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NO. 65123-4

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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CITY OF SEATTLE, MICHAEL MCGINN, SEATTLE DEPARTMENT  
OF PARKS AND RECREATION, and TIMOTHY A. GALLAGHER,

Appellants,

v.

WINNIE CHAN, ROBERT KENNAR, RAYMOND CARTER, GRAY  
PETERSON, GARY G. GOEDECKE, THE SECOND AMENDMENT  
FOUNDATION, INC., CITIZENS COMMITTEE FOR THE RIGHT TO  
KEEP AND BEAR ARMS, WASHINGTON ARMS COLLECTORS,  
INC., and NATIONAL RIFLE ASSOCIATION OF AMERICA, INC.

Respondents.

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**BRIEF OF RESPONDENTS**

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## I. INTRODUCTION

In 1983, the state of Washington enacted a statutory scheme that comprehensively and preemptively regulates all aspects of firearm possession in the state of Washington. RCW 9.41.010-9.41.810. This firearms statute includes a provision entitled “State Preemption.” RCW 9.41.290. That provision states in no uncertain terms that the Washington Legislature “fully occupies and preempts the entire field of firearms regulation within the boundaries of the state.” RCW 9.41.290 (“Preemption Clause”). To avoid the dangers and unfairness inherent in a patchwork quilt of conflicting local regulations, the state preemption provision warned that “[l]ocal 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with, more restrictive than, or exceed the requirements of state law shall not be enacted and are preempted and repealed.” *Id.*

Despite the undeniable fact that this statutory scheme grants the legislature the exclusive authority to regulate firearms in Washington, appellants City of Seattle, Mayor Mike McGinn,<sup>1</sup> Seattle Department of Parks and Recreation, and Superintendent Timothy Gallagher (collectively, “the City”) enacted a firearms ban in certain City parks and

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<sup>1</sup> As originally filed in October 2009, this lawsuit named then-Mayor Gregory Nickels as one of the defendants. Since then, Mayor Nickels has left office and been replaced by Mayor Mike McGinn. The parties have therefore substituted Mayor McGinn for Mayor Nickels.

recreation facilities that was far more restrictive than the regulatory scheme found in RCW 9.41. Worse, the City knew to a certainty that this ban violated the law. Indeed, in a May 2006 letter to Speaker of the House Frank Chopp, then-Mayor Greg Nickels admitted that only the legislature had the power to regulate firearms, stating:

We cannot accomplish anything without your personal leadership in Olympia. State law preempts any and all local regulations related to firearms. Our hands are tied at the local level and we are unable to adopt any local laws to protect our residents from gun crime.

CP 298.

Attorney General Rob McKenna reinforced this message in 2008 in response to a letter from state legislators that asked “Does a city in Washington have the authority to enact a local law that prohibits possession of firearms on city property or in city-owned facilities?” CP

301. Attorney General McKenna responded unequivocally:

The answer to your question is no. RCW 9.41.290 “fully occupies and preempts the entire field of firearms regulation” and preempts a city’s authority to adopt firearms law or regulations of application to the general public, unless specifically authorized by state law. Accordingly, RCW 9.41.290 preempts a city’s authority to enact local laws that prohibit possession of firearms on city property or in city-owned facilities.

*Id.* McKenna went on to state that a city cannot regulate firearm possession under the guise of property ownership because “[l]arge parts of city property are generally open to the public.” *Id.* at 304.

Notwithstanding these clear and unmistakable warnings, in 2009 the City enacted and enforced a firearms ban (which carried a criminal penalty) that violated the rights of ordinary Washington citizens like plaintiffs Winnie Chan, Robert Kennar, Raymond Carter, Gray Peterson, and Gary Goedecke (collectively, “Plaintiffs”). It did so in direct contravention of an express preemption statute, a reasoned Opinion from the Attorney General, and vigorous public opposition. Accordingly, the trial court granted summary judgment to the individual Plaintiffs, declared the City’s firearms ban to be null and void, permanently enjoined the City from enforcing the ban, and ordered the City to remove all signage posted pursuant to the ban. CP 271-273.

Now, on appeal, the City tries to distract this Court with policy arguments better left for the legislature, a misinterpretation of relevant case law, and a proposal for the construction of a statute which ignores legislative history and which, if accepted, would render that statute completely meaningless. The City’s desire to ban firearms from parks and recreation facilities requires a change in legislation – not a judicially-created path around express statutory preemption – and as such its desire

to institute a firearms ban on parks property should have been directed to the legislature in the first instance. Indeed, Mayor Nickels recognized this as early as 2006. The City's appeal is without merit, and the trial court's ruling should be affirmed.

## II. STATEMENT OF THE ISSUES

**Issue No. 1:** Did the trial court properly grant declaratory relief in Plaintiffs' favor and declare the City's Firearms Rule null and void where the Rule denied Plaintiffs, members of the public and holders of lawful Washington Concealed Pistol Licenses, access to public parks while possessing a lawful firearm and carried a criminal penalty in direct violation of the express preemption language in RCW 9.41.290?

