

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

**RESPONDENTS/CROSS-APPELLANTS' RESPONSE TO
WASHINGTON ALLIANCE FOR GUN RESPONSIBILITY AND
GRANDMOTHERS AGAINST GUN VIOLENCE'S *AMICI CURIAE*
BRIEF IN SUPPORT OF DEFENDANTS/APPELLANTS**

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

TABLE OF CONTENTS

I. INTRODUCTION..... 1

II. ARGUMENT 4

A. RCW 9.41.290 Preempts the City’s Attempt to
Regulate Firearms 4

1. An Absence of Subsequent Legislation in a
Preempted Field Does Not Extinguish Field
Preemption 5

2. The Frequency of Conflict is Not Germane
to Preemption Analysis..... 6

B. The Amicus Brief Supports Respondents’ Cross-Appeal..... 8

1. The Access Provision is subject to field and
conflict preemption..... 9

2. Amicus curiae demonstrate why
Respondents’ challenge to the Access
Provision is justiciable..... 10

III. CONCLUSION 12

TABLE OF AUTHORITIES

Cases

<i>Cherry v. Municipality of Metro. Seattle</i> 116 Wn.2d 794, 808 P.2d 746, (1991).....	5
<i>City of Spokane v. Taxpayers of City of Spokane</i> 111 Wn.2d 91, 758 P.2d 480 (1988).....	6
<i>Entm't Indus. Coal. v. Tacoma-Pierce Cty. Health Dep't</i> 153 Wn.2d 657, 105 P.3d 985 (2005).....	10
<i>Grant Cnty. Fire Prot. Dist. No. 5 v. City of Moses Lake</i> 150 Wn.2d 791, 83 P.3d 419 (2004).....	11
<i>Heinsma v. City of Vancouver</i> 144 Wn.2d 556, 29 P.3d 709 (2001).....	6, 7
<i>Kightlinger v. Pub. Util. Dist. No. 1 of Clark Cty.</i> 119 Wn. App. 501, 81 P.3d 876 (2003).....	12
<i>Okeson v. City of Seattle</i> 159 Wn.2d 436, 150 P.3d 556 (2007).....	12
<i>Watson v. City of Seattle</i> 189 Wn.2d 149, 401 P.3d 1 (2017).....	7

Statutes

RCW 9.41.050	8
RCW 9.41.290	passim
RCW 9.41.360	1, 2, 9

I. INTRODUCTION

This case concerns the conflict between a city ordinance and state laws regulating firearms. The question as to whether field preemption of firearms regulations under RCW 9.41.290 preempts the Ordinance passed by the City of Edmonds, or whether state law enacted by Initiative Measure No. 1639 (“I-1639”), codified at RCW 9.41.360, preempts the Ordinance, has been exhaustively briefed at the trial court and on appeal. The sponsors of I-1639, Washington Alliance for Gun Responsibility (“Alliance”), along with Grandmothers Against Gun Violence (collectively “amicus curiae”), have submitted an amicus brief “to provide additional background” and to argue that EMC 5.26.020 (the “Storage Provision”) does not conflict with state law (hereinafter “Amicus Brief”). The Amicus Brief is ultimately unnecessary and unhelpful regarding questions of judicial interpretation in this case.

The primary issue on appeal is the conflict of the Ordinance regulating firearms storage and access and the scope of statewide field preemption of firearms regulation, RCW 9.41.290. I-1639, of course, does not conflict with state field preemption. Unlike the interest group backing the City of Edmonds (among other municipalities) in promulgating local regulation of firearms, the Alliance pursued uniform statewide firearms regulation in conformance with RCW 9.41.290. For those reasons, among others, the purpose behind the Alliance’s actions and the purported intent behind I-1639 has nothing to do with the scope of field preemption.

A secondary issue on appeal is the conflict between the Storage

Provision and RCW 9.41.360 itself. Amicus curiae likewise provide no assistance to the Court on this issue, which turns entirely on judicial interpretation of the text of the Ordinance and the text of state law.

In fact, rather than providing convincing arguments that the Storage Provision is not preempted, amicus curiae's submission and argument instead support the individual plaintiffs'¹ cross-appeal concerning EMC 5.26.030 (the "Access Provision"). The Access Provision is in direct and obvious conflict with RCW 9.41.360, which regulates the same type of conduct (access to stored firearms) inconsistently and more restrictively. Amicus curiae provide no argument to refute this conclusion, nor could they.

