Supreme Court No. 995966

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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,

Petitioners,

v.

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

Respondents.

PETITIONER CITY OF EDMONDS' SUPPLEMENTAL BRIEF

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I. INTRODUCTION

This case concerns the ability of local governments to enact life-saving laws that require gun owners to store their guns responsibly and to control access to their weapons. The lower court ruled that the City of Edmonds' responsible storage and unauthorized access ordinance violated Washington's firearms preemption statute and that the gun owners who sued to invalidate the law had presented a justiciable challenge as to both provisions of the ordinance. The Court of Appeals' decision adopted the broadest possible reading of an ambiguous preemption statute—notwithstanding direction from this Court to interpret preemption statutes narrowly. The result: it extinguished nearly all local authority over one of the most pressing health and safety issues of our time.

Additionally, the lower court's decision as to standing paves the way for almost any person who dislikes a democratically-enacted law to ask the court to invalidate it, regardless of whether the law has any concrete impact on their

lives. This, too, will have a drastic effect if not reversed, as it crosses a line that has circumscribed the judicial role in Washington for nearly a century.

The Washington Constitution gives local governments broad authority to enact health and safety laws. The City of Edmonds used this authority to enact an ordinance governing the storage of firearms. The ordinance is a model of local government responding to local concerns. At a City Council meeting, residents of Edmonds engaged in robust debate about the proposed ordinance. Several of the community members described first-hand experience with gun violence arising out of unsafe firearm storage. The City Council considered these comments, along with evidence showing both that a majority of "firearm-owning households in Washington state do not store their firearms locked and unloaded" and that gun storage laws "reduce self-inflicted fatal or nonfatal firearm injuries among youth, as well as unintentional firearm injuries or deaths among

children." CP 90. Those elected to represent the interests of the City's residents then enacted the ordinance.

The main question on appeal is whether state law preempts the Edmonds ordinance. Washington's firearms preemption statute, codified at RCW 9.41.290, has broad language, to be sure, but a key provision is ambiguous. And where a statute limiting local powers is susceptible to multiple interpretations, the interpretation that allows a local enactment to stand prevails. The City has proffered a reasonable interpretation of the ambiguous language in the firearms preemption statute that allows the ordinance to stand. Following the Washington Constitution, the Court should adopt that interpretation, because it harmonizes the statute with the local ordinance.

The Court of Appeals further erred in ruling that plaintiffs had standing to challenge a separate provision of the ordinance

that prohibits unauthorized access.[1] Plaintiffs did not meet their burden at the pleading stage or following discovery, as no plaintiff has shown any likelihood that the provision prohibiting unauthorized access would ever be enforced against him. While plaintiffs oppose the law as a policy matter, that is not sufficient to give rise to standing. Washington courts have generally applied a liberal approach to standing, but they still require *some* showing that the person suing will be affected in some concrete way to bring suit. That makes sense. Otherwise, anyone who simply did not like a law could sue to have it invalidated, violating the century-old rule that Washington courts do not issue advisory opinions. That is what plaintiffs seek here, and, regardless of the interpretation of the preemption statute, the

[1] All parties agree that at least one individual plaintiff has standing to challenge the first provision of the ordinance (governing storage). Because the Court will necessarily reach the preemption question as to that provision, this brief first addresses preemption before proceeding to standing.

Court of Appeals erred in issuing an opinion on the unauthorized access provision because plaintiffs lack standing.

II. STATEMENT OF THE CASE

The Edmonds ordinance contains two operative provisions. The first prohibits storing or keeping a firearm unless that firearm is secured with a locking device or is "carried by or under the control of the owner or other lawfully authorized user" ("the storage provision"). Edmonds Muni. Code § 5.26.020. The second provision provides that it is a civil infraction if someone who owns or controls a firearm "knows, or reasonably should know, that a minor, an at-risk person, or a prohibited person is likely to gain access to a firearm" and that person does in fact obtain access ("the access provision"). Edmonds Muni. Code § 5.26.030.

