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ORIGINAL
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NO. 74534-4

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

PHILIP WATSON, an Individual, et al.,

Appellants,

v.

CITY OF SEATTLE, a Municipality, et al.,

Respondents.

BRIEF OF AMICI CURIAE CERTAIN WASHINGTON LEGISLATORS

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I. INTRODUCTION

The Washington Legislature has repeatedly amended RCW 9.41.290 to make it clear that local governments cannot pass *any* law regarding firearms without specific authorization from the state. Thus, whether Ordinance 124833 constitutes a "regulation" or a "tax" is ultimately irrelevant—the state did not "specifically authorize" Seattle to enact the Ordinance, so it violates RCW 9.41.290. Accordingly, the Ordinance is preempted, and this Court should invalidate it.

II. ARGUMENT

The current version of RCW 9.41.290 contains the broadest preemption language possible—"fully occupies" and "entire field":

> 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with, more restrictive than, or exceed the requirements of state law shall not be enacted and are preempted and repealed, regardless of the nature of the code, charter, or home rule status of such city, town, county, or municipality.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.

As the drafting history of RCW 9.41.290 makes clear, the current version of the statute was enacted to prevent local governments from adopting *any* firearms law that the Legislature had not expressly authorized. The goal was not simply to prohibit local laws that were inconsistent with those of the state; the aim was to preclude local laws that the Legislature had not explicitly told local governments they could adopt.

Originally, the statute just barred conflicting laws:

> In 1983, the legislature enacted chapter 9.41 RCW to prevent municipalities from adopting inconsistent laws and ordinances regulating firearms. Laws of 1983, ch. 232, § 12; [Cherry v. Municipality of Metro. Seattle, 116 Wn.2d 794, 801, 808 P.2d 746 (1991)]. Former RCW 9.41.290 provides, in pertinent part:
>
>> Cities, towns, and counties may enact only those laws and ordinances relating to firearms that 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.

Chan v. City of Seattle, 164 Wn. App. 549, 552, 265 P.3d 169 (2011) (quoting Laws of 1983, ch. 232, § 12).

That same year, this Court decided Second Amendment Found. v. City of Renton, 35 Wn. App. 583, 668 P.2d 596 (1983). One of the issues in that case was whether RCW Chapter 9.41 preempted an ordinance that barred possession of firearms where alcohol was sold by the drink. The Court held that RCW Chapter 9.41—which did not yet contain

RCW 9.41.290—did not "indicate[] an intention to preempt municipal regulation in all areas of gun control," so the ordinance was not preempted. *See* Second Amendment Found., 35 Wn. App. at 588. In a footnote, the Court explained that the 1983 version of RCW 9.41.290—which had just been enacted—would not have altered its decision:

> Since oral argument in this case, the legislature added a new section to RCW ch. 9.41, to be effective July 24, 1983. Laws of 1983, ch. 232, § 12. This provision prohibits the enactment of local ordinances inconsistent with the requirements of RCW Ch. 9.41. It does not militate against the result reached here.

Second Amendment Found., 35 Wn. App. 583, 588 n.3.

A month after this Court decided Second Amendment Found., the Attorney General's office issued a formal Opinion addressing the case. *See* 1983 Op. Att'y Gen. No. 14 (September 22, 1983).[1] The Attorney General explained that under the version of RCW 9.41.290 then in effect, cities would be able to enact firearms laws, as long as they weren't inconsistent with those of the state. According to the Attorney General, if the Legislature wanted to limit local "actions" and "interference" regarding firearms—not just "regulations"—the Legislature should amend RCW 9.41.290 to add phrases like "preempt" and "occupies the field":

---

[1] The September 22, 1983 Opinion amends a July 28, 1983 Opinion regarding Laws of 1983, ch. 232, § 12.

> [P]reemption indicates a complete take-over of a field of activity to the exclusion of ***all local actions, regulations <u>or</u> interference***—and thus, if that is the intention of the legislature, the best and most effective way to manifest that intent would be to use the term "preemption" or "occupies the field" or similar terms. *See*, <u>P. Lorillard Co. v. City of Seattle</u>, 8 Wn. App. 510, 507 P.2d 1212 (1973). Neither term, however, was used in the case of § 12 of [chapter 232, Laws of 1983].

1983 Op. Att'y Gen. No. 14 (September 23, 1983) (emphasis added). Thus, the Legislature understood in 1983—based on what the then-Attorney General was telling it—that adding "preemption" and "occupies the field" to RCW 9.41.290 would preclude all "local actions" and "interference" by local governments, not just "regulations."