More to the point, the Amicus Brief demonstrates that Respondents have standing to put the question of the Access Provision preemption before this Court. The City has argued repeatedly that Respondents must intend to have firearms accessed by unauthorized users in order to have pre-enforcement standing, but that test is too narrow and appears to be directed at trying to prevent any legitimate review of the Access Provision. In response, Respondents have argued—and amicus curiae implicitly support—that the reality is that Respondents and other individuals could be

¹ As the parties and the Court know, Respondents in this matter consist of the individual plaintiffs who challenged the City's Ordinance. While organizational plaintiffs also joined this lawsuit at the inception, both organizations voluntarily withdrew in order to streamline the case for summary judgment. Nonetheless, amicus curiae repeatedly refer to Respondents as non-party "NRA," presumably for public relations rather than legal reasons.

subject to enforcement of the Access Provision after theft of a firearm. According to amicus curiae, this risk is “not theoretical,” with tens of thousands of thefts in Washington and more than 100 in the nearby City of Everett. Amicus Brief 3, 5. Respondents have previously raised this argument in support of their justiciability arguments. CP 29–31, 44. Thus, Respondents’ decisions regarding firearms storage could realistically and foreseeably subject them to enforcement under the Access Provision.

Finally, the fact of amicus curiae inserting themselves into this dispute and their arguments regarding access to firearms underscores Respondents’ argument that this dispute is an issue of great public importance, and that the Court can find that Respondents have standing. Amicus curiae provide the Court with information regarding the public safety risks and the rationale behind their support for I-1639. No doubt that amicus curiae were motivated to address these issues with statewide regulatory measures, which became the subject of multi-million dollar political campaign. And yet the new state law, which amicus curiae promoted and advocated for based on the information provided in the Amicus Brief, obviously conflicts and is incompatible with the Access Provision. Under RCW 9.41.290, the State has reserved to itself the authority to determine how to regulate firearms, and to implement uniform laws across the State. There are few issues that present such clear-cut questions of public importance as this one. The court should not abdicate its role or avoid this issue, but rather should reach the merits and ensure that state law is uniform as the legislature intended by expressly preempting “the

entire field of firearms regulation.” RCW 9.41.290.

II. ARGUMENT

A. RCW 9.41.290 Preempts the City’s Attempt to Regulate Firearms

The state of Washington has expressly preempted the field of firearms regulation. Nothing in the Amicus Brief—as with all of the previous briefing submitted by the City—challenges this basic premise. Instead, like the City, amicus curiae argue that regulation of “firearm storage” is not firearms regulation, and that even if it is, this Court should allow for the Ordinance to go forward because it is unlikely to conflict with other local jurisdictions’ laws.

Amicus curiae’s arguments in support of the City’s position are incorrect. Nowhere do amicus curiae explain how or why they have any expertise in determining the scope of field or conflict preemption. Their alleged familiarity with the statute is not present in their briefing, which largely cites to the City’s brief. Amicus curiae concede that the purpose of RCW 9.41.290 is to “eliminate a multiplicity of local laws relating to firearms and to advance uniformity in criminal firearms regulation.” Amicus Brief 13 (quoting City’s Opening Br. 43). But they argue that because the Washington state legislature has not expressly addressed storage, the purpose of the preemption statute “is not implicated by local jurisdictions’ firearm storage ordinances” and that because storage generally occurs in a single jurisdiction, conflicting laws between jurisdictions are unlikely to impact a gun owner. Both of these arguments are fatally flawed.

1. An Absence of Subsequent Legislation in a Preempted Field Does Not Extinguish Field Preemption

Amicus curiae argue that because the state has not enacted legislation specifically regulating storage, this should somehow invalidate this portion of the preemption over “the entire field of firearms regulation.” RCW 9.41.290. This is, on its face, an absurd result. “RCW 9.41.290 is concerned with creating statewide uniformity of firearms regulation of the general public. Statutes should be construed to effect their purpose and courts should avoid unlikely, strained, or absurd results in arriving at an interpretation.” *Cherry v. Municipality of Metro. Seattle*, 116 Wn.2d 794, 802, 808 P.2d 746, 749 (1991).