**Issue No. 2:** Did the trial court properly grant injunctive relief in Plaintiffs' favor and enjoin the City from enforcing its Firearms Rule where Plaintiffs had a clear statutory right to carry their firearms anywhere not expressly prohibited by the state legislature, a well-grounded fear of immediate invasion of that right, and had either been injured or would be injured by the Firearms Rule?

### **III. STATEMENT OF THE CASE**

- A. In 2009, the City enacted a Firearms Rule that conflicted with and was far more restrictive than state law.**

In Washington, adults have the statutory right to carry a concealed firearm in most public locations – including city parks – if they have a valid Concealed Pistol License. RCW 9.41.010-9.41.810, 70.108.150. Washington law also permits adults to openly carry a holstered firearm in any place where it is otherwise legal to possess a firearm if such carrying is done peacefully. RCW 9.41.270. Nevertheless, in June 2008, Seattle Mayor Greg Nickels issued Executive Order 07-08 (titled “Gun Safety at City Facilities”), directing all City departments to conduct an inventory of present policies, rules, and leases to determine the extent to which they could prohibit firearms on City property and to implement plans to make such changes. CP 291-92.

Shortly after Mayor Nickles issued this directive, two Washington legislators asked the Attorney General of Washington: “Does a city in Washington have the authority to enact a local law that prohibits possession of firearms on city property or in city-owned facilities?” CP 301. Attorney General Rob McKenna responded:

The answer to your question is no. RCW 9.41.290 “fully occupies and preempts the entire field of firearms regulation” and preempts a city’s authority to adopt

firearms laws or regulation of application to the general public, unless specifically authorized by state law. Accordingly, RCW 9.41.290 preempts a city's authority to enact local laws that prohibit possession of firearms on city property or in city-owned facilities.

*Id.* In reaching this conclusion, McKenna relied on the breadth of the statute's plain language, the statute's history, and the distinction between the existing case law and the specific question presented. *Id.* at 301-11.

Ignoring these clear directives, Seattle's Parks and Recreation Department issued a rule on October 14, 2009 that completely contradicted the state regulatory scheme. The City's firearms rule prohibited citizens from possessing a lawful firearm on city-owned property where "children and youth are likely to be present":

The Department, in its proprietary capacity as owner or manager of Department facilities, does not permit the carrying of concealed firearms or the display of firearms, except by law enforcement officers and on-duty security officers, at Parks Department facilities at which: 1) children and youth are likely to be present and, 2) appropriate signage has been posted to communicate to the public that firearms are not permitted at the facility.

CP 288. This rule, known as the "Firearms Rule," went on to designate an extensive list of Parks Department facilities as facilities at which children and youth were likely to be present. *Id.* Those facilities were:

- 5.1.1 Playgrounds and Children's play areas;
- 5.1.2 Sports Fields, Sports Courts and other sports facilities;
- 5.1.3 Swimming and Wading Pools;

- 5.1.4 Spray Parks (Water Play Areas);
- 5.1.5 Teen Centers;
- 5.1.6 Community Centers;
- 5.1.7 Environmental Learning Centers;
- 5.1.8 Small craft centers;
- 5.1.9 Performing Arts Centers;
- 5.1.10 Tennis Centers;
- 5.1.11 Skateboard Parks;
- 5.1.12 Golf Courses; and,
- 5.1.13 Swim beaches.

*Id.* At these facilities, the Parks Department Superintendent was entitled to post “appropriate signage indicating to the public that firearms are not permitted at that facility.” *Id.* The Rule would become applicable to a particular Parks Department facility once signage had been posted at that facility. *Id.*

The Firearms Rule authorized a police officer or other authorized City employee to order a person to leave a Parks Department facility even if that person had a valid Concealed Pistol License and was permitted by state law to carry a concealed pistol. CP 289. Refusal to leave could subject a violator to citation or arrest for criminal trespass. *Id.*

In conjunction with the enactment of its new Firearms Rule, the City also issued a Press Release announcing that signs would be posted at approximately 530 designated facilities by December 1, 2009. *Id.* at 294.

**B. The City enforced the Firearms Rule against Washington citizens even though the Rule violated state law.**

Plaintiffs all possess lawful and valid Concealed Pistol Licenses.<sup>2</sup>

Because they are properly licensed, state law entitles them to carry

concealed weapons to City parks and other designated facilities.

Nevertheless, the City enforced the Firearms Rule in a manner that denied

the Plaintiffs their right to carry concealed weapons in places like City

parks and recreation facilities.

Plaintiff Winnie Chan. Ms. Chan is a parole and probation officer for the Washington Department of Corrections who carries a personal firearm when she is off-duty in part because of the likelihood that she will encounter people that she has apprehended in her line of work who may wish to cause her harm. CP 53-54. Ms. Chan enjoys recreating at Lincoln Park, Discovery Park, the Alki Beach area, and the Hiawatha Community Center. *Id.* at 54. However, in December 2009, City officials asked Ms. Chan and plaintiff Robert Kennar to leave the Hiawatha Community Center because they possessed otherwise lawful firearms, even though no signage had been posted. *Id.*

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<sup>2</sup> See CP 48, 57, 65-66, 73, 82-83 (copies of individual plaintiffs' Concealed Pistol Licenses).

