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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.

CORRECTED APPELLANT'S OPENING BRIEF

Jessica L. Goldman,
WSBA #21856
SUMMIT LAW GROUP PLLC
315 Fifth Avenue, 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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

I. INTRODUCTION

This appeal concerns the authority of local governments to enact basic firearm storage laws in order to enhance public safety and prevent unnecessary injuries and death, particularly among children. The trial court extinguished this local authority, holding that a state law that does not even mention storage—and which the Washington Supreme Court has mandated be read narrowly—displaces this local authority. It did so despite ambiguities in the statutory language, and even though the Washington Constitution requires any such ambiguities to be construed in favor of local authority. The trial court's decision, and its extreme view of complete state preemption of local firearms laws, should be reversed.

For the City of Edmonds, the dangers caused by irresponsibly stored firearms are not hypothetical. While statistics tell part of the story, as the City Council and Edmonds residents tragically know, the 2014 mass shooting at nearby Marysville Pilchuck High School made plain the need for families with children to responsibly store their firearms. So, after hearing from residents, engaging in public debate, and following democratic processes, the City Council enacted Ordinance Number 4120 (the "Ordinance"). Under that law, those within City limits must store a firearm in a locked container or with a locking mechanism (such as a trigger or cable lock), when they (or another authorized user) are not carrying their

firearm or keeping it within their control. In passing this Ordinance, the City relied upon research from the Washington State Department of Health, the University of Washington School of Public Health, and the U.S. Centers for Disease Control and Prevention about the severity of gun violence in Washington, as well as a meta-analysis of research studies about the efficacy of responsible storage laws in minimizing firearm injuries and deaths.

Upon a challenge from the National Rifle Association, the Second Amendment Foundation, and several individuals, the trial court concluded that the Ordinance's storage provision was preempted by RCW 9.41.290. Specifically, RCW 9.41.290 states that: "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." For firearm regulations that are within the scope of this "field"—a field described by the enumerated categories in this sentence—local governments "may enact only those laws and ordinances relating to firearms that are specifically authorized by state law," and they must have the "same penalty" as in state law and not be "more restrictive than" state law. *Id.* This is broad language that preempts

many categories of firearms regulation. But the trial court failed to recognize that this language, as it has been interpreted by the Court of Appeals and the Washington Supreme Court, is not so broad as to cover local firearm *storage*, which is conspicuously not addressed in the statute.

These precedents hold that, while broad, RCW 9.41.290 does not extinguish all local authority related to the regulation of firearms. *See Kitsap Cnty. v. Kitsap Rifle & Revolver Club*, 1 Wn. App. 2d 393, 407–08, 405 P.3d 1026 (2017) ("[T]he Supreme Court cases addressing RCW 9.41.290 have limited the scope of preemption."). The Washington Supreme Court, only a few years ago, reiterated that RCW 9.41.290 does not preempt all "laws and ordinances relating to firearms," but only those local laws that fall within the "field of firearms regulation" referenced in the first sentence of RCW 9.41.290. *Watson v. City of Seattle*, 189 Wn.2d 149, 171-72, 401 P.3d 1 (2017). That "field," in turn, is circumscribed by the specific list describing it: "registration, licensing, possession, purchase, sale, acquisition, transfer, discharge, and transportation of firearms." Thus, Washington courts look to see if local firearm laws are encompassed with the enumerated categories as the cornerstone of its preemption analysis. *Kitsap Cnty.*, 1 Wn. App. 2d at 406–07. Particularly given the Legislature's frequent amendments to RCW 9.41.290 specifying the precise local laws it

wants to preempt, its omission of any category of firearm laws—like storage laws—is meaningful.

Mindful of this statutory scheme, as interpreted by the courts, the City adopted an ordinance addressing a category of firearms regulation that is not covered by RCW 9.41.290: firearms storage. But the trial court struck the City's storage law anyway, holding that "any" regulation related to firearms is preempted. The trial court should have recognized that RCW 9.41.290 is at least ambiguous as to whether storage is within the preempted field because it is neither explicitly listed in the statute nor encompassed within the listed categories. And the ambiguity within the statutory language should have led the court to apply the long-standing presumption in favor of local authority and uphold the law. Instead, and contrary to well-established canons of statutory construction, the trial court read the list as having no role in cabining the scope of preemption. The result: it red-penned the statute, crossing out words to which it was bound to give meaning. In doing so, it eliminated any constraints on the scope of RCW 9.41.290 over local firearms laws—even though the Supreme Court has held the exact opposite, that not all laws "relating to" firearms are preempted. This Court should reverse the trial court's decision.

II. ASSIGNMENTS OF ERROR

First Assignment of Error: The trial court erred in concluding that RCW 9.41.290 unambiguously preempts local ordinances governing firearm storage, including the firearm storage provision (Edmonds, Wash. Mun. Code § 5.26.020) of the City of Edmonds' Ordinance, even though that statute does not mention storage and the Washington Supreme Court has held that RCW 9.41.290 *does not* preempt all local laws related to firearms.

Second Assignment of Error: The trial court erred in concluding that the firearm storage provision (§ 5.26.020) of the City of Edmonds' Ordinance conflicts with the State's recently enacted ballot initiative, where the ballot initiative expressly states that it does not regulate where or how firearms are stored and where the Ordinance does not require any action that state law prohibits or prohibit any action that the state law permits.

III. STATEMENT OF THE CASE

A. The City of Edmonds Enacts a Firearm Storage Ordinance.

The residents of Edmonds—as the preamble to the Ordinance memorializes—"recognize the grave harm that c[an] occur when an unlocked firearm is used by someone other than the firearm's rightful owner." Clerk's Papers ("CP") 91. Edmonds residents consistently have expressed concerns about the tragic effects of irresponsible gun storage.

Irresponsible storage may mean that small children get access to firearms and unintentionally shoot other children or adults. CP 90, 110–11. It may mean that disturbed teenagers have access to guns to carry out school shootings. CP 90 (the U.S. Department of Education reported that from 1974–2000, in more than 65% of school shootings, "the shooter obtained a gun from their home or that of a relative"). It may mean that firearms can be more easily stolen and then used to perpetuate further criminal activity. CP 90, 118.

And it may mean that adolescents have a relatively easy and effective way of acting on suicidal impulses. Edmonds City Councilmember Dave Teitzel knows that all too well. Thirty years ago, his younger brother accessed his father's unlocked firearm and died by suicide. CP 119. As he expressed to his fellow councilmembers and constituents, if his father's firearm had been securely stored, his younger brother might still be alive. *Id.* Unfortunately, Councilmember Teitzel's tragedy is not an outlier. Not only do firearm deaths continue to plague Washington communities, suicide in particular is the leading cause of firearm death in the State. CP 90.

Despite these harms, "63% of firearm-owning households in Washington state do not store their firearms locked and unloaded." *Id.*

Leading empirical research demonstrates that safe firearm storage laws can be effective in reducing firearm deaths and injuries, especially among those we want to protect the most—children. As the preamble to the Ordinance memorialized, "a 2018 RAND Corporation analysis of firearm policies throughout the United States [found that] the available evidence supports the conclusion that safe storage laws reduce self-inflicted fatal or nonfatal firearm injuries among youth, as well as unintentional firearm injuries or deaths among children." *Id*. The U.S. Center for Disease Control also advises that safe firearm storage practices, such as keeping guns secured with a cable lock or in a gun safe, reduce the risk of firearm injuries. *Id.*

The City responded to its constituents' safety concerns and the research on the efficacy of safe storage laws. After hearing public comment and engaging in deliberative democratic processes and debate, the Edmonds City Council enacted the Ordinance on July 24, 2018. CP 90–98.