In enacting the ordinance, the Edmonds City Council cited to publications from the Centers for Disease Control and RAND Corporation, which indicated that responsible storage laws reduce the risk of firearm injuries and fatalities, including

unintentional shootings by children. CP 90. Unfortunately, this problem has only worsened during the COVID-19 pandemic, as increased gun sales and children spending more time at home have led to a 31% increase in unintentional shootings by children since the start of the pandemic. Jaclyn Diaz, *High Gun Sales And More Time At Home Have Led To More Accidental Shootings By Kids*, NPR, Aug. 31, 2021, https://perma.cc/PDU4-XG3K.

Two individuals and two organizations sued to challenge the law immediately following its enactment. CP 293-300. A third individual plaintiff joined the case in an amended complaint, and the organizational plaintiffs later voluntarily dismissed their claims. CP 280-292, 400-404. Following a motion to dismiss the amended complaint for lack of standing, the trial court agreed that plaintiffs had not alleged standing to challenge the access provision. CP 405-06. Discovery bore out the lack of standing as to the access provision, because no plaintiff indicated that he did, or desired to, act in a way that contravenes the law. CP 367-369, 375-377, 349.

The trial court granted in part and denied in part plaintiffs' motion for summary judgment, ruling that the storage provision was preempted and ruling that no plaintiff had standing to challenge the access provision. CP 13-15. Both parties appealed, and Division I of the Court of Appeals held that plaintiffs had standing to challenge both provisions and that both provisions were preempted by RCW 9.41.290. *Bass v. City of Edmonds*, 16 Wn. App. 2d 488, 481 P.3d 596 (2021).

III. ARGUMENT

A. The Edmonds Ordinance Is Not Preempted by State Law.

The Edmonds ordinance is a valid enactment, consistent both with the broad grant of municipal power and the text of Washington's firearms preemption statute, RCW 9.41.290. That statute preempts the "entire field of firearms regulation," and the central issue that this case presents is how to define the scope of the preempted field. The Court of Appeals held that "RCW 9.41.290 is unambiguous in the expression of intent on the breadth of the preempted field." *Bass*, 16 Wn. App. 2d at 498.

But the opinion does not specify where the boundaries of the field lie, except to say that the field "necessarily extends to regulations of the storage of firearms." *Id.* at 497. This was error, as Washington courts have already explained that the preemption statute does not bar all local ordinances related to firearms. The plain text of the statute, rules of statutory construction, and this Court's cases all point to a narrow—but fair—interpretation of RCW 9.41.290 that does not preempt the Edmonds ordinance.

1. An ambiguous preemption statute must be construed in favor of municipal authority.

Washington's Constitution grants municipalities broad power to "make and enforce within [their] limits all such local police, sanitary and other regulations as are not in conflict with general laws." Wash. Const. art. XI, § 11. Therefore, their police power is "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).

This provision gives rise to a presumption in favor of the validity of municipal enactments. While the Legislature may curtail the ability of municipalities to enact local laws on certain topics, "[a] 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). Thus, when interpreting a preemption statute that is ambiguous—i.e., "susceptible to more than one reasonable meaning," *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 12, 43 P.3d 4 (2002)—the presumption in favor of municipal enactments requires that courts "harmonize municipal ordinances with state law when possible." *Filo Foods, LLC v. City of SeaTac*, 183 Wn.2d 770, 793, 357 P.3d 1040 (2015) (internal quotation marks omitted). A court may "invalidate an ordinance only if it directly and irreconcilably conflicts with state law." *Id.*

Here, the Court of Appeals erred by finding the statute to be unambiguous—as explained *infra*, there are a range of

reasonable meanings that can be ascribed to RCW 9.41.290. The Court of Appeals ignored these narrow and reasonable readings of the statute, unduly limiting the powers granted to municipalities by statute and the Constitution.