Plaintiff Robert Kennar. Mr. Kennar is also an armed parole and probation officer for the Washington Department of Corrections. CP 69. When Mr. Kennar is off-duty, he always carries his personal firearm when he is lawfully permitted to do so because he is legitimately concerned about being threatened by people that he has encountered through his line of work. *Id.* at 70. Mr. Kennar frequently visited Lincoln Park, the Alki Beach area, the Green Lake area, Volunteer Park, Discovery Park, and Gas Works Park until the Firearms Rule was enacted, at which point he ceased visiting those facilities. *Id.* at 71. In December 2009, he was asked to leave the Hiawatha Community Center because he was carrying an otherwise lawful firearm. *Id.*

Plaintiff Raymond Carter. Mr. Carter routinely carries a firearm when he is lawfully permitted to do so because he strongly believes that as an openly gay man, he is susceptible to becoming a victim of a hate crime but, because of health issues, he does not feel that he is physically capable of running away. CP 45. Before the Firearms Rule's enactment, Mr. Carter regularly walked in Lincoln Park, the Alki Beach area, and Volunteer Park, and he twice visited the High Point Community Center for public meetings. *Id.* He ceased visiting those facilities after the Rule was enacted, however. *Id.* In November 2009, Mr. Carter was instructed by a

City Employee that he had to leave the Alki Community Center because he was carrying a firearm. *Id.*

Gray Peterson. Mr. Peterson is a gay man who, like Mr. Carter, always carries a firearm when he is lawfully permitted to do so in order to protect himself from hate crimes. CP 63. Mr. Peterson visited Volunteer Park, Cal Anderson Park, and the Green Lake area with his domestic partner, but stopped when the Firearms Rule went into effect. *Id.*

Gary Goedecke. Mr. Goedecke owns a 35 year-old business at Pike Place Market in downtown Seattle. CP 78. Mr. Goedecke always carries a firearm when he is lawfully permitted to do so, particularly when he is at his place of business due to the level of dangerous criminal activity in downtown Seattle. *Id.* at 79. Pike Place Market is directly adjacent to Victor Steinbrueck Park, which Mr. Goedecke passes through regularly. *Id.* In December 2009, a Seattle Police officer told Mr. Goedecke that due to the new Firearms Rule, Mr. Goedecke could not cross the street into Victor Steinbrueck Park because he was carrying an otherwise lawful firearm. *Id.* at 79-80.

**C. The King County Superior Court declared the Firearms Rule null and void and ordered the immediate removal of the firearm-banning signage.**

In October 2009, Plaintiffs filed a lawsuit against the City, seeking a declaration that the Firearms Rule was null and void under the Preemption Clause and ordering the City to remove all signs posted pursuant to the Rule. CP 1-12. On February 12, 2010, the Honorable Catherine Shaffer of the King County Superior Court heard oral argument, granted Plaintiffs' motion for summary judgment, and issued the relief requested. *Id.* at 271-73.

**IV. ARGUMENT**

**A. Standard of Review**

In reviewing a summary judgment ruling, this Court conducts the same inquiry as the trial court and reviews the order de novo. *Adams v. Thurston County*, 70 Wn. App. 471, 474, 855 P.2d 284 (1993). Questions of statutory interpretation are reviewed de novo, as are injunctions granted in summary judgment. *Parkland Light & Water Co. v. Tacoma-Pierce County Bd. of Health*, 151 Wn.2d 428, 432, 90 P.3d 37 (2004) (standard of review for questions of statutory interpretation is de novo); *Hoggatt v. Flores*, 152 Wn. App. 862, 868, 218 P.3d 244 (2009) (standard of review for injunctions granted in summary judgment is de novo). Summary judgment is proper when, considering the evidence in a light favorable to

the nonmoving party, there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. *Parkland Light & Water Co.*, 151 Wn.2d at 432. This Court may affirm the trial court's ruling on any grounds supported by the record. *Reece v. Good Samaritan Hosp.*, 90 Wn. App. 574, 578, 953 P.2d 117 (1998); *Rounds v. Nellcor Puritan Bennett, Inc.*, 147 Wn. App. 155, 162, 194 P.3d 274 (2008).

**B. RCW 9.41.290 preempts the City's Firearms Rule.**

The possession of a firearm is a clearly protected right under the United States and Washington Constitutions. U.S. CONST. amend. II; *District of Columbia v. Heller*, 554 U.S. 570, 128 S.Ct. 2783, 2797 (2008); WASH. CONST. art. I, § 24. In furtherance of this policy, the Washington legislature has created a comprehensive statutory scheme which aims to protect the citizen's right to bear arms while simultaneously protecting the public's safety from firearm-related dangers. *See* RCW 9.41.010-9.41.810, 70.108.150. Under this statutory scheme, an adult who meets certain criteria may obtain a Concealed Pistol License which entitles him/her to carry a concealed firearm in public locations with limited exceptions such as jails, courtrooms, public mental health facilities, bars, airports, schools, and outdoor music festivals. *Id.* In addition, persons may openly carry lawful firearms in places where firearm possession is

otherwise legal if they do so in a manner that does not manifest an intent to intimidate or warrant alarm. RCW 9.41.270.

