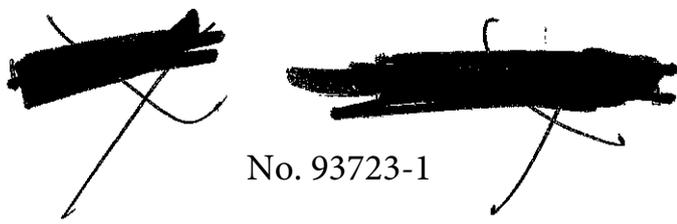


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74534-4

No. 93723-1

No. 74534-4-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON, DIVISION I

PHILIP WATSON, an Individual, et al.,

Appellants,

v.

CITY OF SEATTLE, a Municipality, et al.,

Respondents.

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Division I
State of Washington

Appeal from the Superior Court of Washington
for King County
No. 15-2-20613-3 SEA

APPELLANTS' OPENING BRIEF

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I. INTRODUCTION

Washington law comprehensively and preemptively regulates all aspects of the sale of firearms and ammunition in Washington. *See* RCW 9.41.010-9.41.810. Leaving no uncertainty whatsoever about its intentions, the Washington Legislature declared—in a provision entitled “State Preemption”—that it “fully occupies and preempts the entire field of firearms regulation within the boundaries of the state”, including the sale of firearms and ammunition. RCW 9.41.290. The state preemption provision further warned that “[l]ocal laws and ordinances that are inconsistent with, more restrictive than, or exceed the requirements of state law shall not be enacted and are preempted and repealed.” *Id.*

The City of Seattle is well aware of this restriction on its legislative power, in part because its most recent attempt to regulate firearms was emphatically struck down by this Court. *See Chan v. City of Seattle*, 164 Wn. App. 549, 265 P.3d 169 (2011) (holding that the City’s ban on firearms in city parks was preempted and unenforceable). Frustrated by this constraint, members of the Seattle City Council met with anti-firearms groups in 2015 to try to “brainstorm opportunities at the local level to work-around preemption as it relates to gun laws.” CP 52. Those meetings culminated in the passage of an ordinance that seeks to limit access to firearms and ammunition by imposing what amounts to a regulatory fee on the sale of all firearms and ammunition within City limits. *See* Statement of Councilmember John Okamoto, Seattle City Council (August 10, 2015) (showing his support for the ordinance by

reading a citizen statement that “[p]rohibiting guns completely will not stop every shooting, but I do believe that making it more difficult to access guns and ammunition will save more lives”).¹

In a transparent bid to avoid preemption, the City has labelled this regulatory fee a “tax.” But it is the substance and intent of an ordinance, and not its label, that a court must examine when determining whether a charge imposed by a governmental entity is a tax or a regulatory fee. *See Covell v. City of Seattle*, 127 Wn.2d 874, 878-79, 905 P.2d 324 (1995). Here, the ordinance clearly is a regulatory fee under the three-part test set forth in *Covell* because the primary purpose of the ordinance is to address what the City calls a public health crisis of gun violence; because the ordinance’s funds are dedicated to tracking firearm and ammunition sales and funding gun violence research; and because the fee imposed is directly related to the burden that Seattle claims firearm and ammunition retailers impose. *Id.* at 879 (citation omitted); CP 54-55 (council talking points stating that the fund created from the charges is a “dedicated revenue source” that may only be used to regulate the fee system and fund gun violence programs); CP 57-59 (op-ed piece authored by Tim Burgess, president of the City Council, he expressed this relationship in no uncertain terms: “Let’s tax the gun industry to help pay for the damage their products produce”).

¹ August 10, 2015 Seattle City Council Meeting at 1:24:39, available at <http://www.seattlechannel.org/mayor-and-council/city-council/full-council?videoid=x57446&Mode2=Video>.

But even if the Ordinance were a “tax,” it would still be impermissible. A city does not have the inherent power to tax: “For a municipality to exercise the power to tax, it must have express statutory authority.” *Okeson v. City of Seattle*, 150 Wn.2d 540, 556, 78 P.3d 1279 (2003). Cities do have the authority to charge taxes as a condition of doing business. But if a city imposes such a tax on retailers of personal property (like Appellants Outdoor Emporium or Precise Shooter), then the city must impose the tax on retailers’ gross proceeds, charge all retailers the same rate, and not exceed a maximum rate. *See* RCW 35.21.710 (city tax on retail sales of tangible personal property must be “measured by gross receipts”, imposed “at a single uniform rate upon all such business activities”, and “shall not exceed” specified rate). Before enacting the Ordinance, Seattle was already taxing personal property retailers based upon their gross sales, and doing so at the maximum allowed rate. Thus, even if the Ordinance did impose a “tax,” it would impermissibly create a non-uniform tax rate that is above the not-to-exceed limit. It follows that the Ordinance violates RCW 35.21.710, the City did not have “express authority” to impose it, and the Ordinance—even if it did impose a tax—is still unconstitutional.

Moreover, the Ordinance is still preempted even if it were a proper tax. The Legislature has explicitly stated that RCW 9.41.290 “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” This sweeping occupation of the entire field relating to firearms bars any laws passed by municipalities on firearms and ammunition, except where specifically enumerated by state law.

Accordingly, Outdoor Emporium, Precise Shooter, and the other Appellants respectfully request that this Court reverse the trial court and hold that the Ordinance is unconstitutional.

II. ASSIGNMENTS OF ERROR

The trial court erred in dismissing Appellants’ lawsuit on summary judgment, related to the following issues:

1. Whether the trial court erred in concluding that Seattle Ordinance 124833 is not preempted by RCW 9.41.290.

2. Whether the trial court erred in concluding that Seattle Ordinance 124833, to the extent it imposes a tax, was expressly authorized by the Legislature.

3. Whether the trial court erred in dismissing Appellants’ case where Respondents moved only for partial summary judgment and Appellants expressly reserved argument on issues that were neither argued to nor addressed by the trial court.

III. STATEMENT OF THE CASE

In early 2015, members of the Seattle City Council engaged in meetings with anti-firearms groups to “brainstorm opportunities at the local level to work-around preemption as it relates to gun laws,” to “keep up an ‘all-fronts’ strategy,” and to “get creative” about how they could “curtail gun irresponsibility.” *See* CP 52. These meetings, including

“Local Gun Laws Table Meetings” on March 21, 2015, and May 26, 2015, discussed preemption in detail and concluded that a “tax” provided an opportunity to evade the barrier of preemption. *See* CP 61-62. Attracted to the notion that restrictions on firearm sales could be accomplished by simply labeling them as taxes, the Seattle City Council introduced Bill 118437 as “[a]n Ordinance related to imposing a tax on engaging in the business of making retail sales of firearms and ammunition.” CP 64.

The Seattle City Council did little to hide the regulatory purpose of the ordinance, issuing talking points and an op-ed stating that the goal of the bill was to “tax the gun industry to help pay for the damage their products produce.” *See* CP 54-55 & 57-59. The City Council also released materials proclaiming that the firearms “tax” was part of a “continuing effort” to promote “gun safety actions in Seattle.” CP 88 (enumerating imposition of the “tax” as part of a set of “gun safety measures.”).

