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 REPLY BRIEF

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I. INTRODUCTION

Through RCW 9.41.290, the State of Washington "fully occupies and preempts the entire field of firearms regulation." Because of this law, municipalities may no longer enact any direct regulations of firearms. Here, both operative provisions of Ordinance Number 4120 (the "Ordinance") regulate firearms and do not survive preemption.

This Court should reverse the trial court's conclusion that Respondents' challenge to ECC 5.26.030 (the "Access Provision") is not justiciable. Respondents' allegations are sufficient to confer standing to challenge the entire Ordinance, and Appellants concede that the subject of the Ordinance is a matter of public importance. *E.g.*, Appellant's Opening Br. 5–7, 44–45. Appellants incorrectly argue that Respondents must allege an intent to violate the Access Provision in order to confer justiciability. Neither Respondents here nor a hypothetical plaintiff in a future case can realistically allege intent to allow an unauthorized person to gain non-permissive access to their stored firearm. Under Appellants' absurd standard the Access Provision could escape all declaratory review. *See Grant Cnty. Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 803, 83 P.3d 419, 424 (2004) (applying a "less rigid and more liberal" approach to standing to ensure that the important public issues raised did not escape review).

Respondents have consistently argued that RCW 9.41.290 preempts **firearms regulations**. *E.g.*, Resp't Opening Br. 1-2, 17, 24, 26, 44; *see also*

Watson v. City of Seattle, 189 Wn.2d 149, 172, 401 P.3d 1 (2017) (RCW 9.41.290 expressly occupies the field of "firearms regulations"). Appellants misrepresent Respondents' argument, asserting that Respondents advocate for preemption of all "regulations that *relate* to firearms" or "every regulation that *pertains* to firearms." *E.g.*, Appellants' Resp. Br. 1, 34–38 (emphases added). Appellants create this straw man in order to attack it as overbroad, argue that the straw man runs afoul of precedent, and deflect attention from the unambiguous statutory language. The difference is obvious. Respondents argue—and the statute provides—that the entire field of firearms regulation is preempted by RCW 9.41.290. The field definitively includes all provisions regulating firearms, but may not pertain to provisions regulating something that may "pertain" or "relate to" firearms, such as shooting clubs, convention centers, or sporting goods stores. Rather than arguing that RCW 9.41.290 applies indiscriminately to preempt all ordinances relating or pertaining to firearms, Respondents actually argue for application of the plain statutory language to preempt regulation of firearms. And here Appellants have not—and cannot—argue that the Ordinance does not regulate firearms.

Because state law preempts the "entire field of firearms regulation," the City of Edmonds (the "City") and other local governments have no authority to regulate firearms and municipal firearms regulations are no longer presumed valid. *Heinsma v. City of Vancouver*, 144 Wn.2d 556, 561, 29 P.3d 709, 712 (2001) ("When the legislature has expressly stated its intent to preempt the field, a city may not enact any ordinances affecting the

given field."). Appellants' arguments that the Ordinance does not fall within the field of firearms regulation do not hold water, and this Court should grant Respondents declaratory relief and invalidate the Ordinance in its entirety.

II. ARGUMENT

A. Respondents' Challenge to the Access Provision is Justiciable

1. Standard of Review Applicable to Justiciability

This Court reviews the trial court's rejection of Respondents' declaratory judgment challenge to the Access Provision on justiciability grounds *de novo*. *Am. Traffic Sols., Inc. v. City of Bellingham*, 163 Wn. App. 427, 432, 260 P.3d 245, 247 (2011). To the extent the trial court dismissed the challenge to the Access Provision upon a motion to dismiss, this Court reviews that dismissal *de novo*.[1] *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

[1] Appellants suggest, based in part on the trial court's oral ruling, that Respondents' cross-appeal should be viewed as an appeal from a denied motion for reconsideration. Appellants' Resp. Br. 10, 12. Respondents did not submit a motion for reconsideration below. The trial court's order denying Appellants' motion to dismiss was not clear, in that the trial court held that Respondents did not have independent standing to challenge the Access Provision but yet denied Appellants' motion to dismiss. CP 405–406. Appellants conducted discovery related to the Access Provision, and Respondents addressed justiciability and preemption of the Access Provision in the motion for summary judgment. CP 251–268. The trial court cannot insulate its rejection of Respondents' claims at the motion to dismiss stage and the summary judgment stage by characterizing it as a motion for reconsideration.

