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Court of Appeals, Division II
of the State of Washington

Fort Discovery Corp., a Washington corporation;
Stephen Anderson; Steven Gilstrom; and Jay Towne,

Appellants,

v.

Jefferson County, a Washington municipality,

Respondent.

On appeal from the Superior Court of Washington
for Clallam County
Cause No. 18-2-01023-06

Appellants' Opening Brief

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I. INTRODUCTION

Appellants, who are a gun range operator and people who shoot there, bring this case to challenge the statutory and constitutional validity of a Jefferson County ordinance severely restricting shooting at gun ranges, including limiting shooting in the evening and restricting shooting by law enforcement and the military. *See* Jefferson County Ordinance No. 12-1102-18 (“Ordinance”) (CP 606-646).

This case presents an RCW 9.41.290 pre-emption issue and a constitutional issue on the “range training” right, which is the federally recognized Second Amendment right to train at a gun range. *See Ezell v. City of Chicago*, 651 F.3d 684, 695 (7th Cir. 2011) (“*Ezell I*”). The reason the Second Amendment protects the range training right is:

The right to possess firearms ... implies a corresponding right to acquire and maintain proficiency in their use; the core right wouldn't mean much without the training and practice that make it effective.

Ezell I, at 704. *See also Ezell v. of Chicago*, 846 F.3d 888, 890 (7th Cir. 2017) (“*Ezell II*”) (“the Second Amendment protects the right to learn and practice firearm use in the controlled setting of a shooting range.”).

A significant portion of the legal analysis in Appellants’ Opening Brief addresses two issues: (1) whether Wash. Const. art. I, § 24, the state constitutional guarantee of the right to bear arms, protects the range

training right, and (2) whether the proper standard of review is the mere “reasonableness” standard of the police power or, as Appellants suggest, at least intermediate scrutiny.

“Hard cases make bad law[.]” *State v. Shoemaker*, 85 Wn.2d 207, 215, 533 P.2d 123 (1975) (Utter, J., dissenting). This, of course, means that a case with egregious facts can sometimes lead a court to craft an overly forceful legal holding to alleviate the egregious facts in that particular case. Then that legal holding is later applied in normal, non-egregious situations where it does not fit.

That is what is happening here. With all due respect to this Court, and Appellants mean that sincerely, this Court’s decision in *Kitsap County v. Kitsap Rifle and Revolver Club*, 1 Wn. App. 2d 393, 405 P.3d 1026 (2017), *review denied*, 190 Wn.2d 1015 (2018) (“*Kitsap Rifle*”) is an example of “hard facts make bad law.” An understandable example, but an example nonetheless.

There were four egregious facts in *Kitsap Rifle* that led to what Appellants respectfully assert became a hard-facts-make-bad-law outcome in that case. First, the gun range operator in *Kitsap Rifle* openly defied a county ordinance and brazenly operated a range without even applying for a permit. *Id.* at 398 & 400. Second, this Court had already found in a previous case that the Kitsap gun range was a public safety nuisance and

operating illegally.¹ Third, the Kitsap gun range operator did not assign error to key findings of fact by the trial court that the gun range was unsafe, making the danger of the gun range a verity on appeal. *Id.* at 411. Finally, the gun range operator in *Kitsap Rifle* did not provide the necessary historical analysis of the Second Amendment or even attempt a *Gunwall* analysis of Wash. Const. art. I, § 24. *Kitsap Rifle*, 1 Wn. App. 2d at 415.

The case at bar is just the opposite on all four of these points. First, Appellant Fort Discovery Corp. is not operating a gun range without a permit but rather filed this declaratory judgment action to test the validity of the Ordinance before it applies for the permits to begin building a new gun range. Second, this Court has never declared Appellants' previous range a nuisance or held it was operating illegally. Third, the unchallenged record shows that Fort Discovery has a 27-year perfect safety record and the other gun range subject to the Ordinance has a perfect 56-year record, creating a combined 83-year perfect safety record. Finally, Appellants provide ample historical analysis of the Second Amendment range training right and perform a *Gunwall* analysis of Wash. Const. art. I, § 24. This

¹ See *Kitsap Rifle*, 1 Wn. App. 2d at 399-400 (discussing *Kitsap County v. Kitsap Rifle & Revolver Club*, 184 Wn. App. 252, 337 P.3d 328 (2014), *review denied*, 183 Wn.2d 1008 (2015)).

case is far different than *Kitsap Rifle* on these four important points and should be treated differently.

As will be fully analyzed below, this Court in *Kitsap Rifle* followed state Supreme Court precedent and held, “Firearms rights under [Wash. Const. art. I, § 24] ‘are subject to reasonable regulation pursuant to the State’s police power.’” *Id.* at 418 (citing *State v. Jorgenson*, 179 Wn.2d 145, 155, 312 P.3d 960 (2013)). With all due respect to the state Supreme Court, the 2013 *Jorgenson* decision is no longer valid in light of new federal jurisprudence on the Second Amendment.

The reason, in a nutshell, is that the standard of review for Wash. Const. art. I, § 24 is intermediate scrutiny, not a mere “reasonableness” police power test. This is because the Second Amendment requires intermediate scrutiny (this Court and the Supreme Court agree)² and federal constitutional rights form the “floor” beneath which state constitutional rights cannot go (the Supreme Court agrees).³ The conclusion should be that the state constitution also requires this federal-floor intermediate scrutiny, not mere “reasonableness” under the police power.

² *Jorgenson*, 179 Wn.2d at 162 (intermediate scrutiny applies to Second Amendment); *Kitsap Rifle*, 1 Wn. App. 2d at 416-417 (same) (discussed *infra* at 31-34).

³ *State v. Sieyes*, 168 Wn.2d 276, 292, 225 P.3d 995 (2010) (United States Supreme Court “application of the United States Constitution establishes a floor below which state courts cannot go to protect individual rights.”) (referring to Second Amendment) (discussed *infra* at 36).

However, neither the Supreme Court nor this Court came to this conclusion. Instead, the Supreme Court and this Court did not apply federal-floor intermediate scrutiny to the state constitution but rather the vastly weaker “reasonableness” police power standard.⁴ This case gives this Court, and perhaps ultimately the state Supreme Court, the opportunity to clarify that Wash. Const. art. I, § 24 requires at least intermediate scrutiny, not the mere “reasonableness” police power test.

This Court has the perfect evidentiary record before it upon which to clarify the proper standard of review under Wash. Const. art. I, § 24. There are no contested factual issues; the case was resolved on cross-motions for summary judgment. Respondent Jefferson County moved to strike certain evidence, the Trial Court denied that motion, and Jefferson County did not appeal. Therefore, the entire record before the Court is admissible evidence for the Court to consider. Furthermore, this Court has a free hand to decide the case because this appeal of a trial court’s grant of summary judgment is subject to de novo review.⁵

⁴ *Jorgenson*, 179 Wn.2d at 155 (“firearm rights guaranteed by the Washington Constitution are subject to reasonable regulation pursuant to the State’s police power.”) (citations omitted); *Kitsap Rifle*, 1 Wn. App. 2d at 418 (“Firearm rights under [Wash. Const. art. I, § 24] ‘are subject to reasonable regulation pursuant to the State’s police power.’”) (citing *Jorgenson*, 179 Wn.2d at 155).

⁵ See *Express Scripts, Inc. v. Dep’t of Revenue*, ___ Wn. App. 2d ___, 437 P.3d 747, 749 (2019) (“We review summary judgment orders de novo, performing the same inquiry as the superior court.”) (citation omitted).

II. ASSIGNMENTS OF ERROR AND ISSUES PRESENTED

A. Assignments of Error / Issues Presented

Appellants assign error to the Trial Court's Conclusions of Law Nos. 2, 3, 4, 6, 7, 8, 9, 10, 11, 12, 13, and 14.

Issue No. 1 (pertains to Conclusion of Law No. 3): Does a local ordinance regulating virtually every aspect of shooting at a gun range regulate the "discharge" of firearms as described in RCW 9.41.290?

Issue No. 2 (pertains to Conclusions of Law Nos. 4, 6, and 12): Does a local ordinance regulating the discharge of firearms at a gun range operated by an entity with a perfect 27-year track record of no accidents or bullets leaving the range protect against a "reasonable likelihood" of jeopardy to humans, domestic animals, or property?

Issue No. 3 (pertains to Conclusion of Law No. 11): Do restrictions on evening shooting in a local ordinance regulating the discharge of firearms at a gun range with a 27-year track record of no accidents or bullets leaving the range protect against a "reasonable likelihood" of jeopardy to humans, domestic animals, or property as described in RCW 9.41.300(2)(a)?