The Ordinance contains two prescriptive provisions. The first requires that gun owners and authorized users responsibly store their firearms by placing them in a locked device when they are not actively carrying them or when the firearms are not otherwise under the owner or authorized user's control. This "storage provision" states:

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

Edmonds Mun. Code § 5.26.020. A locking device is defined to include cable locks, trigger locks, gun safes, and other locked containers that meet specified safety standards. *Id.* § 5.26.010(D).

The second provision—the "unauthorized access provision"—penalizes irresponsible storage that leads to access by minors and other unauthorized persons. 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.

Id. § 5.26.030.

Those who violate the Ordinance are subject exclusively to civil penalties. A violation of the storage provision (§ 5.26.020) is a civil infraction that results in a fine of not more than $500 or community service, so long as no unauthorized person has accessed the gun. *Id.* § 5.26.040. If a violation of either provision results in a prohibited person (*i.e.*, someone who is prohibited from owning or possessing a firearm), minor, or at-risk

person (*i.e.*, someone who is at risk of harming themselves or another person) obtaining access to a gun, the civil fine increases to $1,000 (or community service). *Id.* And if a violation of either provision results in a prohibited person, minor, or at-risk person obtaining the firearm and causing injury or death, or using it in connection with a crime, the maximum civil fine is $10,000. *Id.* Any fine imposed under the Ordinance can be challenged in Municipal Court and appealed to Superior Court. *Id.* §§ 5.26.060, 5.26.070.

B. Procedural History

Within days of the Ordinance's passage, the National Rifle Association, the Second Amendment Foundation, and two individual Edmonds residents, Brett Bass and Swan Seaberg (collectively, the "NRA Plaintiffs"), brought this lawsuit against the City, its Mayor, the Police Department, and the Police Chief (collectively, the "City Defendants"), seeking to have the court enjoin the Ordinance and declare it preempted by state law before it went into effect. CP 293–300.

Motion to Dismiss. The City Defendants moved to dismiss the complaint for lack of justiciability, because the NRA Plaintiffs had not alleged an intent to do any of the things prohibited by the Ordinance—just that they disagreed with it as a matter of policy. Supp. CP 645-660. The trial court subsequently permitted the NRA Plaintiffs to allege further facts

demonstrating their standing. Supp. CP 566-67. In response, they pleaded more facts regarding their firearm storage practices, and added a third individual plaintiff, Curtis McCullough. CP 280–92. Specifically, the individual plaintiffs (collectively, the "NRA Member Plaintiffs") pleaded that, while not carrying their firearms, they do not necessarily lock them up (though some are stored in gun safes). Instead, the NRA Member Plaintiffs attested that they keep some of their firearms unlocked and loaded "somewhere" in their homes, and in some cases in hidden locations when they are not at home. CP 284–88. All three NRA Member Plaintiffs later 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, 349-51, 367-69, 375-77. Following the City's renewed motion to dismiss, the trial court concluded that the NRA Plaintiffs did "not have standing to challenge Edmonds City Code 5.26.030"—the unauthorized-access provision—but could continue their challenge against section 5.26.020—the storage provision. Supp. CP 405-06.[1]

[1] Because the trial court properly concluded that the NRA Plaintiffs lacked standing to challenge the unauthorized-access provision (§ 5.26.030) and dismissed the Complaint with respect to that provision, the City does not address preemption with respect to section 5.26.030 in this brief. The NRA Plaintiffs filed a notice of cross-appeal as to the trial court's ruling on section 5.26.030. The City will address any arguments as to that section in their response brief.

Following this decision, the National Rifle Association and the Second Amendment Foundation voluntarily dismissed their claims, leaving only the NRA Member Plaintiffs. Supp. CP 400-04. The organizational plaintiffs "characterized their withdrawal as a strategic decision" and indicated that they would "continue to conduct and fund the legal fight." CP 340-41.

Summary Judgment. The parties thereafter cross-moved for summary judgment as to whether the Ordinance is preempted by state law. The NRA Member Plaintiffs argued that Washington law "comprehensively and preemptively regulates *all aspects* of firearms and ammunition in the state," leaving no room for local regulation of firearms "within the boundaries of the state." CP 251 (emphasis added). The City did not dispute that Washington has broadly preempted the field of firearms regulation. But the City argued that the NRA Member Plaintiffs' extreme view of preemption is unsupported by the relevant decisions of the Court of Appeals and the Washington Supreme Court and cannot stand. CP 49. Those Courts have upheld many laws "relating to firearms"—from regulations of shooting ranges to taxation of gun sales. And the City emphasized that among all the many aspects of firearm regulation that state law lists as preempted, "storage" was conspicuously absent—unlike other state firearm preemption statutes throughout the country. CP 49, 62.

After oral argument, the trial court granted in part the NRA Member Plaintiffs' motion for summary judgment and held that the Ordinance's storage provision (section .020) was preempted by RCW 9.41.290. Verbatim Report of Proceedings ("RP") 28-37. Without discussing any of the many precedents interpreting that statute, the trial court concluded that RCW 9.41.290 "unambiguously preempts the field of firearm regulation including firearms storage." RP 29. The trial court did not acknowledge cases holding that the "field" of firearm regulation, as referred to in RCW 9.41.290, does *not* include all laws "related to firearms." *See* RP 31. And it therefore ignored the fact that, because RCW 9.41.290 does not mention "storage" or any similar terms it is at a minimum ambiguous as to whether the statute preempts local authority to enact firearm storage ordinances. To the trial court, preemption was "not a close issue"—but the issue was only clear to the trial court because it overlooked both precedent and the textual ambiguity. RP 39. Lastly, the trial court stated that "even if the language of [RCW 9.41.290] were to be determined to be ambiguous," the court would still hold that the statute preempted the Ordinance's storage provision. RP 30. The trial court did not mention the Washington Constitution's presumption in favor of local authority to enact exactly these types of health-and-safety ordinances. Nor did the court acknowledge that

any ambiguity as to the State's intent to preempt local power must be construed in favor of local democracy.[2]

IV. ARGUMENT

A. Standard of Review

The Court reviews a trial court's order granting summary judgment *de novo*. *Kitsap Cnty*, 1 Wn. App. 2d at 401. The preemption questions at issue in this appeal require the "interpretation and application of a statute," which is also a "matter of law" that this Court reviews *de novo*. *Id.* (citing *Blue Diamond Grp. v. KB Seattle 1, Inc.*, 163 Wn. App. 449, 453–54, 266 P.3d 881 (2011)).

B. The Washington Constitution Mandates a Strong Presumption Against Preemption of Local Public Health and Safety Ordinances.

The Washington Constitution gives extensive power to local governments to regulate for the general welfare of their citizens by passing safety laws just like the Ordinance. To preserve local power, the Washington Supreme Court has repeatedly held that if there is any way to read a state law to be in harmony with a local law—so that the former does not trample the latter and the two may coexist—they must be so

[2] This summary judgment decision invalidated section .020 of the Ordinance and not section .030. The trial court rejected NRA Member Plaintiffs' attempt to use their motion for summary judgment as a chance to relitigate their standing to challenge the unauthorized-access provision (and to invalidate that provision). RP 25–28; CP 14.

harmonized. The upshot: if a statute is ambiguous as to whether it preempts a particular local law, the local law is not preempted.

