Supreme Court No. 99596-6
Court of Appeals No. 80755-2-I

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.

RESPONDENTS' ANSWER TO PETITION FOR REVIEW FROM DIVISION I OF THE COURT OF APPEALS

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I. INTRODUCTION

Through RCW 9.41.290, the State of Washington "fully occupies and preempts the entire field of firearms regulation." Because of this statute, municipalities may no longer enact any direct regulations of firearms. In this case, the City of Edmonds enacted Ordinance Number 4120 (the "Ordinance"), which regulates firearms in two ways: (1) by requiring firearms to be secured by a properly-engaged locking device when not in the possession or control of the owner or authorized user ("Storage Provision"); and (2) penalizing storage that leads to unauthorized access ("Access Provision"). The trial court declined to reach the merits on the Access Provision, but granted Respondents' motion for summary judgment as to the Storage Provision, ruling that the Storage Provision was preempted by RCW 9.41.290. The Court of Appeals upheld the trial court's decision in part and reversed in part in a published opinion that does not conflict with any of this Court's precedents. *City of Edmonds v. Bass*, __ Wn. App. 2d __, 481 P.3d 596 (2021).

First, the Court of Appeals reversed the trial court's ruling that Respondents did not have standing to challenge the Access Provision. The Court of Appeals applied precedent and held that Respondents had submitted testimony sufficient to give them standing under the Uniform Declaratory Judgment Act (UDJA). Moreover, the Court of Appeals held that Respondent's appeal presented an issue of significant public interest under *Diversified Industries Development Corporation v. Ripley*, 82 Wn.2d

811, 815, 514 P.2d 137 (1973). Under either conclusion, then, the Court of Appeals had the authority to reach the merits on the entire Ordinance.

Second, the Court of Appeals affirmed the trial court's ruling that the Storage Provision was preempted by state law, and extended that conclusion to the Access Provision as well. The Court of Appeals specifically noted that the text of RCW 9.41.290 provides that the State "fully occupies" "the entire field" of firearms regulation, and uses a term of enlargement ("including") along with an illustrative list. The Court of Appeals specifically rejected Petitioners' arguments regarding statutory ambiguity and limited scope of preemption. *Bass*, 481 P.3d at 601–04.

Petitioners now seeks review, re-asserting the same arguments that the Court of Appeals and the trial court have previously rejected. Review should be denied because Petitioners do not allege any actual conflict with existing case law and fail to raise a significant question of constitutional law or an issue of substantial public interest.

II. COUNTERSTATEMENT OF THE ISSUES PRESENTED FOR REVIEW

This case is not appropriate for review by this Court under RAP 13.4(b). If review were granted, the issues presented would be:

1. Did the Court of Appeals correctly apply this Court's decisions in *Diversified Indust. Dev. Corp. v. Ripley*, 82 Wn.2d 811, 815, 514 P.2d 137 (1973), *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 411, 27 P.3d 1149 (2001), and other cases regarding standing under the UDJA that require a party to demonstrate that their rights are adversely affected in

order to have standing to challenge a law?

2. Did the Court of Appeals correctly apply the judicially-crafted public importance exception to the UDJA as an alternative basis for concluding that Respondents had standing to challenge the Ordinance?

3. Did the Court of Appeals correctly conclude that RCW 9.41.290 "fully occupies" "the entire field" of firearms regulation, preempting the Ordinance at issue in this case?

III. COUNTERSTATEMENT OF THE CASE

A. Washington State Law Fully Occupies and Preempts the Entire Field of Firearms Regulation

In 1935, the Washington Legislature adopted laws regulating firearms based on the Uniform Firearms Act.[1] Subsequently, the Legislature repeatedly amended state law in order to ensure uniformity and preempt local regulation. In 1983, the Legislature enacted Chapter 9.41 RCW to prevent municipalities from adopting inconsistent laws and ordinances regulating firearms.[2] In 1985, the Legislature amended former RCW 9.41.290 to "fully occup[y] and preempt[] the entire field of firearms regulation within the boundaries of the state, ..."[3] And in 1994, the

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[1] *Chan v. City of Seattle*, 164 Wn. App. 549, 551–52, 265 P.3d 169, 171 (2011) (citing Laws of 1935, ch. 172 & *Cherry v. Mun. of Metro. Seattle*, 116 Wn.2d 794, 800, 808 P.2d 746 (1991)).