In the lead up to the Council vote, City Council President Tim Burgess admitted that the proposed law “is clearly pushing the edge of the envelope” in terms of constitutionality, but that he intended to proceed nonetheless. CP 164. On August 10, 2015, the Seattle City Council considered Council Bill 118437. Statements by Seattle Council Members in support of the legislation further demonstrated the legislation’s regulatory intent:

- Council member John Okamoto showed his support for the legislation by reading a statement that said

“[p]rohibiting guns completely will not stop every shooting, but I do believe that making it more difficult to access guns and ammunition will save more lives”

- Council member Bruce Harrell issued his support for the ordinance by stating “[t]he fact is, in simple terms; access to guns is too high”; and
- Council member Sally Bagshaw stated that the action was necessary because “we cannot rely upon our federal government to do what’s right here.”²

Following these statements, the City Council passed Council Bill 118437. On August 21, 2015 Mayor Murray approved and signed the Council Bill, making Ordinance 124833 (the “Ordinance”) effective and in force on September 20, 2015. Beginning on January 1, 2016, the City imposed a “tax” on every person or business engaging within the City in the business of making sales of firearms or ammunition:

5.50.030 Tax imposed; rates

A. There is imposed a tax on every person engaging within the City in the business of making retail sales of firearms or ammunition. The amount of the tax due shall be equal to the quantity of firearms sold at retail and the quantity of ammunition sold at retail multiplied by the applicable tax rates that are stated in Section 5.50.030.B.

B. The tax rate shall be \$25 per firearm sold at retail, \$.02 per round of ammunition that contains a single projectile that measures .22 caliber or less sold at retail, and \$.05 per round of ammunition for all other ammunition sold at retail.

² August 10, 2015 Seattle City Council Meeting at 1:24:39, 1:25:44 & 1:27:39, available at <http://www.seattlechannel.org/mayor-and-council/city-council/full-council?videoid=x57446&Mode2=Video>.

CP 76 at ¶¶ 14-21. The funds collected from the Ordinance are to be segregated in a “Firearms and Ammunition Tax Fund,” which shall be used only for programs that “address in part the costs of gun violence in the city” and for “administrative costs to manage the fund and make tax system modifications as needed.” CP 78 at ¶¶ 7-16. The Ordinance also amended section 5.55.220 of the Seattle Municipal Code to make failure to pay the firearm and ammunition tax a gross misdemeanor, punishable by a fine of up to \$5,000, imprisonment for a term not to exceed 364 days, or both. CP 71-73.

Outdoor Emporium, Precise Shooter, and the other Plaintiffs brought a motion for summary judgment on grounds that the Ordinance is preempted by RCW 9.41.290 on its face. Plaintiffs expressly reserved a secondary argument that the Ordinance was preempted even if it were a constitutional tax, because the Ordinance improperly operated to regulate the sale of firearms and ammunition by suppressing sales. CP 34 at n.2; CP 142 at n.1. This reserved issues would only need to be addressed if the first argument was rejected. Plaintiffs moved on the first issue alone because time was of the essence to prevent the enforcement of the Ordinance beginning on January 1, 2016, and because the City had expressed concern that the second argument would require several additional months of discovery to determine whether the fee had the operative effect of suppressing firearm and ammunition sales. CP 34 at n.2; CP 142 at n.1. The City cross-moved for partial summary judgment, addressing only the first issue brought by Plaintiffs. CP 89.

After hearing argument on the motions, the trial court denied Plaintiffs' motion, granted the City's motion, and dismissed the case in its entirety. CP 180-82.

IV. ARGUMENT

Laws specifically relating to firearms or ammunition, including burdens on their "purchase" and "sale", are preempted in Washington. RCW 9.41.290. The trial court found that the Ordinance would be preempted if it were a regulation. CP 179. The trial court went on, however, to find that the Ordinance is a constitutional tax because Seattle's power to tax a business' right to operate is not limited by any statute. CP 180-82. Accordingly, there are three central questions before this Court: 1) whether the Ordinance is a regulation or a tax; 2) if the Ordinance is a tax, is it constitutional; and 3) even if the Ordinance is a constitutional tax, is it still preempted on its face? Washington law demonstrates not only that the Ordinance is a regulation, but that it would not even be within the City's authority to pass the Ordinance as a tax. The Ordinance is therefore preempted and void.

A. The Ordinance Institutes a Regulatory Fee Rather Than a Tax

Fees that are aimed at regulating a particular industry are subject to preemption, even if they are labelled as a "tax". *See City of Seattle v. Campbell*, 27 Wn. App. 37, 39, 611 P.2d 1347 (1980). "[C]lassifying a charge as either a tax or a fee is critical" because there is "an inherent danger that legislative bodies might circumvent constitutional constraints"

by mislabeling the charges they levy. *Okeson v. Seattle*, 150 Wn.2d 540, 552, 78 P.3d 1279 (2003) (quotation omitted). “Generally speaking, taxes are imposed to raise money for the public treasury.” *Okeson*, 150 Wn.2d at 551. “Charges imposed for purposes other than raising money for the public treasury . . . are not taxes” *Id.*

The Washington Supreme Court identifies three factors to distinguish regulatory fees from taxes. *See Covell*, 127 Wn.2d at 879. The **first** factor is whether the primary purpose of the legislation in question is to “regulate” the fee payers or to collect revenue to finance broad-based public improvements. *Id.*

It is a misnomer to simply ask whether the charges raise revenue, because both taxes and regulatory fees raise revenue. What is important is the purpose behind the money raised—a tax raises revenue for the general public welfare, while a regulatory fee raises money . . . *to pay for or regulate the burden those who pay have created.*

Okeson, 150 Wn.2d at 552-53 (emphasis added). A court may look to the “overall plan” of regulation in construing the purpose of the challenged charge. *See Hillis Homes, Inc. v. Public Util. Dist. 1*, 105 Wn.2d 288, 299, 714 P.2d 1163 (1986). Indeed, courts can look beyond the legislation implementing the charge in order to determine the legislation’s purpose. *See Teter v. Clark County*, 104 Wn.2d 227, 239, 704 P.2d 1171 (1985); *Seattle Times Co. v. Benton County*, 99 Wn.2d 251, 255 n.1, 661 P.2d 964 (1983) (“The legislative purpose of this provision has been ascertained, in part, from letters and memoranda from members of the state judicial council and the Senate Judiciary Committee. Such documents are not

authoritative, but if drafted prior to, or contemporaneously with, the passage of an act, they may have value in the search for ‘legislative intent.’”)

The **second** factor is whether the money collected must be allocated only to the authorized regulatory purpose. *Covell*, 127 Wn.2d at 879. In other words, are the funds raised required to only be spent on the subject matter that is targeted by the charge, or are the funds simply deposited into the general fund to be spent on projects at large.

The **third** factor is whether there is a direct relationship between the fee charged and the alleged burden produced by the fee payer. *Id.* “Where such a relationship exists, then the charge may be deemed a regulatory fee even though the charge is not individualized according to the benefit accruing to each fee payer or the burden produced by the fee payer.” *Id.*

Here, all three *Covell* factors demonstrate that the Ordinance instituted a regulatory fee, not a tax.