2. The plain language of RCW 9.41.290 does not extend to local firearms storage laws.

Because this case centers on a question of statutory interpretation, the text is paramount. Washington's firearms preemption law provides:

> The state of Washington hereby fully occupies and preempts the entire field of firearms regulation within the boundaries of the state, including the registration, licensing, possession, purchase, sale, acquisition, transfer, discharge, and transportation of firearms, or any other element relating to firearms or parts thereof, including ammunition and reloader components. Cities, towns, and counties or other municipalities may enact only those laws and ordinances relating to firearms that are specifically authorized by state law, as in RCW 9.41.300, and are consistent with this chapter. Such local ordinances shall have the same penalty as provided for by state law. Local laws and ordinances that are inconsistent with, more restrictive than, or exceed the requirements of state law shall not be enacted and are preempted and repealed, regardless of the nature of the

> code, charter, or home rule status of such city, town, county, or municipality.

RCW 9.41.290. To be sure, this is broad language, as it preempts local enactments that fall within "the entire field of firearms regulation." But that "field" is not unlimited. Instead, the preempted field is circumscribed by the how the Legislature described it.

In describing the field, the Legislature specifically enumerated the nine topics it sought to preempt localities from regulating. Storage is notably absent from the list of enumerated topics. And this absence is significant, because this list is the best evidence of where the boundaries of the field lie.

Under the most straightforward reading of this statute, the list of enumerated topics is an exhaustive list of the topics that the Legislature intended to preempt. If it were not considered an exhaustive list, this detailed and lengthy list of defined subjects risks being "rendered . . . superfluous." *Whatcom Cnty. v. Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996). This reading of the statute also has the virtue of not adding any words

into the statute "where the legislature has chosen not to include them." *Rest. Dev., Inc. v. Cananwill, Inc.*, 150 Wn.2d 674, 682, 80 P.3d 598 (2003).[2]

The Court of Appeals rejected this reading, finding instead that "generally . . . the term 'including' is one of enlargement, not restriction," and therefore "indicates a list that is illustrative and not exhaustive." *Bass*, 16 Wn. App. 2d at 499. But—as the lower court acknowledged—"including" is not always a term of enlargement, and in this case, the context—a lengthy list, and no other description of the field—supports a reading of this statute in which "including" precedes an exhaustive list. *Id*.

3. The *ejusdem generis* canon limits the scope of the preempted field.

Even if "including" is read as a term of enlargement, that merely begs the question of how to define the boundaries of the

[2] Notably, several other states that have passed firearms preemption statutes enumerating the preempted categories have expressly included "storage." *See* Court of Appeals Opening Brief of City of Edmonds ("Opening Br.") at 22 n.3. The Washington Legislature could have done the same here, and its choice not to do so should be given effect.

preempted field while still giving meaning to the list of enumerated topics. If the preempted field covers all local laws that merely relate to firearms then the list, impermissibly, is "rendered meaningless." *Rest. Dev., Inc.*, 150 Wn.2d at 682. To avoid this improper result, this Court has instructed that "[w]here the legislature uses a general statutory term but provides a list of illustrative examples, we construe the term narrowly, consistent with those examples." *Maytown Sand & Gravel, LLC v. Thurston Cnty.*, 191 Wn.2d 392, 427, 423 P.3d 223 (2018). This rule of statutory construction, known as *ejusdem generis*, dictates that "specific words modify and restrict the meaning of general words when they occur in a sequence." *State v. Flores*, 164 Wn.2d 1, 13, 186 P.3d 1038 (2008).

Applying *ejusdem generis* here, the general term—the "field of firearms regulation"—"should be deemed only to incorporate those things similar in nature or 'comparable to' the specific terms." *Simpson Inv. Co. v. Dep't of Revenue*, 141 Wn.2d 139, 151, 3 P.3d 741 (2000). And storage is not similar

to any of the topics expressly preempted, nor is it comparable to any such topic. The preempted topics can be divided into two categories: (1) terms relating to firearms transactions (registration, licensing, purchase, sale, acquisition, transfer); and (2) terms relating to active use of firearms (possession, discharge, transportation). Storage does not fit into either category—it is what one does with a firearm when it is *not* in active use. Thus, even under a more expansive reading of the list, local storage laws are not preempted.

4. Possession does not encompass storage.

Plaintiffs have urged that storage laws fall within RCW 9.41.290's reference to "possession." *See, e.g.*, Court of Appeals Answering Brief of Plaintiffs ("Answering Br.") at 29 (describing firearms storage as "inseparable from firearms possession"). But by its plain language, the Edmonds ordinance does not apply when a gun is in its owner's possession. *See* 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."). Faced with this problem, the Court of Appeals adopted a definition of possession so broad that it encompassed storage. *Bass*, 16 Wn. App. 2d at 500.