The strong presumption in favor of local government authority stems from the Washington Constitution itself. It grants broad powers to cities, stating: "Any county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws." Wash. Const. art. XI, § 11. This section "is a direct delegation of the police power, as ample within its limits as that possessed by the Legislature itself." *Cont'l Baking Co. v. City of Mt. Vernon*, 182 Wash. 68, 72, 44 P.2d 821 (1935) (quoting *Detamore v. Hindley*, 83 Wash. 322, 145 P. 462 (1915)). "The scope of police power is broad, encompassing all those measures which bear a reasonable and substantial relation to promotion of the general welfare of the people." *State v. City of Seattle*, 94 Wn. 2d 162, 165, 615 P.2d 461 (1980). Similarly, the Legislature has specifically authorized local governments to enact public health and safety regulations. RCW 35A.11.010 *et seq*.

Because of this broad delegation of local lawmaking power, ordinances enacted pursuant to municipal police power—as here—carry a presumption of validity. *Second Amendment Found. v. City of Renton*, 35 Wn. App. 583, 589, 668 P.2d 596 (1983) ("Municipal ordinances enacted in the exercise of the municipality's police power are presumed to be valid

enactments."); *accord City of Seattle v. Wright*, 72 Wn.2d 556, 559, 433 P.2d 906 (1967); *Heinsma v. City of Vancouver*, 144 Wn.2d 556, 561, 29 P.3d 709 (2001) ("Municipal ordinances are presumed to be valid, and grants of municipal power are to be liberally construed.").

State law can, of course, displace local law in some circumstances. Under Washington law, a local ordinance that was properly enacted under municipal police powers is preempted if it directly conflicts with a state law—such that there is no way the two can coexist—or "the Legislature has clearly and explicitly stated its intent to preempt the power of local government to legislate in the area." *Renton*, 35 Wn. App. at 587; *accord Watson*, 189 Wn.2d at 171 ("A state statute preempts an ordinance if the statute occupies the field or if the statute and the ordinance irreconcilably conflict."). But given the presumption in favor of local authority, a state statute "will not be construed as taking away the power of a municipality to legislate unless this intent is clearly and expressly stated." *State ex rel. Schillberg v. Everett Dist. Justice Court*, 92 Wn. 2d 106, 108, 594 P.2d 448 (1979).

To meet that high standard, an ambiguous statute will not do. Statutory language is ambiguous when it is "susceptible to more than one reasonable interpretation." *Filo Foods, LLC v. City of SeaTac*, 183 Wn. 2d 770, 786, 357 P.3d 1040 (2015). And when one reasonable interpretation

of a statute allows for both the local and state laws to coexist, a court must follow that interpretation. *See id.* at 793 (applying presumption in favor of local authority to ambiguous statute). A state statute "will not be construed" as preempting a local ordinance "if the ordinance and the statute can be harmonized." *Heinsma*, 144 Wn.2d at 564. Likewise, a court "must interpret an express preemption clause narrowly but fairly." *Kitsap Cnty.*, 1 Wn. App. 2d at 404.

Accordingly, to conclude that a local law is preempted, the court must determine that a statute is unambiguous and that the only fair reading of the statute requires invalidating local law. It is the challengers' burden to prove, under this high standard, that an ordinance is preempted. *Edmonds Shopping Ctr. Assocs. v. City of Edmonds*, 117 Wn. App. 344, 355, 71 P.3d 233 (2003).

The NRA Member Plaintiffs argued below, and the trial court agreed, that the Ordinance's storage provision is preempted because of both the express preemption language in RCW 9.41.290 and conflict with the newly enacted state law governing unauthorized access to firearms. Both arguments are wrong.

C. RCW 9.41.290 Does Not Preempt the Storage Provision of the City's Ordinance.

The NRA Member Plaintiffs first argue that RCW 9.41.290 expressly preempts the Ordinance. But that statute does not expressly preempt local *storage* ordinances. The NRA Member Plaintiffs therefore must rely upon an extremely broad view of RCW 9.41.290. But even assuming theirs is a reasonable interpretation of the statute, it is not the only one. The text, legislative history, and existing precedent point to a narrower reading of RCW 9.41.290. That means RCW 9.41.290 is at a minimum ambiguous as to its preemptive effect on the storage provision here, and the presumption in favor of municipal authority requires that the Court uphold local authority.

1. The plain language of RCW 9.41.290 shows that it does not unambiguously preempt local ordinances ensuring that firearms are safely stored.

As with any case of statutory interpretation, the analysis here starts with a statute's text. *See Kitsap Cnty.*, 1 Wn. App. 2d at 405 ("[W]e first look to the plain language of the statute, considering the text of the provision, the context of the statute, related provisions, and the statutory scheme as a whole." (citing *Gray v. Suttell & Assocs.*, 181 Wn.2d 329, 229, 334 P.3d 14 (2014)). The preemption provision in RCW 9.41.290 states:

> The state of Washington hereby fully occupies and preempts the entire field of firearms regulation within the boundaries of the state, including the registration, licensing, possession,

> purchase, sale, acquisition, transfer, discharge, and transportation of firearms, or any other element relating to firearms or parts thereof, including ammunition and reloader components. Cities, towns, and counties or other municipalities may enact only those laws and ordinances relating to firearms that are specifically authorized by state law, as in RCW 9.41.300, and are consistent with this chapter. Such local ordinances shall have the same penalty as provided for by state law. Local laws and ordinances that are inconsistent with, more restrictive than, or exceed the requirements of state law shall not be enacted and are preempted and repealed, regardless of the nature of the code, charter, or home rule status of such city, town, county, or municipality.

While the language of RCW 9.41.290 is broad and undoubtedly preempts many firearms regulations, the statute is at least ambiguous as applied to local laws about firearm storage, which are not mentioned in the statute.

There are two fundamental aspects of the statute's text (and particularly its first sentence) that are ambiguous.

First, the statute preempts "the entire field of firearms regulation," but that begs the question of what is included within the Legislature's delineated "field." The Legislature answered this question with an extensive list describing the "field" that it preempted, by stating that it "includ[es]" various enumerated categories. But critically, the Legislature never mentions *storage* at all.

Second, the statute is ambiguous because it is not clear whether the categories it enumerates are merely illustrative of potential areas that are

preempted, or whether the specific categories delineate the metes and bounds of the preempted field. Although the term "including" (which precedes the list) is often a term of enlargement, that is not always so, and "including" must be read in context and in a manner that gives the enumerated categories meaning. The trial court neither recognized nor addressed either of these ambiguities, which should have triggered the presumption against preempting the City's firearm storage law.

(a) RCW 9.41.290 is ambiguous as to whether "storage" is included in the circumscribed "field" of firearm regulation that is preempted.

RCW 9.41.290's text is, at a minimum, ambiguous as to whether firearm storage laws are included within the "field of firearms regulations" that it preempts. To be sure, RCW 9.41.290 states that it occupies the "entire field" of firearms regulation. But that still leaves the question of what constitutes the "field" in the first place. And on that point, the statute is unclear.

The best way to understand what the Legislature meant by the "field of firearms regulation" is, of course, to look at how it described that field—here it did so with a list. The Legislature described with precision the categories "includ[ed]" in this field: "registration, licensing, possession, purchase, sale, acquisition, transfer, discharge, and transportation of firearms." Conspicuously absent from this list is storage. And that

omission cannot be ignored because "[l]egislative silence is a poor foundation on which to build a case for express field preemption." *Watson*, 189 Wn.2d at 172 (citing *Brown v. City of Yakima*, 116 Wn.2d 556, 560, 807 P.2d 353 (1991)).