P.3d 40 (2012).

Appellants agree that this Court reviews justiciability decisions *de novo*, Appellants' Resp. Br. 11, but argues that the issue of whether the public importance exception applies is reviewed under the abuse of discretion standard. This is incorrect.

Although *Lewis Cnty. v. State*, 178 Wn. App. 431, 315 P.3d 550 (2013), recites an abuse of discretion standard for review of a trial court's decision not to hear a declaratory judgment claim, that case relies upon *Nollette v. Christianson*, 115 Wn.2d 594, 800 P.2d 359 (1990), where the Washington Supreme Court announced that trial courts have discretion to entertain certain declaratory judgment actions. *Id.* at 599. The Court identified the Uniform Declaratory Judgment Act itself as the source of this discretion. *Id.* at 598–99. The only mention of discretion under the statute is in RCW 7.24.060, which provides that courts "may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding." Neither the trial court nor any party has argued that declaratory judgment in this case would not conclusively terminate the controversy, so RCW 7.24.060 (and the corresponding discretion) does not apply.

Further, there is no mention of discretion, or an appellate abuse of discretion standard, in many of the cases actually applying the public importance exception or the doctrine of relaxed standing. *See, e.g.*, *Grant Cnty.*, 150 Wn.2d at 424–25 (determining *de novo* whether the public

importance exception applied); *Washington State Coal. for the Homeless v. Dep't of Soc. & Health Servs.*, 133 Wn.2d 894, 918, 949 P.2d 1291 (1997) (holding that the public importance exception applies with no mention of abuse of discretion standard); *Washington Nat. Gas Co. v. Pub. Util. Dist. No. 1 of Snohomish Cnty.*, 77 Wn.2d 94, 459 P.2d 633 (1969) (considering whether the public importance exception applied without discussion of the lower court's position); *Kitsap Cnty. v. Smith*, 143 Wn. App. 893, 909, 180 P.3d 834 (2008) (applying the public importance exception and reversing because the trial court "erred" by not reaching the merits of the declaratory judgment claim); *Kightlinger v. Pub. Util. Dist. No. 1 of Clark Cnty.*, 119 Wn. App. 501, 505, 81 P.3d 876 (2003) (affirming trail court with no mention of abuse of discretion standard); *cf. DiNino v. State ex rel. Gorton*, 102 Wn.2d 327, 332, 684 P.2d 1297 (1984) (referring to the appellate court's "discretion" to decide whether or not to render declaratory judgment when judgment would be advisory). And *de novo* review over justiciability and the public interest exception is in line with this Court's review of other legal issues that are decided with reference to the facts in the record.

Even assuming, *arguendo*, that the abuse of discretion standard may apply to application of the public importance exception, the trial court did not apply a discernable legal standard, let alone the correct legal standard, to this issue. The entirety of the trial court's analysis of the public importance exception in the record below was this statement during the oral ruling: "While it may be an issue of public importance, it is important that there be a plaintiff with actual standing on that issue." RP 28. None of the

public importance cases—which involve a relaxed approach to standing and justiciability in light of other important factors—uses the legal standard of "actual standing." Additionally, the hypothetical "future plaintiff" invoked by the trial court was neither identified nor described with reference to the legal standard for the public importance exception. Because the trial court did not apply the correct legal standard, the trial court abused its discretion and this Court may review the issue *de novo*. *Hundtofte v. Encarnacion,* 181 Wn.2d 1, 9, 330 P.3d 168, 174 (2014) ("A trial court abuses its discretion when it applies an incorrect legal standard, ...").

