 'overwhelming.'" *Ames v. Pierce Cnty.*, 194 Wn. App. 93, 116–17, 374

P.3d 228 (2016). This Court reviews a trial court's decision whether to exercise its discretion to resolve an issue under the public interest exception only for manifest abuse of discretion. *See Lewis Cnty. v. State*, 178 Wn. App. 431, 441, 315 P.3d 550 (2013); *Nollette v. Christianson*, 115 Wn.2d 594, 599, 800 P.2d 359 (1990). "A trial court abuses its discretion only when its decision is manifestly unreasonable or based on untenable grounds." *Kitsap Cnty. v. Smith*, 143 Wn. App. 893, 902, 180 P.3d 834 (2008).

To the extent the plaintiffs challenge the trial court's refusal to reconsider the standing issue when the plaintiffs attempted to brief it for a third time on summary judgment, that decision to decline reconsideration is also reviewed for an abuse of discretion. *Wilcox v. Lexington Eye Inst.*, 130 Wn. App. 234, 241, 122 P.3d 729 (2005).

B. The Trial Court Correctly Held that Plaintiffs' Challenge to the Unauthorized Access Provision is Not Justiciable Because No Plaintiff Demonstrated an Intent to Engage in Behavior that Would Violate that Provision.

It is well-established that "[b]efore a court will act under the Uniform Declaratory Judgments Act, chapter 7.24 RCW, the plaintiff must demonstrate the existence of a justiciable controversy." *Am. Traffic Sols., Inc.*, 163 Wn. App. at 432; accord *Snohomish Cnty. v. Anderson*, 124 Wn.2d 834, 840, 881 P.2d 240 (1994). The trial court correctly held that the

plaintiffs failed to make that showing as to their challenge to the unauthorized access provision because the plaintiffs did not demonstrate that they are likely to be harmed by that provision.

1. Plaintiffs must demonstrate that they are likely to be personally harmed by a challenged law for their claims to be justiciable under the Declaratory Judgment Act.

To obtain relief under the Declaratory Judgments Act, "a party must present a justiciable controversy based on allegations of harm personal to the party that are substantial rather than speculative or abstract." *Grant Cnty. Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 802, 83 P.3d 419 (2004). Courts carefully scrutinize whether plaintiffs have made such a showing of harm because otherwise a dispute strays into the realm of advisory opinions. And courts are "not authorized to render advisory opinions or pronouncements upon abstract or speculative questions under the declaratory judgment act." *Wash. Beauty Coll., Inc. v. Huse*, 195 Wash. 160, 164-65, 80 P.2d 403 (1938).

To be a "justiciable controversy," a declaratory judgment action must present:

> (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). "Each of these four requirements must be met" for a claim to be justiciable. *Eyman v. Ferguson,* 7 Wn. App. 2d 312, 320, 433 P.3d 863 (2019). The third justiciability requirement of a direct, substantial interest in the dispute is fatal to the plaintiffs' cross-appeal.

The Supreme Court has explained that this third element "encompasses the doctrine of standing," including "the federal case-or-controversy requirement." *To-Ro Trade Shows v. Collins,* 144 Wn.2d 403, 411 & 414, 27 P.3d 1149 (2001); *see also Grant Cnty. Fire Prot. Dist. No. 5,* 150 Wn.2d at 802 (explaining that the four-element test is "clarified by the common law doctrine of standing"). The key "kernel of the standing doctrine" in a case challenging a law "is that one who is not adversely affected by [the law] may not question its validity." *Walker v. Munro*, 124 Wn.2d 402, 411, 879 P.2d 920 (1994). Therefore, to have standing to challenge a law, a party must show that the specific provision of the act will cause them "sufficient factual injury"—commonly referred to as an "injury-in-fact." *Grant Cnty. Fire Prot. Dist. No. 5,* 150 Wn.2d at 802. As the Supreme Court has repeatedly held: "A person may not urge the invalidity of an ordinance unless he is harmfully affected by the particular feature of the ordinance alleged to be . . . invalid." *City of Seattle v. Long*, 61 Wn.2d

737, 740-41, 380 P.2d 472 (1963); *see also Kadoranian by Peach v. Bellingham Police Dep't*, 119 Wn.2d 178, 191, 829 P.2d 1061 (1992) (no standing where "no actual injury has been claimed").

A plaintiff must demonstrate how they will be "*directly* damaged in person or in property by" the challenged law's enforcement. *DeCano v. State*, 7 Wn.2d 613, 616, 110 P.2d 627 (1941) (emphasis added); *see also Walker*, 124 Wn.2d at 412 (finding that petitioners' failure to identify any "actual, concrete harm" caused by ballot initiative precluded declaratory action). Accordingly, plaintiffs must "establish, with some degree of concrete detail that they intend to violate the challenged law." *Lopez v. Candaele*, 630 F.3d 775, 786 (9th Cir. 2010); [1] *see also Superior Asphalt & Concrete Co. Inc. v. Wash. Dep't of Labor & Indus.*, 121 Wn. App. 601, 608, 89 P.3d 316 (2004) (expressly rejecting the argument that being "required to abide by [a] . . . regulation . . . is enough to create standing"). If the plaintiffs fail to make "any allegation that they intend to engage in

[1] Federal cases on standing and justiciability are instructive and often cited by Washington courts. *See, e.g. Walker*, 124 Wn.2d at 419 (citing federal authority in discussing whether plaintiffs had standing to seek declaratory and injunctive relief); *High Tide Seafoods v. State*, 106 Wn.2d 695, 702, 725 P.2d 411 (1986) (citing federal authority in evaluating standing to challenge constitutionality of tax on fish); *To-Ro Trade Shows*, 144 Wn.2d at 411 (holding that the "federal case-or-controversy requirement" is "[i]nherent in" the Declaratory Judgment Act's justiciability requirements).

conduct prohibited by [the law]," they lack standing—and the case is not justiciable under the Declaratory Judgment Act. *Forbes v. Pierce Cnty.*, 5 Wn. App. 2d 423, 437, 427 P.3d 675 (2018).

2. As the trial court correctly concluded, the plaintiffs failed to demonstrate that they intend to engage in conduct that violates the unauthorized access provision.

