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NO. 65123-4-I

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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

v.

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

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REPLY BRIEF OF APPELLANT

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## I. INTRODUCTION

The crux of this dispute, as framed by the first statement of issues submitted by each party, is whether RCW 9.41.290 is a criminal regulation of firearms. As articulated by Plaintiffs, the question for decision is whether the “City’s Firearms Rule . . . carried a criminal penalty in direct violation of the express preemption language in RCW 9.41.290.” Resp. Br. at 4; compare Plaintiffs’ Issue No. 1 to Defendants’ Assignment of Error No. 1. The answer to that simple question is clearly no—the Parks Policy does not carry a criminal penalty, and is not a criminal regulation of firearms.

Plaintiffs’ argument that the Parks Policy is a criminal regulation rests entirely on their assertion that a violation could, through a chain of events, result in a citation for trespass. But the possibility of an eventual trespass citation does not transform a departmental policy into a general criminal regulation of firearms. Indeed, despite the fact that every Plaintiff in this case willfully violated the Parks Policy, not one of the Plaintiffs was ever subject to any criminal sanction. Because the Parks Policy is not a criminal regulation but a condition of use of property, the Policy falls outside the scope of the Preemption Statute.

Plaintiffs try to disguise the weakness of their position on this determinative issue by quoting an Attorney General Opinion, a public statement of the Mayor, and “legislative history,” and by accusing Defendants of reliance on “policy arguments.” None of these diversionary tactics are supported by the record or Plaintiffs’ legal authorities.

- Plaintiffs position Attorney General Rob McKenna’s Opinion as the heavy artillery of their argument, but that Opinion never enters the field of appellate battle. Statutory construction is a task delegated by the Constitution exclusively to the Judicial Branch, and an opinion from a partisan elected official is entitled to little or no deference.
- Plaintiffs mischaracterize Mayor Nickel’s 2006 statement concerning preemption of “local laws” as an admission that the City’s 2009 Policy was preempted. The 2006 statement is not germane to statutory construction, but even if it were, the Court is required to draw the reasonable inference that the statement referred only to criminal regulation, not the Policy here.
- Plaintiffs’ introductory argument that Defendants “ignore legislative history” is belied by Plaintiffs’ own failure to cite any legislative history that actually supports their construction. In contrast, Defendants have cited legislative history that preemption is limited to “laws and ordinances.” Opening Br. at 13 n.1, 27.
- As to the suggestion that Defendants rely on inappropriate “policy arguments,” Defendants have not based their statutory construction on any contention that restricting firearms is preferable public policy.

Stripped of these diversionary references, Plaintiffs’ argument—like Defendants’—reduces to an application of RCW 9.41.290 based on the statutory construction set forth in two binding supreme court cases—Cherry v. Municipality of Metro. Seattle, 116 Wn.2d 794, 808 P.2d 1141

(1991) and Pac. Nw. Shooting Park Ass'n v. City of Sequim, 158 Wn.2d 342, 144 P.3d 276 (2006). Plaintiffs agree with Defendants that the decisive issue is whether the Parks Policy is a criminal regulation of firearms. However, Plaintiffs miss the mark when they attempt to recharacterize a policy setting conditions to use City property as a criminal firearms regulation of general application to the public. Because the Parks Policy is no such thing, the judgment below must be reversed.

## **II. REBUTTAL TO PLAINTIFFS' STATEMENT OF THE CASE**

Plaintiffs make two factual assertions that are literally true, but from which they draw prohibited factual inferences. On appeal of an order granting summary judgment, of course, all factual inferences must be drawn in favor of Defendants, Opening Br. at 10, and the Court must therefore reject the factual inferences that Plaintiffs draw.

First, Plaintiffs assert that “[t]he Firearms Rule authorized a police officer or other authorized City employee to order a person to leave a Parks Department facility even if that person had a valid Concealed Pistol License,” concluding that “[r]efusal to leave could subject a violator to citation or arrest for criminal trespass.” Resp. Br. at 7. While it is true that the City’s Policy provides that police officers and other City employees “have authority to withdraw . . . a person’s permission to enter or remain at a designated Parks Department facility,” the Policy does not provide that “violators” are subject to “citation or arrest for trespass.” To the contrary, the Policy states clearly:

**6.1 No Criminal or Civil Penalties.** This policy/rule does not include any criminal or civil penalties. Rather, it constitutes conditions placed upon a person's permission to enter or remain at a designated Parks Department facility . . . Such conditions shall be enforced in the same manner and pursuant to the same ordinances and statutes as similar conditions could be enforced by other public or private property owners. CP 21.

Second, Plaintiffs also ask the Court to draw a prohibited inference from a May 2006 statement by Mayor Greg Nickels. It is true that Mayor Nickels sent a letter to Speaker of the House Frank Chopp in which he stated that:

State law preempts any and all local regulations related to firearms. Our hands are tied at the local level and we are unable to adopt any local laws to protect our residents from gun crime.