2. Respondents' Challenge is Justiciable Under *Diversified Industries*

In most cases there must be a justiciable controversy for the courts to entertain a declaratory judgment claim. The Washington Supreme Court set out the four-part test for justiciability in *Diversified Industries Development Corp. v. Ripley,* 82 Wn.2d 811, 815, 514 P.2d 137, 139 (1973). Here, Appellants previously conceded that Respondents meet the four-part test regarding the Storage Provision, and on appeal do not contest that Respondents meet three of the four parts regarding the Access Provision. *See* Appellants' Resp. Br. 14 (arguing only the "direct and substantial" prong is not satisfied). Respondents satisfy the last part, too, because this case "involves interests that [are] direct and substantial, rather than potential, theoretical, abstract or academic." *Ripley,* 82 Wn.2d at 815 (describing third prong of the test).

Appellants argue that in order to satisfy the test, Respondents must

allege direct personal harm and an intent to violate the Access Provision. Not so.

Regarding harm, Appellants overstate the type and degree of harm required to show cognizable injury, while also understating the impact of the Access Provisions upon Respondents. "Under the UDJA, a person whose rights, status, or other legal relations are affected by a statute may have any question of the construction of that statute determined by a court." *Branson v. Port of Seattle*, 152 Wn.2d 862, 877, 101 P.3d 67, 74 (2004) (citing RCW 7.24.020). Here, similar to the Storage Provision, the Access Provision requires Respondents to alter their firearm storage practices or risk violating the law. For example, Mr. McCullough has two young children in his home. While he does not view it as likely that his children will access his firearms, and takes precautions to ensure that they do not, it is indisputably true that Mr. McCullough keeps unlocked firearms in a home with minors. Similarly, Mr. Bass lives with a roommate, and keeps unsecured weapons in the home. While Mr. Bass has no reason to believe his roommate qualifies as an at-risk or prohibited individual, he has not otherwise performed background checks or ensured that his roommate is not at-risk. Mr. Seaberg lives in a neighborhood that has experienced an uptick in home invasions, but continues to keep his firearms unlocked (in fact, his security system recently assisted law enforcement in capturing an individual who had broken into a nearby residence). In each case, Mr. McCullough, Mr. Bass, and Mr. Seaberg must either substantially change their practices or risk violating the law. In fact, modifying and affecting

firearm storage practices (in contravention of state law preempting the field) is the entire point of the Ordinance, and requiring injury beyond the intended consequences of the Ordinance—which affects the rights of Respondents to possess their firearms in a manner consistent with state-wide law—would be contrary to the interests of justice. To the extent the threat of enforcement or the harm to Respondents is less certain, this is attributable to the nature of the Access Provision, which depends upon non-permissive actions by third-parties to trigger enforcement. It is thus rational, and not purely speculative, for a citizen to contemplate possible enforcement of the Access Provision based on the storage of unsecured firearms (and especially in the presence of children or other unauthorized users living under the same roof).

Regarding intent, Appellants are incorrect that precedent requires intent to violate in order for a case to be justiciable. Appellants rely upon *Lopez v. Candaele*, 630 F.3d 775, 786 (9th Cir. 2010) to argue that Respondents must intend to violate the provision in order to have standing to challenge it. Appellants' Resp. Br. 15. But *Lopez* has only been cited once by a Washington court, and that was to reject applying its test for standing. *In re Adoption of M.S.M.-P.*, 181 Wn. App. 301, 306 n.5, 325 P.3d 392 (2014), *aff'd*, 184 Wn.2d 496, 358 P.3d 1163 (2015) ("*Lopez* referred to the standing requirements needed to invoke the jurisdiction of *federal* courts."). And Appellants also point to *Forbes v. Pierce County* to argue that Plaintiffs are required to allege that they intend to violate an ordinance in order to challenge it. But *Forbes* turns on the failure to identify an adverse impact

from the challenged statute, not on a subjective intent to violate the law. *See Forbes*, 5 Wn. App. 2d 423, 435, 427 P.3d 675, 682 (2018) (holding that to challenge a statute "a party must demonstrate that the statute has operated to the party's prejudice."). Appellants are correct that alleging a concrete intent to violate an ordinance can be *sufficient* to give a party standing to challenge the law, but intent to violate the law is *not necessary* in order for the controversy to be justiciable.