Two years later, the Legislature amended RCW 9.41.290, adding language even stronger than what the Attorney General had recommended—clarifying that the state was "*fully* occup[ying]" and "preempt[ing] the *entire*" field:

> 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 and are consistent with this chapter. Such local ordinances shall have the same or lesser 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.

Laws of 1985, ch. 428, § 1 (quoted in Chan, 164 Wn. App. at 552).

As this drafting history makes clear, the Legislature intended its "preemption" language to do more than just bar conflicting firearms "regulations." The intent was to preclude all "local actions . . . or interference."

That interpretation is also consistent with a more recent Opinion from the Attorney General's office:

> While RCW 9.41.290 does not preempt all city authority with regard to firearms, ***it does preempt a city's authority to adopt firearms laws or regulations*** of application to the general public, unless specifically authorized by state law.

Chan, 164 Wn. App. at 554-55 (quoting 2008 Op. Att'y Gen. No. 8, at 1) (emphasis added). The key phrase is "***or*** regulations." According to the Attorney General's office, the intent of RCW 9.41.290 *as a whole*—as opposed to just the first sentence—is to do more than just prevent conflicting regulations. Rather, RCW 9.41.290 also preempts a city's authority to adopt "firearms laws" generally.

It's true that the first sentence of RCW 9.41.290 does say "regulate," and the list that follows doesn't include "tax." But that list is not exhaustive—it's preceded by "including." *See, e.g.*, Fed. Land Bank

of St. Paul v. Bismarck Lumber Co., 314 U.S. 95, 99-100, 62 S. Ct. 1, 86 L. Ed. 65 (1941) ("[T]he term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle.").[2] Also, the Ordinance does in fact "regulat[e] . . . sales." It requires any person subject to the tax to keep certain kinds of records for a certain number of years. *See* SMC 5.55.060. It also states that records must be kept "open for inspection" by the Director of the Finance Department "at any time." *Id.* Similarly, the person's "business premises" must be "open for inspection or examination" by the Director. *Id.*

More importantly, the focus on "regulation" in the first sentence of RCW 9.41.290 ignores the balance of the statute. The second sentence states, "Cities . . . 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." RCW 9.41.290 (emphasis added). It isn't enough that an ordinance is consistent with RCW Chapter 9.41; it must also be "specifically authorized." No state law says, "Local governments may enact taxes on firearms."

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[2] This distinction likewise refutes the City's "*expressio unius*" argument. *See Brief of Respondent* at 35.

"Specifically" means, "In a specific manner; explicitly, particularly, definitely." BLACK'S LAW DICTIONARY at 1571 (4th ed. 1951). The opposite of "specifically" is "generally." WEBSTER'S NEW WORLD ROGET'S A-Z THESAURUS at 740 (1999). No one disputes that the City has the *general* authority to impose taxes. But the Legislature has given it no authority to tax firearms in particular. Thus, the Ordinance also conflicts with the second sentence of RCW 9.41.290.

Again, this interpretation is consistent with the evolution of the statute. At the time the Legislature added this second sentence to RCW 9.41.290, it was already true that cities required state law authorization (such as their police power under Article XI, section 11, or a statute authorizing them to tax) to enact laws and ordinances. Certainly, no one would have argued that a city could pass an ordinance that was *not* authorized by state law. Thus, by adding the phrase "*specifically* authorized," the Legislature must have intended, as to firearms, that local governments acquire something more than the general authority they already possessed. Otherwise, the sentence would have had no purpose. Put another way, "specifically authorized" would be superfluous unless interpreted to mean something more than the general authority to tax, regulate, etc. that cities already possessed. *See* Rivard v. State, 168 Wn.2d

775, 783, 231 P.3d 186 (2010) ("[W]e interpret a statute to give effect to all language, so as to render no portion meaningless or superfluous.").

This interpretation is also consistent with the phrase "as in RCW 9.41.300." RCW 9.41.290 didn't originally contain that phrase—the Legislature added it in 1994 after this Court's decision in City of Seattle v. Ballsmider, 71 Wn. App. 159, 856 P.2d 1113 (1993). Before Ballsmider, RCW 9.41.290 simply stated, "Cities . . . may enact only those laws and ordinances relating to firearms that are specifically authorized by state law . . . ." *See* Ballsmider, 71 Wn. App. at 161-62. Also, RCW 9.41.300 started with the phrase, "Notwithstanding RCW 9.41.290 . . . ." Ballsmider, 71 Wn. App. at 162.