Issue No. 4 (pertains to Conclusion of Law No. 7): Do a local government's police powers under Wash. Const. art. XI, § 11 and RCW 36.32.120 authorize an ordinance restricting shooting at a gun range when the ordinance conflicts with a statute such as RCW 9.41.290 and a state constitutional provision such as Wash. Const. art. I, § 24?

Issue No. 5 (pertains to Conclusion of Law No. 9): Does a local ordinance governing virtually every aspect of shooting at a gun range, including prohibiting evening shooting and significantly limiting shooting by law enforcement and the military, burden the range training right recognized by federal cases to be protected by the Second Amendment?

Issue No. 6 (pertains to Conclusion of Law No. 10): If the Second Amendment applies, does the Ordinance as a whole fail intermediate scrutiny and thereby violate the Second Amendment?

Issue No. 7 (pertains to Conclusion of Law No. 13): If the Second Amendment applies, do the portions of a local ordinance prohibiting evening shooting and significantly limiting shooting by law enforcement and the military fail intermediate scrutiny and thereby violate the Second Amendment?

Issue No. 8 (pertains to Conclusion of Law No. 8): Does a local ordinance restricting shooting at a gun range burden a right protected by Wash. Const. art. I, § 24 such as the range training right?

Issue No. 9 (pertains to Conclusion of Law No. 8): If so, does Wash. Const. art. I, § 24 afford greater protections to the range training right than the Second Amendment?

Issue No. 10 (pertains to Conclusion of Law No. 14): Which standard of review – rational basis, “police power,” intermediate scrutiny, or another standard – applies to determining whether a local ordinance restricting shooting at a gun range, particularly prohibitions on evening shooting and shooting by law enforcement and the military, violates Wash. Const. art. I, § 24?

III. STATEMENT OF THE CASE

A. Parties

Appellant Fort Discovery, Corp. operated a gun range from 1990 to 2017 (“Old Range”). (CP 174 & 177.) The other Appellants shot at the Old Range and wish to shoot at a new Fort Discovery range.⁶ Jefferson County did not challenge Appellants’ standing to bring this case.

B. Safety Record of Commercial Gun Ranges in Jefferson County

Fort Discovery operated the Old Range very, very safely – in fact, it would be impossible to operate it more safely. The Old Range operated

⁶ Appellant Stephen Anderson is an employee of Fort Discovery and trained civilians, licensed armed security guards, law enforcement, and the military at the Old Range. (CP 308-311.) Appellant Steven Gilstrom was a law enforcement officer for 36 years and shot at the Old Range, including in the evenings. (CP 311-314.) Appellant Jay Towne shot at the Old Range and wishes to shoot at a new Fort Discovery range during the evening hours. (CP 304-307.)

for its entire 27-year history without a single accident requiring medical attention, and with all the berms and barriers no bullet ever left the range. (CP 178.) Fort Discovery's Old Range operated in the evenings and allowed law enforcement and the military to shoot there in the evenings. (CP 174-175.) That is, Fort Discovery's range, which operated in the evenings and included law enforcement and military clients, never had a single accident in its 27-year existence. (CP 174.) This is the operation Jefferson County sought to make "safer" with the restrictions in the Ordinance.

A second gun range in Jefferson County, the Jefferson County Sportsmen's Association ("Sportsmen's Association"), is also subject to the Ordinance. (CP 178.) The Sportsmen's Association has operated for its entire 56-year existence without a single incident. (CP 305.) Therefore, the two gun ranges in Jefferson County have a combined 83-year track record of zero safety incidents. (CP 174 & 305.) Zero in 83 years. The Ordinance is a "solution" in search of a problem. But the facts *infra* at 12 show why Jefferson County nonetheless passed it.

C. Evening Shooting

One of the issues in the case is the prohibition on evening shooting in the Ordinance. *See* Ordinance § 8.50.240(3)(n) (CP 635-636.) The Ordinance prohibits shooting between "dark" and 10:00 p.m. One

exception is for law enforcement and the military, who can shoot from “dark” to 10:00 p.m., but are limited to doing so only once per week. *Id.*

This brief uses the term “evening shooting” to describe the shooting between dark and 10:00 p.m. now outlawed by the Ordinance. Dark comes as early as 4:57 p.m. in the winter. (CP 175 & 226.) Therefore, the hours from “dark” (e.g., as early as 4:57 p.m.) to 10:00 p.m. are most accurately described as the “evening.” In the summer when the sun is out until 9:00 p.m. or later, that is most accurately described as the “evening” because if the sun is out it is not “night.” The term “night shooting” is not used because Fort Discovery does not allow shooting after 10:00 p.m. (CP 175.)⁷

Evening shooting at the Old Range sometimes occurred more than once a week. (CP 175.)⁸ There were never any safety incidents. (CP 178.) Again, the Ordinance is a “solution” in search of a problem.

⁷ Fort Discovery is not suggesting that true “night shooting” (shooting after 10:00 p.m.) be allowed and would not engage in true “night shooting” even if allowed. Fort Discovery is a business and chooses to close at 10:00 p.m. to allow its employees to go home. (CP 175.) The Old Range allowed evening shooting from dark until 10:00 p.m. (CP 175.) A separate, pre-existing Jefferson County noise ordinance, JCC § 8.70.060(18) & (19), which is not involved in this case, prohibits shooting after 10:00 p.m. (CP 175, 228-232.) Fort Discovery operated the Old Range in accordance with JCC § 8.70.060(18) & (19) and stopped all shooting at 10:00 p.m. (CP 175.)

⁸ Clients of the Old Range liked the fact that the range was available in the evening for shooting. (CP 175.) Several of Fort Discovery’s clients, mostly law enforcement and the military, specifically requested evening range time to practice low-light shooting. (CP 176.) The only other range in the county, the Sportsmen’s Association, did not and still does not offer evening shooting. (CP 176 & 305.) Fort Discovery’s Old Range was the only range in Jefferson County that offered evening shooting, and that was a significant draw to Fort Discovery’s clients. (CP 176.)

In sum, Fort Discovery's Old Range with the perfect 27-year safety record simultaneously had four attributes: (1) shooters included civilians, licensed armed security guards, law enforcement, and the military, (2) shooting occurred in the evenings until 10:00 p.m., which included dark hours depending on the time of the year, (3) more than one day per week, but (4) there never was a safety incident. (CP 174-175, 322-324.) Yet the Ordinance attempts to prevent exactly this kind of shooting in the name of "safety." (CP 323.) Although, as will be shown in the next section below, "safety" arguably was not the reason for the Ordinance.

D. Jefferson County Imposes Moratorium on Fort Discovery's Proposed New Range

The next few paragraphs lay out facts about a 2017 moratorium on new gun ranges, which ultimately led to the restrictive 2018 Ordinance at issue. The moratorium is not directly at issue in this case. However, the genesis of the moratorium directly relates to the Ordinance because Jefferson County's efforts to impose a moratorium – including relying on a claim that bullets were leaving another gun range, which Jefferson County admitted was false – show that the County will use "safety" as an excuse to shut down a gun range disliked by some politically influential County residents.

1. Political Efforts to Shut Down the Old Range

From about 2005 onward, numerous politically influential people in Jefferson County pressured the County to shut down the Old Range. (CP 176-177.) This prompted the Deputy Solicitor General at the Washington State Attorney General's Office to write a letter in 2006 to Jefferson County reminding them about state pre-emption of regulating the "discharge" of firearms. The Deputy Solicitor General wrote:

The state also preempts counties like Jefferson County from regulating firearms, including their discharge, under RCW 9.41.290, unless specifically authorized by law, as in RCW 9.41.300[.]

(CP 234.)

Jefferson County backed off. For a while. But the politically influential people kept hounding Jefferson County to shut down the range.

Then Jefferson County started years of litigation in an attempt to shut down the Old Range. *See* CP 292-294 (summarizing years of litigation). Jefferson County even enlisted neighbors to make 911 calls with noise complaints to attempt to get a search warrant to search the home of Fort Discovery's owner. (CP 293.)

2. Timeline of Moratorium

In 2017, Fort Discovery decided to move the Old Range to a new location that was even more remote and further from the politically influential opponents of the range. (CP 177.) The new location was near

Tarboo Lake, an extremely remote part of Jefferson County. *Id.* The new location is at least a mile and a half away from the nearest residence, with only a handful of dwellings in a several-mile radius. (CP 236.)