In addressing the interests of firearm possession and public safety, the Washington legislature made it abundantly clear that the authority to regulate firearms rests exclusively with the state:

The state of Washington hereby **fully occupies and preempts the entire field of firearms regulation within the boundaries of the state**, including the . . . possession . . . of firearms, or any other element relating to firearms or parts thereof[.] 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. [. . .] 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 [. . .].

RCW 9.41.290 (“Preemption Clause”) (emphasis added).<sup>3</sup> This Preemption Clause “was enacted 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” and aims to “creat[e] statewide uniformity of firearms regulation of the general public.” *Cherry v. Mun. of Metro. Seattle*, 116 Wn.2d 794, 801-02, 808

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<sup>3</sup> While the Preemption Clause provides that municipalities may regulate firearms to the extent specifically authorized by state law, no state law allows a municipality to ban the possession of otherwise lawfully possessed firearms from city parks and recreation property during public use of that property.

P.2d 746 (1991); *see also Rabon v. Seattle*, 135 Wn.2d 278, 289, 957 P.2d 621 (1998) (“Preemption may be found where there is express legislative intent to preempt the field or such intent appears by necessary implication”); *Shoreline v. Club for Free Speech*, 109 Wn. App. 696, 703, 36 P.3d 1058 (2001) (“when statutory language is clear and unequivocal, courts must assume the legislature meant exactly what it said and apply the statute as written”) (internal quotation omitted).

Because the state of Washington has preempted the field of firearms regulation, a municipality may not regulate the lawful possession of firearms on its property when that property is being used by the general public for a public purpose. *Pac. Northwest Shooting Park Ass’n v. City of Sequim*, 158 Wn.2d 342, 357, 144 P.3d 276 (2006). The City is well aware of the Preemption Clause and the limits it imposes on local actions to regulate firearms. In May 2006, for instance, then-Mayor Nickels wrote a letter to Speaker of the House Frank Chopp in which he urged Representative Chopp to work toward adopting reasonable gun regulations. CP 297-99. In that letter, Mayor Nickels discussed the problem of gun violence in Seattle, then admitted:

We cannot accomplish anything without your personal leadership in Olympia. State law preempts any and all local regulations related to firearms. Our hands are tied at the local level and we are unable to adopt any local laws to protect our residents from gun crime.

*Id.* at 298. Similarly, in a July 2009 e-mail to the Alki Community Counsel, Seattle City Councilmember Richard McIver stated, “While I would support a gun ban in city parks, I think you really need to direct your lobbying to members of the State Legislature who do have the power to address this issue.” CP 331.

Indeed, as stated above, Attorney General McKenna unequivocally reinforced this conclusion in an Opinion issued shortly after Mayor Nickels directed all Seattle departments to assess and implement plans to prohibit firearms on City property in 2008. *See* CP 291-92, 301-11. In responding to the question, “Does a city in Washington have the authority to enact a local law that prohibits possession of firearms on city property or in city-owned facilities?”, McKenna concluded that RCW 9.41.290 “preempts a city’s authority to enact local laws that prohibit possession of firearms on city property or in city-owned facilities.” *Id.* at 301. He then went on to state that a city cannot regulate firearm possession under the guise of property ownership because “[l]arge parts of city property are generally open to the public.”<sup>4</sup> *Id.* at 304.

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<sup>4</sup> The City has failed to mention the Attorney General’s Opinion in its Opening Brief. In doing so, it ignores the rule that Attorney General Opinions are persuasive and entitled to great weight by this Court. *See, e.g., Branson v. Port of Seattle*, 152 Wn.2d 862, 884-85, 101 P.3d 67 (2004); *Thurston County v.*

The City's Firearms Rule unquestionably violates state law. The ability to regulate the possession of firearms in public parks and recreational facilities, during the public use of those facilities, lies within the exclusive province of the State. The statute is clear, as is the Attorney General's Opinion. The Firearms Rule is unlawful in its entirety.

- 1) The *Cherry* and *Sequim* cases cited by the City are inapplicable here and do not save the Firearms Rule.

In an attempt to bypass clear statutory preemption, the City argues that the Firearms Rule is justified by holdings set forth in *Cherry v. Mun. of Metro. Seattle*, ("Cherry"), 116 Wn.2d 794, and *Pac. N.W. Shooting Park Ass'n v. City of Sequim* ("Sequim"), 158 Wn.2d 342. But a close reading of those cases demonstrates that they in no way save the Firearms Rule.

In *Cherry*, the Washington Supreme Court was asked to decide whether the Preemption Clause foreclosed a municipal employer's right to regulate firearms possession among its employees in the workplace. The Court examined the language and history of the Preemption Clause and determined that the Preemption Clause was enacted to promote a uniform

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*City of Olympia*, 151 Wn.2d 171, 177, 86 P.3d 151 (2004); *Belas v. Kiga*, 135 Wn.2d 913, 928, 959 P.2d 1037 (1998). Here, McKenna's Opinion provides a thorough review and analysis of the law and should be carefully considered.

system of firearm regulations among counties, cities, and towns which would apply to the general public; it was not intended to interfere with an employer's right to regulate the behavior of its employees at the worksite. 116 Wn.2d at 801-02 (“[t]he preemption clause is not intended to prohibit reasonable work rules regarding possession of weapons in the public workplace”). Here, in contrast, the Firearms Rule is a rule imposed upon **any member of the general public** who chooses to visit a **public** park or recreation center. This scenario is not remotely similar to an internal workplace rule.