Each of the three plaintiffs fail this test. As the trial court correctly concluded, despite having "every opportunity to put forth any and all evidence that they might have on the standing issue," no plaintiff alleged specific facts demonstrating that he presently stores his firearms in a manner that would violate the unauthorized access provision, or that he intends to do so in the future. RP 26. To have standing, the plaintiffs were required to plead the "risk of future, potential . . . enforcement based on their anticipated conduct." *Forbes*, 5 Wn. App. 2d at 436. Yet their allegations—which are bereft of details as to when, how and under what circumstances minor, at-risk, or prohibited persons would be *likely* to obtain one of their firearms—fall woefully short of demonstrating that they "will be specifically and perceptibly harmed" by the Ordinance. *Save a Valuable Env't v. City of Bothell*, 89 Wn.2d 862, 866, 576 P.2d 401 (1978). With the benefit of discovery, the lack of standing was even further confirmed. The three plaintiffs each testified that they do *not* intend to engage in any

conduct that is proscribed by the unauthorized access provision. *Compare* CP 349-51, 367-69, 375-77.

The plaintiffs advance two arguments to demonstrate that they are personally injured by the unauthorized access provision. Neither has merit.

First, they argue that "because the Ordinance penalizes access by any other non-authorized person,"—i.e., anyone without the owner's permission to possess the firearm—"it is hardly speculative for each of the Plaintiffs to be in a scenario where they face enforcement." Respondents' Brief ("Resp. Br.") at 35. But how will nonauthorized persons obtain their firearms? It is not enough for plaintiffs to allege that some of their firearms are unlocked in their home. They bear the burden of alleging how any unauthorized person would ever obtain them. The plaintiffs do not say. Plaintiffs Bass and Seaberg do not even allege in their verified amended complaint that any children, at-risk, or prohibited persons live in or visit their homes. CP 284-87. This argument rests on pure speculation.

Moreover, even assuming that an unauthorized person did obtain one of the plaintiffs' firearms, that alone would not be enough to violate the provision. To violate the unauthorized access provision, a firearm owner has to engage in conduct where a "reasonable person" should know it is "likely" that a minor, at-risk, or prohibited person would gain access. Thus, while the plaintiffs are correct that they do not need to allege that they intend

for an unauthorized person to obtain a firearm—e.g., that they intend to give their gun to a person at risk of harming themselves or another—they must allege storage practices or other conduct where a reasonable person should know that an unauthorized person is likely to obtain their firearm.[2] Resp. Br. at 35. They have not. They have made no attempt in their various pleadings or even in their brief to this Court to connect the dots and demonstrate that they intend to engage in conduct that would violate the unauthorized access provision.

Second, the plaintiffs rely upon the fact that Plaintiff McCullough has minor children living in his home. Resp. Br. at 35. But this too falls short of alleging that his children—both under the age of three—are *likely* to access his weapons. He does not plead facts that gives rise to such an inference, as his broad and vague pleadings leave it unclear where, within his house, he keeps his concealed weapons or whether his children are

[2] The plaintiffs wrongly assert that the City "narrowed" its position at oral argument as to whom would have standing to challenge the unauthorized access provision. Resp. Br. at 35. The City did not assert that the *only* people who would have standing are those that *intend* to violate the unauthorized access provision, by for example, giving their teenage children unsupervised access to a firearm so the child could use it in self-defense. Those were mere examples of people who might have standing. As the City has consistently argued, anyone who intends to engage in conduct that would violate the Ordinance, whether they want to be or know they are violating it or not, would also have standing. But the plaintiffs allege no such conduct.

capable and likely to access his firearms. If plaintiffs had pled, for example, that they routinely left an unsecured firearm accessible in a room where children played unsupervised, that would be sufficient to allege standing to challenge §5.26.030; but they make no such specific allegations, and it is not for the Court to put words in their mouths.

Essentially, the plaintiffs are asking this Court to endorse a standard that would require trial courts to imagine factual scenarios without any mooring to the complaint. They assert, without explanation, that it is "hardly a stretch" to see how "the circumstances" prohibited by the Ordinance could "meet Mr. McCullough's specific circumstances." Resp. Br. at 35. The Court, then, is left to hypothesize what facts might give the plaintiffs' standing. Without detailed allegations about how Mr. McCullough stores his firearms and how his children are likely to obtain them, the trial court did not err in declining to enter into the "hypothetical, speculative" realm of a nonjusticiable dispute. *Diversified Industries*, 82 Wn.2d at 815.

Nor can the plaintiffs meaningfully distinguish their case from Division Two's recent decision in *Forbes v. Pierce County*, where the Court considered whether a party had standing to challenge a local ordinance, when that ordinance had not yet been enforced against them. 5 Wn. App. 2d at 435-37. 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 he can show he intends to engage in conduct prohibited by the statute. *Id.* at 436-37. Then it dismissed the 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.* So too here. The plaintiffs cannot maintain their declaratory judgment action without allegations that they intend to act in ways that would violate the statute. In *Forbes*, the Court dismissed the claim even though the plaintiffs had already received a "notice and order to correct," which identified violations of the law, stated "that failure to comply may result in further enforcement action," and cited the imposition of fines as an example of possible enforcement. *Id*. at 429, 435-37. Yet even then the Court found enforcement too speculative to deem it a "justiciable controversy."

The inquiry in *Forbes*, as in *Diversified Industries*, turns on whether the risk of enforcement is "speculative"—that is, whether the plaintiffs make concrete factual allegations that they intend to engage in conduct that would constitute a violation of the law, and hence that the law harms them in a concrete way. As the trial court correctly found, those allegations were lacking here, requiring it to dismiss the claim.

C. The Trial Court Correctly Held that Plaintiffs' Standing to Challenge the Storage Provision Did Not Confer Standing to Challenge the Unauthorized Access Provision.

Even though they do not present a justiciable controversy as to the unauthorized access provision, the plaintiffs argue that this Court should nonetheless opine on its validity because they have standing to challenge the storage provision. Resp. Br. at 6 (Issue 2). But that is not how standing law works. Unsurprisingly, the plaintiffs only make this argument in passing and do not have a single citation to support it. Resp. Br. at 32, 43. The trial court properly rejected it. RP 26.