Under the rules of statutory construction, the failure of RCW 9.41.290 to "make any reference to the regulation" of firearm storage is significant. *Kitsap Cnty.*, 1 Wn. App. 2d at 406. The Legislature did not include "storage" in its list, and a court may not add a word—indeed, an entire category—when the Legislature has elected not to do so. "When ascertaining the plain meaning of the statute, [a court] 'must not add words where the legislature has chosen not to include them.'" *State v. James-Buhl*, 190 Wn. 2d 470, 474, 415 P.3d 234 (2018) (quoting *Rest. Dev., Inc. v. Cananwill, Inc.*, 150 Wn.2d 674, 682, 80 P.3d 598 (2003)). This Court must interpret the scope of the "field" as the Legislature described: by looking at the plain language of the enumerated categories and not adding or subtracting from the list.

The recent Court of Appeals decision in *Kitsap County* underscores the import of this omission. 1 Wn. App. 2d at 401. There, the Court concluded that local regulation of shooting ranges was not encompassed within the "field" of firearm regulation because it was not listed in RCW 9.41.290's preempted categories. *Id*. at 406-07. Shooting ranges are

necessarily intertwined with the topic of firearms generally and, in particular, the "discharge" of firearms—one of RCW 9.41.290's enumerated categories. *Id*. But the Court of Appeals held that the "field" of firearms regulation did not encompass unenumerated categories even if they "relat[e] to firearms." *Id.* (citing RCW 9.41.290); *see also Watson*, 189 Wn.2d at 172 (local firearms tax not preempted because "RCW 9.41.290 makes no mention of taxation."). Instead, the Legislature's silence as to shooting ranges was critical to the Court's conclusion that the local ordinance was not preempted. Because the categories listed in RCW 9.41.290 "primarily focus on the possession, delivery, sale, and use of firearms," and "nothing in chapter 9.41 RCW" addresses storage or "make[s] any reference to" storage, as with shooting ranges in *Kitsap County*, the statute does not preempt Edmonds' storage provision. 1 Wn. App. 2d at 406.

Given the context of firearm preemption statutes nationwide, the Washington Legislature's decision not to include "storage" within the categories of the preempted field is even more significant. Like numerous states across the country, the Legislature here could easily have included storage among the categories of local firearms laws it preempts. *See State v. Flores*, 164 Wn.2d 1, 13, 186 P.3d 1038 (2008) (reasoning that the Legislature's failure to specifically address a topic meant that it was

excluded, especially given similar statutes expressly addressing the topic). Other states, for instance, preempt local laws "relating to the possession, transfer or *storage* of firearms." Ariz. Rev. Stat. Ann. § 13-3118(A) (emphasis added).[3] The Legislature could have done the same here, but it did not. Indeed, as described below, the Legislature has amended the preemption statute several times to clarify additional types of local firearm regulations that it intends to preempt. Thus, when the Legislature wants to preempt a category of firearms regulation, "it knows how to say so." *See Flores*, 164 Wn.2d at 13. It did not "say so" here. *Id.*

Accordingly, the absence of storage in the statute must be given meaning: local storage laws, like Edmonds', are not preempted. At the least, RCW 9.41.290 is ambiguous on that point, meaning that the

[3] *Compare also* RCW 9.41.290 *with* Idaho Code § 18-3302J(2) ("Except as expressly authorized by state statute, no county, city, agency, board or any other political subdivision of this state may adopt or enforce any law, rule, regulation, or ordinance which regulates in any manner the sale, acquisition, transfer, ownership, possession, transportation, carrying or *storage* of firearms . . . ."); Ind. Code § 35-47-11.1-2 ("[A] political subdivision may not regulate . . . the ownership, possession, carrying, transportation, registration, transfer, and *storage* of firearms. . . ."); Ky. Rev. Stat. § 65.870 ("No existing or future city, . . . may occupy any part of the field of regulation of the manufacture, sale, purchase, taxation, transfer, ownership, possession, carrying, *storage*, or transportation of firearms"); Nev. Rev. Stat. § 268.418(1)(b) ("The Legislature hereby declares that . . . [t]he regulation of the transfer, sale, purchase, possession, carrying, ownership, transportation, *storage*, registration and licensing of firearms . . . is within the exclusive domain of the Legislature . . . ."); Wyo. Stat. § 6-8-401(C) ("The sale, transfer, purchase, delivery, taxation, manufacture, ownership, transportation, *storage*, use and possession of firearms, weapons, and ammunition . . . is preempted by the state.") (emphasis added in all parentheticals above).

presumption of municipal authority should prevail. *See Heinsma*, 144 Wn.2d at 561.

(b) The term "including" is ambiguous as to whether the listed categories are mere examples or define the metes and bounds of the "field."

Even though the Legislature omitted firearm storage from the preempted categories in RCW 9.41.290, the trial court held that the list was merely illustrative, not exhaustive, of the categories of local laws encompassed within the "field of firearms regulations." In reaching that conclusion, the trial court seized on the word "including," reasoning that the statute preempted "the field of firearms regulations," including—*but not limited to*—the enumerated categories. RP 30–31. But the statute's text is not so clear.

RCW 9.41.290 does not state that the field "include[es], but is not limited to" the listed examples, although the Legislature could have, and often does, say exactly that. *See, e.g.*, RCW 28B.10.912 ("Core services shall include, but not be limited to…"); RCW 47.64.355(2) ("Service effectiveness measures including, but not limited to…"). Nor did the Legislature otherwise make clear that its list is non-exclusive and can extend to "any other" related categories. *See, e.g.*, *Flores*, 164 Wn.2d at 13 (interpreting former RCW 69.50.401(f) narrowly despite statute stating that it applies to "any other manner" of involving minors in crime). The Court

cannot judicially engraft these clarifying phrases onto the statute when the Legislature did not.[4]

The term "including," can be read in two different ways. While generally the context and surrounding language will make plain which definition is applicable, this statute offers no guidance—only ambiguity. The dictionary definitions of "including" point in two different directions. The Oxford English Dictionary explains that the verb "include" can mean "to contain as part of a group, category, etc.; to have as any of a number of sections, members, constituent elements, etc." Include, Oxford English Dictionary Online (last visited Feb. 25, 2020), www.oed.com/view/Entry/93571. That definition would support the trial court's reading that the categories listed as "includ[ed]" in the field are just a part of a larger group, and not exclusive. But that same dictionary also states that "include" means "to consist of (all of the parts making up the whole); to comprise." *Id.* Under this definition—the parts "included" in a

[4] The Legislature did not include a catch-all phrase in RCW 9.41.290 with the phrase "or any other element relating to firearms or parts thereof," as described below (*infra* Section IV(C)(2)(a)) because that phrase modifies "firearms," so only preempts regulations dealing with elements or parts of firearms, such as ammunition or triggers.

list are not mere examples, but instead describe the whole contents of the more general term they follow.[5]

Because of this ambiguity, Washington courts make the caveat that "including" is "*[g]enerally*" a term of "enlargement,"—careful not to foreclose its alternative meaning. *Queets Band of Indians v. State*, 102 Wn. 2d 1, 4, 682 P.2d 909 (1984). As with all statutory interpretation, the term "including" followed by the extensive list of categories has to be read within the context of RCW 9.41.290 as a whole. And the context and statutory structure here suggest that the most reasonable interpretation is that "including" connotes an exclusive list. It would have made no sense for the Legislature to have specified a long list of nine categories describing the "field" of firearms regulations if they did not intend it to encompass the field. The Legislature could have provided that the "entire field of firearms