Nor is *Sequim* dispositive of the issues in this case. There, Supreme Court was asked to decide whether a city could impose restrictions on the sale of firearms in a city-owned convention center where it had issued a temporary permit for the use of the convention center for a gun show. First and foremost, the Court held that the city had the authority to regulate firearm possession and sales under a statute which specifically grants a city the right to regulate firearms in convention centers. *Sequim*, 158 Wn.2d at 356 (RCW 9.41.300(2)(b)(ii) expressly permits cities to enact laws and ordinances “restricting the possession of firearms in any stadium or convention center operated by a city...”).

The *Sequim* Court then went on to state – in dicta – that the Preemption Clause does not prohibit a city from imposing contractual

conditions on the sale of firearms on city property in order to protect its property interests, as long as those conditions relate to the **private use** of city property. 158 Wn.2d 342, 357. In so holding, the Court emphasized two critical caveats that render the case entirely inapposite to the present case. First, it clarified that “[a] municipality acts in a proprietary capacity when it ‘acts as the proprietor of a business enterprise for the private advantage of the [municipality]’ and it may ‘exercise its business powers in much the same way as a private individual or corporation.’” *Id.* (quoting *Hite v. Pub. Util. Dist. No. 2 of Grant County*, 112 Wn.2d 456, 459, 772 P.2d 481 (1989)). Hence, a city which issues a special use permit – for a fee – to an organization that wishes to hold a gun show (as was the case in *Sequim*) is acting in a proprietary capacity. *Id.* at 357. A city which provides **free public spaces** under the auspices of performing a public good – as is the case here – is not.

This distinction leads to the second critical caveat in *Sequim*. In concluding its analysis, the Court emphasized:

The critical point is that the conditions the city imposed related to a permit for private use of its property. They were not laws or regulations of application to the general public.

*Id.* Here, the City cannot seriously argue that the Firearms Rule was not a regulation of application to the general public. It applied across-the-board

to the **public** use of City property which is **open to the public**. It was not a contractual condition imposed in a temporary lease, as was the case in *Sequim*, and the City cannot pretend that its role as a property owner entitles it to a blanket exception to preemption.

Indeed, Attorney General McKenna reached the same conclusion. While he acknowledged that *Cherry* and *Sequim* establish that the Preemption Clause “does not preempt a city’s ability to impose conditions when it is acting in a private capacity[,]” he went on to assess the distinction between a city acting in a private capacity and instances where “a city prohibit[s] the general public from possessing firearms on city property.” CP 304. He concluded that, while private citizens are not preempted from prohibiting firearms on their own private property,

a city is not in the same position as a private citizen. Large parts of city property are generally open to the public. [. . .] For these reasons, neither *Cherry* nor *Pacific Northwest Shooting Park [Sequim]* support the view that cities may prohibit the general public from possessing firearms on city property.

*Id.*

In sum, the Firearms Rule is not an isolated workplace rule that extends only to employees while on duty, nor is it a contractual condition that the City imposed on an entity in exchange for the entity’s temporary lease of private property. Neither *Cherry* nor *Sequim* save the Firearms

Rule from the Preemption Clause's expansive reach. Moreover, if this Court were to adopt the City's overreaching interpretation of *Cherry* and *Sequim*, the Preemption Clause would be rendered meaningless, as suddenly a municipality could prohibit firearms without limit as long as it did so under the guise of property ownership. This cannot be what the legislature intended.

2) The Firearms Rule *does* include criminal penalties.

There is no dispute that, in enacting the Preemption Clause, the legislature sought to “advance uniformity in criminal firearms regulation,” and as such the Preemption Clause applies to regulations containing a penal element. *Cherry*, 116 Wn.2d at 801; *see also Sequim*, 158 Wn.2d at 357 n.6. But the Firearms Rule carries a penal element, and the City's argument to the contrary is, quite simply, wrong.

Under the Rule, if a city official asks a person possessing a firearm to leave the premises and the person refuses, that person will be charged with **criminal trespass**. CP 294, 319. In fact, City officials informed Parks Department employees that, in enforcing the Rule, **they should call the police** if the person refuses to leave. *Id.* at 321-24. Under these circumstances, the City cannot seriously argue that the Firearms Rule contains no penalties for enforcement. Indeed, the City's attempt to create an artificial distinction between “the carrying of the weapon” (which,

according to the City, carries no penalty) and “the refusal to leave the premises” (which, according to the City, does carry a penalty) is unavailing and legally inconsequential. AB at 19. The Attorney General agrees:

Allowing a city to use criminal trespass to enforce a ban on firearms allows conflicting criminal codes regulating the general public’s possession of firearms. In this respect, it makes little difference to a citizen who is subjected to conflicting criminal codes whether he or she is being prosecuted for the gross misdemeanor of first degree trespass, or for the crime of possession of a firearm.