Here, the Access Provision does not require an intent to violate in order for a challenge to be justiciable. First, subjective intent is irrelevant to the question under the Access Provision as to whether the firearm storage leading to non-permissive access was "reasonable" or not. Second, requiring intent would be incongruous due to the necessity of non-permissive third-party action in order to trigger enforcement. In fact, if intent is required for justiciability, there will not be any hypothetical plaintiffs to challenge the regulation and the Access Provision could escape review without the public importance exception. *See Grant Cnty.*, 150 Wn.2d at 803; *infra* Section II.A.3 (discussing the public importance exception).

3. Respondents' Challenge is Justiciable Under the Public Importance Exception

In any event, this Court can review the validity of the entire Ordinance by applying the public importance exception and a "less rigid and more liberal" approach to the standing analysis. This case presents many of the hallmarks of cases where the courts have applied the doctrine.

Moreover, applying the public importance exception here will not be contrary to precedent, nor will it create a slippery slope regarding future application to unwarranted cases.

At the outset, Appellants awkwardly attempt to walk a tightrope between touting the importance and desired impact of the Ordinance and acknowledging that this is a case of substantial public importance. *Compare* Appellants' Opening Br. 1, 5–6 *and* Appellants' Resp. Br. 4 (touting the importance and public impact of the Ordinance) *with* Appellants' Resp. Br. 23, 25 (acknowledging the "public importance" of the Ordinance but questioning whether "significant segments of the population" are affected). The record is replete with references and concessions by Appellants to the broad public importance and impact of the Ordinance. *See, e.g.*, CP at 647 (Appellant's Motion to Dismiss touting importance of Ordinance), 47–51 (Appellant's Opposition to Summary Judgment doing the same), 304–05 (preamble to Ordinance 4120 enumerating the public interest reasons to support the ordinance), 333–335 (Edmonds City Council meeting minutes discussing the issues of public importance underpinning the Ordinance). In fact, the trial court acknowledged when ruling on the parties' motions for summary judgment that this is a matter of public importance. RP 28 (declining to reach the merits of the Access Provision in spite of it being a matter of public importance). Appellants' transparent attempt to minimize these issues for the purpose of justiciability must fail.

Respondents here meet the three-part *Grant County* test for a "less rigid and more liberal" approach to standing. As discussed above, this case

(1) is of substantial public importance and (2) immediately affects significant segments of the population. *Grant Cnty.*, 150 Wn.2d at 803. The recent initiative process—concerning firearms storage and access and involving hundreds of thousands of petition signatures and robust public debate—further reinforces these conclusions. And firearms regulations (3) have a direct bearing on commerce. *See id.*; *see also Washington Nat. Gas Co.*, 77 Wn.2d at 96 (holding that the plaintiff gas company is a substantial customer and the case will have a direct effect on the people of the state). Courts in other jurisdictions have reached the same conclusion regarding the public impact of firearms regulations. *See Chester Twp. v. Panicucci*, 116 N.J. Super. 229, 234, 281 A.2d 811, 814 (N.J. Super. Ct. App. Div. 1971), *aff'd*, 62 N.J. 94, 299 A.2d 385 (1973) (holding that a question of whether township gun ordinance was preempted by state statutes "involve[d] a matter of public importance").[2]

Appellants argue that application of the public importance exception is necessarily rare, and that preemption challenges are not *automatically* justiciable under these tests. Respondents do not disagree, but these are not the issues presented in this case. While the court in *Lewis v. State* compared the dispute in that case unfavorably in terms of public import versus other important cases, the court did not hold that only cases involving electoral or

[2] Appellants claim that Respondents did not argue comity as a justification to apply the public importance exception. Appellants' Resp. Br. 24 n.4. Not so. Respondents argued in its opening brief on cross appeal that "a decision on the validity of the Access Provision would benefit the public and local municipalities . . . beyond just the City of Edmonds." Resp't Opening Br. 41.

structural issues qualify for the exception. *See Lewis Cnty.*, 178 Wn. App. at 440; *cf. Kightlinger*, 119 Wn. App. at 505 (holding that the issue of a public utility district's authority to engage in appliance repair was an issue of widespread public interest).