Both common usage of "possession" and the dictionary provide two relevant definitions. The narrow definition is limited to "actual possession," which Black's Law Dictionary defines as "physical occupancy or control over property,"—i.e., an object on one's person or within reach. Black's Law Dictionary, "Possession" (11th ed. 2009). The broader definition is "constructive possession," which means "control or dominion over a property without actual possession or custody of it." *Id.*

In the face of this ambiguity, the presumption in favor of municipal enactments should have steered the Court of Appeals to the narrower definition, thereby excluding storage (and the Edmonds ordinance) from the preempted field. *See Filo Foods, LLC*, 183 Wn.2d at 785-86. But the Court of Appeals opted instead to adopt a broad definition of "possession," extending to constructive possession.

To support its adoption of the broader definition, the Court of Appeals referenced how the term possession was used in another section of RCW 9.41. *Bass*, 16 Wn. App. 2d at 500-01. But the court's analysis falls apart upon examination. Throughout Chapter 9.41, "possession" is used to specify a state in which a firearm is within someone's physical control—i.e., actual possession. *See* Opening Br. at 36-37 (analyzing usage of possession in Title 9, Chapter 41 of the RCW). And, contrary to the Court of Appeals' analysis, RCW 9.41.040 supports a narrow construction of possession, because it shows that, where the Legislature intended a broader construction, it indicates that explicitly. *See, e.g.*, RCW 9.41.040(a) (defining the crime of unlawful possession as applying when a prohibited "person owns, has in his or her possession, or has in his or her control any firearm.").

Finally, the interpretation proffered by plaintiffs, that any local law that "pertains to firearms" is preempted, is at odds with this Court's precedent interpreting RCW 9.41.290. Answering

Br. at 20. In each case interpreting RCW 9.41.290, this Court has emphasized the need to read the statute narrowly, so that "if the statute and ordinance may be read in harmony, no conflict will be found." *Watson v. City of Seattle*, 189 Wn.2d 149, 171, 401 P.3d 1 (2017); *see also Cherry v. Metro. Seattle*, 116 Wn.2d 794, 800, 808 P.2d 746 (1991) (determining that the Legislature's intent in enacting RCW 9.41.290 was "not clear" and construing it to not apply to municipal employers' authority to regulate employees' firearm possession while on the job); *Pacific Nw. Shooting Park Ass'n v. City of Sequim*, 158 Wn.2d 342, 357, 144 P.3d 276 (2006) (extending *Cherry* to support the "general proposition that when a municipality acts in a capacity that is comparable to that of a private party, the preemption clause does not apply").

5. The Edmonds ordinance does not conflict with RCW 9.41.360.

Separately, plaintiffs have argued that the Edmonds ordinance is in conflict with RCW 9.41.360, which was enacted by statewide ballot initiative and creates criminal penalties for

irresponsible gun owners who allow children and other prohibited persons to access and use their firearms. Answering Br. at 29-32, 45-47. The Court of Appeals did not adopt this argument, and it fails as to both provisions of the Edmonds ordinance. As to the storage provision, there is no conflict because RCW 9.41.360 expressly states that "[n]othing in this section mandates how or where a firearm must be stored." As to the access provision, it too survives, because it does not prohibit what the state law permits, and it does not permit what the state law prohibits. *See Lawson v. City of Pasco*, 168 Wn.2d 675, 682-684, 230 P.3d 1038 (2010).

* * * * * * * *

Neither RCW 9.41.290 nor RCW 9.41.360 "irreconcilably conflicts" with the Edmonds ordinance. Though Section .290 has broad language, its plain text cannot be given the near-limitless interpretation urged by plaintiffs and seemingly adopted by the Court of Appeals without ignoring well-established rules

of statutory construction, this Court's precedent, and common sense.