CP at 306.<sup>5</sup>

- 3) The Preemption Clause does not exclude “rules” or “policies” from its reach.

The City’s argument that the Firearms Rule is not preempted because the Preemption Clause applies only to “laws and ordinances” rather than “rules” or “policies” has been rejected both by the Supreme

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<sup>5</sup> Comparing the present case to *Estes v. Vashon Maury Island Fire Prot. Dist. No. 13*, No. 05-2-02732-1 KNT (King County Super. Ct. Mar. 9, 2005) is instructive on this point. That case involved a challenge to a fire district’s policy prohibiting possession of firearms by employees and visitors on district property. Relying on *Cherry*, the defendants argued that the policy was not preempted by RCW 9.41.290, and the trial court agreed. CP 178, 184-85; *see also Estes v. Vashon Maury Island Fire Prot. Dist. No. 13*, 2005 Wash. App. LEXIS 2575 at \*6 (Wash. Ct. App. Oct. 3, 2005), 129 Wn. App. 1042 (2005) (affirming trial court on appeal and stating “[b]ecause the fire district policy here fall does not fall within the scope of the criminal firearms regulations that the *Cherry* Court viewed as governed by RCW 9.41.290, we reject *Estes*’ claim of statutory preemption.”). The rule in *Estes* contained no penalty whatsoever, much less a penalty akin to the criminal trespass sanction in the Firearms Rule. CP 336. The *Estes* case is therefore inapplicable here.

Court and by Attorney General McKenna. In *Sequim*, the city argued that preemption applied only to formal laws and ordinances, but the Court declined to so hold and decided the case on alternate grounds. 158 Wn.2d at 353-57. In *Cherry*, the city invited the Court to hold only that formal laws and ordinances were preempted, but the Court declined and instead explained that the “laws and ordinances” language refers to “laws of application to the general public, not internal rules for employee conduct.”<sup>6</sup> 116 Wn.2d at 800-01. And Attorney General McKenna recognized that

There are different ways in which a city might take action to prohibit firearms on city property. One would be for the city legislative authority to enact an ordinance imposing the prohibition. Another would be for a city official to impose the prohibition, if he or she were authorized by city law to impose conditions on access to city property. **In our view, the answer to this question does not turn on the manner in which the prohibition might be imposed.**

CP 305 n.2 (emphasis added).

Indeed, the first sentence of the Preemption Clause is dispositive: “The state of Washington hereby fully occupies and preempts the entire field of firearms regulation within the boundaries of the state[.]” RCW

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<sup>6</sup> *Cherry* and *Sequim* refer to the Preemption Clause as pertaining to “criminal firearms regulation[.]” See 116 Wn.2d at 801; 158 Wn.2d at 356. “Regulation” encompasses any governmental attempt to control behavior, regardless of whether that attempt appears by way of a statute, ordinance, rule, or policy.

9.41.290. This unequivocal expression of preemption applies to “the **entire field** of firearms regulation[,]” not just laws and ordinances. *Id.* (emphasis added). The second sentence, on which the City relies, enables municipalities to enact a very narrow range of firearms regulation **despite** state preemption – it does not, conversely, reduce the scope of the state’s preemption by allowing municipalities to adopt rules or policies.

If this Court were to read the Preemption Clause as the City urges, it would permit a municipality to regulate firearms to its heart’s content as long as it did so under the guise of a “rule” or “policy.” This cannot be what the legislature intended, as such an interpretation would render the Clause’s first sentence completely meaningless. *See City of Seattle v. Winebrenner*, 167 Wn.2d 451, 464, 219 P.3d 686 (2009) (a court cannot interpret a statute in such a way that would render portions of its language meaningless). In fact, the Clause’s history makes abundantly clear the legislature’s determination to keep the universe of firearms regulation within its exclusive reach. The legislature first attempted to preempt firearms regulation in 1983. *See* Laws of 1983, ch. 232, § 12. Because the legislature did not explicitly express its intent to preempt the entire field of firearms regulation, the statute was deemed as preempting only inconsistent local firearm laws. *See id.*; *Second Amendment Found. v. City of Renton*, 35 Wn. App. 583, 588 n.3, 668 P.2d 596 (1983). To solve this problem, the legislature amended

the statute in 1985, and again in 1994, adding the words “fully occupies and preempts the entire field[.]” *See* Laws of 1985, ch. 428, § 1; Laws of 1994, 1st Sp. Sess., ch. 7, § 428. Both the 1985 and 1994 legislation followed court decisions limiting the preemptive effect of RCW 9.41.290 and 9.41.300. In other words, when courts limited the Clause’s preemptive reach, the legislature responded by amending the statute with stronger preemption language. To interpret the Preemption Clause as the City now urges would be to completely ignore clear legislative directives to the contrary.