Next, Appellants seemingly argue that although the issue of firearms storage is of great public importance, Respondents' challenge does not qualify for the public importance exception because it would not "enhance" firearms storage. Appellants' Resp. Br. 23–25. Appellants base this one-way ratchet on *Snohomish County v. Anderson*, 124 Wn.2d 834, 881 P.2d 240 (1994). But Appellants misread *Anderson*. In *Anderson*, the Washington Supreme Court discussed "the extent to which public interest would be enhanced by reviewing the case" in the context of whether or not the opinion would be advisory. *Id.* at 841. The court declined to reach the merits in Anderson because another active case would resolve the issue such that the "benefit of an authoritative determination for future guidance is therefore minimal at this time." *Id.* Here, there is no allegation that a final determination would be advisory or would not conclusively resolve the validity of the Ordinance. More to the point, there is not another active case or potential plaintiff challenging the City's Ordinance.[3]

[3] The Organizational Plaintiffs voluntarily dismissed their claims in this action in order to streamline the discovery process and ensure this case could be timely heard. It was not, as Appellants facetiously assert, because the Organizational Plaintiffs would have had an issue demonstrating standing, Appellant's Resp. Br. 26, but rather the knowledge that Appellants would have delayed a hearing in this case by demanding unnecessary discovery from the Organizational Plaintiffs.

Appellants rely extensively on *Walker v. Munro*, 124 Wn.2d 402, 411, 879 P.2d 920 (1994). *See* Appellants' Resp. Br. 26–28. As described previously, *Walker* does not preclude Respondents' case and the facts in *Walker* are wildly different than the facts of this case. *See* Resp't Opening Br. 41–43. Moreover, unlike in *Walker* where none of the plaintiffs had standing for any of the claims, Respondents here have standing and a justiciable claim regarding at least one provision, and this Court will reach the merits of precisely the same legal issue as to at least one provision in the Ordinance. And unlike *Walker*, where claims were not ripe because the text of the initiative were subject to various interpretations, 124 Wn.2d at 412–13, no additional factual development is needed for this Court to determine whether the Access Provision is subject to preemption. Further factual development or enforcement of the Access Provision will not alter the legal preemption analysis—and Appellants have never claimed as much—but waiting for factual development or enforcement may actually prevent review of the Access Provision due to the requirement for third-party non-permissive action.

Finally, Appellant's argument that the public importance exception is not available in the absence of standing is contrary to precedent. The entire point of the *Grant County* test for a "less rigid and more liberal" approach to standing in cases of public importance is to permit review even where standing is not clear-cut. *Grant Cnty.*, 150 Wn.2d at 803. Moreover, the Access Provision could permanently escape declaratory judgment review if this Court does not apply the public importance exception. *Id.* The

Court has the authority to apply the doctrine under the facts alleged, and application of the doctrine will further judicial economy. The two provisions in the Ordinance rise and fall on the same legal theory, the issues are ripe, and the validity of the Storage Provision will be decided in this proceeding. The Court should reach the merits and declare the Access Provision preempted, as well.

B. The Access Provision is Preempted by RCW 9.41.290

In the combined Response/Reply, Appellants repeat the same arguments that the trial court rejected. This Court should also reject Appellants' novel and unsupported arguments.

As they must, Appellants concede that the Access Provision is preempted if field preemption under RCW 9.41.290 applies. *E.g.*, Appellants' Resp. Br. 48 (conceding that if the Ordinance is within the field of the statute the Ordinance will be preempted). Appellants essentially make three arguments in order to place the Ordinance beyond the scope of field preemption and the statute. First, Appellants misconstrue and distort Respondents' preemption argument in order to create a straw man. Second, Appellants argue that the list of examples of firearms regulations in the statute limits the scope of the statute because treating the list as illustrative would nullify the list, while conveniently omitting discussion of the term "entire" in the statute. Third, Appellants argue that the statute is ambiguous as to whether firearms regulation like the Ordinance is preempted under the "field of firearms regulation" because the statute does not include "storage"

among other examples. All three contentions are wrong.