B. Plaintiffs' Challenge to the Access Provision Is Not Justiciable.

Plaintiffs' challenge to the access provision fails for another reason, namely that they have not shown that they have standing and that this is a justiciable challenge under the Uniform Declaratory Judgment Act ("UDJA"). No plaintiff has been harmed by or anticipates any future harm from the access provision, a fact that takes this challenge outside the Constitution's broad grant of jurisdiction to the superior courts.

1. No plaintiff has shown "actual, concrete harm."

Justiciability under the UDJA requires: (1) "an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which

will be final and conclusive." *Diversified Indus. Dev. Corp. v. Ripley*, 82 Wn.2d 811, 815, 514 P.2d 137 (1973). "Inherent in these four requirements are the traditional limiting doctrines of standing, mootness, and ripeness, as well as the federal case-or-controversy requirement." *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 411, 27 P.3d 1149 (2001). "The kernel of the standing doctrine is that one who is not adversely affected by a statute may not question its validity." *Walker v. Munro*, 124 Wn.2d 402, 419, 879 P.2d 920 (1994). Thus, to meet the *Diversified Industries* test, one must show, amongst other things, "actual, concrete harm." *Id.* at 412.

That element is absent here. No plaintiff alleged, nor testified in his deposition, that he engaged in conduct that would violate the access provision, changed his behavior because of this provision, or had any future plans to engage in conduct that would violate the access provision. In the amended complaint, the most plaintiffs could muster is that plaintiff Curtis McCullough has young children and stores three of his firearms

"in an unlocked and usable state in his home, even when not in his possession." CP 286. Yet discovery revealed that Mr. McCullough did not leave any firearms where it was likely that any child would access them (and he took affirmative steps to prevent that from happening). CP 349. Thus, even if a child were to access one of Mr. McCullough's firearms, he would not have violated the access provision, because, according to his undisputed testimony, he is diligent in ensuring that children cannot access his firearms. *See* Edmonds Muni. Code § 5.26.030 (penalizing access only where owner knows or reasonably should know of likelihood that child or other prohibited person would gain access to the guns).

The lack of any concrete harm or likelihood of enforcement against plaintiffs should have led the Court of Appeals to hold, under *Walker* and *Diversified Industries*, that this case did not present a justiciable dispute. Instead, the Court of Appeals cited its earlier decision in *Alim v. City of Seattle*, stating that "'[t]he test under the UDJA is not whether a party

intends to violate the law being challenged but merely whether their rights are adversely affected by it.'" *Bass*, 16 Wn. App. 2d at 496 (quoting *Alim v. City of Seattle*, 14 Wn. App. 2d 838, 854, 474 P.3d 589 (2020)). This formulation, however, just elides the central question: what is "actual, concrete harm," in the context of a pre-enforcement challenge to the validity of a statute? *Walker*, 124 Wn.2d at 412. An abstract fear that is not premised upon a party's violation of the statute (or intent to engage in prohibited conduct) is neither actual nor concrete; it is (at best) speculative.

The Court of Appeals correctly noted that, if a gun owner had elected to change their storage practices to bring them in line with the new law's requirements, that would confer standing. *Bass*, 16 Wn. App. 2d at 496. It went on to describe testimony, without citation to the factual record, that could have given rise to standing: "The Gun Owners testified that they have an interest in keeping their firearms unsecured in the presence of unauthorized users, and they will have to deviate from their

storage practices to avoid violating both provisions of the ordinance." *Id*. But there was no such testimony. To the contrary, no plaintiff changed his storage practices to bring himself into compliance with the ordinance.[3]

Plaintiffs have suggested that the City is imposing an impossible barrier and that no one could challenge this statute. Pl. Reply Br. at 9. Not so. Any person who stored their gun in such a way that they know their child or a relative with a prohibiting criminal conviction can access the gun would have standing. For instance, a parent who tells their teenage child the code to the family gun safe could challenge the ordinance. *See* Court of Appeals Reply Brief of City of Edmonds ("City Reply. Br.") at 18. But *these* plaintiffs did not meet their burden, and for this reason, the Court of Appeals erred in concluding they had raised a justiciable controversy.