First, the City Council made very clear that the purpose of the Ordinance was “gun safety,” not revenue generation. Even a cursory review of the legislative history shows that the Seattle City Council sought to address what they called a public health crisis by reducing access to firearms and ammunition. *See, e.g.*, CP 88 (identifying the “tax” along with the City’s other attempts at gun control); August 10, 2015 Seattle City Council Meeting at 1:24:39, 1:25:44 & 1:27:39 (statements by Seattle City Council Members speaking in favor of limiting access to firearms and

ammunition); CP 52 & 61-62 (describing meetings attended by Seattle Council Members as a way to “brainstorm opportunities at the local level to work-around preemption as it relates to gun laws” to “keep up an ‘all-fronts’ strategy and to get creative about how we curtail gun irresponsibility”). The Seattle City Council’s express focus on preventing potential hazards to the lives of Seattle citizens is exactly the type of classic regulatory purpose the *Covell* test highlights. In *Teter*, for example, the Court held that a charge to prevent flooding was a regulatory fee because the legislative history indicated the municipality was trying to protect public safety. In *Covell*, by contrast, the court held the charge was not a fee because the ordinance was *not* aimed at enhancing public safety (indicating that if the municipality *had* been trying to directly impact public safety, then the ordinance would have been deemed a regulation). The City’s professed purpose in imposing the Ordinance was to combat gun violence and it cannot now argue that the Ordinance is merely a fundraising measure.

Second, the money collected pursuant to the Ordinance is specifically segregated from the general fund and used to regulate the sale of firearms and ammunition. *See* CP 78 at ¶¶ 7-16. In particular, the fees collected are not aimed at funding broad-based programs. Instead, they are aimed only at regulating gun violence in Seattle, including research on how to reduce access to firearms, and at funding the collection, tracking, and auditing of the number of firearms and rounds of ammunition sold by retailers in order to enforce the collection of fees. *See id.* Seattle would

be preempted if it attempted to pass a bill which required sellers to report the volume or types of sales of firearms or ammunition to the City, but that is exactly the type of tracking the Ordinance will fund when it requires retailers to pass along that information and enables the City to audit those sales. Accordingly, Seattle's proposed research and intervention programs are not an end to themselves, but rather a means to more closely monitor and minimize the sale of firearms and ammunition. Despite copying the correct terminology from *Covell*, the City's claim that the fees are funding "broad-based improvements" does not match the restricted and particularized purposes for which the funds must be used. *See, e.g., Covell*, 127 Wn.2d at 886 (charge was a tax because it was not based on rate payors' activities nor did it attempt to monitor, quantify, or alter any rate payor activities).

Third, there is a direct relationship between the fee charged and the alleged burden the City claims is produced by the fee payer. The Ordinance does not raise general funds; it singles out a specific type of activity, collects a fee from an extremely small number of businesses in Seattle for engaging in that activity, and then requires that the funds be applied only to the burden allegedly created by those few businesses' activities.

The City claims this factor does not apply because no one can quantify exactly how much a single firearm or round of ammunition contributes to gun violence. *See* CP 111. Although this argument raises a fundamental question of why Seattle believes there is a relationship

between the legal sale of firearms and ammunition and gun violence if it has not even attempted to establish the mathematical correlation, all *Covell* requires is that the charge correlate to an alleged burden created by the payors as a group. See *Okeson*, 150 Wn.2d at 554 (citing *Covell* for the principle that “[t]he charge does not need to be individualized according to the exact . . . burden produced by . . . the fee payer”). “[O]nly a practical basis for the rates is required, not mathematical precision.” *Teter*, 104 Wn.2d at 238.

Here, the City contends there is a direct connection between firearms sales and the cost of gun violence. CP 54-55 (talking points created for the City Council which indicated that the “tax” was specifically intended to “mitigate the public health impacts” from gun violence and that it was “time for the gun industry to chip in to help defray those costs”); CP 57-59 (op-ed from Councilmember Burgess noting that the goal of the Ordinance was to “tax the gun industry to help pay for the damage their products produce”). According to the City, firearm and ammunition retailers are responsible for more than 125 people killed in Seattle every year and cost the City over \$180 million annually. See CP 97 at ¶¶ 19-27. It would elevate form over substance if Seattle could strip the regulatory nature of the Ordinance merely by forgoing the responsibility of calculating the proper amount of the fee. *Covell*, 127 Wn.2d at 883 (“Although the charges were not individualized according to the benefits accruing to each specific customer, this was not required. Only a practical basis for the rates is required, not mathematical

precision.”) (internal alterations omitted). Seattle has itself claimed that \$25 per firearm and \$0.02 to \$0.05 per round is the proper amount to charge retailers “for the damage their products produce.” CP 58.

As the above discussion makes clear, the Ordinance imposes a fee that retailers must pay for the privilege of selling each firearm or round of ammunition as a means to address what Seattle calls a public health crisis. These fees are then segregated into a special fund that can only be used to track and address the alleged burdens that stem from sales by firearm and ammunition retailers in the City. These fees are set irrespective of the price of the firearm or ammunition (although Seattle pointedly crafts a difference between low caliber ammunition used mostly for target practice and higher caliber ammunition that may be used for other purposes). In the face of these facts, the trial court’s passing analysis appears to do exactly what the Supreme Court has warned courts not to do: rule the Ordinance is a tax because it says it is a tax. *Okeson*, 150 Wn.2d at 552. This Court should look beyond the label and call the Ordinance what it is in substance: an impermissible local regulation specifically targeted at burdening the sale of firearms and ammunition.

B. Labeling the Ordinance a Tax Violates the City’s Limited Taxing Authority

The City’s attempt to label the Ordinance as a tax is also entirely undermined by the fact that the Ordinance would be unconstitutional even if it could somehow be considered a tax under *Covell*. A city’s taxing authority is strictly limited and can only be exercised pursuant to specific

powers granted by state statute. *Covell*, 127 Wn.2d at 878-79.

The City has attempted to pass the Ordinance as a type of excise tax commonly known as a business and occupation (“B&O”) tax. But municipal B&O taxes on the sales of tangible personal property must satisfy each of at least three strict requirements, and the Ordinance—because it is not a tax at all—fails every one. *See* RCW 35.21.710; RCW 35.102 *et seq.* First, the municipal B&O tax must be imposed as a percentage rate to be applied across all of a retailer’s gross receipts, yet the Ordinance does not utilize a percentage at all, and instead impermissibly imposes a per item charge on a subset of select retail products (firearms and ammunition). Second, the municipal B&O tax must be imposed uniformly upon all retailers, but the Ordinance applies only to retailers who sell firearms and ammunition. Third, the municipal B&O tax may not exceed a maximum statutory percentage rate. The City’s existing municipal B&O tax already applies the statutory maximum rate, meaning that the fees sought by the Ordinance are above and beyond the statutory maximum municipal B&O tax the City already charges and collects. The failure to satisfy any one of these three requirements is fatal to a proposed municipal B&O tax on the sale of tangible personal property; here, the Ordinance fails all three. The Ordinance’s three-part failure is of a piece with its failure to satisfy *Covell*, and further demonstrates that the Ordinance is a regulatory fee, not a tax.

1. Municipal B&O taxes are subject to strict statutory requirements.

Local governments do not have the inherent power to tax. *Covell*, 127 Wn.2d at 878-79. While the State Legislature has the inherent power to impose taxes on everything from cigarettes to wood stoves in nearly any form it wishes, a city's power to tax derives exclusively from state statute. See WASH. CONST. ART. 11 § 12; see also *Arborwood Idaho, L.L.C. v. City of Kennewick*, 151 Wn.2d 359, 365-66, 89 P.3d 217 (2004) (as the police powers granted to cities in the Constitution do not include the power to tax, municipalities must have express legislative authority); *State ex rel. Pacific Tel. & Tel. Co. v. Department of Pub. Serv.*, 19 Wn.2d 200, 272, 142 P.2d 498 (1943) (holding that a city only exercises delegated taxing powers). The State's grant of the power to tax to a city is to be strictly construed and "[i]f any doubt exists as to the meaning of a taxation statute, the statute must be construed most strongly against the taxing power and in favor of the taxpayer." *Ski Acres, Inc. v. Kittitas County*, 118 Wn.2d 852, 857, 827 P.2d 1000, 1003 (1992); see *P. Lorillard Co. v. Seattle*, 8 Wn. App. 510, 513, 507 P.2d 1212 (1973).