[2] *Id.* at 552 (citing Laws of 1983, ch. 232, § 12; *Cherry*, 116 Wn.2d at 801).

[3] *Id.* (quoting Laws of 1985, ch. 428, § 1).

Legislature amended former RCW 9.41.290 to preempt municipalities from regulating firearms unless "specifically authorized by state law, as in RCW 9.41.300" and to harmonize the penalties for violations of municipal ordinances and state law.[4]

B. The City of Edmonds Regulates Firearms Storage & Access

On July 24, 2018, the Edmonds City Council enacted the Ordinance, which regulates firearms by imposing penalties for non-compliant storage of firearms within the City of Edmonds. CP 89–103. During discussions prior to the City's enactment of the Ordinance, the councilmembers and members of the public questioned whether state law would preempt local regulation of firearms storage. *Id.* at 120–122. Also discussed at the meeting was a pending initiative that, among other provisions, would regulate access to stored firearms in a manner that differed from the Ordinance. *Id.* Thus, even before passage, the Edmonds City Council was aware of RCW 4.91.290, aware that state law imposed limits on the type of firearms regulation available to a municipality as compared to the State, and aware that the Ordinance may be preempted by state law.

Also mentioned before enactment was an ordinance passed by the City of Seattle, which was substantially similar to the Edmonds Ordinance,

[4] *Id.* at 553, 553 n.2 (citing Laws of 1994, 1st Spec. Sess., ch. 7, §§ 428–29).

and which Councilmembers knew was substantially likely to be challenged in court.[5] *Id.*

The Ordinance established Chapter 5.26 in the Edmonds City Code. The Ordinance contains two firearms storage regulations. The "Storage Provision" requires firearms to be secured by a properly-engaged locking device when not in the possession or control of the owner or authorized user. ECC 5.26.020. The "Access Provision" penalizes storage that leads to unauthorized access. ECC 5.26.030. The City of Edmonds imposes penalties for violations of the Ordinance. A violation of the Storage Provision is an infraction subject to a fine not to exceed $500. ECC 5.26.040(A). If any unauthorized user obtains a firearm in violation of the Storage Provision or the Access Provision, the penalty rises to $1,000, or up to $10,000 if the firearm is used in a crime. ECC 5.26.040(B) & (C).

C. Washington State Regulates Firearms Storage & Access

Months after the City enacted the Ordinance, Washington State voters approved Initiative No. 1639 ("I-1639"), which made a number of changes to Washington's firearms laws. One of the additions to state law concerned provisions related to "secure gun storage," and establishes standards related to the use of trigger locks or similar devices designed to prevent unauthorized use or discharge.

[5] *See* Seattle Municipal Code, Chapter 10.79.

D. Procedural History

Respondents filed suit and sought declaratory judgment that the Ordinance was preempted and invalid. Appellants filed a motion to dismiss under Rule 12(b)(1), arguing that the entire case was not justiciable. *Id.* at 649–745. The trial court permitted Respondents to submit a verified amended complaint to allege additional facts and to add an additional individual plaintiff. *Id.* at 280–292. After Petitioners filed a renewed motion to dismiss, the trial court ruled that all of the individual and organizational plaintiffs had standing to challenge the Storage Provision, but none of the individual and organizational plaintiffs had standing to challenge the Access Provision. *Id.* at 405–406.

On July 3, 2019, Respondents submitted a motion for summary judgment challenging the entire Ordinance. *Id.* at 251–268. As part of the summary judgment motion, Respondent submitted testimony that each of the individual plaintiffs continue to store firearms without a locking device and outside their possession and control, even though the Ordinance is now in effect, and that the individual plaintiffs remained concerned . CP 74–85. Each individual was concerned, based on their firearms storage practices, that the City of Edmonds could enforce both provisions in the Ordinance against them.