The plaintiffs' standing to challenge the storage provision—which the City does not contest—does not automatically transfer to the unauthorized access provision just because they happen to have been enacted as part of the same Ordinance. As the Supreme Court has held, a plaintiff must allege that "he is harmfully affected by the particular feature of the ordinance alleged to be . . . invalid." *Long*, 61 Wn.2d at 741. Thus, in *Forbes*, Division Two determined that the plaintiffs had standing to challenge one provision of the ordinance at issue but had not presented the court with a justiciable dispute as to a separate section of the same ordinance. 5 Wn. App. 2d at 435, 437; *see also Get Outdoors II, LLC v. City of San Diego, Cal.*, 506 F.3d 886, 892 (9th Cir. 2007) (holding that a party "cannot leverage its injuries under certain, specific provisions to state

an injury under the . . . ordinance generally"). Standing does not turn on whether the Legislature or City Council included multiple provisions in the same law or separated them out into distinct ordinances or statutes. It makes no difference, as plaintiffs contend, that "there is already a justiciable case regarding [another part of] the Ordinance" or that this is, in plaintiffs' view, a "hotly contested controversy" such that each side will present the case with "sufficient militancy." Resp. Br. at 43. That is not the standard for justiciability—the plaintiffs must demonstrate that they personally are harmed (or will be harmed) by the unauthorized access provision. They have not done so.

D. The Trial Court Did Not Abuse Its Discretion in Declining to Exercise Review Under the Public Importance Exception to Justiciability.

Because of the weakness of their arguments on justiciability, the plaintiffs instead argue at length (at pages 35-44) that this Court should jettison standing altogether and review their unauthorized access provision claim because it is a matter of pubic importance. The trial court rejected that argument, and for good reason. Washington courts apply the public interest exception to justiciability on rare occasions to the very few cases in which: (1) resolution would have widespread public impact, (2) a plaintiff with a concrete interest in the outcome brings the case, and (3) the matter might otherwise escape review. While it touches on a topic of importance,

this case still fails to meet the high bar for excusing justiciability, especially given that, as the trial court recognized, a "plaintiff with actual standing" could challenge it. RP 28. That ruling comports with precedent and is not an abuse of discretion.

1. This case does not present one of the "rare" instances where the Court should issue an advisory opinion because of an "overwhelming" public impact to large segments of the population.

Where all four justiciability factors are not met, "the court steps into the prohibited area of advisory opinions." *Diversified Industries*, 82 Wn.2d at 815. Accordingly, a court may only exercise its discretion to deliver an advisory opinion on those "rare cases" where the interest of the public in the resolution of the case is "overwhelming." *Lewis Cnty.*, 178 Wn. App. at 440; *accord Ames*, 194 Wn. App. at 116–17.

To meet this standard, the "existence of a statute" or a law "implicating the public interest is not sufficient to support the examination of an issue which is not otherwise justiciable." *Anderson*, 124 Wn. 2d at 840–41. Thus, as the trial court recognized, it is insufficient that the challenged provision focuses on a matter of "public importance." RP 28. Certainly, negligent firearm storage practices that allow unauthorized persons to obtain guns are an important safety issue. But "in deciding whether to review such an issue, courts examine not only the public interest which is represented by the subject matter of the challenged statute, but the

extent to which public interest would be enhanced by reviewing the case." *Anderson*, 124 Wn. 2d at 841 (emphasis in original). That is, resolving the specific case must impact "significant segments of the population" and be beneficial to "other branches of the government." *Grant Cnty. Fire Prot. Dist. No. 5*, 150 Wn. 2d at 802–03; *Seattle School Dist. 1 v. State*, 90 Wn.2d 476, 490, 585 P.2d 71 (1978).

The magnitude of the public importance necessary for this exception is borne out in prior examples: "Washington courts have applied this exception in cases involving, for example, eligibility to stand for public office, freedom of choice in elections, and the constitutionality of excise taxes." *Lewis Cnty.*, 178 Wn. App. at 440–41 (citing *Wash. State Coal. for the Homeless v. Dep't of Soc. & Health Servs.*, 133 Wn.2d 894, 917, 949 P.2d 1291 (1997)). "[I]ssues involving elections, public office, and constitutionality of taxes affect every citizen in the State." *Id*. To be sure, unauthorized access to firearms is an important issue, but it does not have the broad, structural impact that these examples all share.[3]

The plaintiffs fail to demonstrate how they meet this strict burden or even the one they have set forward in their brief. The plaintiffs assert that

[3] Washington courts have also "on the rare occasion, rendered an advisory opinion as a matter of comity for other branches of government." *Walker*, 124 Wn.2d at 417, 879 P.2d 920. The plaintiffs do not argue that basis for an exception here.

the Court should take a "less rigid and more liberal approach" to justiciability 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." Resp. Br. at 36 (citing *Grant Cnty. Fire Prot. Dist. No. 5*, 150 Wn.2d at 803). But the plaintiffs do not attempt to satisfy their own assertion that, to meet the public interest exception, a plaintiff needs to demonstrate that the case has "direct bearing on commerce, finance, labor, industry, or agriculture." It plainly does not. Nor do they meet their burden to allege (and subsequently present evidence) that requiring responsible gun storage practices would "immediately affect[] significant segments of the population." *Grant Cnty. Fire Prot. Dist. No. 5*, 150 Wn.2d at 803. Nor do they argue (and nor could they) that striking this safety provision and allowing such negligent practices to go forward would "enhance[]" the public interest. *Anderson*, 124 Wn. 2d at 841. Tellingly, the organizational plaintiffs representing firearms owners across the state that originally filed this action did not (or could not) demonstrate how this issue negatively impacted their membership and have withdrawn. CP 400-04.

The most the plaintiffs can muster is that an unspecified number of unnamed municipalities "are attempting to regulate on this subject." Resp. Br. at 41. But they do not claim that multiple other municipalities are

attempting to impose this precise provision, and, if so, why a plaintiff with standing could not challenge the provision in one of those municipalities. As the trial court held, this issue should wait for a plaintiff with "actual standing." Tr. 28.

2. Washington courts decline to apply the public interest exception where, as here, the plaintiffs' harm is speculative and another plaintiff with "real" harm can challenge the law.

Washington courts further limit the application of the public importance exception—they will not issue advisory opinions, even on important issues, where, as here, the plaintiffs seeking to challenge a law have not alleged any "concrete harm." *Walker*, 124 Wn.2d at 415. That is especially true when another person with concrete harm could bring the case. This factor alone disposes of the plaintiffs' contention that the Court should charge forward with reviewing the unauthorized access provision despite their lack of standing.