1. RCW 9.41.290 Preempts "Firearms Regulations"

First, in an attempt to create a straw man, Appellants misconstrue and distort Respondents' preemption argument. Appellants misleadingly assert that Respondents argue for preemption of all "regulations that *relate* to firearms" or "every regulation that *pertains* to firearms." E.g., Appellants' Resp. Br. 1, 34–38 (emphasis added). Then, Appellants complain that the broad straw man version of the argument is contrary to precedent like *Kitsap County v. Kitsap Rifle & Revolver Club* and *Watson v. City of Seattle*. But Respondents have consistently argued that this Court should apply the statutory language and rule that all "firearms regulations" are preempted by RCW 9.41.290. *E.g.*, Resp't Opening Br. 2-3, 17, 20, 24; CP 256–58 (Respondents' Motion for Summary Judgment). This application of the statutory language is entirely consistent with precedent, and compels preemption of the Ordinance in this case. *See Kitsap Cnty. v. Kitsap Rifle & Revolver Club*, 1 Wash. App. 2d 393, 406, 405 P.3d 1026, 1032 (2017) (holding that the ordinance at issue "is not a 'firearms regulation.'").

Appellants repeatedly invoke two recent cases—*Watson* and *Kitsap County*—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 at 156. In *Kitsap County*, the challenged provision was a regulation of shooting ranges, not a "firearms regulation." 1 Wash. App. 2d at 406. Upon review of the reasoning and holdings in each case, Appellants' arguments collapse like a house of cards.

Here there is no dispute that the Access Provision, and the Ordinance as a whole, regulates firearms. Conspicuously, Appellants never deny this dispositive fact, either in briefing before this Court or in the record below. *See* Resp't Opening Br. 2 (pointing out there is no dispute that "the operative provisions in the Ordinance are **firearms regulations**"), CP 263 (Appellants describing the Ordinance in a heading as "regulation of firearms storage"). Nor could Appellants argue that the Access Provision does not regulate firearms. It is impossible for the City to regulate "storage"—storage of *what*? By analogy, in *Chan* the Seattle Parks rule did not regulate "possession" but rather regulated firearms through possession requirements. *Chan v. City of Seattle*, 164 Wn. App. 549, 265 P.3d 169 (2011). By contrast, the subject of regulation in *Kitsap County* was a shooting range and not the discharge of firearms, and the subject of regulation in *Sequim* was a convention center permit and not regulations of application to the general public. *Kitsap Cty.*, 1 Wash. App. 2d at 406 ("Instead, the ordinance regulates 'shooting facilities.'"); *Pac. Nw. Shooting Park Ass'n v. City of Sequim*, 158 Wn.2d 342, 357, 144 P.3d 276, 283 (2006).

2. The Statutory List is Illustrative

Second, Appellants argue that the list of examples of firearms regulations in the statute limits the scope of the statute because treating the list as illustrative would nullify the list, while ignoring the statute's use of the word "entire." Appellants' Resp. Br. 39–40. This is wrong. The Washington Supreme Court has repeatedly held that such lists are illustrative and do not limit the definition of the field. *See, e.g.*, *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."); *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."); *Town of Ruston v. City of Tacoma*, 90 Wn. App. 75, 84, 951 P.2d 805, 810 (1998) (holding that the absence of a specific reference to the tidelands section of Tacoma did not indicate an intent to excluded it when the statute used "including" before the list of enumerated entities). Under binding precedent, the statutory list in RCW 9.41.290 enlarges the scope of the statute beyond the enumerated list, and does not limit the scope to the list itself.

Appellants do not cite a single case holding that an "illustrative" list has no meaning and thus violates statutory construction principles.[4]

[4] Appellants cite *Davis v. State ex rel. Dep't of Licensing*, 137 Wn.2d 957, 969, 977 P.2d 554 (1999), in favor of the canon that a statute should not be interpreted in a manner that gives a portion of the statute no meaning. But *Davis* does not involve an illustrative list, and provides no support for Appellants' argument.