The trial court granted-in-part and denied-in-part Respondents'

motion for summary judgment. RP 25–40. First, the trial court incorporated the ruling denying Appellants' motion to dismiss, and rejected Plaintiffs' request to invalidate the Access Provision. *Id.* Turning to the Storage Provision, the trial court ruled that RCW 9.41.290 "unambiguously preempts the field of firearm regulation including firearms storage," and ruled the Storage Provision preempted and invalid. *Id.* at 28–37. The trial court explained "the basic 101 tenets of the rules of statutory preemption" prohibited a local jurisdiction from passing a law in a field occupied by the state. *Id.* at 29, 33. The trial court did not view the validity as a "close issue." *Id.* at 39.

The parties cross-appealed. The Court of Appeals reversed the standing decision and held both provisions in the Ordinance preempted by RCW 9.41.290. Regarding standing, the Court of Appeals held that "the 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*, 481 P.3d at 600 (quoting *Alim v. City of Seattle*, 14 Wn. App. 2d 838, 852, 474 P.3d 589 (2020)). The individual plaintiffs satisfied that test by testifying 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.* In the alternative, the Court of Appeals concluded that the appeal qualified

under the exception to *Diversified's* standing test because Respondents had raised an issue of "broad overriding public import."

Regarding the merits, the Court of Appeals examined the broad text of RCW 9.41.290 and concluded that state law preempted both provisions of the Ordinance. The Court of Appeals proceeded to reject each of Petitioner's various arguments, many of which appear again in the Petition for Review.

IV. REASONS WHY REVIEW SHOULD BE DENIED

A. The Court of Appeals Did Not Apply the "Hypothetical Facts" Pleading Standard When Holding that Respondents Had Standing to Challenge the Access Provision

The premise of Petitioners' argument is that the Court of Appeals decision conflicts with *Diversified Industries* by citing *Alim v. City of Seattle* for the holding that a UDJA motion to dismiss is analyzed under Rule 12(b)(6) and not Rule 12(b)(1). Petitioner also claims that review of this issue is in the public interest. The problem with Petitioner's argument is three-fold: (1) the portions of the opinion Petitioner points to do not control the result of the case and are dicta; (2) there is no conflict; and (3) there is no "issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b)(4).

First, Petitioners zeros in on footnotes one and two in the Court of Appeals opinion. These footnotes describe the case background, including a sub-issue on appeal regarding whether the trial court had made its standing

rule based on the motion to dismiss or the motion for summary judgment.

But the Court of Appeals' holding that Respondents had standing to challenge the access provision is not based on the Rule 12(b)(6) standard or any alleged "hypothetical facts." Rather, the Court of Appeals held that Respondents had standing based on the testimony submitted in the record with the summary judgment motions.

> The City argues the Gun Owners cannot advance a pre-enforcement challenge to the unauthorized access ordinance, ECC 5.26.030, because they do not intend to ever violate that ordinance and thus have not suffered any injury in fact. But in *Alim v. City of Seattle*, 14 Wn. App. 2d 838, 852, 474 P.3d 589 (2020), this court recently held that "the 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." **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.** This evidence suffices under *Alim*.

Bass, 481 P.3d at 600 (emphasis added). The Court of Appeals cited *Alim* for the test for standing under the UDJA, not the correct pleading standard or the "hypothetical facts" standard.

In fact, it appears that Petitioners argument regarding conflict with *Diversified Industries* actually applies to the *Alim* decision, and not this decision. But Petitioners, some of whom were counsel of record in *Alim*, elected not to petition for discretionary review in that case.

Second, Petitioners have not identified an actual conflict between the cited cases. Petitioners appear to disagree with this Courts holding in

In Marriage of Buecking, 179 Wn.2d 438, 447, 316 P.3d 999 (2013), which noted that "Washington courts have been inconsistent in their understanding and application of jurisdiction." Petitioners would have the Court of Appeals interpret *Diversified Industries's* use of the term "jurisdiction" in direct conflict with the recent guidance provided in *Buecking*. In fact, "jurisdiction" in *Diversified Industries* does not mean subject matter jurisdiction and there is no conflict between *Diversified Industries, Buecking*, or any of the other cited decision.

Third, this case is inappropriate to apply "the issue of substantial public interest" provision of RAP 13.4(b)(4). This issue would not alter the result of the case and there is no actual conflict in the case law. Last, Petitioners have no identified an emergent situation which requires this Court to reach out and solve the issue now. To the extent Petitioners identify any legitimate concerns regarding the UDJA, other cases will provide a better vehicle for review.