Relocating to Tarboo Lake did not stop the political efforts to stop the range. A small number of people formed a group called the Tarboo Ridge Coalition (“TRC”) to oppose Fort Discovery’s new gun range. (CP 177.) The TRC has strong political ties to the Jefferson County Board of County Commissioners (“BoCC”). *Id.*

In the summer of 2017, Fort Discovery told the Jefferson County planning department of its intention to close the Old Range and build a new one at Tarboo Lake. (CP 177.) This is when Jefferson County set the wheels in motion to adopt a moratorium to stop Fort Discovery’s proposed range, and then ultimately to adopt the Ordinance which restricts its operation and is the subject of this case. (CP 292-294.)

Fort Discovery’s proposed new range was the only gun range subject to the moratorium. (CP 178.) Therefore, the moratorium is more appropriately described as a moratorium on Fort Discovery’s proposed range.

After Fort Discovery told Jefferson County in the summer of 2017 of its plans to build the new range, the TRC and at least one member of the BoCC began working together to impose a moratorium on Fort

Discovery's gun range, as evidenced by a November 15, 2017 email. (CP 178 & 238.)⁹

This timeline is important, because the alleged justification for the moratorium (bullets flying out of a range, which never happened) occurred in this mid-November to mid-December 2017 period when the TRC was working so closely with the BoCC.

One week after the November 15, 2017 email between TRC Vice President Nancy Wyatt and BoCC Commissioner Kler, an interesting event occurred. Or, actually, did not occur.

On November 22, 2017, a realtor visiting a property near the Sportsmen's Association claimed an errant bullet left the Sportsmen's Association gun range and struck his house from about 800 to 1000 yards away (discussed *infra* at 15-16). (CP 273.) This was exactly what the TRC and BoCC needed to pass the moratorium on Fort Discovery's proposed new range, which led to the Ordinance. It came exactly at the right time – if the goal was to stop the proposed Fort Discovery range.

⁹ As the result of a public records request, Jefferson County produced an email dated November 15, 2017. (CP 178 & 238.) In it, Nancy Wyatt, the Vice President of the TRC, asked BoCC Commissioner Kathleen Kler how the "moratorium idea" for preventing new gun ranges "went over" with the BoCC. Specifically, TRC Vice President Wyatt wrote to Commissioner Kler:

Can you call [TRC president] Peter Newland back? ...

This is regarding your "sense of how the moratorium idea went over with the BOCC." Should we pursue it? Leave it alone? We want to maintain good relations with the BOCC and not push something you don't think has value. ...

Sit in the hot tub with a wine tonight!

(CP 238.)

On December 18, 2017, Jefferson County suddenly and without public comment passed the moratorium as an emergency moratorium on new gun ranges. (CP 178-179 & 240-244.) This stopped Fort Discovery's proposed new gun range in its tracks.

3. The Errant Bullet Pretext

The December 18, 2017 moratorium contained the following legislative finding about a bullet supposedly leaving the Sportsmen's Association's shooting range:

WHEREAS, bullets striking a residence on November 22, 2017 near the [Sportsmen's Association] commercial shooting facility ... called to question the safety of commercial shooting facilities
....

(CP 240.) This will be referred to as the "Errant Bullet Pretext."

However, the alleged November 22, 2017 bullet strike that led to the Errant Bullet Pretext never happened. And Jefferson County knew it.

During this mid-November to mid-December 2017 period in which the TRC and BoCC were quietly crafting the moratorium, the Jefferson County Sheriff's Office investigated the alleged bullet strike and wrote a report. (CP 271-285.) Fort Discovery did not know about the report until ten months later. (CP 179.)

The Sheriff's Office investigative report was dated December 4, 2017. (CP 272.) In it, Undersheriff Art Frank concluded that bullets, if any, did not come from a gun range. *Id.* The Undersheriff went on to

explain: “The design of the firing range, specifically the rifle range, appears to be constructed sufficiently to prevent” a bullet strike on the neighboring property. (CP 272.)

It turns out that the occupants of this property made 11 previous reports of bullet strikes, every single one of which was determined by the Sheriff’s Office to be unfounded. (CP 275.) One complaint, for example, involved a “dent on an outer wall not facing the range[.]” *Id.*

There is no question that Jefferson County knew that the Errant Bullet Pretext was false because the moratorium’s legislative finding admitted it (emphasis added):

WHEREAS, bullets striking a residence on November 22, 2017 ... called to question the safety of commercial shooting facilities, even though *it was ultimately determined the damage was likely not caused by the shooting facility operated by the Jefferson County Sportsmen’s Association[.]*

(CP 240.)

Even though Jefferson County knew the Errant Bullet Pretext was false, it nonetheless included it in the moratorium as the justification for the ban on Fort Discovery’s range.

It worked. The moratorium passed on December 18, 2017 without any notice to the public or opportunity for public comment. (CP 179.)

4. Gun Range Operating Permit Ordinance

The moratorium recited that during the one-year moratorium Jefferson County would work on drafting an ordinance governing the operation of gun ranges. (CP 241.) The result was the operating permit ordinance, which is the Ordinance at issue in this case.

a. Draft Ordinance

Throughout the first half of 2018, while the moratorium was in effect, Jefferson County staff began drafting an operating permit ordinance to regulate commercial gun ranges in Jefferson County. (CP 412.)

The draft ordinance contained the same Errant Bullet Pretext. (CP 437.) Fort Discovery did not know at this point that the Sheriff’s report showed that it was false. (CP 179.) The draft ordinance did not contain any restrictions on evening shooting or limits on shooting by law enforcement and the military – those were suddenly added at the last minute into the final ordinance. (CP 180, 213-214, 437-474.)

Jefferson County claimed in the draft ordinance that (1) the restrictions therein, which regulated almost every conceivable aspect of shooting firearms at a gun range, did not involve the “discharge” of firearms and therefore were not pre-empted by RCW 9.41.290, (2) gun ranges – no matter how many decades of their perfect safety record – inherently present a “reasonable likelihood” of jeopardy to humans,

domestic animals, and property, (3) the Errant Bullet Pretext meant that bullets randomly fly off of gun ranges with some frequency, requiring regulations to prevent all the escaping bullets (even though there never were any). (CP 437-474.)

b. Errant Bullet Pretext Debunked

In the public hearing on the draft ordinance, Fort Discovery learned for the first time of Sheriff's report about the false reports of bullet strikes and obtained a copy. (CP 179-180.) Learning that the Sheriff's investigation wholly contradicted the Errant Bullet Pretext, Fort Discovery's president, Joseph D'Amico, concluded Jefferson County was up to its old ways of disingenuously claiming "safety" as a reason to stop his gun range. *Id.* Fort Discovery submitted comments on the draft ordinance and supplemental comments on the false Errant Bullet Pretext making the point that "safety" was not what was driving Jefferson County's quest to shut down the proposed new gun range. (CP 292-294, 296-300.)

In particular, Fort Discovery's supplemental comments addressed the legal invalidity of the Errant Bullet Pretext by explaining that under RCW 9.41.300(2)(a) there must be evidence of an actual "reasonable likelihood" of jeopardy to humans, domestic animals, or property for a local ordinance to override the state pre-emption of firearms regulation.

(CP 296-300.) The comments also explained why the Errant Bullet Pretext was founded on the flawed theory that the mere “possibility” that a bullet left another gun range (shown to be false) could somehow “call into question” the safety of all commercial gun ranges and thereby serve as the legal justification for overriding the state pre-emption of firearms in RCW 9.41.290. *Id.* A mere “possibility” that “called into question” safety was not the standard, Fort Discovery’s comments argued; instead, the standard in RCW 9.41.300(2)(a) was a bone fide “reasonable likelihood.” (CP 296-300.) Fort Discovery further argued that watering down the statutory standard of “reasonable likelihood” to a mere “possibility” that “called into question” safety is not a standard at all, and renders the “reasonable likelihood” requirement of RCW 9.41.300(2)(a) meaningless. *Id.*

c. Final Version of Ordinance

On November 2, 2018, Jefferson County adopted the final version of the Ordinance. (CP 610.) Two changes from the draft to the final version are at issue in this case.

i. Evening-Shooting Restrictions Added at Last Minute

The final version of the Ordinance suddenly contained the restrictions on evening shooting. (CP 180.) It created three distinct restrictions on the discharge of firearms: (1) civilians and licensed armed security guards cannot shoot after dark; (2) law enforcement and the

military can only shoot for a total of four hours between dark and 10:00 p.m.; and (3) law enforcement and the military can only shoot once per week between dark and 10:00 p.m. (CP 336.)

ii. Errant Bullet Pretext Removed

The final version of the Ordinance dropped the Errant Bullet Pretext that was in the draft ordinance. *Cf.* CP 437 *with* CP 606-607. After jettisoning the proven-to-be-false Errant Bullet Pretext, Jefferson County did not supply a new reason why gun ranges (with 83 years of perfect safety records) were so dangerous as to require a new restrictive ordinance. (CP 606-607.)