[5] That "include" (or "including") can refer to both an exhaustive list or a non-exhaustive list of examples is clear across dictionaries. LEXICO, the online dictionary collaboration between the Oxford University Press and Dictionary.com defines "include" as "[c]omprise or contain as part of a whole," and demonstrates with examples the dual meaning of the word. Include, Lexico (last visited Mar. 2, 2020), https://www.lexico.com/en/definition/include. On the one hand, "include" can mean "comprise" (an exhaustive list of the whole) as in, "*the price includes dinner, bed, and breakfast*"—no one would also think you could get snacks in the price. But it can also mean one or a subset of a whole, as in "*other changes included the abolition of the death penalty*." *Id*. This dictionary elaborates on these multiple meanings, stating: "In the sentence 'the accommodation comprises two bedrooms, bathroom, kitchen, and living room,'" the word comprise implies that there is no accommodation other than that listed. *Id*. "*Include can be used in this way too*, but it is also used in a non-restrictive way, implying that there may be other things not specifically mentioned that are part of the same category, as in 'the price includes a special welcome pack.'" *Id*. (internal quotation marks and emphasis added).

regulation" and left it at that. Or, it could have added the words used elsewhere in the Revised Code—"but not limited to"—following "including." But it did neither. Instead, the Legislature set forth a detailed list describing what comprises (or is "includ[ed]" in) that "field."[6]

Moreover, even if the Court were to read RCW 9.41.290's list of categories in the "field of firearms regulation" as non-exhaustive, it is still far from clear that the statute would cover storage provisions, which are different in kind from the enumerated categories. In interpreting statutes that contain lists accompanying a general term, Washington courts employ *ejusdem generis*, the "well-established principle of statutory interpretation . . . that specific words modify and restrict the meaning of general words when they occur in a sequence." *Flores*, 164 Wn.2d at 13. In short, under *ejusdem generis*, the list confines the bounds of the general term or phrase.

[6] The trial court itself recognized that the word "including" in RCW 9.41.290 could mean that the list of categories are exhaustive of the "field of firearm regulation,"—exactly the City's argument here. The trial court stated: "If the State meant for the list to be inclusive and not illustrative," as the City argues, the statute "would just say the State preempts the statute [sic] *including* these things." RP 33 (emphasis added). That is, however, exactly what the Legislature did do. The trial court dismissed this established meaning of "including" because the Legislature also said "fully and entirely," reasoning that "[t]he only way that list can be exclusive and not illustrative is by reading out the word 'fully,' and reading out the word 'entire' from the first sentence in the statute." RP 33. Not so. As explained below (*infra* Section IV(C)(2)(a)), the words "fully" and "entire" explain that the statute preempts *all* of the categories of firearms regulation in the field, it does not change the contents of the field itself or change the definition of the word "including." Given the trial court's own recognition that "including" could mean that the list of preempted categories is exclusive, it should have recognized that the statute was at a minimum ambiguous.

This rule of construction is so strong that courts constrain even broadly worded general phrases, such as in *Flores*, where a statute provided that "'[i]t is unlawful to compensate, threaten, solicit, or *in any other manner* involve'" a minor in a drug transaction. *Id*. at 10 (quoting former RCW 69.50.401(f)). Despite the umbrella "any other manner" language, the Supreme Court held that the specific verbs "compensate, threaten, [and] solicit" restrict the scope of the general phrase, making clear that the Legislature intended to criminalize only similar conduct. *Id*. at 13 ("The ejusdem generis rule is generally applied to general and specific words clearly associated in the same sentence in a pattern such as . . . '[general], including [specific] and [specific].'" (quoting *Sw. Wash. Chapter v. Pierce Cnty.*, 100 Wn. 2d 109, 116, 667 P.2d 1092 (1983)). Likewise, even when a statute makes plain that a list is purely illustrative—unlike here—by saying that the general category "include[es], but it not limited to," the listed examples, Washington Courts still constrain the general category to those closely associated with the listed examples. *See State v. Larson*, 184 Wn.2d 843, 849–50, 365 P.3d 740 (2015) (holding that the "illustrative examples" following the phrase "including, but not limited to," were "intended to *limit* the scope of the statute" and adopting a narrow interpretation).

So too here. The phrase "entire field of firearms regulation" is modified and restricted by the specific categories listed in sequence with it:

"registration, licensing, possession, purchase, sale, acquisition, transfer, discharge, and transportation." RCW 9.41.290. Under *ejusdem generis*, even if the "field" extends beyond these specific listed categories, the list still cabins the scope of the field. *Flores*, 164 Wn.2d at 13; *see also Kitsap Cnty.*, 1 Wn. App. 2d at 407 (local laws that "indirectly affect[]" categories listed in RCW 9.41.290 are not preempted). In RCW 9.41.290, the enumerated categories concern either firearms transactions ("registration, licensing, . . . purchase, sale, acquisition, transfer") or possession and use ("possession, . . . discharge, and transportation"). "Possession," as discussed further below, does not reasonably encompass "storage." Absent from this list is the *storage* of firearms when they are not involved in a transaction or otherwise in the owner's possession, being carried, or being discharged. And that is the precise—and only—area the Ordinance covers.

It is therefore evident from the plain text of the statute that the Legislature did not intend RCW 9.41.290 to preempt local regulation of firearms storage. Indeed, the plaintiffs agree that "[t]he examples in the text of the statute. . . are the best indication of the legislature's intent." CP 257. That means that, even if the listed categories are just illustrative (which is itself ambiguous), they are not meaningless. And they cannot be stretched so far as to reach the local storage ordinance here.

2. The trial court's limitless interpretation of RCW 9.41.290 is wrong.

Instead of recognizing the statute's ambiguity, the trial court adopted a "sweeping" interpretation of RCW 9.41.290 that not only preempts Edmonds' firearms storage law but would also extend to "any" local law "relat[ed] to firearms." RP 29, 31. Its reasoning is flawed in multiple respects. *First*, the court's textual analysis is wrong and renders much of the statutory language superfluous. *Second*, its decision conflicts with established precedent. *Third*, as a back-up, the trial court improperly conflated "possession"—which is mentioned in the RCW 9.41.290—with "storage"—which is not. The two are not the same and the trial court's attempt to shoehorn Edmonds' law within the scope of RCW 9.41.290 must be rejected.

(a) The trial court's textual analysis is wrong and renders portions of the statutory language superfluous.

Although the trial court purported to ground its expansive reading of RCW 9.41.290 in the statute's text, it misinterpreted that text and violated basic rules of statutory construction. The trial court's textual analysis focused on two phrases; it erred in interpreting them both.

First, the trial court concluded that RCW 9.41.290 preempts local firearms storage laws because the statute says that the state "fully occupies and preempts the entire field of firearms regulation." The trial court

reasoned that the words "fully" and "entire" mean that any local regulation related to firearms would be preempted, even if it were not encompassed within any of the specific categories listed in the statute.

To be sure, this is broad language, but it cannot be read in isolation. To say that the state "fully occupies" and preempts the "entire field" just begs the question of what the "field" is comprised of in the first place. The trial court reasoned that "[t]he only way that list can be exclusive and not illustrative is by reading out the word 'fully,' and reading out the word 'entire' from the first sentence in the statute." RP 33. Not so. The words "fully" and "entire" explain that the statute preempts *all* of the categories of firearms regulation in the field. They do not expand the contents of the "field." Nor do the words "fully" and "entire" license the trial court to ignore the specific list and extend RCW 9.41.290's scope to "any" regulation "relating to firearms." But that is what the trial court did.