In enacting RCW 9.41.290, the Legislature expressly preempted local jurisdictions’ ability to regulate firearms. Neither the Legislature’s decision to not pass laws regulating storage, nor the voters’ decision to enact a state-wide scheme imposing personal liability for unauthorized access resulting from unsafe storage practices, overrule or obviate the Legislature’s decision to preclude local jurisdictions from regulating firearms in this manner.² To find otherwise would result in the absurd—requiring the

² As amicus curiae point out, the statewide law the voters did enact expressly stated it did not “mandate[] how or where a firearm must be stored.” Amici Br. at 11. If the voters enacted a law which expressly stated it did not regulate storage, the intent of the voters must be to not regulate storage. *See City of Spokane v. Taxpayers of City of Spokane*, 111 Wn.2d 91, 97–98, 758 P.2d 480, 483 (1988) (“Judicial interpretation should focus on the voters’ intent and the language of the initiative as the average informed lay voter would read it. In determining voters’ intent, courts should not read into an initiative technical and debatable legal distinction[s] not apparent to the average informed lay voter.” (Internal citations and quotation marks omitted) (alterations in original)).

Legislature to continually enact laws in areas in which it has expressly preempted the field in order to preserve such preemption.

2. The Frequency of Conflict is Not Germane to Preemption Analysis

Local jurisdictions are prohibited from enacting ordinances on a given subject “if the legislature has expressly or by implication stated its intention to preempt the field. When the legislature has expressly stated its intent to preempt the field, a city may not enact any ordinances affecting the given field.” *Heinsma v. City of Vancouver*, 144 Wn.2d 556, 561, 29 P.3d 709, 712 (2001). No part of the analysis of preemption turns on whether the local jurisdiction’s regulation is likely to conflict with another local jurisdiction’s regulation—and how could it, when both jurisdictions are precluded from enacting such regulations?

Despite this core truth, amicus curiae argue that because “storage” generally occurs in a single jurisdiction—unlike “possession,” “sale,” “discharge,” and “transportation,” all of which amicus curiae concede are substantially likely to be subject to regulations from multiple jurisdictions—the preemptive nature of RCW 9.41.290 should not apply to storage. Amicus Brief 14. Once again, amicus curiae turn the application of preemption analysis on its head.

Even setting aside amicus curiae’s concession that firearm owners will sometimes be subjected to conflicting storage regulations (“firearms owners would not **normally** be subject to conflicting jurisdictions’ storage requirements,” *id.* (emphasis added)), their suggested approach to preemption analysis is flawed, ignores the possibility of multiple layers of

local regulation, and sweeps away the established practices of Respondents in this matter and the citizens subject to the City's unlawful Ordinance.

How frequently a local jurisdiction's regulation may conflict with another's is simply not an element of preemption analysis that this Court should consider. Amicus curiae cite no cases purporting to support this position, and Respondents have found none. Instead, "[w]hen the legislature has expressly stated its intent to preempt the field, a city may not enact any ordinances affecting the given field." *Heinsma*, 144 Wn.2d at 561; *see also Watson v. City of Seattle*, 189 Wn.2d 149, 159, 401 P.3d 1, 6 (2017) ("If the Ordinance is a regulation, it is facially preempted by RCW 9.41.290 and our analysis ends."). Where the Legislature has occupied the field, local regulations are preempted—regardless of whether those local regulations are likely to subject a citizen to a conflicting regulation in a neighboring jurisdiction.

Amicus curiae's arguments also fail to account for the various levels of local regulatory authority. A citizen of Edmonds, who lives exclusively in Edmonds, and stores her firearm exclusively in her home, may well avoid a conflicting ordinance in the neighboring cities of Lynnwood and Mountlake Terrace. But that citizen is still subject to the regulations enacted by King County—which has its own council and regularly enacts legislation which must be followed by citizens of Edmonds, Lynnwood, and Mountlake Terrace (as well as the other 2.253 million people who live in

King County).³ Just because storage may largely occur in Edmonds does not mean storage cannot be subject to conflicting regulations.

Moreover, the idea that storage is limited to a single location is flatly untrue, and contrary to the facts in this case. Gun owners regularly travel, and regularly bring their firearms with them when they travel. State law expressly allows for holders of concealed pistol licenses to travel with their firearms. RCW 9.41.050. Many citizens of Edmonds—including Respondents—regularly travel outside of Edmonds for work, pleasure, or other purposes, with their firearms. For example, Mr. Bass had his deposition taken in Seattle—during which he left his firearm locked in his vehicle, which he had driven to Seattle. CP 366. Citizens, many of whom own firearms, regularly move into and out of Edmonds.

Amicus curiae’s arguments that firearm owners are not likely to be subject to “a plethora” of firearm regulations related to storage, in contrast to firearm regulations pertaining to “sale” or “possession” is both incorrect and a misrepresentation of the relevant question of preemption before this Court.