Appellants rhetorically asked if Jefferson County had such a compelling “safety” reason for the Ordinance, why did the County remove the finding about bullets leaving a gun range and hitting neighboring properties? (CP 334.) The answer, Appellants argued, was two-fold: (1) the gun ranges, with their 83-year combined perfect track record of safety were not a “safety” problem, and (2) Jefferson County removed the Errant Bullet Pretext because Appellants had proven it false with the Sheriff’s Office report. (CP 343.)

After the passage of the Ordinance, Fort Discovery attempted to avoid litigation by asking Jefferson County one more time to repeal it and provided legal argument for the reasons why; Jefferson County refused.

(CP 289, 302-303, 735, 773). This declaratory judgment action followed.

The parties filed cross motions for summary judgment and the Trial Court ruled for Jefferson County. (CP 24-26, 34, 315-4-4, 679-707; RP at 1.)

This timely appeal followed. (CP 12-25.)

IV. ARGUMENT

A. RCW 9.41.290 Pre-Empts the Ordinance

1. The State “Fully Occupies” the Field of Gun Regulation

The Legislature could not have been clearer that the State pre-empts local governments’ attempts to regulate firearms. RCW 9.41.290 provides (emphasis added):

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. [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. . . .

The plain meaning of this statute is inescapable: the state “fully occupies and preempts the entire field of firearms regulation.” RCW 9.41.290. *See Chan v. City of Seattle*, 164 Wn. App. 549, 562, 265 P.3d 169 (2011) (applying the “plain language” of RCW 9.41.290 to find city gun ordinance pre-empted).¹⁰

¹⁰ Not only is the present language of RCW 9.41.290 clear, but the Legislature has consistently amended it to make it even more clear that the state pre-empts local

a. Specifically, RCW 9.41.290 Pre-Empts Local Regulation of the “Discharge” of Firearms

RCW 9.41.290 pre-empts a local government’s attempt to regulate the “discharge” of firearms. *Id.* (state pre-empts “the entire field of firearms regulation ... including the ... discharge ... of firearms”).

The Ordinance governs the “discharge” of firearms. The Ordinance regulates numerous aspects of shooting such as the type of firearms that may be discharged and the times of discharge. *See* Ordinance, *passim*. (CP 606-646.) *See also* Ordinance at JCC § 8.50.310(2)(g) & (h) (regulating types of firearms that may be discharged) (CP 645); JCC § 8.50.240(3)(n) (regulating the times firearms may be discharged) (CP 635-636). The plain meaning of “discharge” in the context of firearms is “shooting.” *See* CP 821-823 (citing authority and dictionary definition).

This Court in *Kitsap Rifle* held that a different Kitsap County gun range ordinance did not regulate the “discharge” of firearms. *See id.* at 406. However, the Kitsap County ordinance had two major differences with the one in this case. *See generally* CP 813-814 (analyzing differences). First, the ordinance in *Kitsap Rifle* did not restrict evening shooting, which is the heart of the case here. Second, the Kitsap County ordinance was not as onerous as the one here; the Kitsap ordinance was 14

governments’ ongoing and creative attempts to regulate firearms. *See Chan*, 164 Wn. App. at 551-3 (analyzing legislative history of RCW 9.41.290).

pages, while the Jefferson County Ordinance is 41 pages. *Cf.* CP 92-105 with 606-646. Therefore, given the differences between the Kitsap County and Jefferson County ordinances, the *Kitsap Rifle* ruling on gun ranges not involving the “discharge” of firearms does not answer that question in our case. The ordinances at issue are different.

b. The Exception for an Ordinance to Protect Against a “Reasonable Likelihood” of Harm Does Not Apply Because There Is No Such Harm Here

One relevant exception exists to the full state pre-emption of firearms. RCW 9.41.300(2) allows pre-emption to be overridden by a local government, but only in very limited circumstances. This statute allows municipalities to enact an ordinance (emphasis added):

Restricting the discharge of firearms in any portion of their respective jurisdictions where there is a *reasonable likelihood* that humans, domestic animals, or property will be jeopardized. Such laws and ordinances shall not abridge the right of the individual guaranteed by Article I, section 24 of the state Constitution to bear arms in defense of self or others[.]

RCW 9.41.300(2)(a). This will be referred to as the “Reasonable Likelihood” exception.

The standard is a “reasonable likelihood,” not a mere “possibility” that “call[s] into question” the safety of gun ranges with a combined 83-year perfect track record of safety. Jefferson County must have an actual safety basis to restrict the use of firearms and this basis must be a “reasonable likelihood,” not speculation.

**i. Absence of Legislative Finding of
“Reasonable Likelihood” of Harm**

The Ordinance is completely devoid of a specific factual legislative finding justifying the Reasonable Likelihood exception.¹¹ *See* Ordinance, *passim*. (CP 606-646.) In fact, Jefferson County originally had a legislative finding (the Errant Bullet Pretext) but removed it when Fort Discovery pointed out the falsity of that pretext. *Cf.* CP 437 *with* CP 606-607; *see also* CP 296-300. So, if a local government had a specific reason justifying a restriction on firearms but removed it because it was false, what does that tell you about the strength of its safety rationale?

The absence of an actual safety rationale in the Ordinance is consistent with the facts in the record: the 83-year safety track record of the ranges. (CP 174 & 305.) *See also* CP 272 (Undersheriff concluding “The design of the firing range, specifically the rifle range, appears to be constructed sufficiently to prevent” a bullet strike on the neighboring properties).

¹¹ Appellants are not arguing that the Ordinance needed to have the magic words “legislative finding” and then a finding about safety. Instead, Appellants argue that there was no legitimate safety rationale for the restrictions in the Ordinance – as amply illustrated by the fact that the first rationale, the Errant Bullet Pretext, was removed from the final version.

ii. The Ordinance Violates Wash. Const. art. I, § 24

There is a second requirement in RCW 9.41.300(2)(a) for a local ordinance regulating the discharge of firearms to override the pre-emption in RCW 9.41.290: not violating Wash. Const. art. I, § 24.¹²

The reasons why the Ordinance violates Wash. Const. art. I, § 24 are described *infra* at 34-39. However, it is important for the Court to remember that an RCW 9.41.300(2)(a) pre-emption analysis is a two-part test: (1) a Reasonable Likelihood justification, and (2) not violating Wash. Const. art. I, § 24. For reasons described *infra* at 36, this effectively means a Reasonable Likelihood justification must pass federal intermediate scrutiny.¹³

¹² See RCW 9.41.300(2)(a) (municipal ordinances restricting the discharge of firearms “shall not abridge the right of the individual guaranteed by Article I, section 24 of the state Constitution to bear arms in defense of self or others[.]”). It is unusual for the Legislature to emphasize in a statute that compliance with the state constitution is also required. Presumably the Legislature did so out of concern that municipalities would concoct Reasonable Likelihood reasons to restrict the right to bear arms. This Court in *Kitsap Rifle* did not analyze the Wash. Const. art. I, § 24 issue as part of the RCW 9.41.290 pre-emption issue. See 1 Wn. App. 2d at 407. Rather, this Court analyzed Wash. Const. art. I, § 24 separately (*id.* at 408) but did not explicitly state that, as statutory matter, RCW 9.41.290 also requires compliance with Wash. Const. art. I, § 24.

¹³ This is because the Second Amendment intermediate scrutiny standard is the “federal floor” of rights that must also be protected by Wash. Const. art. I, § 24 (*see infra* at 36). Therefore, because RCW 9.41.300(2)(a) incorporates Wash. Const. art. I, § 24 into the statutory standard, the statutory standard must also pass intermediate scrutiny. This can be articulated as a three-step statement: (1) RCW 9.41.300(2)(a) incorporates Wash. Const. art. I, § 24, (2) Wash. Const. art. I, § 24 must mirror the “federal floor” Second Amendment standard of protection, and (3) the Second Amendment standard is intermediate scrutiny – *ergo* RCW 9.41.300(2)(a) requires intermediate scrutiny as a statutory matter.