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[3] Plaintiffs made similar statements in their reply brief to the Court of Appeals. Court of Appeals Reply Brief of Plaintiffs ("Pl. Reply Br.") at 7-8. But these statements also lack any support in the record (and, unsurprisingly, lack citations to the record).

2. UDJA justiciability is jurisdictional.

Not only did the Court of Appeals misconstrue the *Diversified Industries* standard and the record on appeal, it also erred in holding that UDJA justiciability was non-jurisdictional. The Court of Appeals treated this as an appeal from a motion to dismiss decision,[4] citing its earlier decision in *Alim*, to hold that UDJA justiciability did not implicate the court's subject matter jurisdiction. *Bass*, 16 Wn. App. 2d at 493 n.1. Without jurisdictional concerns, the lower court then applied the "hypothetical facts" standard employed under CR 12(b)(6). *Haberman v. Wash. Pub. Power Supply Sys*., 109 Wn.2d 107, 120, 744 P.2d 1032 (1987). And only under that low standard

[4] This case was cross-appealed from a decision on fully-briefed cross-motions for summary judgment. The trial court had the benefit of a full evidentiary record when it held that "Plaintiffs do not have standing to challenge, pursuant to the Court's oral ruling and prior written order, Edmonds City Code 5.26.030." CP 14. The Court of Appeals' determination that this was an appeal from a motion to dismiss relied upon a statement made during the trial court's oral ruling that a prior ruling on a motion to dismiss (holding that plaintiffs did not have standing to challenge the access provision) "'remain[ed] in effect.'" *Bass*, 16 Wn. App. 2d at 494 n.2.

did the Court of Appeals conclude that plaintiffs had met their burden. *Bass*, 16 Wn. App. 2d at 496.

But the Court of Appeals misread this Court's decisions: justiciability under the UDJA goes to a court's subject matter jurisdiction and is reviewed under CR 12(b)(1). Following "inconsistent" application of the principles of jurisdiction, this Court clarified that "'[s]ubject matter jurisdiction' refers to a court's ability to entertain a type of case, not to its authority to enter an order in a particular case." *In re Marriage of Buecking*, 179 Wn.2d 438, 448, 316 P.3d 999 (2013). Because the Legislature may not deprive courts of jurisdiction granted to them by the Constitution, the touchstone of this inquiry is the Constitution, which grants superior courts "original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court." Wash. Const. art. IV, § 6.

UDJA justiciability remains jurisdictional after *Buecking* because it tells courts whether a declaratory judgment action is a

"case" at all, or whether instead it is a request for an advisory opinion. *See Diversified Indus. Dev. Corp*, 82 Wn.2d at 815 (warning that absent justiciability, "the court steps into the prohibited area of advisory opinions."). In contrast to the procedural requirements that the Court considered in *Buecking*, UDJA justiciability is a threshold question because it determines whether there is a case or proceeding over which the courts shall have jurisdiction. *See* Wash. Const. art. IV, § 6.

Because UDJA justiciability is jurisdictional, it was error for the Court of Appeals to "consider hypothetical facts not part of the formal record," under CR 12(b)(6). *Haberman*, 109 Wn.2d at 120. Instead, under *Diversified Industries*, the Court of Appeals should have found that plaintiffs had failed to present "an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement." 82 Wn.2d at 815. This is not a justiciable case.

3. This case does not fall within the public importance exception.

The Court of Appeals also invoked the public importance exception to UDJA justiciability, reasoning that the only issues before the court were questions of law and that these issues "affect[] every gun owner and every municipality in the state." *Bass*, 16 Wn. App. 2d at 496-97. As outlined in the City's petition for review, there has not been consistent application of the public importance exception, except in one respect: every case has a plaintiff with concrete harm.

In *Walker*, this Court surveyed cases applying this exception, and concluded, "even if we do not always adhere to all four requirements of the justiciability test, this court will not render judgment on a hypothetical or speculative controversy, where concrete harm has not been alleged." 124 Wn.2d at 415. That ensures that courts are not engaged in the task of rendering "advisory opinions or pronouncements upon abstract or speculative questions." *Id*. at 418. Thus, at a minimum, a plaintiff should have to show actual harm to invoke the public

importance exception. And that, for the reasons described above, is absent here.