It is, then, the trial court's decision that is "reading out" words from the statute. The court's interpretation gives the listed categories no meaning at all. It essentially deletes them from the statute, violating the cardinal rule of statutory construction that no part of a statute should be rendered superfluous. *State ex rel. Evergreen Freedom Found. v. Wash. Educ. Ass'n*, 140 Wn. 2d 615, 639, 999 P.2d 602 (2000), *as amended* (June 8, 2000) ("It is a basic rule of statutory construction that, whenever possible, statutes

should be construed so that no part of the statutory scheme is rendered superfluous."). But, of course, the list must be given meaning, and the omission of "storage" makes the statute at least ambiguous as applied to Edmonds' ordinance.

Second, the trial court relied on the phrase "or any other element relating to firearms or parts thereof" to hold that RCW 9.41.290 covers the City's storage law. The trial court treated this as a catch-all phrase, as though RCW 9.41.290 preempts laws about "any other" aspect of firearms regulation even if not listed in the statute. But here too the trial court takes the phrase out of context. RP 29, 31.

In the full sentence, it is clear that this phrase attaches to the word "firearms" that immediately precedes it, rather than to the word "including," as the trial court erroneously concluded. The sentence reads: the state preempts "the entire field of firearms regulation …, 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 (emphasis added). It does not say that it preempts all of these categories *and* "any other element relating to firearms," as the trial court would have it. Instead, it says that the state preempts local laws in all these categories (e.g., purchase, sale) for "firearms, *or* any element relating

to firearms or parts thereof." This phrase thereby expands the scope of preemption *within* each enumerated category to cover both firearms or firearm elements and parts. For example, a local government cannot restrict the "purchase, sale, acquisition [or] transfer" of firearms *or* related elements and parts (*e.g.*, triggers, bumpstocks, silencers). But it does not open the statute to new categories—like storage. And this makes sense. The Legislature did not want local governments to evade the preempted categories by regulating parts or elements of firearms, rather than firearms themselves. But contrary to the trial court's atextual reading, the phrase does not make local firearm storage laws subject to preemption.

(b) The Washington Supreme Court and the Court of Appeals have already rejected the trial court's expansive reading of RCW 9.41.290.

Beyond these textual flaws, the trial court's decision has another fatal flaw: it contravenes established precedent. The Washington Supreme Court already rejected the precise holding the trial court made here—that RCW 9.41.290 preempts "any" law related to firearms. In *Watson*, the Court adopted a narrow reading of RCW 9.41.290 when it upheld Seattle's firearm transaction tax. 189 Wn.2d at 172. In that case, the plaintiffs—and the dissenting justices—argued that RCW 9.41.290 not only preempted the "field of firearm regulation" (as stated in the first sentence), but also preempted localities from passing any "laws and ordinances relating to

firearms" unless "specifically authorized by state law" (as stated in the second sentence). *Id.* at 180–83 (McCloud, J., dissenting). Even if not in the "field of firearms *regulation*," the plaintiffs argued, the Legislature also preempted all "gun-related ['']laws and ordinances['] unless specifically authorized by state law." *Id.* at 172. The Supreme Court's response: "We disagree." *Id*.

Instead, the Court held that the first sentence of RCW 9.41.290 necessarily cabined the second; not all guns-related laws and ordinances are preempted, only those considered to be "in the field of firearms regulation." *Id.* at 175–76. To be sure, in *Watson* the Court held that Seattle's law did not fall within the "field of firearms regulation" because it was a tax, rather than a regulation. But what is critical for this appeal is *Watson*'s holding that not all local laws relating to firearms are preempted, even if *not* specifically authorized, unless they are within the "field."[7]

The critical question after *Watson*, then, is whether a law falls within the "field" of firearms regulations, not whether a law is "related to" firearms. As demonstrated above, that "field" is limited by the Legislature's

[7] Because Edmonds' storage provision is not within the "field" of firearms regulation, Edmonds does not have to rely on the exception to preemption in RCW 9.41.290 for those local laws that are "specifically authorized" by the State. Even so, RCW 35A.01.010 *et seq.* provides specific authorization for the Ordinance because the Legislature explicitly delegated authority to localities to enact such police and sanitary regulations as they deem appropriate. *See Kitsap Cnty.*, 1 Wn. App. 2d at 407 (citing RCW 26.32.120 in support of local authority to regulate shooting facilities).

detailed listing of categories comprising that "field." That is why the Court of Appeals looks to see whether the subject-matter of a local law is directly referenced in RCW 941.290 in evaluating whether it is preempted. *Kitsap Cnty.*, 1 Wn. App. 2d at 406-07. And that is why it has rejected preemption challenges to regulations (and not just taxes) that are undoubtedly "related to" firearms—like local regulation of shooting ranges—when they are not mentioned in the particular categories describing the "field." *Id.* Indeed, the fact that the RCW 9.41.290 preempts local regulations governing the "discharge" of firearms was not enough for the Court of Appeals to hold that the statute displaces regulations governing "shooting ranges"—places that exist for the sole purpose of "discharge[ing]" firearms. *Id.*

The trial court should have heeded the "Supreme Court cases addressing RCW 9.41.290 [that] have limited the scope of preemption," and afforded significance to the Legislature's decision to omit "storage" within its description of the preempted "field." *Id*. at 407–09. Instead, the trial court incorrectly broadened the scope of RCW 9.41.290.

(c) The trial court improperly construed "storage" as being encompassed within RCW 9.41.290's mention of "possession."

Trying to squeeze Edmonds' storage provision into RCW 9.41.290's preempted categories, the trial court held in the alternative that "possession"—which is listed—also includes "storage"—which is not. RP

31. But Edmonds carefully crafted the Ordinance to avoid regulating "possession." The Ordinance does not apply when a firearm is in someone's possession—*i.e.*, when a person is carrying a gun or when the gun is otherwise under the person's control. *See* section 5.26.020 ("for purposes of this Section 5.26.020, such weapon shall be deemed lawfully stored or lawfully kept if carried by or under the control of the owner or other lawfully authorized user"). Rather, the City regulated "storage," which is a particular way in which a person keeps and secures a firearm when *not* in his or her possession.

Nevertheless, the trial court held that "possession" in RCW 9.41.290 includes "constructive possession," which refers to objects under one's "dominion and control" even if not on one's body, such as how "you store and keep" a firearm. RP 32. But nowhere else in the statutory scheme does the Legislature use the word "possession" to refer to "storage" or to anything else that a person does with a firearm when it is in his or her "constructive possession."

However, elsewhere within the same chapter of the Revised Code, the Legislature uses the word "possession" in the context of firearms and other weapons to specify a state in which a person carries a weapon on one's person, rather than as a general term broad enough to encompass storage. For instance, RCW 9.41.300 prohibits any person from entering certain

sensitive places (e.g., jails, mental health facilities, airports), if that person "knowingly *possesses* or knowingly has under his or her control a weapon." (Emphasis added.) That prohibition would make little sense if possession were to include storage at home, because there would be no reason to restrict someone from sensitive places if they did not have their weapon on their person. Similarly, in RCW 9.41.060, the Legislature exempted from the concealed carry statute's limitations "[a]ny person engaged in the business of manufacturing, repairing, or dealing in firearms . . . if *possessing*, using, or carrying a pistol in the usual or ordinary course of the business." (Emphasis added.) Again, it would not make sense for the applicability of concealed carry regulations to turn on questions of constructive possession. Under the trial court's reasoning, this Court would have to adopt a definition of "possession" that departs from its usage in the rest of the statutory scheme. But courts are to interpret terms *in pari materia*—having the same definition throughout similar parts of the statutory scheme. *See Champion v. Shoreline School Dist. No. 412 of King Cnty.*, 81 Wn. 2d 672, 676, 504 P.2d 304 (1972).