B. The Police Power Is Not Directly Involved in This Appeal

The police power was mentioned in the trial court proceedings, but it appears that it is not directly at issue in this appeal.¹⁴ Of course, the police power only applies when an ordinance does not conflict with a statute or state constitutional provision; the police power is not a stand-alone power. *See* CP 819-820 (Appellants’ trial court briefing on police power). It appears that neither Jefferson County nor the Trial Court claimed otherwise.¹⁵ Rather, they were stating that because they thought the Ordinance was statutorily authorized by RCW 9.41.300(2)(a) and did not violate Wash. Const. art. I, § 24 that the police power did not disallow the Ordinance. While Appellants disagree that the Ordinance is statutorily authorized by RCW 9.41.300(2)(a) and does not violate Wash. Const. art. I, § 24, Appellants acknowledge that if the Ordinance were statutorily authorized and did not violate the state constitution that it would be valid under the police power.¹⁶

¹⁴ While the police power itself is not at issue in the sense of whether the police power authorizes the Ordinance, the holding in *Kitsap Rifle* that “Firearms rights under [Wash. Const. art. I, § 24] ‘are subject to reasonable regulation pursuant to the State’s police power.’” (citing *Jorgenson*, 179 Wn.2d at 155) is at issue. *See infra* at 36. However, the issue in this case mentioning the police power is what standard of review applies to Wash. Const. art. I, § 24 – Appellants assert it is not mere “reasonableness” often associated with the police power – not whether the police power itself authorizes the Ordinance.

¹⁵ Appellants’ trial court briefing analyzed why the police power was not a stand-alone power, but this was because Appellants thought Jefferson County was arguing that; apparently the County was not.

¹⁶ Appellants assign error to the Trial Court’s Conclusion of Law No. 7 that the police power authorizes the Ordinance because, in the Trial Court’s view, the Ordinance is

C. The Ordinance Violates the Second Amendment

1. Why The Second Amendment Will Be Analyzed First

Normally a court analyzes the state constitutional right first and the federal one second.¹⁷ However, this case involves the rarely litigated range training right (the right to train on a gun range to maintain proficiency in a firearm) (discussed *infra* at 28). There are two federal Second Amendment cases on the range-training right directly addressing the issue.¹⁸ The analytical framework in the federal Second Amendment cases is helpful for laying the foundation for a subsequent analysis of Wash. Const. art. I, § 24, which must be as protective as the federal right.¹⁹ Therefore, the federal Second Amendment cases are analyzed first.

statutorily authorized and does not violate the state constitution. Appellants believe the Ordinance is not authorized by statute and violates the state constitution, and that for either of those two reasons is not authorized by the police power. Accordingly, Appellants appealed that conclusion of law.

¹⁷ “Where feasible, we resolve constitutional questions first under our own state constitution before turning to federal law.” *Jorgenson*, 179 Wn.2d at 152 (interpreting statute under Art. I, § 24 first, and then under Second Amendment).

¹⁸ They are *Ezell v. City of Chicago*, 651 F.3d 684, 695 (7th Cir. 2011) (“*Ezell I*”) and *Ezell v. of Chicago*, 846 F.3d 888 (7th Cir. 2017) (“*Ezell II*”), which are discussed extensively *infra*. There is one Washington case, *Kitsap Rifle*, 1 Wn. App. 2d 393, that addresses the Second Amendment and a gun range ordinance, but the analysis in *Ezell I* and *Ezell II* is much more in depth. The gun range operator in *Kitsap Rifle* did not undertake a historical analysis of whether the Second Amendment even applied, so it is understandable that the Court did not analyze the range training right under the Second Amendment. Therefore, the Court was forced to assume – without deciding – that the Second Amendment applied. *See id.* at 415. In contrast to the gun range operator in *Kitsap Rifle*, Appellants provide extensive historical analysis. Accordingly, with this complete historical record, this case gives the Court a chance to squarely address the applicability of the Second Amendment to the range training right.

¹⁹ *See infra* at 36 (federal “floor” of rights).

2. The Range Training Right is a Corresponding Right of the Core Right to Self-Defense Guaranteed by the Second Amendment

Core constitutional rights often include more specific corresponding rights to carry out the core right. For example, the core First Amendment right to free speech comes with a corresponding right for the media to generally publish without fear of being sued for libel.²⁰

Like the First Amendment, the core Second Amendment right has corresponding ones.²¹ While individual self-defense is the core right protected by the Second Amendment,²² the range training right is a corresponding right:

The right to possess firearms for protection implies a corresponding right to acquire and maintain proficiency in their use; the core right wouldn't mean much without the training and practice that make it effective.

Ezell I, 651 F.3d at 704. *See also Ezell II*, 846 F.3d at 890 (“the Second Amendment protects the right to learn and practice firearm use in the controlled setting of a shooting range.”).

That is, a person cannot “bear” arms if they cannot maintain proficiency in their use. This bears (no pun intended) repeating because

²⁰ *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

²¹ Courts use very similar analysis when analyze First Amendment and Second Amendment rights. *See Jackson v. City & County of San Francisco*, 746 F.3d 953, 960 (2014) (determining Second Amendment protections “bears strong analogies to the Supreme Court’s free-speech caselaw.”) (citing *Ezell I*, 651 F.3d at 702-703).

²² *Dist. of Columbia v. Heller*, 554 U.S. 570, 599 (2008); *McDonald v. City of Chicago*, 561 U.S. 742, 787 (2010).

the Second Amendment range training right comes up so rarely that it is not intuitive: The right to “bear” arms necessarily includes a right to shoot at a range to maintain proficiency in firearms. “Bearing” arms does not just mean owning them; it also means practicing with them. So restricting the right to practice with them is restricting the “bearing” of arms – and the Ordinance certainly restricts the right to practice with arms.

3. Two-Part Test for Determining Violation of the Second Amendment

This Court has adopted the Ninth Circuit’s two-part test for determining whether an enactment violates the Second Amendment. *See Kitsap Rifle*, 1 Wn. App. 2d at 414 (quoting *Silvester v. Harris*, 843 F.3d 816, 820-821 (9th Cir. 2016)). That test is:

[F]irst, the court asks whether the challenged law burdens conduct protected by the Second Amendment; and if so, the court must then apply the appropriate level of scrutiny.

Id.

a. First Step of Test: Historical Analysis of Whether Second Amendment Protects Conduct at Issue

The threshold question under the Second Amendment analysis is whether [an ordinance restricting range training] burdens the right to bear arms. In general, this question involves a historical analysis of the Second Amendment right – whether the challenged law falls outside the historical scope of the right. [*Jackson v. City & County of San Francisco*, 746 F.3d 953, 960 (9th Cir. 2014), *cert. denied*, 135 S.Ct. 2799 (2015).] When state or local laws are challenged, the scope of the right to bear arms depends on how the right was

understood when the Fourteenth Amendment was ratified.
[*McDonald v. City of Chicago*, 561 U.S. 742, 746-747 (2010).]

Kitsap Rifle, 1 Wn. App. 2d at 414-415.

The Fourteenth Amendment was ratified in 1868 so this is the relevant date for determining whether a right was protected by the Second Amendment. *McDonald*, 561 U.S. at 776.

The burden of proof is on the government to prove the activity at issue was not protected by the Second Amendment.²³ The kinds of rights not historically protected by the Second Amendment are typically the obvious ones like felons and the mentally ill possessing firearms and carrying firearms in sensitive places like government buildings.²⁴

i. In 1868 Range Training Was Not Restricted

In 1868 there were no restrictions on shooting ranges in Washington. (CP 358, 831-832). In fact, there were no shooting ranges in Washington; people just shot on their property or others'. Jefferson County, who has the burden of proof on this first part of the Second Amendment test, cannot point to anything in the record showing pre-1868

²³ *Ezell I*, 651 F.3d at 702-703 (“[I]f the government can establish that a challenged firearm law regulates activity falling outside the scope of the Second Amendment right as it was understood at the relevant historical moment – 1791 [for federal restrictions] or 1868 [for state or local restrictions] – then the analysis can stop there; the regulated activity is categorically unprotected, and the law is not subject to further Second Amendment review.”) (emphasis added).