Seattle had passed a rule regarding firearms that was within the scope of RCW 9.41.300, but imposed a greater penalty than under state law. The appellant in Ballsmider argued that RCW 9.41.290 preempted the rule because the rule was inconsistent with state law. The City countered that the word "notwithstanding" in RCW 9.41.300 meant the City could pass laws about subjects in that statute, even if they contradicted state law. This Court agreed:

> The definition of "notwithstanding" is "in spite of," which in turn is defined as "in defiance of, *regardless of*." . . . . Thus, the effect of "notwithstanding RCW 9.41.290" is that the preemption statute and its restrictions, including its penalty restrictions, are to be disregarded and have

> absolutely no bearing on laws enacted pursuant to RCW 9.41.300(2)(a).

Ballsmider, 71 Wn. App. at 162-63.

The next year, the Legislature deleted the phrase "notwithstanding RCW 9.41.290" from RCW 9.41.300. It also amended RCW 9.41.290, adding, "as in RCW 9.41.300" after "specifically authorized by state law": "Cities . . . may enact only those laws and ordinances relating to firearms that are specifically authorized by state law, as in RCW 9.41.300 . . . ."

The timing of these amendments makes their plain language even clearer. RCW 9.41.300 is not an exception to RCW 9.41.290. Statutes like RCW 9.41.300—ones that expressly mention "firearms"—are the sole authority by which a local government can enact a law regarding firearms. A local government can't enact a firearms law unless a statute specifically authorizes it in the kind of way that RCW 9.41.300 does.

RCW 9.41.300 expressly mentions "firearms"—and expressly states that local governments may adopt certain kinds of *firearms* laws:

> (2) Cities, towns, counties, and other municipalities may enact laws and ordinances:
>
> (a) Restricting the discharge of ***firearms*** in . . . ; and
>
> (b) Restricting the possession of ***firearms*** in . . . , except that . . . .
>
> (3)(a) Cities, towns, and counties may enact ordinances restricting the areas in their respective jurisdictions in which ***firearms*** may be sold . . . .

> (b) Cities, towns, and counties may restrict the location of a business selling ***firearms*** to . . . .

RCW 9.41.300 (emphasis added).

By contrast, RCW 35.22.280(32)—the statute that the City claims grants it authority to enact the Ordinance—doesn't even mention "firearms." That law doesn't "specifically authorize[]" a local government to act "*as in RCW 9.41.300.*" It *generally* authorizes activity, in a manner nothing like RCW 9.41.300.

Lastly, the Ordinance violates the fourth sentence of RCW 9.41.290 because Seattle's tax on gun buyers now exceeds the requirements of 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 . . . ." RCW 9.41.290. Significantly, this sentence has three subparts, and they're phrased in the disjunctive. An ordinance need not be "inconsistent" with or "more restrictive" than state law—it's enough that it requires more than what state law requires. Also, like the second sentence of RCW 9.41.290, the fourth sentence refers to "laws" and "ordinances" generally—not just laws that "regulate."

State law doesn't impose a separate tax on guns. The "requirements of state law" are to simply pay whatever sales tax applies.

Thus, the requirement that Seattle gun buyers pay an additional per-gun and per-round tax for firearms and ammunition "exceed[s] the requirements of state law."[3]

III. CONCLUSION

The drafting history of RCW 9.41.290 confirms its plain language: the Legislature intended to fully preempt the entire field of firearms laws. A local government cannot enact a firearms law unless the Legislature has "specifically" authorized it "as in RCW 9.41.300"—*i.e.*, with a law that expressly mentions firearms and expressly states that the local government can pass the firearms law. RCW 35.22.280(32) doesn't do that. Accordingly, the City was not specifically authorized to tax guns. The Ordinance is preempted and this Court should invalidate it.

DATED this 18th day of July, 2016.

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[3] Amici agree with Appellants that the Ordinance also violates the City's taxing authority. Under the City's reasoning, the ordinance in Okeson v. City of Seattle, 150 Wn.2d 540, 78 P.3d 1279 (2003), would have been acceptable because the rate it imposed alone—as opposed to the rate that resulted from the combination of the ordinance and any already-existing taxes—did not exceed six percent. The Supreme Court didn't agree with that strained interpretation. Seattle cannot circumvent RCW 35.21.710 by imposing a greater-than-.00215 rate tax using two ordinances, as opposed to one.

CERTIFICATE OF SERVICE

The undersigned certifies that on *Monday, July 18, 2016*, I caused and true and correct copy of this document to be delivered in the manner indicated to the following parties:

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