B. The Amicus Brief Supports Respondents’ Cross-Appeal

The Amicus Brief is seemingly silent regarding the Access Provision, even though the Access Provision regulates access to firearms with provisions that are similar to—but different than—state law enacted

³ Amicus curiae themselves make the point that city and county regulations may conflict, noting the City of Edmonds could have differing regulations than Okanogan County. Amicus Brief 12.

by I-1639 on that subject, RCW 9.41.360. There is little doubt that the Access Provision regulates firearms and is subject to preemption, or that the Access Provision conflicts with state law and is likewise subject to preemption, and amicus curiae provide no argument to the contrary despite their professed familiarity with the subject. Further, the information cited by amicus curiae supports Respondents' justiciability arguments.

1. The Access Provision is subject to field and conflict preemption

The Access Provision is, like the Storage Provision, a regulation of firearms. Neither amicus curiae nor the City have provided an argument as to why field preemption does not apply to invalidate the Access Provision.

Additionally, the Access Provision is subject to conflict preemption because it is inconsistent with and irreconcilably conflicts with RCW 9.41.360. As described elsewhere in Respondents' briefing, RCW 9.41.360 requires a prohibited person to not only gain access to an unsecured firearm but to engage in a subsequent act (such as using the firearm to commit a crime) before the statute is violated. The Access Provision requires no subsequent act, and imposes liability upon access alone. Likewise, the Access Provision defines "prohibited person" differently (and more broadly) than state law. And while there is a safe harbor for reporting stolen firearms under state law, the Edmonds City Code provides no such safe harbor. *See* Respondents' Opening Brief 45–46. Through not one but many differences, then, the Access Provision penalizes conduct that is not subject to penalty under state law. These differences are not only "inconsistent with, more restrictive than, [and] exceed[s] the requirements of" RCW 9.41.360,

the Ordinance irreconcilably conflicts with state law and is preempted. RCW 9.41.290 (providing for preemption of firearms regulations that are inconsistent with state law); *see also Entm't Indus. Coal. v. Tacoma-Pierce Cnty. Health Dep't*, 153 Wn.2d 657, 663, 105 P.3d 985, 987 (2005) (providing for preemption of ordinance that prohibits conduct that is permitted under state law).

2. Amicus curiae demonstrate why Respondents' challenge to the Access Provision is justiciable.

Although not convincing regarding preemption of the Storage Provision, the Amicus Brief does reinforce Respondents' arguments regarding justiciability. The Access Provision, like the Storage Provision, requires Respondents to alter their firearm storage practices or risk violating the law. Respondents have stated that they do not subjectively intend for minors or others to obtain access to their firearms, but violation of the Access Provision is based on an objective test of reasonability. Because Respondents do not comply with the Storage Provision, Respondents reasonably fear that the authorities will determine—if someone else gains access to their firearms—that they violated the Access Provision.

Amicus curiae demonstrate why this fear of prosecution is not hypothetical. According to the Amicus Brief, “a staggering number of firearms are stolen from individual gun owners every year.” Amicus Brief 5. Amicus curiae point out that in nearby Everett alone more than 100 firearms were stolen in the year before adoption of the Ordinance, and in the state of Washington approximately 48,000 firearms were reported

stolen, at an estimated value of \$21.6 million. *Id.* Respondents' own experience corroborates these concerns, and demonstrate how it is applicable to Respondents. Respondents argued below that risk of theft was a factor giving Respondents standing to challenge the Access Provision. CP 44. During his deposition, Mr. Seaberg testified that he lives in a neighborhood that has experienced home invasions, and that he fears that an individual may gain access to his home and his firearms. CP 29–31. Everett Police Chief Dan Templeman has explained that firearm theft is a major concern. CP 528. These concerns are real, and not hypothetical or speculative.

Additionally, amicus curiae's arguments here support Respondents' claim that the "less rigid and more liberal" approach to standing applies here. The Washington Supreme Court applies this approach where a controversy (1) is of substantial public importance; (2) immediately affects significant segments of the population; and (3) has a direct bearing on commerce, finance, labor, industry, or agriculture. *Grant Cnty. Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 803, 83 P.3d 419, 424 (2004). Amicus curiae drive home for the Court that the issue of regulating storage and access to firearms have been hotly debated in recent years, including during a statewide initiative process resulting in codified state law. Amicus curiae also reinforce the public health and safety statistics motivating the substantial public debate, which amicus curiae argue affects the lives of thousands people in Washington. All of the Washington Supreme Court's required elements are present here regarding the Access

Provision, and whether it conflicts with recently-enacted state law.