Review should be denied.

B. The Court of Appeals Correctly Applied the "Public Interest Exception" to the Diversified Industries Test for Standing as an Alternative Holding After Concluding That Respondents Actually Have Standing

This issue is not appropriate for review because Petitioners have not identified any actual conflict between the Court of Appeals decision and other precedent. Petitioners merely allege "confusion" and multiple tests in order to determine when to apply the judicially-created exception. *See* RAP 13.4(b)(1)–(2).

This case is also an inappropriate because the "public interest exception" holding was **in the alternative** to the Court of Appeals other conclusion, which was that Respondents actually have standing to challenge the Access Provision. As explained above, the Court of Appeals did not apply the Rule 12(b)(6) "hypothetical facts" standard to reach that conclusion, and Petitioners have not identified the Court of Appeals' actual holding as an error or issue for review. Thus, even if Petitioners were correct regarding the need for this Court to provide guidance on the test for the public interest exception, review of this case would not change its result and would be entirely **advisory**.

Review should be denied.

C. The Court of Appeals Correctly Held that RCW 9.41.290 Preempts Local Regulation of Firearms

Review should be denied over the issue of the scope of the preemption statute for two reasons. First, Petitioners have not actually identified any conflict with a decision of this Court or a published decision of the Court of Appeals. Second, this case is inappropriate for review under "the issue of substantial public interest" provision of RAP 13.4(b)(4) because Petitioners fail to provide any reason why the Court of Appeals was incorrect when it rejected all of Petitioners' arguments in the decision below.

First, Petitioners provide several arguments regarding "ambiguity" and suggests that the Court of Appeals departed from this Court's analysis in *Watson v. City of Seattle*, 189 Wn.2d 149, 401 P.3d 1 (2017), before eventually arguing that the Court of Appeals decision conflicts with *Kitsap County v. Kitsap Rifle & Revolver Club*, 1 Wn. App. 2d 393, 405 P.3d 1026 (2017). But the Court of Appeals created no conflict with either decision.

Regarding *Watson*, the Court of Appeals stated:

> In *Watson*, the Supreme Court concluded that RCW 9.41.290 did not preempt a Seattle ordinance imposing a tax on firearms and ammunition sold within the city limits. But the basis for its holding was that the ordinance was a tax and not a "regulation" at all. *Watson*, 189 Wn.2d at 172. The court rejected the challengers' preemption argument because RCW 9.41.290 only preempted "regulations," and not taxation. Id. In this case, the City does not argue, as the City of Seattle in *Watson*, that the ordinance is not a firearm regulation.

Bass, 481 P.3d at 603.

Regarding *Kitsap County*, the Court of Appeals acknowledged Petitioners' argument but pointed out that the ordinance at issue in that case was a business permit regulation, and did not directly regulate the general public's use of firearms. In the key passage, the Court of Appeals stated:

> *Kitsap County* is distinguishable because the local ordinances at issue are so different. The Edmond Ordinance, unlike Kitsap County's shooting range permit requirement, **directly regulates the manner in which gun owners possess, store, and allow others to access their firearms**. It is not regulating a business's activities, like the county

> ordinance does. . . . The Ordinance is therefore a "firearm regulation" within the meaning of RCW 9.41.290.

Bass, 481 P.3d at 604 (emphasis added). *Kitsap County* is easily distinguishable, and Petitioners cannot point to any actual conflict to justify this Court's review.

Second, this case does not warrant review under RAP 13.4(b)(4) for several reasons, not least of which is that the statutory text is very broad and no dispute that the Ordinance is a regulation. While Petitioners may prefer it otherwise, review of the Court of Appeals decision will not disturb the State's preemption of the "entire field" of firearms regulation.

Review should be denied.

DATED this 23rd day of April, 2021.

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CERTIFICATE OF SERVICE

The undersigned certifies as follows:

1. I am employed at Corr Cronin LLP, attorneys for Respondents herein.

2. On April 23, 2021, I caused a true and correct copy of the foregoing document to be served on the following parties in the manner indicated below:

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

DATED: April 23, 2021, at Seattle, Washington.

s/ Melinda Sullivan
Melinda Sullivan

CORR CRONIN LLP

April 23, 2021 - 4:48 PM

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