When the Legislature wanted to include constructive possession or otherwise regulate a weapon that is not in a person's actual possession in Title 9, Chapter 41, it did so explicitly. The trial court, by contrast, thought that "possession" must include "constructive possession" within Title 9,

because in its experience "people are convicted for possessing firearms and drugs in places that are not [i]n their personal possession," and can be convicted for unlawful possession even if the guns are "stored," "locked in their homes" or otherwise in a "storage unit." RP 32. But the trial court's example just supports the City's point. For the crime of unlawful possession, the statute is explicit in that it covers more than "possession," but also extends to anyone who unlawfully "owns" or has a firearm "in his or her control." *See* RCW 9.41.040(1)(a) (guilty of unlawful possession "if the person owns, has in his or her possession, or has in his or her control any firearm" which they cannot legally have). The Legislature knew how to—and did—specify when more than actual possession on one's person or in one's immediate control is covered by a firearms statute. It did not do that here.

Finally, even assuming that the term "possession" in RCW 9.41.290 includes "constructive possession," it still would not preempt the City's storage provision. The concept of "possession" (whether actual or constructive) is binary: one either has possession of a firearm or not. It is either under one's "dominion and control" or not. RP 32. "Possession" does not refer to what one does with a firearm while it is in his or her actual or constructive possession, such as the manner in which one uses or stores a firearm. A person may need to possess a firearm in order to store it, but

such indirect relationship between possession and storage is insufficient to bring it within the scope of RCW 9.41.290. *See Kitsap Cnty.*, 1 Wn. App. 2d at 407.

Indeed, under the trial court's interpretation that "possession" in RCW 9.41.290 encompasses anything that one does with a firearm that is under his or her dominion and control, there would have been no reason for the Legislature to include such an exhaustive list of preempted categories. The trial court's view of possession subsumes all the other listed categories—"registration, . . . licensing, purchase, sale, acquisition, transfer, discharge, and transportation." One cannot do any of those things without at some point possessing—actually or constructively—a firearm. That is not what the Legislature meant when it preempted local "possession" laws. So, contrary to the trial court's strained reading, RCW 9.41.290's mention of "possession" does not preempt the City's storage provision.

3. <u>The legislative history reinforces that the Legislature did not intend RCW 9.41.290 to preempt local firearm storage ordinances</u>.

Given the ambiguity in the text, the Court should apply the presumption in favor of local authority and uphold the Ordinance. *See Heinsma*, 144 Wn.2d at 561. The legislative history further supports the City's argument that the Legislature, while it wanted to preempt many types of local firearms laws, did not intend to preempt storage laws. *See Cherry*

v. Seattle, 116 Wn.2d 794, 799, 808 P.2d 746 (1991) (looking to legislative history given textual ambiguity in RCW 9.41.290). The legislative history of RCW 9.41.290 supports two conclusions. *First*, in the past, the Legislature has repeatedly "corrected" what it viewed as erroneous judicial interpretations of RCW 9.41.290, but it has not amended the statute in response to decisions, such as *Kitsap County*, that have narrowly interpreted the scope of the preempted field. *Second*, the Legislature's primary concern was preempting overlapping municipal criminal codes. Thus, there is no basis in legislative intent for concluding that RCW 9.41.290 preempts the Ordinance's civil penalties-only storage provision.

(a) The Legislature's history of repeatedly amending RCW 9.41.290 supports the validity of the City's storage ordinance.

The Legislature has amended RCW 9.41.290 numerous times to clarify the preemptive reach of state law in displacing local firearms regulations, frequently in response to court decisions narrowing the scope of preemption. *See Watson*, 184 Wn.2d at 172–73. But in none of these various amendments has the Legislature mentioned storage laws. While typically legislative silence is not a strong indication of Legislative intent, the situation here is different because, since the passage of RCW 9.41.290, there has been a constant dialectic between the Legislature and the courts on the scope of that provision. In this context, the Legislature's failure to

include storage takes on greater significance. *See id.* at 173 (relying, in part, on the Legislature's failure to extend RCW 9.41.290 to taxation, despite a history of many other amendments and extensions). Particularly in this context, "[l]egislative silence" matters, and provides a "poor foundation" for the extraordinary step of displacing local law. *Id.* at 172.

The trial court gleaned the wrong message from this legislative history. It concluded that the Legislature's various amendments showed that it endeavored to "go back in and try to make the statute more and more clear" so that there were "no exceptions," and all laws related to firearms would be preempted, without exception. RP 34. But the Washington Supreme Court has already rejected that reading of the legislative history. *See Watson*, 189 Wn.2d at 173. It held that while the Legislature expanded preemption in some areas through various amendments, that "does not mean the legislature intended to extend preemption to other areas." *Id.*

Instead, the trial court should have taken note of the varied history concerning when the Legislature has amended RCW 9.41.290. Washington courts have frequently upheld local regulations related to firearms against preemption challenges. *Watson*, 189 Wn.2d at 149; *Estes v. Vashon Maury Isl. Fire Protection Dist. No. 13*, 129 Wn. App. 1042 (2005) (unpublished;

no precedential value)[8]; *Pac. Nw. Shooting Park Ass'n v. City of Sequim*, 158 Wn.2d 342, 144 P.3d 276 (2006); *Kitsap Cnty.*, 1 Wn. App. 2d at 1026. The Legislature did not amend or clarify the preemption statute in response to any of these decisions. Given the Legislature's willingness to correct other court rulings—such as the Court of Appeals' decisions in *City of Seattle v. Ballsmider*, 71 Wn. App. 159, 856 P.2d 113 (1993) and *Renton*, 35 Wn. App. 583—the Legislature's silence in the face of decisions endorsing a narrow reading of the scope of field preemption is instructive.

Even after the *Kitsap County* decision, which endorsed an interpretation of RCW 9.41.290 in which the preempted field is cabined by the list of enumerated topics—the Legislature has not responded. The Legislature knows from that case that Washington courts are looking to see whether the subject of a local firearms law is listed in RCW 9.41.290's enumerated categories, and that an indirect relationship to one of these categories cannot overcome the presumption in favor of the validity of municipal enactments. Yet the Legislature has stayed silent. Particularly in the context of the longstanding dialogue between the courts and the Legislature, this "Legislative silence" cannot sustain the drastic step of

[8] Although this decision *was* issued prior to 2013, the City does not cite this decision for precedential or persuasive value, *see* GR 14.1, but instead for the fact of the decision—that the Court of Appeals in that case upheld a local law as against a preemption challenge and that the Legislature did not respond to the *Estes* decision.

superseding local authority. *Watson*, 189 Wn.2d at 172. This Court should not step in to extend the statute on its own.

(b) The Legislature sought uniformity in criminal—not civil—firearms laws.

The legislative history of RCW 9.41.290 supports the City in another respect: it shows that the Legislature was most concerned with creating uniformity among criminal—not civil—firearms laws, and thus that courts should only invalidate those local civil laws that the Legislature explicitly brought within RCW 9.41.290's reach. Of course, the fact that the Ordinance has no criminal penalties, just civil fines (or, upon request, community service), does not alone place it outside RCW 9.41.290's reach. The Legislature's focus on criminal laws does not mean that civil firearms laws escape preemption altogether—and especially when a civil law falls within one of RCW 9.41.290's enumerated categories. But this legislative history and purpose highlight that the Court should not be adopting a broad view of preemption among local civil laws, as the trial court below did.