²⁴ *Heller*, 544 U.S. at 626.

restrictions on shooting ranges in Washington. The range training right existed in 1868.

ii. The Ordinance Burdens the Range Training Right as It Existed in 1868

The Ordinance burdens range training by, among other things, restricting the times people can shoot. *See* Ordinance § 8.50.240(3)(n) (CP 635-636.) The right to shoot at a range without restrictions such as those in the Ordinance is a right protected by the Second Amendment. *See Ezell I*, 651 F.3d at 705-706 (Second Amendment implicated by restrictions on range training).²⁵

b. The Second Step: Determining the Appropriate Level of Scrutiny, Which is Intermediate Review

The second inquiry involves which level of scrutiny to apply. *Kitsap Rifle*, 1 Wn. App. 2d at 415. Rational basis review is not the standard to apply to the Second Amendment. *Id.* at 416 (citing *Heller*, 554 U.S. at 628 n. 27).²⁶ This Court adopted the Ninth Circuit “sliding scale”

²⁵ In *Kitsap Rifle*, the gun range operator did not undertake a historical analysis of the range training right. *Id.* at 415. This forced this Court to “assume without deciding that [the Kitsap ordinance] implicates the Second Amendment.” *Id.* Now, with a complete historical record, this Court can decide that the range training right was historically protected by the Second Amendment. This is especially true because the record shows so (CP 358, 831-832) and Jefferson County, who has the burden of proving otherwise (*Ezell I*, 651 F.3d at 702-703) cannot.

²⁶ While *Kitsap Rifle* correctly noted that rational basis review was not the proper standard for analyzing a Second Amendment right, *id.* at 416, the Court went on to nonetheless speak of the Kitsap ordinance passing state constitutional muster because it was “reasonable.” *Id.* at 418 (holding that Kitsap ordinance is a “reasonable regulation that does not violate article I, section 24.”) However, the federal standard – that more than rational basis review is required – is the floor beneath which an interpretation of the state constitution cannot go. *See infra* at 36.

approach. *Kitsap Rifle*, 1 Wn. App. 2d at 416 (quoting *Silvester*, 843 F.2d at 821). After applying the sliding scale approach, this Court determined that a restriction on range training was subject to intermediate scrutiny under the Second Amendment. *Kitsap Rifle*, 1 Wn. App. 2d at 417 (citing *Jorgenson*, 179 Wn.2d at 161-162).

The intermediate scrutiny test is whether the restriction is “substantially related to an important government purpose.” *Id.* at 417 (quoting *Jorgenson*, 179 Wn.2d at 162).

Appellants agree that reasonably safe gun ranges are an important government purpose. But “reasonably” safe does not mean absolutely preventing any accident of any kind; such a standard would preclude all gun ranges – and driving automobiles, operating machines, walking down streets, and every other activity of normal life.

However, the Ordinance is not substantially related to the government purpose of having reasonably safe gun ranges. The reason is simple: a 27-year perfect track record of safety, including shooting in the evening. (CP 174-175.) The Ordinance is a “solution” in search of a problem. Fort Discovery knows how to operate a perfectly safe gun range – and has a flawless decades-long record of doing so. The Ordinance is not needed. It was enacted for political reasons, not safety reasons.

Ezell I provides guidance to this Court on the issue of the lack of an articulated “safety” reason for jeopardy to humans, domestic animals, or property from Fort Discovery’s proposed range. In *Ezell I*, the City of Chicago “presented no data” about the dangers of a gun range, and “presented no evidence to establish” concerns about accidental deaths at a gun range. *Id.* at 709. *See id.* (city “produced no empirical evidence whatsoever”). Neither has Jefferson County. *Ezell I* struck down the restrictions on the gun range in that case. *Id.* at 711.

Ezell I also provides guidance on Jefferson County’s “calls into question” theory that stray bullets (which never happened) could “call into question” the safety of gun ranges. The *Ezell I* court found that the City of Chicago failed to establish the range training restrictions did not violate the Second Amendment because the city merely “hypothesized that one cause of range-related injury could be stray bullets, but this seems highly implausible” for a commercial shooting range. *Id.* at 709. Non-existent events cannot “call into question” safety that, in turn, justify the infringement of constitutional rights.

In sum, the Ordinance fails intermediate scrutiny because it is not substantially related to valid safety concerns. This Court in *Kitsap Rifle* could have concluded that the Kitsap ordinance was substantially related to safety because the gun range operator did not challenge findings of fact

about the dangerous nature of the range and, quite frankly, the range operator was not a sympathetic party because it was brazenly defying a county ordinance. So whether the Kitsap ordinance was substantially related to safety – given the unchallenged findings of fact in *Kitsap Rifle* – does not determine the outcome here. In this de novo review, with a much different set of facts in the record, it is appropriate to conclude that the Ordinance is not substantially related to a reasonable level of safety.

Hence, the Ordinance violates the Second Amendment.

D. The Ordinance Violates Wash. Const. art I, § 24

No Washington case has fully analyzed – with a *Gunwall* analysis – the range training right under Wash. Const. art. I, § 24.²⁷ Appellants present a full *Gunwall* analysis *infra* at 41-48. But first Appellants provide an analytical framework for interpreting Wash. Const. art. I, § 24.

²⁷ *Kitsap Rifle* involved the range-training right and quickly analyzed it under Wash. Const. art. I, § 24. *Id.*, 1 Wn. App. 2d at 418. However, neither party nor the Court engaged in a *Gunwall* analysis of the state constitutional provision. *See Kitsap Rifle*, 1 Wn. App. 2d at 415 (gun range operator did not “undertake ... a historical analysis regarding the regulation of shooting facilities.”). Therefore, there has never been a full *Gunwall* analysis of how Wash. Const. art. I, § 24 protects the range training right. (There have been cases applying a *Gunwall* analysis to other Wash. Const. art. I, § 24 rights but not the range training right.) This case – with its full *Gunwall* analysis, ample evidentiary record, and de novo standard of review – allows this Court to make the first ruling with a *Gunwall* analysis on how Wash. Const. art. I, § 24 protects the range training right.

1. The Right to Bear Arms is a Fundamental Right

Sieyes held that the right to bear arms in self-defense is a fundamental right. *Id.*, 168 Wn.2d at 287 & 291.²⁸ This should be kept in mind when considering how much protection should be afforded this right.

2. Differences Between State and Federal Constitutional Rights to Bear Arms

Wash. Const. art I, § 24 provides in pertinent part, “The right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired”

This differs from the text of the Second Amendment, which provides, “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” U.S. Const. amend. II.

Given these textual differences, “[T]he state and federal rights to bear arms have different contours and mandate separate interpretation.” *Jorgenson*, 179 Wn.2d at 153. But the fact that the federal constitution provides minimum protections should be examined first because it impacts the protections that must be recognized in the state constitution.

²⁸ *Sieyes* was referring to the Second Amendment, but the same is true of Wash. Const. art. I, § 24 because the Second Amendment is the “federal floor” on rights. *See id.* at 292.

3. The Federal “Floor” Establishes the Minimum Protections for a State Constitution

A different interpretation of Wash. Const. art I, § 24 does not mean the state constitution can provide weaker protections than the Second Amendment. The Second Amendment is incorporated by the Fourteenth Amendment against the states or their subdivisions to provide protection from them infringing on federal right constitutional rights. *Sieyes*, 168 Wn.2d at 291. This means the Second Amendment is a “floor” for protecting the right to bear arms. *Id.* at 292 (United States Supreme Court “application of the United States Constitution establishes a floor below which state courts cannot go to protect individual rights.”) (referring to Second Amendment).

It is important to remember what the federal floor is when it comes to the range training right: intermediate scrutiny. *Kitsap Rifle*, 1 Wn. App. 2d at 417 (Second Amendment requires intermediate scrutiny). Therefore, intermediate scrutiny is the *minimum* level of protection for the range training right under Wash. Const. art. I, § 24.

4. “Reasonableness” and the “Police Power” Are Not the Proper Standards of Review for Wash. Const. art. I, § 24

Jorgenson applied what appears to be a hybrid of rational basis and intermediate review, with some “police power” mixed in. *See id.*, 179 Wn.2d at 156 (“reasonable necessity” and “substantially related to

legitimate ends” and firearms regulations are subject to “reasonable regulation pursuant to the State’s police power.”). This holding has been repeated in at least one subsequent case to find restrictions on the right to bear arms to be valid because they were merely reasonable or were thought to be proper exercises of the police power. *See Kitsap Rifle*, 1 Wn. App. 2d at 418 (“Firearms rights under [Wash. Const. art. I, § 24] ‘are subject to reasonable regulation pursuant to the State’s police power.’”) (citing *Jorgenson*, 179 Wn.2d at 155).

If by “reasonable regulation” *Jorgenson* and *Kitsap Rifle* meant rational basis review for the range training right under Wash. Const. art. I, § 24, then that is improper. This is because under the Second Amendment the range training right is subject to intermediate scrutiny, which is a higher standard than rational basis review,²⁹ and Wash. Const. art. I, § 24 must be at least as protective as the Second Amendment, so rational basis

²⁹ Rational basis review is the lowest standard of review and merely “requires a court to uphold regulation so long as it bears a ‘rational relationship’ to a ‘legitimate governmental purpose.’” *Ezell I*, 651 F.3d at Id. at 687-8 (citation omitted). Rational basis review is not the proper standard of review under the Second Amendment because:

If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect.