Nor should this Court be distracted by the City’s citation to other preemption statutes. AB at 26-27. Those statutes do not contain pronouncements of state preemption nearly as broad and sweeping as the Preemption Clause at issue here. Moreover, language used in one statute has no bearing on the interpretation of language used in unrelated statutes. *See, e.g., HomeStreet, Inc. v. Dep’t of Revenue*, 166 Wn.2d 444, 454, 210 P.3d 297 (2009); *Int’l Ass’n of Fire Fighters v. City of Everett*, 146 Wn.2d 29, 39-40, 42 P.3d 1265 (2002). In any event, the statutes cited by the City involve areas of law heavily regulated by various agencies and therefore inclusion of the term “rule” was more obviously necessary. *See* RCW 9.94A.8445(1) (regarding residency restrictions for sex offenders and referring in part to “local agencies”); RCW 19.190.110 (regarding the

regulation of commercial e-mail and referring in part to “local agenc[ies]”); RCW 46.61.667(5) (regarding traffic laws, specifically regulation of use of cell phones while driving); RCW 80.50.110 (regarding selection and utilization of energy facility sites and environmental impacts resulting from such sites).<sup>7</sup>

In sum, when interpreting a statute, this Court must first look to the language of the statute and resort to case law only if the meaning of the statute is ambiguous. *See Indoor Billboard/Washington, Inc. v. Integra Telecom of Washington, Inc.*, 162 Wn.2d 59, 71; 170 P.3d 10 (2007) (“If the statute is clear and unambiguous on its face, we determine its meaning only from the language of the statute and do not resort to statutory construction principles.”); *Columbia Phys. Therapy, Inc., v. Benton Franklin Orthopedic Assoc., PLLC*, 168 Wn.2d 421, 433; 228 P.3d 1260 (2009) (If the statute’s meaning is plain, the court’s “inquiry is at an end”). Where a statute expressly and unequivocally declares itself to “fully occup[y] and preempt[]

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<sup>7</sup> The City also suggests that its Firearms Rule does not fall within the “laws and ordinances” rubric because it “does not purport to be a [...] regulation of general application[.]” AB 28; *see also* AB 5 (suggesting that a rule is not preempted where it “does not apply outside of the designated City-owned facilities”). This misses the point, as there are numerous examples of ordinances that apply only to certain designated areas. *See, e.g.*, Seattle Ordinance 122267 (banning the consumption of alcohol in transit facilities); Seattle Ordinance 123369 (prohibiting nighttime disturbances in the “nighttime zone”); Seattle Ordinance 122474 (creating a “Nightclub Safety Code”); Seattle Ordinance 121313 (creating off-leash dog area at Regrade Park).

the entire field of firearms regulation within the boundaries of the state,” as the Preemption Clause does here, there can be no question that it governs over all else. *See Estate of Haselwood v. Bremerton Ice Arena, Inc.*, 166 Wn.2d 489, 498; 210 P.3d 308 (2009) (stating that “plain language does not require construction”). The City’s attempt to misconstrue existing case law and urge strained interpretations should be rejected, as it would strip a clear statute of its meaning and impact.

**C. An award of injunctive relief was appropriate and necessary to enforce declaratory relief.**

“[T]he combining of declaratory and coercive relief is proper and even common” where, as here, a municipality was engaging in abusive practices that violate state law. *See Ronken v. Bd. of County Comm’rs of Snohomish County*, 89 Wn.2d 304, 311-12, 572 P.2d 1 (1977); *see also* RCW 7.24.080. In arguing the trial court erred in granting injunctive relief, the City not only raises irrelevant and inaccurate accusations against the individual Plaintiffs, it also mischaracterizes the relevance of public policy.<sup>8</sup> *See* AB 41-42. An injunction is appropriate where a plaintiff has

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<sup>8</sup> Even if this Court decides to reverse the trial court’s decision to grant injunctive relief, the Firearms Rule is still preempted by state law and the declaratory judgment stands. This is impliedly acknowledged by the City, which states that “[t]he court retains the inherent power of contempt, so the court is not without power to enforce its ruling under the Declaratory Judgment Act.” AB at 29 n.2.

a clear legal or equitable right and a well-grounded fear of immediate invasion of that right, and where the act complained of is resulting, or will result, in actual and substantial injury. *Wash. Fed'n of State Employees v. State*, 99 Wn.2d 878, 887-88, 665 P.2d 1337 (1983). If those criteria are met, this Court must then balance “the relative interests of the parties, and **if appropriate**, the interests of the public.” *Tyler Pipe Indus. Inc. v. Department of Rev.*, 96 Wn.2d 785, 792, 638 P.2d 1213 (1982) (emphasis added).

1) Plaintiffs had a clear legal right here.

Plaintiffs have the clear legal right to carry a firearm anywhere the state has not expressly prohibited. *See* RCW 9.41.290. The City’s argument that the Preemption Clause does not confer a private right of action is nonsensical: if that were the case, no one would ever be able to challenge a firearms regulation that violates preemption. This result could not have been intended by the legislature, nor is it consistent with the case law, as the plaintiffs in *Cherry* and *Sequim* were able to raise a challenge under the preemption statute. *Cherry*, 116 Wn. 2d at 796-97; *Sequim*, 158 Wn.2d at 349.

Moreover, in challenging the trial court’s decision to grant injunctive relief, the City spends significant time claiming that the trial court “committed error by deciding scope of constitutional rights that had

not been briefed, argued, or presented for decision.” AB at 29-37.