Here, the Legislature has granted Seattle the authority to enact the *kind* of tax at issue—a tax that is imposed as a condition of doing business within the city. See RCW 35.22.280(32); see also *Pac. Tel. & Tel. Co. v. City of Seattle*, 172 Wash. 649, 653 (1933). But the grant is not without limits: "The authority is to grant licenses for any lawful purpose, *and in the absence of restriction*, the purpose of raising revenue is as lawful as the purpose of exercising the police power." *Pac. Tel.*, 172 Wn.2d at 653

(emphasis added). Two such restrictions that the Legislature has placed on a city's power to impose business license fees and taxes are found in RCW 35.102 *et seq.* and RCW 35.21.710.

The first restriction on a city's business license fees and taxes is found in RCW 35.102 *et seq.*, which is the Model Municipal Business and Occupation Tax Statute ("Model Statute"). In 2003, the Legislature found that a multitude of overlapping and non-uniform municipal B&O taxes were negatively affecting businesses across the state. *See* RCW 35.102.010. In response, the Legislature required that Washington "[c]ities imposing business and occupation taxes" are required to enact a model B&O tax ordinance or those cities "may not impose a tax that is imposed by a city on the privilege of engaging in business activities." RCW 35.102.140. Among other requirements, the model ordinance must include certain tax classifications that identify the types of business activities that are taxed (*i.e.* retailing, manufacturing, services) and then impose a tax on those classifications "measured by the value of products, the gross income of the business, or the gross proceeds of sales." RCW 35.102.030(3) & .120. The Model Statute's mandate to impose these business and occupational taxes as percentage of gross receipts is based on the need to ensure small businesses with low gross proceeds are not paying the tax and to allocate and apportion the gross income of businesses so that businesses are not being double taxed. *See* RCW 35.102.040(2)(b) (setting minimum business tax threshold of at least twenty thousand dollars in gross income annually); RCW 35.102.130

(setting allocation and apportionment rules).

The second restriction on a city's ability to impose business license fees is found at RCW 35.21.710, titled "License fees or taxes on certain business activities—Uniform rate required—Maximum rate established."

The statute states, in part:

Any city which imposes a license fee or tax upon business activities consisting of the making of retail sales of tangible personal property which are measured by gross receipts or gross income from such sales, shall impose such tax at a single uniform rate upon all such business activities. The taxing authority granted to cities for taxes upon business activities measured by gross receipts or gross income from sales shall not exceed a rate of .0020

RCW 35.21.710. Pursuant to this statute, a city's taxes on the "certain business activities" of "the making of retail sales of tangible personal property" are expressly restricted in three ways:

As an initial matter, RCW 35.21.710 aligns with the Model Statute's requirement that municipal B&O taxes on the making of retail sales of tangible personal property must be imposed only on the gross receipts or gross income of such sales. *Compare* RCW 35.21.710, with RCW 35.102.030 (defining city "business and occupation tax" or "gross receipts tax"—as that "measured by the value of products, the gross income of the business, or the gross proceeds of sales"), and RCW 35.102.040 (requiring cities to comply with the provisions of RCW 35.102.020 to 35.102.130, which includes the definition of a municipal B&O tax as a gross receipts tax).

Further, a municipal B&O tax on retail sales must be a single uniform rate that is applied to all retailers. *See* RCW 35.21.710. This uniformity prohibits a city from imposing a higher rate on a specific type of retailer while maintaining a lower rate against all other retailers. *See id.* This call for uniformity also aligns with the Model Statute's desire to eliminate excessive and multiple taxation faced by Washington businesses. *See, e.g.,* RCW 35.102.010 (stating the findings of the Washington Legislature in requiring municipalities to adopt a model system related to B&O taxes).

Finally, the tax rate on a municipal B&O tax cannot exceed a maximum rate, generally set at 0.2% and currently set at 0.215% in Seattle.³ RCW 35.21.710 (setting the state-wide maximum rate at 0.2%); SMC 5.45.050(C) (raising the statutory maximum in Seattle to .215% by a vote of Seattle citizens pursuant to RCW 35.21.711). Notably, RCW 35.21.710 was specifically "designed to severely restrict the tax rates local governments could assess" and a tax that exceeds the maximum rate is void. *Western Telepage, Inc. v. City of Tacoma*, 140 Wn.2d 599, 613, 998 P.2d 884 (2000).

2. The Ordinance does not satisfy any of the requirements of a municipal B&O tax.

In passing the Ordinance, the City sought to invoke its B&O taxing

³ Briefing before the trial court mistakenly stated that the maximum rate was set at 2% and currently set at 2.15% instead of 0.2% and 0.215%, due to a faulty conversion of the statutory rates of .002 and .00215 to percentages.

authority, but violated every single strict constraint on municipal B&O taxes. *See, e.g.*, CP 79 (making the ordinance subject to RCW 35.21.706, which relates to challenging the institution or increase in a rate of a municipal B&O tax under RCW 35.21.210 through referendum); CP 85 (“Under Business and Occupation tax provisions, the City has the authority to tax sellers of a good by volume of the goods sold.”).

First, the Ordinance imposes a set \$25 for each firearm and \$.02 to \$.05 for each round of ammunition, irrespective of how much the firearms or ammunition cost. Instead of being a simple percentage tax that a retailer applies to total gross sales at the end of the year, the Ordinance requires retailers to track every firearm and round of ammunition they sell so that they may pay the applicable fee for each item sold. This fee-per-item arrangement does not meet the definition of municipal B&O taxes as a percentage of total sales. RCW 35.21.710; RCW 35.102.030.

Second, the Ordinance does not apply a uniform tax rate to all retailers. It is undisputed that Seattle already taxes retailers of personal property and that Seattle measures that tax by applying it equally to each retailer’s gross proceeds:

Upon every person engaging within the City in the business of making sales of retail services, or making sales at wholesale or retail; as to such persons, the amount of tax with respect to such business shall be equal to the gross proceeds of such sales of the business without regard to the place of delivery of articles, commodities or merchandise sold, multiplied by the rate of .00215.

SMC 5.45.050(C). Following the Ordinance, however, the tax rate among

retailers of personal property is no longer uniform—non-firearm retailers pay only .00215 of their gross sales, while Outdoor Emporium and Precise Shooter pay .00215 of their gross sales plus some additional amount based on the quantity of firearms and ammunition they sell. Accordingly, firearm and ammunition retailers are subject to a higher municipal B&O tax than other retailers simply because of the products they sell.

Third, the tax is in excess of the maximum statutory rate. RCW 35.21.710 set the maximum rate at .2% and Seattle then raised the maximum municipal B&O tax to .215 by a vote of Seattle residents. *See* RCW 35.21.711; SMC 5.45.050(C); Association of Washington Cities, *City Business (B&O) Tax Rates Effective January 1, 2016 (Jan. 2016)* (listing Seattle as already applying the maximum rate for B&O taxes on retailers).⁴ By applying the maximum municipal B&O tax rate to firearm and ammunition retailers in their capacity as general retailers and then charging them another B&O tax based only on their sales of firearms and ammunition, the City is engaging in double taxation on the retail sale of tangible personal property far in excess of the statutory limit and in contravention of the Model Statute.