Appellants' illogical argument has not been adopted by any court. Appellants also implausibly argue that the use of a list following the term "including" is only *generally* a term of enlargement but does not apply here. Appellants' Resp. Br. 41. Perhaps most tellingly, Appellants make no attempt to explain how a statute which "**fully** occupies and preempts the **entire** field of firearms regulation within the boundaries of the state," RCW 9.41.290 (emphasis added), could subsequently be limited by the use of the term "including." Appellants, who omit the word "entire" in order to allow their argument about the ambiguity of the phrase "field of firearms regulation" to tread water, do not offer any reason based on the text of RCW 9.41.290 for this Court to ignore Washington Supreme Court precedent and refuse to apply the "general" rule of enlargement here.

3. Field Preemption Unambiguously Applies to the Access Provision

Finally, based upon the previous arguments, Appellants argue that the preemptive scope of RCW 9.41.290 is ambiguous, and therefore the City should prevail. Appellants' Resp. Br. 34. Embedded in this argument is a concession that the Ordinance will be preempted if it falls within the plain meaning of a "firearms regulation." *See Heinsma*, 144 Wn.2d at 561 (holding that when the legislature preempts the field a city may not enact any ordinances affecting the given field). And because Appellants do not (and cannot) argue that the Ordinance does not regulate firearms, Appellants argue that the definition of the field of firearms regulation is different from, and narrower than the plain meaning of the statute. *See*

Appellants' Resp. Br. 40 (questioning the meaning of the phrase "field of firearms regulations" and positing that the scope is narrower than simply covering all "firearms regulations").

The lynchpin of Appellants argument that the statute is narrower than its plain meaning is the non-exhaustive list of examples in the statute, which does not enumerate "storage." Appellants' argument is entirely based upon the theory that this list alters the plain meaning of the phrase "fully occupies and preempts the entire field of firearms regulation within the boundaries of the state, ..." But, as described in the previous section, in Respondents' opening brief, and below, the canons of statutory interpretation and Washington Supreme Court precedent provide that a list of terms following the term "including" does not limit the scope of the statute, but rather enlarges it. *Supra* Section II.B.2; Resp't Opening Br. 21–24. Additionally, the statutory language specifying that the state "fully occupies and preempts the entire field" further delegitimizes Appellants' argument that the only types of regulation preempted are listed in the statute. The point of field preemption is to avoid the need to enumerate everything within the scope of preemption—rather, everything is categorically preempted, and that is that.

In the end, Appellants get it backwards: the inquiry as to the preemptive scope of RCW 9.41.290 begins with the meaning of "firearms regulation." And Appellants cannot seriously dispute that the Access Provision will survive preemption if it is a "firearms regulation" under the statute. In fact, with respect to conflict preemption, Appellants offer no

argument at all that the Ordinance survives if it is within the scope of RCW 9.41.290. *See* Appellants' Resp. Br. 47-48 (conceding that the Ordinance is "more stringent" than state law and not arguing that the Ordinance would survive if RCW 9.41.290 applies).

Respondents have pointed out repeatedly that the Ordinance regulates firearms, and while Appellants dispute the scope of RCW 9.41.290, they do not deny that the Storage Provision and the Access Provision are firearms regulations. The meaning of the statute is plain, and the Ordinance falls squarely within that plain meaning. Applying the plain meaning of the terms in RCW 9.41.290, the Ordinance, and the straightforward application of the canons of statutory interpretation compels one result in this case: preemption of the City's unlawful regulation of firearms.

III. CONCLUSION

For these reasons, Respondents respectfully request that the Court reverse the trial court's decision not to reach the merits on the Access Provision and to hold that, like the Storage Provision, the Access Provision is also preempted and invalid.

DATED this 6th day of June, 2020.

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CERTIFICATE OF SERVICE

The undersigned certifies as follows:

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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED: July 6, 2020, at Seattle, Washington.

s/ Christy A. Nelson
Christy A. Nelson

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