However, the City misconstrues the court’s statements regarding constitutional rights. The court stated that its comments regarding constitutional rights were merely “background” and “not the main focus of the court’s ruling.” RP 37:22-25, 38:1-3. The court then turned to “Washington state law and the critical provisions that we are dealing with in this case” and found that “plaintiffs have clear legal rights under Washington state law...” RP 40:9-11, 50:9-11. Accordingly, the court’s holding was clearly based upon the violation of statutory rights, and any statements regarding constitutional rights were merely dicta. *State v. Potter*, 68 Wn. App. 134, 149 n.7, 842 P.2d 481 (1992) (“Statements in a case that do not relate to an issue before the court and are unnecessary to decide the case constitute obiter dictum, and need not be followed.”). In any event, this Court may affirm the trial court on any basis supported by the record. *Gates v. The Port of Kalama*, 152 Wn. App. 82, 91, 215 P.3d 983 (2009); *Swineheart v. The City of Spokane*, 145 Wn. App. 836, 844, 187 P.3d 345 (2008); *Woody v. Stapp*, 146 Wn. App. 16, 21, 189 P.3d 807 (2008).

- 2) Plaintiffs had the well-grounded fear of immediate invasion of their clear legal rights.

Plaintiffs had obvious reason to fear the immediate invasion of their statutory rights, as the City posted firearms-banning signage and most of the individual Plaintiffs had been told by parks officials that they could not enter parks premises. CP 90-93, 100, 116. Nothing more is required.

- 3) The acts complained of were resulting, or would have resulted, in actual and substantial injury to the Plaintiffs.

The City asserts that there is a genuine issue of fact as to whether Plaintiffs have not suffered an injury. AB 37. As support for this assertion, the City states that many facilities had not been posted with signs, and that areas covered by the restrictions are often limited to small sections of the parks. *Id.* at 37-38. The City further finds fault with the Plaintiffs for not calling each and every park they had previously visited to determine where they could and could not exercise their right to carry their lawful firearms. *Id.* at 38. This argument not only thoroughly mischaracterizes the Plaintiffs' testimony but also misses the point: these law-abiding citizens should be free to use **all** public recreation facilities without having to carefully tip-toe to avoid areas with posted signage.

4) The trial court was not required to consider the public's interest.

The City argues that the trial court erred by failing to consider the public's interest in enjoining the city. AB at 41-42. But the court was only required to consider the public's interest "if appropriate." *Tyler Pipe*, 96 Wn.2d at 792; *see also Mains Farm Homeowners Association v. Worthington*, 64 Wn. App. 171, 824 P.2d 495 (1992) (declining to resolve public policy issue where the record was inadequate to identify the facts and policies underlying the issue). In this case, the City's policy arguments are not appropriate and should have no bearing. Such arguments are better directed toward the state legislature, which is the only body that can control this issue. *See, e.g., Wash. State Labor Council v. Reed*, 149 Wn.2d 48, 64, 65 P.3d 1203 (2003) ("Courts do not have the authority to legislate, only to construe existing law"). Even Mayor Nickels appeared to recognize this fact when he stated to Representative Chopp that his "hands are tied" at the local level, *see* CP 105-07, and Seattle City Councilmember Richard McIver similarly acknowledged that the Alki Community Council "need[ed] to direct [its] lobbying to members of the State Legislature who do have the power to address this issue." *Id.* at 331.

Furthermore, even if this Court were required to consider the public's interest, that interest actually supports the imposition of an injunction here. The public has an interest in having these issues fully assessed and determined by the state legislature in a process that invites public input. This process would lie in stark contrast to what happened here, where the City unilaterally imposed this rule disregarding the fact that an overwhelming majority (96%) of the people commenting on proposed gun ban opposed such a ban.<sup>10</sup> CP at 327.

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<sup>10</sup> Moreover, the City overlooks the fact that none of the specific events cited in its press release as justification for the Firearms Rule would have actually been prevented by the Rule. *See* CP 294-95. First, the release states that "In June, a group of teen boys flashed a gun at several girls outside of the Alki Community Center." *Id.* at 295. Teenagers cannot lawfully possess firearms anywhere, and in any event they were not on city property, so the Rule would have had no impact. Second, the release states that "Last December, a former Franklin High School basketball player was shot in the face outside the Garfield Community Center." *Id.* Again, this was off city property and therefore the Rule would have had no effect. And last, the release states "In 2004, a woman was shot dead at a Red Cross shelter set up in the Miller Community Center on Capitol Hill," *id.*, referring to a murder by which a convicted sex offender used a stolen firearm to kill his girlfriend. Clearly, the Firearms Rule would have done nothing to prevent that tragic event.

V. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court affirm the decisions of the King County Superior Court.

Respectfully submitted this 22<sup>nd</sup> day of October, 2010.

CORR CRONIN MICHELSON  
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The undersigned, being first duly sworn upon oath, deposes and says:

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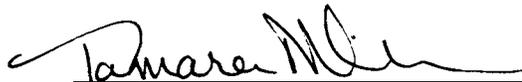
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SUBSCRIBED AND SWORN TO before me this 22<sup>nd</sup> day of October, 2010, by Christy A. Weaver.



  
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My appointment expires 08-03-13