In *Walker v. Munro*, the Washington Supreme Court reviewed cases where it had issued advisory opinions and 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." 124 Wn. 2d at 415. The Court emphasized that it only issues an advisory

opinion where a party has suffered actual harm and is precluded from review for failing to establish *other* aspects of justiciability. *Id*. at 414-18. Thus, while that case involved important questions about the validity of a ballot measure that imposed limits on state expenditures, taxation and fees and had been extensively briefed, the Court still held that it did not warrant an advisory opinion under the public importance exception. Here, as the trial court agreed, no plaintiff alleged the requisite concrete harm—an essential element of justiciability even for cases of great public import.

None of the cases the plaintiffs rely on undermine *Walker v. Munro* or allow challengers to move forward with lawsuits under the public importance exception despite presenting only speculative or hypothetical harm. *See* Resp. Br. at 38-40. In each, there was a plaintiff who was directly harmed, or another branch of government was seeking an opinion "as a matter of comity" (per *Walker*).[4] *See, e.g., Grant Cnty. Fire Prot. Dist. No. 5*, 150 Wn.2d at 802 (holding that "property owners in this case clearly have standing to bring this action"); *Clallam Cnty. Deputy Sheriff's Guild v. Bd. of Clallam Cnty. Comm'rs*, 92 Wn.2d 844, 849, 601 P.2d 943 (1979)

[4] Plaintiffs also cite *Farris v. Munro*, 99 Wn.2d 326, 662 P.2d 821 (1983), in support of their argument that *Walker*'s limiting principles are not applicable here. Resp. Br. at 40. But that case analyzed taxpayer standing to bring a mandamus action, which is governed by a different standard than standing under the Declaratory Judgment Act. *Id*. at 330.

(concluding that plaintiffs had a "direct and substantial interest" in the outcome of the case); *Kightlinger v. Pub. Util. Dist. No. 1 of Clark Cnty.*, 119 Wn. App. 501, 505, 81 P.3d 876 (2003) (determining that the "parties have an actual, present, and existing dispute" that is "not hypothetical or speculative"); *Coal. for the Homeless*, 133 Wn.2d at 918 (concluding that all four prongs of the *Diversified Industries* test were met *and* that the case presented an issue of public importance): *Smith*, 143 Wn. App. at 908–09 (county government seeking declaratory judgment, in part so it would "be able to advise its employees of the legal limits on their ability to record work-related conversations"). Thus, while the plaintiffs may want to distinguish *Walker v. Munro* on its facts, *see* Resp. Br. at 41-42, they do not and cannot contest the holding of that case: that Washington courts will not, even under the public interest exception, hear cases based on speculative or hypothetical harm. That is fatal to the plaintiffs' plea for the exception here.

Nor is this a case where a law would escape review if the Court requires a plaintiff with concrete and non-speculative harm. While the plaintiffs quote *Grant County Fire Protection District Number 5 v. City of Moses Lake* in support of liberalizing the standing requirements here, (Resp. Br. at 36), they omit a key sentence. In that case, the Supreme Court qualified its approval of a "less rigid and more liberal" approach: "However, we have applied this liberal approach to standing only in cases where the

plaintiff whose standing was challenged was the *only* plaintiff in the case and the *liberal approach was necessary to ensure that the important public issues raised did not escape review."* 150 Wn. 2d at 803 (emphasis added). The unauthorized access provision, however, can be challenged pre-enforcement by a person who intends to engage in conduct that would be prohibited by that law or it can be challenged by any person who is issued a fine for its violation.

Accordingly, the trial court did not abuse its discretion. Its decision comports with *Walker v. Munro,* and the extensive history described in that case, in declining to invoke the public importance exception when plaintiffs have not demonstrated concrete harm.

3. The plaintiffs' remaining arguments fail to demonstrate that the trial court abused its discretion in declining to apply the public importance exception to the justiciability requirement.

The plaintiffs' other scattershot arguments as to why a court should review their challenge to the unauthorized access provision under the public importance exception also fail to demonstrate that the trial court abused its discretion.

First, the plaintiffs argue that the case involves constitutional issues. Resp. Br. at 40, 43. Alleged infringement upon constitutional rights, "in of itself, does not qualify the case as one presenting issues of broad overriding public import." *DiNino v. State ex rel. Gorton*, 102 Wn.2d 327, 332, 684

P.2d 1297 (1984) (internal quotation marks omitted). In *DiNino*, the Court refused to consider a dispute about provisions for pregnancy and abortion in advanced directives. *Id.* at 331. "Despite the obviously important constitutional rights involved," the plaintiff's harm was merely speculative, and the Court held that "without a factual controversy before it" an advisory opinion was not warranted. *Walker*, 124 Wn.2d at 415–16 (citing *DiNino*, 102 Wn.2d at 332).

Here, the plaintiffs do not claim that the unauthorized access provision infringes upon the Second Amendment or any of their constitutional rights. Any such claim would be specious. *See Jackson v. City & Cnty. of San Francisco*, 746 F.3d 953, 966 (9th Cir. 2014) (rejecting Second Amendment challenge to San Francisco safe storage ordinance). Instead, the plaintiffs' constitutional argument rests upon the fact that preemption is a question of the supremacy of state law over local, and hence "constitutional." Resp. Br. at 40. But if that were enough to trigger the public importance exception, it would mean that all preemption cases could go forward without justiciability or a plaintiff with a real and substantial harm at stake. That is not the law.

Nor can the plaintiffs rest upon a general "desire to clarify legal rights" to invoke the public interest exception. *See id.* at 34, 39, 43. The plaintiffs cite to *Clallam County Deputy Sherriff's Guild v. Bd. of Clallam*

County Commissioners to assert that the court may exercise its discretion to review a declaratory judgment action without standing just to "clarify" uncertain legal rights. 92 Wn.2d at 849. But that case provides no support for such a broad exception to the justiciability doctrine. In *Clallam County*, the plaintiff—a workers' guild—had a "direct and substantial interest in securing relief from the uncertainty of their legal rights and obligations," in part because the case had a direct bearing on how the salaries of its members would be set. *Id.* at 849. The interest was not speculative, as here, and the *Clallam County* Court did not even need to rely on an exception to the justiciability doctrine; it only referenced the importance of the case to the County as further supporting review.

Second, the plaintiffs emphasize that the Court may bypass the justiciability requirements because no "additional factual development is required" and the "merits of the case will be adequately briefed and argued." Resp. Br. 36, 41. But those are mere prerequisites to applying the public importance exception; they cannot confer a matter with the immediate public importance and widespread impact that is also required. *See Lewis Cnty.*, 178 Wn. App. at 440 (declining review because, even if the claim were ripe for review, the plaintiff's case "does not compare" in magnitude of impact to the "other cases where the major public importance exception has applied").