Washington courts have held that the Legislature's primary intent in passing RCW 9.41.290 was to "reform that situation in which counties, cities, and towns could each enact conflicting local *criminal* codes regulating the general public's possession of firearms." *Cherry*, 116 Wn.2d at 801 (emphasis added); *accord Pac. Nw. Shooting Park*, 158 Wn.2d at 356. As the Supreme Court explained, in enacting RCW 9.41.290, the

Legislature "sought to eliminate a multiplicity of local laws relating to firearms and to advance uniformity in criminal firearms regulation." *Cherry*, 116 Wn.2d at 801.

Given the focus on uniformity among criminal laws, Washington courts have treated local criminal regulations related to firearms as automatically suspect (and scrutinized accordingly), while requiring a stronger showing from plaintiffs who seek to invalidate local civil ordinances. In *Pacific Northwest Shooting Park Association*, the Supreme Court emphasized that RCW 9.41.290 is particularly concerned with preempting criminal laws. 158 Wn. 2d at 356. In rejecting the plaintiffs' preemption challenge, the Court cited *Cherry* for the conclusion "that the central purpose of RCW 9.41.290 was to eliminate *conflicting municipal criminal codes* and to 'advance uniformity in *criminal firearms regulation*'" and that "the penal nature of the Uniform Firearms Act, chapter 9.41 RCW, [is] particularly significant." *Id* (emphasis in original). Reinforcing the Legislature's focus on preempting criminal laws, the Court noted "that the legislature placed the preemption clause in Title 9 of the Washington criminal code rather than in Title 35, which governs activities of cities and towns, or Title 36, which governs activities of counties." *Id*. at 356 n.6; *see also Chan v. City of Seattle*, 164 Wn. App. 549, 565–66, 265 P.3d 169 (2011) (concluding that the local civil firearms law was preempted and

relying in part on the fact that the ordinance, while civil, could result in criminal penalties for trespass). The legislative history, then, further undermines the trial court's view that all local laws related to firearms are preempted by RCW 9.41.290.

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Because the text of RCW 9.41.290 is at least ambiguous as applied to local firearms storage laws, and the legislative history points to a narrow view of preempting civil firearms ordinances, the lower court should have applied the presumption in favor of local authority. It did not even mention it. This Court should reverse and uphold this democratically enacted local public health and safety law.

D. The City of Edmonds' Firearms Storage Ordinance Is Not in Conflict with the 2018 Ballot Initiative.

Nor does the recently enacted statewide ballot initiative regarding child access to firearms conflict with, and thereby preempt, the Ordinance's storage provision. In 2018, Washington voters overwhelmingly voted to enact Initiative No. 1639, aimed at "increas[ing] public safety and reduc[ing] gun violence." CP 202. The new state law, among other things, creates criminal penalties for irresponsible gun owners if they allow children or other prohibited persons to access their firearms, and such prohibited persons misuse those firearms. *See* RCW 9.41.360 (codifying initiative). It provides that "[n]othing in this section mandates how or where

a firearm must be stored." RCW 9.41.360(6). The newly enacted state law does not mention preemption or otherwise contemplate displacing any local law. Because Edmonds' storage provision can exist harmoniously with this new statewide initiative, well-established conflict-preemption principles mandate that the local law remain undisturbed.

1. The Trial Court Inappropriately Applied a Heightened Standard for Conflict Preemption.

In evaluating whether a local law conflicts with a state law, a court evaluates whether "'an ordinance permits what state law forbids or forbids what state law permits.'" *Watson*, 189 Wn.2d at 171 (quoting *Lawson v. City of Pasco*, 168 Wn.2d 675, 679, 230 P.3d 1038 (2010)). "Where 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. In other words, a local ordinance will survive scrutiny, if "[t]he city does not attempt to authorize by this ordinance what the Legislature has forbidden . . . and does [not] . . . forbid what the Legislature has expressly licensed, authorized, or required." *City of Bellingham v. Schampera*, 57 Wn.2d 106, 111, 356 P.2d 292 (1960) (internal citation and quotation marks omitted).

The trial court, however, applied a heightened standard for conflict preemption drawn from RCW 9.41.290, saying that Edmonds can only

enact ordinances that are "the same" as state law and do not go beyond anything that state law requires. RP 34–37. As the trial court properly noted, the statute's third sentence states: "Local laws and ordinances that are inconsistent with, more restrictive than, or exceed the requirements of state law shall not be enacted." RCW 9.41.290; RP 35. But the trial court was wrong in applying that standard here. That standard does not apply to all "[l]ocal laws and ordinances" writ large, but only to those considered to be in the "field of firearms regulations." As explained above (*supra* Section IV(C)(2)(b)), *Watson* held that the strictures of RCW 9.41.290 apply only to those local laws that fall within the "field of firearms regulations." That is why the Supreme Court did not apply RCW 9.41.290's heightened preemption standard in *Watson*. In that case, the municipal ordinance adding a firearm transaction tax was undoubtedly a "[l]ocal law and ordinance[]" that related to firearms, but because the ordinance was not in the "field" of firearms regulation, the Supreme Court did not apply this heightened standard. *Watson*, 189 Wn.2d at 175-76. So too here. Local storage laws are not encompassed within the scope of RCW 9.41.290. Hence, the heightened conflict preemption standard does not apply.

2. The City's Ordinance Does Not Prohibit Any Conduct that State Law Expressly Permits Because the State Law Explicitly States that it is Not Governing Storage Practices.

Under the proper standard, the Ordinance's storage provision does not conflict with the ballot initiative. Dispositive here is that the newly enacted law states that "[n]othing in this section mandates how or where a firearm must be stored." RCW 9.41.360(6). This last sentence makes plain that the storage provision of the Ordinance does not conflict with the ballot initiative. Under well-established conflict preemption principles, a prohibitory local ordinance is not in conflict with a prohibitory state law if it does not forbid "what the Legislature has expressly licensed, authorized, or required." *Schampera*, 57 Wn.2d at 111 (internal quotation marks omitted). There is no state law that expressly authorizes the sort of irresponsible storage that is prohibited by the City in Section .020. Nor is there any state law that expressly authorizes residents to keep their firearms unlocked even when not in their control—the precise conduct the Ordinance prohibits. Thus, local law does not prohibit anything that state law expressly permits.

Rather, by indicating that the State takes no position on the how and where of gun storage, the ballot initiative expressly leaves this area open for local regulation. Indeed, this is not even an area where a local government

is exceeding or adding onto a state law; there is no state storage law. On conflict preemption too, this Court should reverse.

V. CONCLUSION

For these reasons, the City of Edmonds respectfully requests the Court to reverse the trial court's decision and hold that state law does not preempt the Ordinance's firearm storage provision.

DATED this 13th day of July, 2020.

Respectfully submitted,

SUMMIT LAW GROUP PLLC

By: *s/ Jessica L. Goldman*

Jessica L. Goldman, WSBA #21856
315 Fifth Ave., 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
(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 CORRECTED OPENING 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 13th day of July, 2020.

s/ Colleen A. Broberg
Colleen A. Broberg, Legal Assistant
colleenb@summitlaw.com

SUMMIT LAW GROUP

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- sfogg@corrcronin.com

Comments:

CORRECTIONS: p. 9 • Corrected: •Defs.• Mot. to Dism.• to •Supp. CP 645-660• p. 10 • Corrected: •Order Granting Pls.• Mot. to Amend or Supplement• to •Supp. CP 566-67• p. 11 • Corrected: •Order Denying Defs.• Mot. to Dism.• to •Supp. CP 405-06• p. 11 • Corrected: •Order Granting Stip•d Mot. for Vol. Dism.• to •Supp. CP 400-04•

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

Address:
315 Fifth Avenue So.
Suite 1000
Seattle, WA, 98104
Phone: (206) 676-7000

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