Heller, 554 U.S. at 628, n. 27. The same would be true of Wash. Const. art. I, § 24: if all that was required was a rational basis, which is already required for all laws, then Wash. Const. art. I, § 24 would be superfluous and meaningless. So mere rational basis review cannot be the standard this Court applies to a right protected by the Wash. Const. art. I, § 24.

review is too weak to be the Wash. Const. art. I, § 24 standard. *See Sieyes*, 168 Wn.2d at 294-295 (“rational basis scrutiny” is “too low a standard to protect the right to bear arms.”) (citation omitted).

The reasons why the police power, standing alone, is not a proper basis to validate a local enactment restricting the range training right was fully briefed in the trial court. *See* CP 47-48, 819-820.³⁰

A probable explanation for the improper “reasonableness” and “police power” standard in *Jorgenson* is that it was decided in 2013, before the current wave of new Second Amendment jurisprudence.³¹

This Jefferson County case gives this Court, and perhaps ultimately the state Supreme Court, a chance to clarify the *Jorgensen* “reasonableness” and “police power” standard. Appellants suggest this Court should rule that – at a minimum – intermediate scrutiny is the proper standard of review for Wash. Const. art. I, § 24 and clarify that “reasonableness” and the “police power” are not.

³⁰ Of course, the police power cannot trump constitutional guarantees of the right to bear arms. *See Sieyes*, 168 Wn.2d at 294 (“In Washington the police power is subject to all the rights specified in [the state constitution’s] Declaration of Rights, including the constitutional right of the individual citizen to keep and bear arms.”)

³¹ Notably, the *Jorgenson* Court’s apparent holding that the Wash. Const. art. I, § 24 rights are subject to the police power (*id.* at 155) cited obsolete cases for this proposition from 1945, 1984, 1992, and 1996 – long before the 2008 *Heller* decision, 2010 *McDonald* decision, and the numerous post-2010 federal circuit cases. *See Ezell II*, 846 F.3d at 893 (collecting post-2010 federal circuit cases). This is why Appellants respectfully suggest this Court and ultimately the state Supreme Court need to “hit the refresh button” on their holdings from before the blossoming of the federal jurisprudence on the range training right and Second Amendment rights in general. This case is the vehicle to do so.

5. The Range Training Right Should Be Afforded More Protections Under Wash. Const. art. I, § 24 Than the Minimum of Intermediate Scrutiny

a. State Constitutions Can Be More Protective of Individual Rights than the Federal Constitution

“[S]tates of course can raise the ceiling to afford greater protections under their own constitutions.” *Sieyes*, 168 Wn.2d at 292. This is the famous “one-way ratchet” of state and federal constitutional rights: with the federal right as the floor, state constitutions can be interpreted to be more protective of rights, but cannot be interpreted to be less protective than the federal constitution – like a ratchet that only goes in one direction.³²

Wash. Const. art. I, § 24 is a one-way ratchet: it can be more protective of the range training right than the intermediate scrutiny of the Second Amendment, but not less so.

It is important to note that affording greater protections for the range training right under the state constitution will not weaken gun control laws. This case involves the important, but very rarely invoked,

³² See generally William J. Brennan Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. Rev. 535 (1986); Robert F. Utter, *Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights*, 7 U. PUGET SOUND L.Rev. 491, 499 (1984) (“Washington is one of many states that rely on their own constitutions to protect civil liberties. . . . [T]he appellate courts of a majority of the states have interpreted their state constitutions to provide greater protection for individual rights than does the United States Constitution.”).

range training right. A ruling by this Court that Wash. Const. art. I, § 24 affords greater protections of the range training right will not affect other issues such as felons or the mentally ill possessing firearms, or legalizing machine guns. Only the range training right is at issue here.

There are two reasons to afford the range training right more protection under Wash. Const. art. I, § 24 than the federal minimum. First, the range training right is so closely intertwined with the right to bear arms. Second, a *Gunwall* analysis shows the state constitution is more protective of the right to bear arms when it comes to the range training right. Both reasons are analyzed immediately below.

b. The Range Training Right Is Intertwined With the Core Wash. Const. art. I, § 24 Right to Bear Arms

The “core” right protected by Second Amendment and Wash. Const. art. I, § 24 is individual self-defense. *See Heller*, 554 U.S. at 630; *Jorgenson*, 179 Wn.2d at 153. However, Wash. Const. art. I, § 24 is more explicit about the core right to self-defense right than the federal constitution. *See Jorgenson*, 179 Wn.2d at 153 (observing that inclusion of the term “bear arms in defense of himself” in Wash. Const. art. I, § 24 means the state constitution is more protective of the individual right to self-defense than the federal constitution). Accordingly, any corresponding rights closely related to this “core” right of self-defense

should also be afforded a correspondingly high level of protection. This is where the connection between the right to self-defense and the right to train to maintain proficiency in firearms comes into play. After all:

The right to possess firearms ... implies a corresponding right to acquire and maintain proficiency in their use; the core right wouldn't mean much without the training and practice that make it effective.

Ezell I, 653 F.3d at 704.

Providing greater state constitutional protections to the right to self-defense means providing greater protections to the corresponding right to train and maintain proficiency in self-defense. A *Gunwall* analysis reinforces this conclusion.

6. *Gunwall* Analysis

To determine if the state constitution provides greater protections than the federal constitution, a court applies the six-factor *Gunwall* analysis. *See State v. Gunwall*, 106 Wn.2d 54, 60, 720 P.2d 808 (1986). *See also Jorgenson*, 179 Wn.2d at 152 (discussing *Gunwall* and Wash. Const. art I, § 24). The six factors are: (1) the text of the state constitution, (2) differences in the text of the parallel state and federal constitutional provisions, (3) the history of the state constitution, (4) pre-existing state law, (5) structural differences between the state and federal constitutions, and (6) matters of particular state interest or local concern. *Gunwall*, 106

Wn.2d at 61-62. The relevant date for a *Gunwall* analysis is the 1889 ratification of the state constitution.³³

To set the stage for this historical analysis, it is important to remember that in 1889 western states like Washington placed a high importance on the right to bear arms:

Article I, section 24 plainly guarantees an individual right to bear arms. There is quite explicit language about the right of the individual citizen to bear arms in defense of himself. This means what it says. From time to time, people in the West had to use their weapons to defend themselves and were not interested in being disarmed.”

Sieyes, 168 Wn.2d at 292 (citation and internal quotation marks omitted).

The State Supreme Court has already analyzed Wash. Const. art. I, § 24 under *Gunwall* and determined that, “the state and federal rights to bear arms have different contours and mandate separate interpretation.” *Jorgenson*, 179 Wn.2d at 153. The question becomes how different the contours are and how separate the interpretation is for the specific right at issue in our case, the range training right. Based on the analysis below of the six *Gunwall* factors, the range training right should be afforded greater protection under Wash. Const. art. I, § 24 than under the Second Amendment. The reason centers on the level of regulation of gun ranges in Washington in 1889: none. Absolutely none.

³³ See *Gunwall*, 106 Wn.2d at 65-66 (1889 ratification of state constitution relevant date for *Gunwall* analysis).

There were no restrictions on gun ranges in 1889. The record is devoid of any evidence to the contrary. Instead of modern commercial gun ranges, people in 1889 merely shot on their property or another's. There were no restrictions on evening shooting in 1889 because, until electric lighting was introduced in the 1890s, there was no night lighting for any gun range that might exist. Therefore, people shot when and where they wanted to. That might be in the evening; it might even be at dark. There were absolutely no restrictions on range training in 1889 in Washington. That is important to remember.

a. First and Second *Gunwall* Factors: Text and Differences Between Parallel Provisions

The first two *Gunwall* factors are textual language and the differences between parallel provisions. “These factors indicate that the firearms rights guaranteed by the Washington Constitution are distinct from those guaranteed by the United States Constitution.” *Jorgenson*, 179 Wn.2d at 152-53. This does not tell us much because it is not as if the state constitution said something like, “The right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired – except that restrictions may be placed on shooting at gun ranges” but the Second Amendment omitted this language about gun ranges.

b. Third *Gunwall* Factor: History

The third *Gunwall* factor is the “history of the state constitution” or, as *Jorgenson* put it, “our common law history.” *Jorgenson*, 179 Wn. 2d at 153.³⁴ This factor definitely points to the range training enjoying more protection under the state constitution.