3. The Ordinance is unconstitutional as a tax because it violates the statutory restrictions on municipal B&O taxes.

The restrictions set forth in the Model Statute and RCW 35.21.710 are not mere technicalities. The restrictions enforce the Legislature's goal

⁴ Available at <http://www.awcnet.org/Portals/0/Documents/Legislative/bandotax/botaxrates.pdf>.

to maintain a balance between a city's need for tax revenue and a business' need to be free from duplicative and oppressive taxation. While local governments may have some leeway in how they classify certain business activities under the Model Statute, they are absolutely barred from collecting municipal B&O taxes that do not satisfy the restrictions set forth in RCW 35.21.710. *Western Telepage, Inc. v. City of Tacoma*, 140 Wn.2d 599, 613-14, 998 P.2d 884 (2000). In particular, “[l]ocal governments can change the tax treatment of certain activities to make that taxation consistent with state definitions, so long as the effort is not a mere subterfuge, meant to circumvent the express restrictions on local taxing authority set forth in RCW 35.21.710.” *Id.*

“Mere subterfuge” is an apt description of Seattle’s efforts to explain the Ordinance’s failure to comply with RCW 35.21.710. Seattle freely admits that the Ordinance does not satisfy the B&O tax requirements mandated by RCW 35.21.710. *See* CP 114 at ¶¶ 25-29. Indeed, Seattle was well aware even before it passed the Ordinance that the legislation was legally suspect. In an email City Council President Tim Burgess sent before passage of the Ordinance, he admitted the proposed law “is clearly pushing the edge of the envelope.” CP 164 (emphasis added).

Because the Ordinance so clearly exceeds the envelope of Seattle’s taxing authority, its lawyers have no choice but to wish the envelope away, maintaining that the requirements of RCW 35.21.710 are not applicable to all municipal B&O taxes on the retail sale of tangible

personal property, but only those B&O taxes that are measured in a particular way, *i.e.*, taxes that are measured by the “gross receipts or gross income from such sales.” *See* CP 114 at ¶¶ 25-29. Seattle, so the argument goes, can tax retail sales of tangible personal property with no restrictions whatsoever so long as the tax is based upon a measure other than gross receipts.

The City’s logic would render RCW 35.21.710 a nullity. Consider a bookstore located within the City of Seattle. Assume that Seattle already collects from the bookstore the maximum municipal B&O tax permitted by RCW 35.21.710 when measured by the gross receipts of sales made by the bookstore. *See* SMC 5.45.050(C) (imposing the maximum tax rate of .215% on the gross receipts of retailers). Assume further that Seattle seeks additional municipal B&O tax revenue from the bookstore directly imposed on its sales, notwithstanding the limitations imposed by RCW 35.21.710. By the logic Seattle espouses to defend its Ordinance, Seattle could:

- Impose an additional \$10 per book fee on every book sold; and/or
- Levy a 50% tax on all books sold on a Wednesday; and/or
- Collect \$5 from the bookstore for the sale of any book that Seattle believed contributed to a “public health epidemic” or otherwise increased costs to the city.

The possibilities are literally endless: if the Court were to accept Seattle’s crabbed interpretation of RCW 35.21.710, Seattle could collect

as much municipal B&O tax as it likes on the retail sale of tangible personal property, whenever it likes, so long as the measure employed to collect the tax does not use the term “gross receipts.” Under Seattle’s reasoning, as long as it enacts two ordinances instead of one—and the second one doesn’t use gross sales as a measure of the tax—then RCW 35.21.710 does not forbid a city from imposing non-uniform taxes on retailers of personal property at any rate the City chooses.⁵

Thus, in the world Seattle proposes, the Legislature mandated uniformity and a maximum rate for a city’s local business taxes on the retail sale of tangible personal property, but only as to one of an infinite number of ways a city can measure a tax. In short, the City asks this Court to find that RCW 35.21.710 grants Seattle the unlimited authority to tax the retail sale of tangible personal property.

As one would expect, Supreme Court precedent does not support the extreme interpretation Seattle urges upon the Court. *See Okeson v. Seattle*, 150 Wn.2d 540, 78 P.3d 1279 (2003). In *Okeson*, the Supreme Court considered a Seattle ordinance that transferred responsibility to pay for streetlights from the city’s general budget to the customers of City

⁵ The City’s assumption that it may evade the restrictions on its taxing power by passing two ordinances taxing the same process is also flawed because it ignores the word “single” in RCW 35.21.710: “Any city . . . shall impose such tax at a single uniform rate upon all such business activities.” “Single” means, “Consisting of one as opposed to or in contrast with many.” THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, 1625 (4th ed. 2000). The import of that word is clear: if a city chooses to impose a tax on retailers that is measured by the retailers’ gross sales—which SMC 5.45.050(C) unquestionably does—then that tax shall constitute the *one* rate imposed on all of those retailers’ business activities.

Light. See *Okeson*, 150 Wn.2d at 543. One of the issues was whether the ordinance violated RCW 35.21.870, which prohibits cities from taxing electrical services at a rate greater than six percent without voter approval (which the City had not obtained).⁶ The Court held that because City Light customers were already paying the maximum six percent rate (obviously via a *different* ordinance), then the ordinance in question exceeded the city's taxing authority:

City Light already imposed the maximum six percent tax before Ordinance 119747 was passed. Therefore, passage of Ordinance 119747 increased the tax burden on City Light's ratepayers in excess of the statutory six percent ceiling. Because voters did not first approve the tax increase that exceeded six percent, the ordinance violated RCW 35.21.870(1).

Okeson, 150 Wn.2d at 556.

Applying Seattle's logic to *Okeson*, Ordinance 119747 would have been acceptable because the rate that it alone imposed—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 obviously did not agree with that strained interpretation. A cap is a cap. *Okeson*'s substantive focus on the maximum tax rate (and not the varying measures used to collect the total tax) is necessary to ensure that local governments do not engage in “mere subterfuge, meant to circumvent the express

⁶ RCW 35.21.870 states, “No city or town may impose a tax on the privilege of conducting an electrical energy . . . business at a rate which exceeds six percent unless the rate is first approved by a majority of the voters of the city or town voting on such a proposition.”

restrictions on local taxing authority. . . .” *Western Telepage*, 140 Wn.2d at 613-14.

The same substantive restrictions that prevented the City from imposing fees above the 6% cap for utilities in *Okeson* apply to the .2% statutory cap on taxes for retailers of tangible personal property found in RCW 35.21.710. *See Lane v. City of Seattle*, 164 Wn.2d 875, 886, 194 P.3d 977 (2008) (declining to apply the maximum rate restriction in RCW 35.21.710 to a tax on a water utility, only because the statute had an express exception for taxes on public utilities). The Model Statute and RCW 35.21.710 are expressly aimed at limiting taxes imposed on the “business activity” of the retail sale of tangible personal property and the Washington Legislature has mandated that taxes on the retail sales of tangible personal property are subject to uniformity and maximum rate restrictions. *See* RCW 35.102 *et seq.*; RCW 35.21.710. Further, RCW 35.21.710’s reference to gross receipts is not, as the City and the trial court argue, a limitation on the statute’s restriction of local taxing authority; instead, it is a limitation on local taxing authority itself as a means to foster statewide uniformity and lower the administrative burden on businesses in calculating taxes on certain activities. *See* RCW 35.102 *et seq.* (Model Statute); *see also* RCW 35.102.040 (requiring cities to comply with RCW 35.102.020 to 35.102.130, which includes the definition of B&O taxes as a gross receipts tax on certain activities).