Lastly, the plaintiffs' reliance on out-of-state precedent is just a distraction. The plaintiffs devote significant space to describing cases from other states to demonstrate that other jurisdictions, like Washington, apply a more liberal approach to standing in cases involving "matters of great public importance." Resp. Br. at 37-38, 41 n.10, 43. But the City does not dispute that Washington law has an exception to justiciability for cases of great public importance. And none of these cases—certainly not a 1956 trial court decision from Ohio where the public interest standing doctrine has since been limited (*id.* at 38)—bears on whether that exception as it has been interpreted by Washington courts should apply to the plaintiffs' challenge to the unauthorized access provision. *See ProgressOhio.org, Inc. v. JobsOhio*, 13 N.E.3d 1101 (Ohio 2014). The plaintiffs' long footnote relying on Wyoming law is likewise misplaced. Resp. Br. at 38 n.9. They claim that Wyoming applies the exception to cases of public importance that "would otherwise have escaped review." But, as the trial court found, this case is not one that would escape review because it could be brought by an individual who—unlike these plaintiffs—intends to engage in conduct that would violate the law. Thus, there was no abuse of discretion in the trial court's judgment not to invoke this "rare" exception to the justiciability requirements. RP 28.

V. ARGUMENT RESPONDING AND REPLYING TO APPELLEES/CROSS-APPELLANT'S CONTENTION THAT BOTH THE STORAGE PROVISION AND ACCESS PROVISION ARE PREEMPTED BY STATE LAW

The plaintiffs fare no better when it comes to the merits of their preemption challenge to the storage provision and, assuming *arguendo* they have standing to challenge it, the unauthorized access provision. Their arguments as to both field preemption and conflict preemption fail.

A. The plaintiffs are wrong that RCW 9.41.290 divests local governments of all authority to enact regulations related to firearms.

The preemption statute's first sentence states:

> The state of Washington hereby fully occupies and preempts the entire field of firearms regulation within the boundaries of the state, including the registration, licensing, possession, purchase, sale, acquisition, transfer, discharge, and transportation of firearms, or any other element relating to firearms or parts thereof, including ammunition and reloader components.

RCW 9.41.290. Although this language is broad, it is not without boundaries. The plaintiffs' position—which was adopted by the trial court—is that RCW 9.41.290 preempts every "regulation" that is related to firearms, including the Ordinance, which relates to firearm storage. Resp. Br. at 20. But such a limitless reading of RCW 9.41.290 has already been rejected by Division Two of this Court. *See Kitsap Cnty. v. Kitsap Rifle & Revolver Club*, 1 Wn. App. 2d 393, 407–08, 405 P.3d 1026 (2017).

Rather than preempting every regulation that pertains to firearms, Washington courts instead have held that the list of preempted categories enumerated in RCW 9.41.290 circumscribes the "field of firearms regulations." The Legislature took pains to enumerate nine categories of firearms regulations in the preempted "field": "registration, licensing, possession, purchase, sale, acquisition, transfer, discharge, and transportation of firearms." Conspicuously, it omitted storage. Thus, based on the statute's plain language and precedent, it is at a minimum ambiguous as to whether RCW 9.41.290 preempts local storage regulations. And when a statute is ambiguous as to preemption, a court must rule in favor of local authority. *See Filo Foods, LLC v. City of SeaTac*, 183 Wn.2d 770, 793, 357 P.2d 1040 (2015) (applying presumption in favor of local authority to ambiguous statute). Accordingly, the Court should uphold the City's democratically enacted attempt to protect its residents from needless gun violence.

1. The Washington Supreme Court and Division Two have already rejected the plaintiffs' contention that all regulations relating to firearms **are preempted.**

Under the plaintiffs' interpretation of RCW 9.41.290, all local "firearms regulations"—i.e., regulations pertaining to firearms—are preempted. Resp. Br. at 20, 25. But that view is in direct conflict with precedent. Division Two recognized that "the Supreme Court cases

addressing RCW 9.41.290 have limited the scope of preemption." *Kitsap Cnty.*, 1 Wn. App. 2d at 407–08. As described in the City's opening brief, rather than finding "any" and all regulations related to firearms preempted, Washington courts employ the list of enumerated categories in RCW 9.41.290 to determine which types of local regulations fall within the preempted "field of firearms regulations." App. Br. at 19-23.

The plaintiffs' attempt to recharacterize the precedent falters. They focus on the fact that in *Watson* the Supreme Court upheld a local firearms sales tax because a tax is not a "regulation." Resp. Br. at 24-25. True, in that case the Court made a distinction between regulations and taxes, which is not at issue here. *See Watson v. City of Seattle*, 189 Wn.2d 149, 171-76, 401 P.3d 1 (2017). But the Court's reasoning in upholding the firearms sales tax in *Watson* is still instructive. It held that that not all gun-related laws and ordinances are preempted, even if not "specifically authorized" by state law. *Id.* at 171–72; 174. Only laws considered to be in the "field of firearms regulation," as specified in the first sentence of RCW 9.41.290, are preempted. *Id.* at 175–76.

Not all laws that relate to firearms are in this "field of firearms regulation." The plaintiffs cannot ignore other precedent where Washington appellate courts have upheld local "regulation[s]"—not taxes—that the plaintiffs concede relate to firearms. For instance, in *Kitsap*

County, the Court of Appeals noted that "[t]he legislature did not define 'firearms regulation'" and concluded that local regulation of shooting ranges was not encompassed within the "field" of firearm regulation. 1 Wn.App.2d at 406. The plaintiffs do not dispute that shooting ranges are necessarily related to firearms. But there too the Court upheld the local law anyway. *Id*. at 407–08. *See also Pac. NW Shooting Park Ass'n v. City of Sequim*, 158 Wn.2d 342, 357, 144 P.3d 276 (2006) (upholding a city's rule imposing certain conditions on gun shows taking place at the local convention center, including restricting purchases and limiting sales to those with specific types of licenses).

Given the precedent upholding regulations that relate to firearms, the plaintiffs walk back their broad argument, as they must, that all regulations pertaining to firearms are preempted. They add the caveat that "as long as the regulation pertains to firearms, *and not shooting ranges or convention center permitting*, municipalities may not regulate firearms." Resp. Br. at 20 (emphasis added). But that is not how statutory interpretation works. There is no shooting range or convention center exception in RCW 9.41.290, such that all other regulations "pertain[ing]" to firearms (but not to shooting ranges or convention centers) are preempted. And these cases do not carve out singular exceptions to RCW

9.41.290; indeed, courts have no such power. They must follow an interpretation of the statutory language that applies to all cases.