The *Kightlinger* case applied the major public importance test in a similar situation. There, while the Public Utility District claimed that the legal issue of its authority was of local interest only, the court of appeals disagreed and ruled on the declaratory judgment action. *Kightlinger v. Pub. Util. Dist. No. 1 of Clark Cnty.*, 119 Wn. App. 501, 505, 81 P.3d 876, 879–80 (2003), *overruled on other grounds, Okeson v. City of Seattle*, 159 Wn.2d 436, 451 n.5, 150 P.3d 556, 565 (2007). First, in both cases the media and interest groups followed the case closely—here, amicus curiae have even submitted arguments to influence the Court’s decision. Second, in both cases the issue had already reached Statewide government—here, by the initiative process and related litigation. Third, in both cases other municipalities were interest in similar regulation—here, the City of Seattle has an almost-identical ordinance on the books and a lawsuit challenging it on appeal. *Id.* at 505, 508 n.3.

The legal issues in this case are ripe, and Respondents’ standing to challenge the Access Provision is not hypothetical. If the Court considers the Amicus Brief, Respondents respectfully request that the Court considers the submission in light of the important public issues at stake regarding the validity and justiciability of the Access Provision.

III. CONCLUSION

Respondents respectfully request that the Court considers this response to the arguments raised by amicus curiae.

DATED this 31st day of July, 2020.

CORR CRONIN LLP

s/ Eric A. Lindberg

Steven W. Fogg, WSBA 23528

Eric A. Lindberg, WSBA No. 43596

1001 Fourth Avenue, Suite 3900

Seattle, Washington 98154-1051

Tel: (206) 625-8600

Fax: (206) 625-0900

Attorneys for Cross-Appellants

CERTIFICATE OF SERVICE

The undersigned certifies as follows:

1. I am employed at Corr Cronin LLP, attorneys for Plaintiffs herein.
2. On July 31, 2020, I caused a true and correct copy of the foregoing document to be served on the following parties in the manner indicated below:

Attorneys for Defendants:

Edmonds City Attorney
c/o Jeffrey Taraday,
WSBA No. 28182
Lighthouse Law Group PLLC
600 Stewart St, Ste 400
Seattle, WA 98101-1217
(206) 273-7440 Phone
jeff@lighthouselawgroup.com

- Via ECF
- Via U.S. Mail
- Via Hand Delivery
- Via Overnight Mail
- Via electronic mail

Attorneys for Defendants:

Jessica L. Goldman
Summit Law Group PLLC
315 Fifth Avenue S, Suite 1000
Seattle, WA 98104-2682
(206) 676-7000 Phone
jessicag@summitlaw.com

- Via ECF
- Via U.S. Mail
- Via Hand Delivery
- Via Overnight Mail
- Via electronic mail

Attorneys for Defendants:

Molly Thomas-Jensen,
Admitted *Pro Hac Vice*
Everytown Law
450 Lexington Ave, Suite 4184
New York, NY 10017
(646) 324-8222 Phone
mthomasjensen@everytown.org

- Via ECF
- Via U.S. Mail
- Via Hand Delivery
- Via Overnight Mail
- Via electronic mail

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

DATED: July 31, 2020, at Seattle, Washington.

s/ Monica Dawson
Monica Dawson

CORR CRONIN LLP

July 31, 2020 - 3:36 PM

Transmittal Information

Filed with Court: Court of Appeals Division I
Appellate Court Case Number: 80755-2
Appellate Court Case Title: Brett Bass et al., Respondents/Cross-App., v. City of Edmonds et al., Apps./Cross-Resp.
Superior Court Case Number: 18-2-07049-8

The following documents have been uploaded:

- 807552_Briefs_20200731153442D1134294_3056.pdf
This File Contains:
Briefs - Answer to Amicus Curiae
The Original File Name was 2020-07-31 Response to Amicus Brief.pdf

A copy of the uploaded files will be sent to:

- bbyers@corrchronin.com
- dpatterson@corrchronin.com
- etirschwell@everytown.org
- greg.wong@pacificallawgroup.com
- jeff@lighthouselawgroup.com
- jessicag@summitlaw.com
- kai.smith@pacificallawgroup.com
- sfogg@corrchronin.com
- sharonh@summitlaw.com
- sydney.henderson@pacificallawgroup.com
- thien.tran@pacificallawgroup.com

Comments:

Sender Name: Eric Lindberg - Email: elindberg@corrchronin.com

Address:

1001 4TH AVE STE 3900
SEATTLE, WA, 98154-1051
Phone: 206-625-8600

Note: The Filing Id is 20200731153442D1134294