Unlike the reading of the City and the trial court of the restrictions in RCW 35.21.710 as superfluous and endlessly evadable, Plaintiffs’

reading gives the statute effect in the way the Supreme Court did in *Okeson*. The substantive effect of the Ordinance is to impose an additional financial burden directly on the retail sales of tangible personal property. As in *Okeson*, the City's effort to collect these additional municipal B&O taxes fails because it is not applied as a percentage of gross receipts, is not uniformly applied to all retailers, and Seattle already imposes the maximum tax on retail sales of tangible personal property. See *Okeson*, 150 Wn.2d at 556; RCW 35.21.710.

4. The trial court erred by relying on inapposite examples and reasoning to find the Ordinance constitutional.

The trial court's reasoning was as equally flawed as the City's, but for different reasons. According to the Order dismissing the case:

- RCW 35.22.280(32)⁷ authorizes the City to grant licenses as a condition of doing business and to charge for those licenses;
- RCW 35.22.280(32) "has been interpreted [in *Pac. Tel.*, 172 Wash. at 655] to include the ability to raise revenues by imposing a tax," which the Supreme Court referred to in *Pac. Tel.* as "an excise";
- not all excise taxes are imposed as B&O taxes on gross receipts—some "excise taxes" are on "specific products (cigarettes, gasoline . . . harvested lumber, leaseholds, etc.)";
- RCW 35.22.280(32) therefore gives the City unfettered authority to issue "excise taxes" on particular products.

CP 181-82.

⁷ RCW 35.22.280(32) states, "Any city of the first class shall have power: . . . [t]o grant licenses for any lawful purpose, and to fix by ordinance the amount to be paid therefor, and to provide for revoking the same"

The trial court's reasoning has at least two flaws.

First, the phrase “an excise” in *Pac. Tel.* simply means that the tax is imposed as a condition on an action, as opposed to a tax on an item, for example, an estate or real property. *See Pacific Tel.*, 172 Wash. at 654 (“The tax is an excise. It is levied upon the right to do business, not upon the right to exist; nor upon the property.”). This statement is no more helpful than the dictionary definition of “excise”: “any of various taxes upon privileges (as of engaging in a particular trade or sport, transferring property, or engaging in business in a corporate capacity) that are often assessed in the form of a license or other fee.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY, UNABRIDGED, 792 (Philip Babcock Gove & Merriam-Webster, eds., 3rd ed. 2002). Thus, stating that a city can impose “an excise” is no more informative than stating it can impose “a tax.” No one disputes that Seattle can tax. The question is: *how* can it tax? “[E]xpress statutory authority” requires more than a generic case citation saying “a city can tax.” *See Okeson*, 150 Wn.2d at 556 (“For a municipality to exercise the power to tax, it must have express statutory authority.”).

Second, the examples of “excise taxes” cited by the trial court are ones that are either imposed by the State (which does not need the same express permission to tax that the City requires) or are expressly authorized by statute. *See* CP 181 at ¶¶ 7-11. The cigarette tax is levied

by the State (*and* specifically authorized by a statute). *See* RCW 82.24; Wash. Dep't of Revenue, *Tax Reference Manual*, at 55.⁸ Gas taxes are also State-levied and authorized. *See* RCW 82.36.020; Wash. Dep't of Revenue, *Tax Reference Manual*, at 76, 81. Taxes on timber and "leaseholds" are expressly authorized by statute. *See* RCW 84.33.051 ("The legislative body of any county may impose a tax upon every person engaging in the county in business as a harvester [of timber]."); RCW 82.29A.040 ("The legislative body of any county or city is hereby authorized to levy and collect a leasehold excise tax on . . ."); *see also* Wash. Dep't of Revenue, *Tax Reference Manual*, at 187, 196. Thus, pointing out that the *State* can issue excise taxes, or that municipalities can impose certain excise taxes that the Legislature has specifically empowered them to impose, is not the evidence of "express statutory authority" for Seattle to tax firearms or ammunition.

Neither the trial court nor the City have been able to point to a single example of another municipal excise tax placed on the retail sale of tangible personal property that contradicts RCW 35.21.710—and for good reason. RCW 35.21.710 was "designed to severely restrict the tax rates local governments could assess." *Western Telepage*, 140 Wn.2d at 613-14. Seattle cannot evade these restrictions through the "mere subterfuge" of claiming that a fee on the sale of firearms and ammunition has nothing

⁸ Available at http://dor.wa.gov/content/aboutus/statisticsandreports/2010/tax_reference_2010/default.aspx.

to do with the restrictions on how retail sales of tangible personal property may be taxed. *Id.* (prohibiting taxation scheme that is “mere subterfuge, meant to circumvent the express restrictions on local taxing authority set forth in RCW 35.21.710.”). Accordingly, even if the Ordinance were a tax, it is still unconstitutional. *See* WASH. CONST. ART. 11 § 12.

C. The Ordinance is Preempted Even if it Were a Tax

The Ordinance does not escape preemption even if it were a proper tax. The Ordinance is unquestionably a law passed directly and exclusively on the sale of firearms and ammunition in the City of Seattle. This puts the Ordinance squarely within the scope of preemption in RCW 9.41.290 and RCW 9.41.300. Left with an Ordinance that is preempted on its face, Seattle made the only argument it could below, *i.e.*, the time-worn contention that the Legislature only intended to preempt “criminal” statutes. The City has advanced this argument in the past and should be well-aware that it fails for two independent reasons: a) the Legislature has repeatedly and unmistakably affirmed that it occupies the entire field, including laws that are primarily civil in nature; and b) when a law—like the Ordinance in question—may be enforced through criminal prosecution, it is preempted even if one (incorrectly) assumes that RCW 9.41.290 applies only to “criminal” legislation.

1. The plain text of RCW 9.41.290 unambiguously governs both criminal and civil legislation.

RCW 9.41.290 “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” Accordingly, cities “may enact only those laws and ordinances relating to firearms that are specifically authorized by state law” RCW 9.41.290. The Legislature’s sweeping occupation of the entire field of firearms regulation leaves no room to build a wall between civil and criminal statutes. *See, e.g., Chan v. City of Seattle*, 164 Wn. App. 549, 562, 265 P.3d 169 (2011) (finding preemption under the unambiguous plain language of RCW 9.41.290 and RCW 9.41.300).

Notably, this case fundamentally differs from prior cases where RCW 9.41.290 was held ambiguous, because those cases were focused exclusively on whether the challenged policies were considered “laws and ordinances” *See, e.g., Pacific Northwest Shooting Park Ass’n v. City of Sequim*, 158 Wn.2d 342, 356, 144 P.3d 276 (2006) (“We determined that the purpose of the statute was unclear, at least with respect to the internal policies of municipal employers, and conducted an examination of legislative intent.”). No such ambiguity is found here. Seattle’s action is admittedly an ordinance and it relates to the sales of firearms and ammunition. Accordingly, the unambiguous statute “is to be derived from the language of the statute alone.” *Cherry v. Municipality of Metropolitan Seattle*, 116 Wn.2d 794, 799, 808 P.2d 746 (1991). In particular, RCW 9.41.290 mandates that “municipalities may enact only those laws and ordinances relating to firearms that are specifically authorized by state law” The City cannot point to any state law authorization that would

support the passage of the Ordinance, because there is none. Thus, the conclusion must be that the Ordinance is preempted and void.