IV. CONCLUSION

For the foregoing reasons, the City of Edmonds urges this Court to reverse the Court of Appeals' decision and hold that the Edmonds ordinance is not preempted and that, as to the access provision, no plaintiff presented a justiciable dispute.

DATED this 3rd day of November, 2021.

Respectfully submitted,

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I certify that this Supplemental Brief contains 4,727 words, in compliance with the RAP 18.17(c).

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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 **PETITIONER CITY OF EDMONDS' SUPPLEMENTAL 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:

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APPENDIX 1

Chapter 5.26
STORAGE OF FIREARMS*

Sections:

*Code reviser's note: Section 3 of Ord. 4131 states: "Ordinances 4120 and 4121 shall not be enforced until 240 days after final passage, which is March 21, 2019."

5.26.010 Definitions.

For purposes of this chapter, the following definitions apply:

A. "At-risk person" means any person who has made statements or exhibited behavior that indicates to a reasonable person there is a likelihood that the person is at risk of attempting suicide or causing physical harm to oneself or others.

B. "Firearm" means a weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder, including but not limited to any machine gun, pistol, rifle, short-barreled rifle, short-barreled shotgun, or shotgun as those terms are defined in RCW 9.41.010. "Firearm" does not include a flare gun or other pyrotechnic visual distress signaling device, or a powder-actuated tool or other device designed solely to be used for construction purposes.

C. "Lawfully authorized user" means any person who:

1. Is not in the unlawful possession of a firearm under RCW 9.41.040; and

2. Is not prohibited from possessing a firearm under any other state or federal law; and

3. Has the express permission of the owner to possess and use the firearm.

D. “Locking device” includes any device listed on the Approved Firearms Safety Devices Compatibility Chart, published by the State of California’s Office of the Attorney General and attached to the ordinance codified in this section as Exhibit A, which is incorporated herein by this reference as if set forth in full, and stored in conjunction with a compatible firearm.

E. “Minor” means a person under 18 years of age who is not authorized under RCW 9.41.042 to possess a firearm, or a person of at least 18 but less than 21 years of age who does not meet the requirements of RCW 9.41.240.

F. “Prohibited person” means any person who is not a lawfully authorized user. [Ord. 4131 § 1, 2018; Ord. 4120 § 1, 2018].

5.26.020 Safe storage of firearms.

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, 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. [Ord. 4120 § 1, 2018].

5.26.030 Unauthorized access prevention.

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. [Ord. 4120 § 1, 2018].

5.26.040 Penalties.

A. A violation of ECC 5.26.020 shall constitute a civil infraction subject to a civil fine or forfeiture not to exceed $500.00. For good cause shown, the court may provide for the performance of community restitution, in lieu of the fine or forfeiture imposed under this subsection.

B. A violation of ECC 5.26.020 or 5.26.030 shall constitute a civil infraction subject to a civil fine or forfeiture in an amount up to $1,000 if a prohibited person, an at-risk person, or a minor obtains a firearm as a result of the violation. For good cause shown, the court may provide for the performance of community restitution, in lieu of the fine or forfeiture imposed under this subsection.

C. A violation of ECC 5.26.020 or 5.26.030 shall constitute a civil infraction subject to a civil fine or forfeiture in an amount up to $10,000 if a prohibited person, an at-risk person, or a minor obtains an unsecured firearm and uses it to injure or cause the death of oneself or others, or uses the firearm in connection with a crime. A separate civil fine or forfeiture may be issued for each instance that a person is injured or killed as a result of a violation of ECC 5.26.020 or 5.26.030.

D. A violation of ECC 5.26.020 or 5.26.030 is hereby deemed at minimum negligent and may be considered reckless depending upon the knowledge and actions of the violator.

E. Nothing in this chapter shall be construed to alter any requirements, including, but not limited to, any warrant requirements applicable under the Fourth Amendment to the United States Constitution or Article I, Section 7 of the Washington State Constitution.