Rather than signaling one-off exceptions, what these precedents demonstrate is that the plaintiffs' proposed construction of the statute is at odds with how the Court of Appeals and the Supreme Court have interpreted RCW 9.41.290. It cannot be, as the plaintiffs contend, that RCW 9.41.290 preempts all local regulations pertaining to firearms because local laws regulating firearms at shooting ranges are not preempted and local laws regulating firearms at the convention center are not preempted. So too here: local laws regulating firearm storage at home are not preempted just because they relate to firearms.

The standard that Washington courts have used for determining what local laws fall within the "field of firearms regulation" is not only whether the local law is a regulation (not a tax) that pertains to firearms, but also whether it is a regulation that falls within the scope of the enumerated categories in RCW 9.41.290 that describe the "field." In *Kitsap County*, for instance, the Court of Appeals depended on the list of enumerated preempted categories to interpret RCW 9.41.290, emphasizing that it "does not make any reference to the regulation of shooting facilities." 1 Wn. App. 2d. at 406. Although RCW 9.41.290 specifically enumerates "discharge" among the preempted categories (which is what happens at a shooting

range), even that connection was not enough for the Court to find the law preempted because the local law did not directly regulate "discharge." *Id.* That is, the Court was looking for the subject of the local law to be on the list or contained within a category on the list before it would be preempted. *Id.* at 406. That is a far cry from the plaintiffs' claim that all local laws pertaining to firearms are barred.

2. The plaintiffs' interpretation of RCW 9.41.290 disregards key language in the statute and adds a word—"storage"—that the Legislature omitted.

Beyond contravening existing precedent, the plaintiffs' argument also fails as a matter of statutory interpretation. RCW 9.41.290 by its plain language does not expressly preempt local *storage* ordinances. RCW 9.41.290 expressly lists nine categories of local firearms regulations in describing the preempted "field of firearms regulations"—storage is notably absent and is not directly related to any of the enumerated categories.

The plaintiffs want to ignore this list. Indeed, they often exclude it altogether in quoting the first sentence of RCW 9.41.290. *See* Resp. Br. at 1, 8. But they cannot. As described in the City's opening brief, the extensive list of categories describing the "field of firearms regulations" (and excluding "storage") means that it is at least *ambiguous* as to whether storage falls within the "field of firearms regulations." App. Br. at 19-23. The plaintiffs cannot add the word "storage" into the statute. *Rest. Dev.*,

Inc. v. Cananwill, Inc., 150 Wn.2d 674, 682, 80 P.3d 598 (2003) ("[A] court must not add words where the legislature has chosen not to include them."). So, they instead interpret the statute to cover any regulation related to firearms, giving this extensive list of preempted categories no meaning. That too violates cardinal rules of statutory construction. *Davis v. State ex rel. Dep't of Licensing*, 137 Wn.2d 957, 969, 977 P.2d 554 (1999) ("A fundamental canon of construction holds a statute should not be interpreted so as to render one part inoperative.").

The plaintiffs' various arguments to the contrary are unpersuasive in demonstrating that the Court should disregard the import of this list in cabining the preemptive scope of RCW 9.41.290. And even if the plaintiffs had set forth a plausible interpretation of RCW 9.41.290 that encompasses storage, that would not be enough. The plaintiffs do not dispute that any ambiguity in whether RCW 9.41.290 preempts local storage ordinances must be construed in favor of local authority. Thus, to prevail on their preemption claim, the plaintiffs must demonstrate that the City's reading of RCW 9.41.290 is not even plausible. The plaintiffs have not and cannot meet that burden.

First, the plaintiffs argue that because RCW 9.41.290 provides that the State "fully occupies" the "entire field of firearms regulation," there is no room for any local regulation that relates to firearms at all. Resp. Br. at

21. For field preemption, the plaintiffs argue, the Legislature does not need to "enumerate all of the specific items within the field" because it has "remove[d] the authority of municipalities from any regulation at all in the category." *Id.* But this argument is circular—it presumes what the "field" or "category" encompasses, then says the "entire" field is preempted. But the predicate question is what constitutes the "field of firearms regulations." And that is what is ambiguous. Contrary to the plaintiffs' argument, the City does not argue for "less-than-a-field" preemption, it agrees that the "entire" field is preempted but seeks to define what that actual field is. Resp. Br. at 21.

The phrase "field of firearms regulation" is ambiguous in RCW 9.41.290. Does the "field of firearms regulation" include every regulation related to firearms?; or is the "field" cabined by the extensive list of enumerated categories the Legislature delineated? Perhaps both interpretations are plausible. But the precedent described above, along with the plain text, demonstrate that the "field of firearms regulations" has the narrower meaning. Indeed, the best way to discern what the Legislature intended when it preempted the "field of firearms regulations" is, of course, to look at how it described the scope of that field. And here it did so with a precise list. That list includes many large categories of firearms regulations—*i.e.*, sale, transfer, possession, discharge, transportation—but

it does not include storage or another category that would encompass storage. Thus, while RCW 9.41.290 is broad and undoubtedly preempts many local firearms regulations, it is at least ambiguous as applied to the local storage provisions here. And that ambiguity must be construed in favor of the City.

Second, the plaintiffs argue that the list of categories "is illustrative and does not limit the field" because it is preceded by the word "including." Resp. Br. at 22. According to the plaintiffs, "including" is a "term of enlargement," meaning that the listed categories are nonexclusive. *Id*. As an initial matter, even by the cases the plaintiffs cite, Washington courts say that "including" is "*generally*" considered a term of enlargement, but it is not necessarily so. *See* Resp. Br. at 22 (citing, e.g., *Douglas v. Shamrock Paving, Inc.*, 189 Wn.2d 733, 740, 406 P.3d 1155 (2017) ("'including,' which is *generally* construed as a term of enlargement") (emphasis added); *see* App. Br. at 23-25. And unlike a statute expressly providing that it "includes, but is not limited to" the following list, there is no language that would eliminate such ambiguity in RCW 9.41.290.