2. The legislative history of RCW 9.41.290 demonstrates the wide and exhaustive preemption created by the Legislature.

The scope of RCW 9.41.290 is no different even if the Court were to find the statute ambiguous. “A review of the legislative history makes clear that RCW 9.41.290 is concerned with creating statewide uniformity of firearms regulation of the general public.” *Cherry*, 116 Wn.2d at 801.⁹

A *de novo* review of the history and structure of the statute demonstrates that all laws singling out firearms and ammunition are preempted, whether they are criminal or civil. The preemption statutes have been amended three times in response to judicial interpretations that limited the scope of firearm preemption. In *Second Amendment Foundation v. City of Renton*, the trial court found that the city could prohibit possession of firearms in bars because the original preemption statute only repealed inconsistent legislation in effect in 1961 and had no prospective effect. 35 Wn. App. 583, 583 & 588, 668 P.2d 596 (1983). While *City of Renton* was pending before the Court of Appeals, the Legislature amended RCW 9.41.290 to prospectively preclude local laws

⁹ Although the City has relied below and in prior cases on *Cherry* and *Pacific Northwest* to argue that preemption only applies to criminal statutes, that claim does not withstand scrutiny. *Cherry* and *Pacific Northwest* stand for the proposition that preemption only attaches to restrictions that apply to the general public, not to private internal rules. See *Pacific Northwest*, 158 Wn.2d at 356-57; *Cherry*, 116 Wn.2d at 801. While these cases contain dicta indicating that the elimination of conflicting criminal statutes was the original central purpose of RCW 9.41.290 in 1961, the distinction between civil and criminal preemption was not relevant to those cases and they neither addressed nor held that criminal regulations are the only type of legislation subject to preemption.

that were more restrictive than or exceeded state laws. *Id.* at 588 n.3. However, the Court of Appeals found that the amendment made while the case was pending only preempted inconsistent local firearms laws and did “not militate against the result reached here” because the State did not specifically regulate possession. *Id.* In response, the Legislature *again* amended RCW 9.41.290 to state that “Washington hereby fully occupies and preempts the entire field of firearms regulation” and also added RCW 9.41.300 which prohibited possession of firearms in certain places but allowed municipalities to enact certain possession laws “notwithstanding” RCW 9.41.290. *See* Laws of 1985, ch. 428 §§ 1-2.

Ten years later, in *City of Seattle v. Ballsmider*, the Court of Appeals found that this “notwithstanding” language in RCW 9.41.300 was intended “to allow local governments relatively unlimited authority in one specific area—*i.e.*, the discharge of firearms in areas where people, domestic animals, or property would be endangered.” 71 Wn. App. 159, 162-63, 856 P.2d 1113 (1993). The next year, the Legislature *again* amended RCW 9.41.290 to abrogate *Ballsmider*. The Legislature mandated that local laws and ordinances are only permitted as specifically delineated in RCW 9.41.300 and removed the “notwithstanding” language from RCW 9.41.300. *See* Laws of 1994, 1st Sp. Sess., ch. 7, §§ 428-29.

The legislative history tells a story: every time a court has sought to restrict the preemptive field, the Legislature has forcefully struck back and reaffirmed or expanded the all-inclusive scope of RCW 9.41.290. *See Chan*, 164 Wn. App. at 551-53 (summarizing history). Given this history,

it beggars belief that the Legislature intended a narrow “criminal only” field.

Equally important, the current text of RCW 9.41.300 itself supports a finding that preemption applies to civil legislation as well. In 1994, the Legislature amended RCW 9.41.300 to specifically permit municipalities to use zoning laws to regulate where firearms could be sold, but barring municipalities from otherwise burdening firearms businesses any more than other similarly zoned businesses. *See* RCW 9.41.300(3)(a) (“Cities, towns, and counties may enact ordinances restricting the areas in their respective jurisdictions in which firearms may be sold, but, . . . a business selling firearms may not be treated more restrictively than other businesses located within the same zone.”). The Final Bill Report stated that this amendment was necessary because “the state has preempted the area of firearms regulation” and “counties and cities are not authorized to regulate, through zoning, where firearms may be sold.” Final Bill Report, E2SHB 2319 at 8 (1994).¹⁰

The fact that the Legislature has stated that RCW 9.41.290 preempts zoning regulations is yet another reason why a civil/criminal distinction must fail. Zoning is inherently civil in nature, and is enforced through civil penalties. *See, e.g.*, SMC 23.90.018. If RCW 9.41.290 preempts civil zoning regulations (and it clearly does), there simply is no

¹⁰ Available at <http://apps.leg.wa.gov/documents/billdocs/1993-94/Htm/Bill%20Reports/House/2319-S2.FBR.htm>.

room for an argument that RCW 9.41.290 is limited to the field of criminal regulation. As the Legislature has stated time and time again, RCW 9.41.290 is intended to fully and completely occupy the field of firearms regulation—and that field of course includes legislation, like zoning, that are primarily civil in nature.

3. This Court has already found preemption where a municipality inserts an extra step between the mandate and the penalty.

Even if criminal enforcement were a prerequisite to preemption, it is present here. Failure to pay the “tax” for the sale of firearms or ammunition is punishable as a gross misdemeanor. *See CP 71-73*. While the City may contend that this criminal punishment is directed at a failure to pay money instead of the act of selling firearms and ammunition, *Chan* has already rejected this very argument when it preempted a Seattle ordinance that imposed a restriction on firearms without a criminal sanction but punished non-compliance with a separate criminal statute. *See* 164 Wn. App. at 565-66.

In *Chan*, Seattle banned firearms from public parks, but expressly disclaimed any criminal or civil penalties for the failure to abide by the ban. *Id.* As *Chan* found, however, Seattle intended to use the already existing trespass laws to prosecute anyone who violated the ban. *Id.* at 566. Thus, *Chan* has already held that preemption may not be

circumvented simply by adding an extra step between the regulated conduct and the criminal penalty.¹¹ *Id.*

Like the plaintiffs in *Chan* who faced trespass prosecution for violating the public park ban, Outdoor Emporium and Precise Shooter will be subject to criminal penalties if they do not abide by the Ordinance, rendering this Ordinance just as unconstitutional as the ordinance found unconstitutional in *Chan*. *See id.* The application of RCW 9.41.290 preempts the Ordinance through its plain language, upon a review of the legislative history, and by the application of court precedent. Accordingly, no matter how the Ordinance is categorized, it is preempted because it violates RCW 9.41.290: “municipalities may enact only those laws and ordinances relating to firearms that are specifically authorized by state law.”