Our common law history is clear: there was no regulation of gun ranges in Washington at all. None. No restrictions on the kind of firearms that could be fired, the times of firing, or limits on when law enforcement or the military could shoot – none of the dozens of restrictions in the Ordinance. The record is devoid of evidence to the contrary.

This third *Gunwall* factor strongly points toward finding the state constitution provides greater protections than the federal constitution. This is because the right to freely shoot to maintain proficiency in firearms was a fact of life in 1889 in Washington and the state Framers did not draft Wash. Const. art. I, § 24 to eradicate that pre-existing right. They did not snuff out the pre-existing right to range training by writing Wash. Const. art. I, § 24 to say, “The right of the individual citizen to bear arms in

³⁴ The right to bear arms “is deeply rooted in this Nation’s history and tradition.” *Sieyes*, 168 Wn.2d at 287. Gun ownership and use has been an important common law right for centuries. See generally Joyce Lee Malcom, *The Right of the People to Keep and Bear Arms: The Common Law Tradition*, 10 HASTINGS CONST. L.Q. 285 (1983).

defense of himself, or the state, shall not be impaired – except that restrictions may be placed on shooting at gun ranges.”

The state Framers codified the existing 1889 common law gun rights in the state constitution – and shooting without restrictions such as those in the Ordinance was one of the rights codified. The state Framers never explicitly added that the range training right cannot be infringed because, presumably, it was understood that the right to “bear” arms included the right to shoot at a range.

Jorgenson notes that the first, second, and third *Gunwall* prongs show that Wash. Const. art. I, § 24 is largely about the individual right to self-defense. *Jorgenson*, 179 Wn.2d at 153. The right to range training is part and parcel of this right to self-defense. Pardon the repetition, but this point is critical to this entire case:

The right to possess firearms ... implies a corresponding right to acquire and maintain proficiency in their use; the core right wouldn't mean much without the training and practice that make it effective.

Ezell I, 653 F.3d at 704.

The fact that the core right to self-defense and range training are so intertwined is why “the Second Amendment protects the right to learn and practice firearm use in the controlled setting of a shooting range.” *Ezell II*, 846 F.3d at 890.

Accordingly, because Wash. Const. art. I, § 24 is largely about the individual right to self-defense (*Jorgenson*, 179 Wn.2d at 153) and this right is directly linked to range training (*Ezell I*, 653 F.3d at 704; *Ezell II*, 846 F.3d at 890), then range training is directly linked to a right protected by Wash. Const. art. I, § 24. Accordingly, Wash. Const. art. I, § 24 protects the right to range training.

c. Fourth *Gunwall* Factor: Pre-Existing State Law

The fourth *Gunwall* factor, pre-existing state law, “does not demonstrate how the state right compares to its federal counterpart.” *Jorgenson*, 179 Wn.2d at 154. This does not apply in our case because there were no pre-existing gun range laws in Washington.

Jorgenson discussed this factor by referring to the 1996 (pre-*Heller*) state law that seemed to allow rational basis review of gun rights. *Jorgenson*, 179 Wn.2d at 154 (referring to *City of Seattle v. Montana*, 129 Wn.2d 583, 919 P.2d 1218 (1996) (allowing “reasonable regulation” of firearms)). However, since the 2008 *Heller* decision, rational basis review is no longer the standard of review for the Second Amendment (*Heller*, 554 U.S. at 628-29 & n. 27) so the pre-existing state law referred to in *Jorgenson* is no longer good law. This is probably why *Jorgenson* punted on the fourth *Gunwall* factor by observing:

Second Amendment case law is currently evolving. It is uncertain how the federal right compares to our preexisting “reasonable regulation” analysis. We move on to the fifth *Gunwall* factor.

Id. at 154.

d. Fifth *Gunwall* Factor: Structural Differences Between State and Federal Constitutions

The fifth *Gunwall* factor is the structural differences between the state and federal constitutions. Because Wash. Const. art. I, § 24 is in Article I (the state Bill of Rights), the *Jorgenson* court found this factor to point toward the state constitution being more protective:

[W]here the United States Constitution is a grant of enumerated powers, the Washington Constitution is a limitation on the otherwise plenary power of the state. The same reasoning applies here. Because the state has the plenary power to act unless expressly forbidden by the state constitution or federal law, we give a broad reading to the “explicit affirmation of fundamental rights in our state constitution.”

Jorgenson, 179 Wn.2d at 155 (emphasis in original) (citations omitted).

Looking at the explicit affirmation of fundamental rights in Article I of our state constitution means looking at Wash. Const. art. I, §24.³⁵ This provision categorically states: “The right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired[.]” This means Wash. Const. art. I, §24 is a guarantee of the right to bear arms

³⁵ The reference in *Jorgenson* to “fundamental rights in our state constitution” is to Art. I (the state Bill of Rights). *See Gunwall*, 106 Wn.2d at 62 (“Hence the explicit affirmation of fundamental rights in our state constitution may be seen as a guarantee of those rights rather than as a restriction on them.”).

rather than a limitation on it. And, because the right to bear arms “implies a corresponding right to acquire and maintain proficiency in their use; the core right wouldn’t mean much without the training and practice that make it effective” (*Ezell I*, 651 F.3d at 704), “bearing” arms means being able to use them and maintain proficiency in them, meaning that Wash. Const. art. I, §24 protects the right to range training.

e. Sixth *Gunwall* Factor: Particular State Interest and Concern

The final *Gunwall* factor, whether the subject matter involves a particular state interest and concern, “instructs us to look to [Wash. Const. art. I, §24] separately from the federal right.” *Jorgenson*, 179 Wn.2d at 155. This is because “Firearm ownership varies radically between localities[.]” *Id.* (citation omitted). This is certainly true in the western states. *See Sieyes*, 168 Wn.2d at 292 (“[P]eople in the West had to use their weapons to defend themselves and were not interested in being disarmed.”) (citation and internal quotation marks omitted).

Pre-empting excessive regulation of the discharge of firearms such as restrictions on gun ranges is, indeed, a matter of state concern, which is presumably why most local regulation of firearms is pre-empted by RCW 9.41.290.

In sum, a *Gunwall* analysis of the right to range training shows that Wash. Const. art. I, §24 provides greater protection than the Second Amendment.

7. Strict Scrutiny Should Be the Standard of Review for the Range Training Right Under Wash. Const. art. I, § 24

The right to keep and bear arms in self-defense is a fundamental right. *Sieyes*, 168 Wn.2d at 287 & 291. The range training right is intertwined with this fundamental right by maintaining proficiency in the controlled use of firearms for self-defense. Given that a fundamental right is at stake, Appellants ask the Court to determine that strict scrutiny is the proper standard of review for the range training right. (And only the range training right, not other matters such as felons or the mentally ill possessing firearms.)

Justice James Johnson’s dissent in *Jorgenson* provides the road map for this:

[T]his court in [*Sieyes*, 168 Wn.2d at 287], determined that the right to bear arms is fundamental. “State interference with a fundamental right is subject to strict scrutiny.” *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 220, 143 P.3d 571 (2006). In order to pass strict scrutiny, a law infringing on a fundamental right must be narrowly tailored to serve a compelling state interest. *Id.* (citing *Washington v. Glucksberg*, [521 U.S. 702, 721 (1997)]).

Jorgenson, 179 Wn.2d at 165 (Johnson, J. M., J. dissenting).

The Ordinance fails strict scrutiny. It is not “narrowly tailored” – it applies to a gun range with a 27-year perfect safety track record. Jefferson County does not have a “compelling” interest in making already perfectly safe gun ranges somehow safer.

Under the Ninth Circuit’s “sliding scale” test for the Second Amendment, the range training right probably would not be subject to strict scrutiny. *See Silvester*, 843 F.3d at 821 (discussed in *Kitsap Rifle*, 1 Wn. App. 2d at 416). However, this is the test for the Second Amendment – the test for Wash. Const. art. I, § 24 can be more protective. And, given that the range training right is rarely invoked, applying strict scrutiny to this unique fact pattern will not upset other restrictions on firearms in the state.

V. CONCLUSION

For all of the reasons presented herein, the Ordinance in its entirety, but especially the restrictions on evening shooting, is unlawful because it is both pre-empted by RCW 9.41.290 and is unconstitutional under the Second Amendment and Wash. Const. art. I, § 24. Accordingly, Appellants are entitled to a declaratory judgment to that effect.

RESPECTFULLY SUBMITTED this 6th day of May, 2019.

By: 
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CERTIFICATE OF SERVICE

I, Greg Overstreet, certify that on May 6th, 2019, I emailed a copy of:

- Appellants' Opening Brief

to: Philip Hunsucker

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