The trial court attempted to resolve the ambiguity stemming from the word "including" and ignored the import of the extensive list by focusing on the phrase "or any other element relating to firearms or parts thereof" in RCW 9.41.290. RP 29. But as explained in the City's opening

brief, that phrase only modifies the word "firearms"—it clarifies that the State preempts local laws regulating the sale, licensing, transportation, etc. of "firearms" or "any other element relating to firearms or [firearm] parts." App. Br. at 31. For example, this language clarifies that the State preempts local licensing, sales, or transportation laws regarding ammunition, not just firearms themselves. This phrase is not a residual clause or catch-all clause that expands beyond the listed categories themselves. Unsurprisingly, then, the plaintiffs do not attempt to defend this aspect of the trial court's reasoning and make no mention of that phrase.

Moreover, even assuming that the enumerated list is merely "illustrative," it still—as the City argued in its opening brief—limits the scope of RCW 9.41.290. App. Br. at 26. Under the canon of *ejusdem generis*, a court must read a list following a general phrase as to "modify and restrict the meaning of [the] general words." *State v. Flores*, 164 Wn.2d 1, 13, 186 P.3d 1038 (2008). Under this canon, the general phrase—here, "field of firearms regulations"—is limited to those things that are the same in kind, or directly related, to the enumerated categories. As explained before, those categories focus on firearm transactions ("registration, licensing, . . . purchase, sale, acquisition, transfer") or possession and use ("possession, … discharge, and transportation"). App. Br. at 28. Storage is a separate issue. The only thing that is similar about storage and the other

listed categories is that they all relate to firearms. But as explained above, Washington Courts have already rejected such a broad reading of the statute and adopting such an interpretation would render the list meaningless.

The plaintiffs' attempts to squeeze storage within the categories enumerated in RCW 9.41.290's list are also unavailing. For instance, they attempt to characterize storage as "simply non-possessory ownership" to fit within the scope of RCW 9.41.290's enumerated categories. Resp. Br. at 29. But "ownership" is not on RCW's 9.41.290's list either. The plaintiffs further argue that the "Ordinance is inextricably tied to issues of possession [and] non-possession." *Id.* But defining RCW 9.41.290 to include all issues tied to possession and non-possession would mean it covers anything related to firearms, which are always, by definition, either possessed or not possessed. They could have just as easily (and nonsensically) argued that storage is tied to transportation and non-transportation, and thus fits within the list. But these readings have a fatal flaw: they give the list no limiting function at all, rendering it superfluous and contravening precedent. And the plaintiffs do not even attempt to refute the City's argument that Washington firearms statutes specifically refer to "constructive possession" when addressing issues like storage, and do not treat "storage" as part of the concept of "possession."

Lastly, moving away from the statute's text, the plaintiffs invoke its legislative history to support their limitless view of preemption. Resp. Br. at 26. This too is unavailing. The legislative history is generally only relevant if the statutory language is ambiguous. *Five Corners Family Farmers v. State*, 173 Wn.2d 296, 305-06, 268 P.3d 892 (2011). But for preemption statutes, if a statute is ambiguous, it must be construed in favor of local authority given the protections for local rule under the Washington Constitution. *See* App. Br. at 14-16.

Nevertheless, citing *Cherry v. Mun. of Metro. Seattle*, the plaintiffs argue that the "'legislative history makes clear that RCW 9.41.290 is concerned with creating statewide uniformity of firearms regulation." Resp. Br. at 26 (quoting 116 Wn.2d 794, 802, 808 P.2d 746 (1991)). But that selective quotation from *Cherry* is misleading. The Court's review of the legislative history in *Cherry* demonstrated that the Legislature's intent was to "advance uniformity in *criminal* firearms regulation"—not civil regulations, like the Ordinance. 116 Wn.2d at 801 (emphasis added); *see also id.* (intent was to reform "conflicting local criminal codes regulating the general public's possession of firearms."). The City agrees that RCW 9.41.290, by its plain terms, applies to civil firearms regulations. But it raises this civil versus criminal distinction because it undermines the plaintiffs' repeated emphasis on uniformity—and that any such intent could

be used to resolve ambiguity in favor of preempting the civil statute at issue here. *See* Resp. Br. at 1, 17.

Nor can the plaintiffs rely on the fact that the Legislature has amended RCW 9.41.290 "time and time again" to expand preemption. Resp. Br. at 26-27. The plaintiffs cite *Chan v. City of Seattle* for the proposition that this history of amendments demonstrates that the Legislature made "'clear its intent to fully occupy and preempt municipalities from regulating *firearm possession*.'" *Id.* (quoting *Chan v. City of Seattle*, 164 Wn. App. 549, 551–53, 265 P.3d 169 (2011)) (emphasis added). But the City agrees that localities cannot regulate "firearm possession." This case is about storage, not possession; and, as explained before, those two are not the same. *See* App. Br. at 37-38. And while the Legislature expanded preemption in some areas through various amendments, that "does not mean that the legislature intended to extend preemption to other areas." *Watson*, 189 Wn.2d at 173. Rather, the fact that the Legislature has been willing to amend and expand preemption under RCW 9.41.290 undercuts the plaintiffs' argument. The Legislature could have amended RCW 9.41.290 to include storage, just as it has amended the statute to strengthen other areas. Particularly after *Kitsap*, it knows that the courts have narrowly read RCW 9.41.290 and look to the list of preempted

categories. Still, it has not broadened the list of enumerated topics to include storage.

That is so even though states across the country include storage explicitly in their firearms preemption statutes *See* App. Br. at 22. The plaintiffs, confusingly, rely on a footnote in a concurrence in a case from Ohio that is not about firearm storage to argue that "[m]inor distinctions in language or included terms" in various state statutes do not indicate differences in the scope of preemption. Resp. Br. at 28 (citing *Cincinnati v. Baskin*, 112 Ohio St. 3d 279, 292 n. 8, 859 N.E. 2d 514 (2006)). But when the Legislature has identified nine areas that constitute the preempted "field of firearms regulation" and—unlike states around the county—has omitted storage, it suggests that the Legislature has made a deliberate choice, or, at a minimum, it means there is ambiguity as to whether storage falls within the scope of the "field." The Legislature still has the choice to amend the statute and include storage, but the Court should not invalidate local laws that the Legislature has not "clearly and expressly" preempted. *Schillberg v. Everett Dist. Justice Court*, 92 Wn.2d 106, 108, 594 P.2d 448 (1979). This Court, therefore, should reverse the trial court's decision as to field preemption.