D. Declaratory and Injunctive Relief Are Appropriate

Plaintiffs have demonstrated that the Ordinance is a regulation rather than a tax. Thus, the Ordinance violates RCW 9.41.290—and is therefore preempted and unconstitutional—because the State occupies the entire field regarding firearms regulation. RCW 9.41.290; WASH. CONST. ART. 11 § 11 (“POLICE AND SANITARY REGULATIONS. Any county, city, town or township may make and enforce within its limits all

¹¹ Notably, *Chan* did not hold that criminal enforcement was required for preemption. There was no argument by the plaintiffs in *Chan* that preemption should apply to non-criminal statutes, because that argument was irrelevant given the application of trespass statutes. Thus, the Court simply disposed of Seattle’s semantic argument that the ban on firearms in the park was not criminal in nature. The same result is warranted here.

such local police, sanitary and other regulations as are not in conflict with general laws."); *Chan*, 164 Wn. App. at 549; CP 179 at ¶¶ 18-25 (trial court's finding that the Ordinance would be preempted if it were a regulation). Even if the Ordinance were a tax under *Covell*, it is both an unauthorized use of the taxing power and preempted on its face as related to the sale of firearms, and therefore unconstitutional. *See supra* Sections IV.B and IV.C. Because the Ordinance is unconstitutional under any of these scenarios, the Court should enter declaratory and injunctive relief to bar its enforcement. *See, e.g., Okeson*, 150 Wn.2d at 549 ("The issues in this case pertain to constitutional limitations and statutory authority, and so are issues of law to be determined de novo by this court.").

In particular, a person may ask a court to determine the validity of an ordinance, and obtain a declaration of rights under that ordinance, if that person's "rights, status or other legal relations are affected by" that rule. RCW 7.24.020. Such declaratory relief is "peculiarly well suited to the judicial determination of controversies concerning constitutional rights and, as in this case, the constitutionality of legislative action or inaction." *Seattle Sch. Dist. v. State*, 90 Wn.2d 476, 490, 585 P.2d 71 (1978). A party may show the need for a declaratory judgment where a justiciable controversy is established through: (1) an actual, present, and existing dispute, as opposed to a dispute that is possible, hypothetical, moot, or speculative; (2) between parties that have genuine and opposing interests; (3) which involves direct and substantial interests as opposed to potential, theoretical, or abstract interests; and (4) a judicial determination of which

will conclusively terminate the controversy. *See To-Ro Trade Shows v. Grant Collins*, 144 Wn.2d 403, 411, 27 P.3d 1149 (2001); RCW 7.24.060. Similarly, a party may obtain injunctive relief by showing: (1) a clear legal or equitable right; (2) a well-grounded fear of immediate invasion of that right; and (3) that the acts complained of either result in or will result in actual and substantial injury. *Chan*, 164 Wn. App. at 567.

Where a law is preempted, the factors for declaratory and injunctive relief are easily met. *See, e.g., Gen. Tel. Co. of the N.W., Inc. v. City of Richmond*, 105 Wn.2d 579, 587, 716 P.2d 879 (1986) (affirming trial court's decision to grant declaratory relief where a city ordinance requiring telephone franchisees to move underground lines at its own expense was declared null and void because a state regulation required the expense to be paid for by the party requesting the move); *State v. City of Seattle*, 94 Wn.2d 162, 166-67, 615 P.2d 461 (1980) (granting declaratory and injunctive relief where a Seattle ordinance regarding historic landmarks was declared unconstitutional because it conflicted with a state statute expressly permitting the University of Washington to alter and demolish certain University-owned property).

Chan is an obvious and instructive example. In that case, Judge Shaffer granted a summary judgment motion that plaintiffs brought shortly after filing their lawsuit. *Chan*, 164 Wn. App. at 558. Finding that the City of Seattle's attempt to regulate firearms by banning them from city parks was preempted by state law and therefore void, Judge Shaffer ordered immediate declaratory and injunctive relief that prevented the City

from enforcing the preempted regulations. *Id.* This Court affirmed Judge Shaffer's decision, including the declaratory judgment and injunction that she ordered as a remedy. *Id.* at 567.

The Plaintiffs in this case are entitled to the same relief afforded the plaintiffs in *Chan*; like the parks ban at issue in *Chan*, the Ordinance is preempted by state law, and is thus "null and void." *Id.* at 558. As to the firearm and ammunition retailers Outdoor Emporium and Precise Shooter, at the very least, there is no dispute that they sell firearms and ammunition in the City of Seattle and would be subject to the "tax" to be imposed by the Ordinance starting on January 1, 2016. Accordingly, the retailer Plaintiffs' challenge to the "tax" presents an actual, present, and existing dispute between the parties that involves the retailers' statutory and constitutional rights to be free from the substantial fees that are imposed under the threat of criminal prosecution. This Court can, and should, conclusively terminate the controversy created by the City's unconstitutional local interference with the sale of firearms and ammunition by issuing declaratory and injunctive relief.

E. The Trial Court Erred By Dismissing the Case in its Entirety on a Motion for Partial Summary Judgment

The trial court dismissed this case in its entirety even though the City of Seattle had only filed a partial motion for summary judgment on a portion of the challenge to the Ordinance and the parties had not had the opportunity to address the remaining arguments to the trial court.

As explicitly established before the trial court, *see* CP 34 at n.2; CP 142 at n.1, Plaintiffs' claims encompass two related, yet separately judicable theories of preemption. The primary subject of the motions before the trial court was whether the Ordinance was preempted on its face. The public record concerning the gestation, passage, and structure of the Ordinance was the only relevant evidence required to address this contention. If the trial court, or this Court on appeal, found this initial argument persuasive, that would be the end of the inquiry and a declaratory judgment and injunction against the Ordinance would be appropriate. However, if, and only if, the trial court found Plaintiffs' initial argument unpersuasive, the trial court would be required to address a secondary contention: the Ordinance is preempted because the amounts charged to firearm and ammunition businesses make it impractical or impossible to sell firearms and ammunition in Seattle. Addressing this second issue would require some discovery—largely surrounding the potential profit margin of sales before and after the institution of the Ordinance—to fully and finally examine whether the Ordinance is preempted because it regulates the sale of firearms or ammunition.

Plaintiffs brought their initial motion on the initial argument alone to prevent the irreparable damage faced by the Plaintiffs if the Ordinance went into effect as scheduled on January 1, 2016, and to accommodate the City's concerns that the second contention of a de facto regulation would require a discovery and briefing schedule that could not be accommodated prior to the end of 2015. CP 34 at n.2; CP 142 at n.1. The City cross-

moved only for partial summary judgment on the same issues, signaling that they too believed that further analysis would be required even if the City prevailed on the cross-motions before the trial court. CP 89.

In short, the trial court erred when it dismissed Plaintiffs' Complaint despite the failure to adjudicate all issues. *See, e.g., In re Estate of Black*, 153 Wn.2d 152, 171-72, 102 P.3d 796 (2004) ("We find that it was an abuse of the trial court's discretion not to hear all issues regarding the validity of the will at the probate proceeding."). Accordingly, even if this Court affirms the trial court's holding as to the partial analysis of the Ordinance, this case should be remanded for further proceedings on the yet-to-be-addressed analysis of the Ordinance requiring an evaluation of whether the Ordinance is preempted by RCW 9.41.290 because it operates to suppress sales of firearms and ammunition. *See id.* at 172-73 ("We find that on remand it is more appropriate to hear all issues regarding the validity of both wills in one proceeding because the claims are interrelated and involve the same 'transactional nucleus of facts'").

V. CONCLUSION

For all the foregoing reasons, Plaintiffs respectfully request that this Court reverse the trial court, hold that the Ordinance is a regulation, and impose a declaratory judgment and injunction preventing the enforcement of the Ordinance.

DATED this 4th day of April, 2016.

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CERTIFICATE OF SERVICE

The undersigned hereby declares as follows:

1. I am employed at Corr Cronin Michelson Baumgardner
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2. On this date, I caused a true and correct copy of the
foregoing document to be served via Email on the following parties:

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

DATED: April 4, 2016, at Seattle, Washington.

s/ Christy A Nelson _____

Christy A. Nelson