F. ECC 5.26.020 and 5.26.030 shall not apply to "antique firearms," as defined in RCW 9.41.010. [Ord. 4120 § 1, 2018].

5.26.050 Notice of infraction – Issuance.

A. A peace officer has the authority to issue a notice of infraction:

1. When an infraction under this chapter is committed in the officer's presence;

2. If an officer has reasonable cause to believe that a person has committed an infraction under this chapter.

B. A court may issue a notice of infraction upon receipt of a written statement from the officer that there is reasonable cause to believe that an infraction was committed. [Ord. 4120 § 1, 2018].

5.26.060 Response to notice of infraction – Contesting determination – Hearing – Failure to appear.

A. Any person who receives a notice of infraction shall respond to such notice as provided in this section within 15 days of the date the notice is personally served or, if the notice is served by mail, within 18 days of the date the notice is mailed.

B. If the person determined to have committed the infraction does not contest the determination the person shall respond by completing the appropriate portion of the notice of infraction and submitting it, either by mail or in person, to the Edmonds municipal court. A check or money order in the amount of the penalty prescribed for the infraction must be submitted with the response, if responding by mail, or, if responding online, payment may be made using a credit card. When a response that does not contest the determination is received, an appropriate order shall be entered in the court's records.

C. If the person determined to have committed the infraction wishes to contest the determination the person shall respond by completing the portion of the notice of infraction requesting a hearing and submitting it, either by mail or in person, to the Edmonds municipal court. The court shall notify the person in writing of the time, place, and date of the hearing, and that date shall not be sooner than seven days from the date of the notice, except by agreement.

D. If the person determined to have committed the infraction does not contest the determination but wishes to explain mitigating circumstances surrounding the infraction, the person shall respond by completing the portion of the notice of infraction requesting a hearing for that purpose and submitting it, either by mail or in person, to

the Edmonds municipal court. The court shall notify the person in writing of the time, place, and date of the hearing.

E. In any hearing conducted pursuant to subsection (C) or (D) of this section, the court may defer findings, or in a hearing to explain mitigating circumstances may defer entry of its order for up to one year and impose conditions upon the defendant the court deems appropriate. Upon deferring findings, the court may assess costs as the court deems appropriate for administrative processing. If at the end of the deferral period the defendant has met all conditions and has not been determined to have committed another infraction under this chapter, the court may dismiss the infraction. A person may not receive more than one deferral within a seven-year period.

F. If any person issued a notice of infraction:

1. Fails to respond to the notice of infraction as provided in subsection (B) of this section; or

2. Fails to appear at a hearing requested pursuant to subsection (C) or (D) of this section;

the court shall enter an appropriate order assessing the monetary penalty prescribed for the infraction and any other penalty authorized by this chapter. [Ord. 4120 § 1, 2018].

5.26.070 Hearing – Contesting determination that infraction committed – Appeal.

A. A hearing held for the purpose of contesting the determination that an infraction has been committed shall be without a jury.

B. The court may consider the notice of infraction and any other written report made under oath submitted by the officer who issued the notice or whose written statement was the basis for the issuance of the notice in lieu of the officer's personal appearance at the hearing. The person named in the notice may subpoena witnesses, including the officer, and has the right to present evidence and examine witnesses present in court.

C. The burden of proof is upon the city to establish the commission of the infraction by a preponderance of the evidence.

D. After consideration of the evidence and argument, the court shall determine whether the infraction was committed. Where it has not been established that the infraction was committed, an order dismissing the notice shall be entered in the court's records. Where it has been established that the infraction was committed, an appropriate order shall be entered in the court's records.

E. An appeal from the court's determination or order shall be to the superior court. The decision of the superior court is subject only to discretionary review pursuant to Rule 2.3 of the Rules of Appellate Procedure. [Ord. 4120 § 1, 2018].

The Edmonds City Code and Community Development Code is current through Ordinance 4232, passed August 24, 2021.

Disclaimer: The city clerk's office has the official version of the Edmonds City Code and Community Development Code. Users should contact the city clerk's office for ordinances passed subsequent to the ordinance cited above.

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Appellate Court Case Title:	Brett Bass, et al. v. City of Edmonds, et al.
Superior Court Case Number:	18-2-07049-8

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