B. There is no conflict between the City's Ordinance and Initiative 1639.

The plaintiffs' back-up theory for preemption fares no better. In 2018, Washington citizens voted to enact Initiative 1639, now codified at RCW 9.41.360, in order to "increase public safety and reduce gun violence." CP 202. Not all localities had enacted ordinances, like Edmonds, mandating safe storage practices and penalizing unreasonable conduct that leads to unauthorized access to firearms. So Initiative 1639 provides a statewide penalty for unreasonable practices that lead to unauthorized persons obtaining one's firearms. The proponents of the Initiative wanted to create more safe storage laws and greater protections, not eliminate them. The Ordinance's requirements are consistent with what Initiative 1639 requires—notably, behavior that complies with one constitutes compliance with the other. Yet still the plaintiffs contend that it "irreconcilably conflicts" with the Ordinance. Resp. Br. at 32, 45. Not so. The Ordinance may be more stringent than RCW 9.41.360, but under basic preemption principles that does not create a conflict because the Ordinance does not "permit what state law forbids or forbid[] what state law permits." *Lawson v. City of Pasco*, 168 Wn.2d 675, 682, 230 P.3d 1038 (2010).

As an initial matter, the plaintiffs misperceive the relevant standard for conflict preemption that applies to this case. They correctly note that

RCW 9.41.290 provides for a heightened conflict preemption standard. Resp. Br. at 30. Typically, a local law that is more restrictive or protective than a state law is not in conflict with it. *Brown v. City of Yakima*, 116 Wn.2d 556, 562, 807 P.2d 353 (1991). RCW 9.41.290, however, provides that local laws that are "inconsistent with, more restrictive than, or exceed the requirements of state law" are preempted. But, as the Washington Supreme Court held in *Watson* and as detailed in the City's opening brief, the heightened preemption standard of RCW 9.41.290 applies only to those local laws that fall within the "field of firearms regulations." App. Br. at 46. That is why the Supreme Court did not apply RCW 9.41.290's heightened preemption standard in *Watson*. And that is why the trial court erred in applying that heightened standard here.

Notably, the plaintiffs do not dispute that RCW 9.41.290's heightened preemption standard is inapplicable to local laws related to firearms that nonetheless fall outside the "field of firearms regulations," as described in RCW 9.41.290's first sentence. *See* Resp. Br. at 30. Instead they argue that the Ordinance is within that "field." If that's so, then the Court need not even reach the conflict preemption question. But, for the reasons stated in the City's opening brief and above, that is wrong—and hence, just like in *Watson*, Washington's traditional conflict standard applies here.

The plaintiffs maintain that they can show conflict preemption even under the traditional standard. Resp. Br. at 46-47. For their conflict preemption theory, the plaintiffs rest on a series of ways that the Ordinance differs in the extent of its prohibition from state law—but "[w]here both the ordinance and the statute are prohibitory, and the difference between them is that the ordinance goes further in its prohibition, they are not deemed inconsistent because of mere lack of uniformity in detail." *Brown*, 116 Wn.2d at 562. For instance, § 5.26.020 requires locking a firearm in a safe or with a locking device when it is not in an authorized user's control, and if an unauthorized person obtains the firearm due to an owner's unreasonable practice, under § 5.26.030 the owner can be penalized even if that unauthorized person never uses the firearm, as is required for the penalty under Initiative 1639. *See* Resp. Br. at 30–31, 45–46. In the plaintiffs' view, there is a conflict because the Ordinance "penalizes conduct that is not subject to penalty under state law." *Id*. at 46. But, as noted above, that is not how conflict preemption works. *Brown*, 116 Wn.2d at 562.

Local laws are allowed to be more protective, unless the "Legislature has expressly licensed, authorized, or required" that prohibited conduct. *City of Bellingham v. Schampera*, 57 Wn.2d 106, 111, 356 P.2d 292 (1960) (internal quotation marks omitted). Contrary to the plaintiffs'

contention, state law has not "expressly licensed, authorized" or, in their words, "*entitle[d]* firearm owners to store firearms in a manner that they see fit." Resp. Br. at 31 (emphasis added). Initiative 1639 does not mandate a specific storage practice—it is explicit about that point. RCW § 9.41.360(6) ("Nothing in this section mandates how or where a firearm must be stored."). But neither does it *entitle* firearm owners to engage in any storage practice they like. Unsurprisingly, the plaintiffs point to no language in the Initiative in support of an "entitlement." Instead, state law leaves room for municipalities to mandate storage practices through local democratic channels if they so choose. And that is precisely what Edmonds has done here. Accordingly, the Court should also reject plaintiffs' conflict preemption argument.

VI. CONCLUSION

For these reasons, the City respectfully requests that the Court affirm the trial court's decision that the plaintiffs do not have standing to challenge the Ordinance's unauthorized access provision and reverse the trial court's decision that RCW 9.41.290 preempts the storage provision.

DATED this 5th day of June, 2020.

Respectfully submitted,

SUMMIT LAW GROUP, PLLC

By: *s/ Jessica L. Goldman*

Jessica L. Goldman, WSBA #21856
315 Fifth Avenue S., Suite 1000
Seattle, WA 98104
Tel: (206) 676-7000
jessicag@summitlaw.com

Molly Thomas-Jensen, *Pro Hac Vice*
Eric A. Tirschwell, *Pro Hac Vice*
EVERYTOWN LAW
450 Lexington Avenue, #4184
New York, NY 10017
Tel: (646) 324-8222
mthomasjensen@everytown.org
etirschwell@everytown.org

Attorneys for Defendant/Appellant
CITY OF EDMONDS

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury according to the laws of the State of Washington that on this date she caused to be electronically filed the foregoing APPELLANT'S REPLY IN SUPPORT OF ITS OPENING BRIEF AND RESPONSE TO RESPONDENT/CROSS-APPELLANTS' BRIEF with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record, including the following:

Steven W. Fogg
Eric A. Lindberg
Corr Cronin LLP
1001 Fourth Avenue, Suite 3900
Seattle, WA 98154
sfogg@corrcronin.com
elindberg@corrcronin.com

DATED this 5th day of June, 2020.

s/ Sharon K. Hendricks
Sharon K. Hendricks, Legal Assistant
sharonh@summitlaw.com

SUMMIT LAW GROUP

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Sender Name: Sharon Hendricks - Email: sharonh@summitlaw.com
Filing on Behalf of: Jessica L. Goldman - Email: jessicag@summitlaw.com (Alternate Email: sharonh@summitlaw.com)

Address:
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