Resp. Br. at 2. But the inference that Plaintiffs draw—that “the City knew to a certainty that [the City’s Policy] violated the law,” *id.*,—is not only irrelevant to legal construction of the Preemption Statute, it is unfounded and an improper inference on summary judgment. Mayor Nickels’ 2006 statement to Speaker Chopp was an accurate statement, indeed a truism, that the City was preempted from enacting “local laws” of general application that regulate firearms with criminal sanctions. The Mayor’s comment preceded the 2009 Parks Policy by more than three years, was not addressed to the Parks Policy, and clearly does not apply to that Policy. On appeal of summary judgment, this Court is required to draw all reasonable inferences in Defendants’ favor. Here, the only reasonable inference is that Mayor Nickels was referring to local laws of general application regulating firearms with criminal sanctions, and not the Policy

issued three years later setting conditions for use of City property. The statement does not support Plaintiffs' inference or legal argument.<sup>1</sup>

### III. ARGUMENT

#### A. The Attorney General Opinion Is Not Precedent and Its Conclusions Are Not Supported in Law

Plaintiffs rely heavily on a 2008 Attorney General Opinion (“AGO”) speaking to Attorney General McKenna’s views on the scope of the Preemption Statute, quoting it extensively in their summary judgment briefing below. See, e.g., CP 87, 96-97, 266. Now, on appeal, Plaintiffs chide the City for failing “to mention the Attorney General’s Opinion in its Opening Brief,” and argue that the AGO is “entitled to great weight.” Resp. Br. at 15 n.4.

Plaintiffs are correct in one respect—the City did intentionally omit the AGO from its Opening Brief—and for good reason, it is not precedent. In fact, the AGO is not entitled to deference because the court “remains the final authority on the proper construction of a statute.” Wash. Fed’n of State Employees, Council 28 v. Office of Fin. Mgmt., 121 Wn.2d 152, 165, 849 P.2d 1201 (1993); ATU Legislative Council of Wash. v. State, 145 Wn.2d 544, 554, 40 P.3d 656 (2002) (“However, this court gives little deference to attorney general opinions on issues of statutory construction.”).

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<sup>1</sup> Plaintiffs also assert that the Policy was implemented despite “vigorous public opposition,” Resp. Br. at 3, but they cite nothing from the clerk’s record to support this contention. In any event, this case raises no challenges to the City’s administrative rule-making process, and whether the majority of City residents support or oppose the Parks Policy is irrelevant to the question of statutory construction that is presented.

To the extent that the AGO is offered for its persuasive rationale, its conclusion on the central question of a city’s ability to restrict firearms on municipal property amounts to little more than a conclusory sentence, unsupported by any legal rationale, authority or precedent. While the eleven-page AGO contains an extended discussion of the holdings in both Cherry and Sequim, just a single paragraph is devoted to the question of “whether this reasoning would apply if a city prohibited the general public from possessing firearms on city property.” CP 304. The AGO acknowledges that the Preemption Statute would not prevent a private property owner from restricting firearms on the owner’s property, but then nakedly asserts that “a city is not in the same position as a private citizen” because “[l]arge parts of the city property are generally open to the public,” and because “citizens may be required to enter city property.” Id. This purported distinction cannot win the day because citizens are not required to enter City parks to exercise their rights of citizenship, and neither the Attorney General nor Plaintiffs have offered any authority to suggest that a City’s “bundle of property rights” does not include the ability to exclude visitors and define conditions of use.

**B. The Parks Policy Is Not a Criminal Regulation of Firearms**

Plaintiffs concede that “[t]here is no dispute that, in enacting the Preemption Clause, the legislature sought to ‘advance uniformity in criminal firearms regulation.’” Resp. Br. at 20 (citing Cherry and Sequim). After conceding this critical point, Plaintiffs then argue that “the Firearms

Rule carries a penal element.” Id. This argument is obviously wrong—the Parks Policy sets forth no criminal penalties for violation (nor could it, because it was not enacted as an ordinance). CP 21; supra p. 3-5. That simple analysis should end the inquiry and lead to reversal of the trial court’s entry of judgment.

As explained above, the Parks Policy clearly states that it “does not include any criminal or civil penalties,” and it clearly provides that the Policy shall be enforced “in the same manner and pursuant to the same ordinances and statutes as similar conditions could be enforced by other public or private property owners.” CP 21 (emphasis added). This language is not an “artificial distinction” as Plaintiffs’ argue, Resp. Br. at 20, but derives from the fundamental distinction between the legislative power to regulate behavior, and the rights of property owners to set conditions for use of their property. Plaintiffs have not identified a single person who was subjected to “criminal penalties” for violation of the Parks Policy, and obviously, they cannot.

The Parks Policy contemplates that an individual who brings a firearm into a posted area in a park or community center would simply be asked to leave as with violation of any other park rule. In fact, this is exactly what happened to the Plaintiffs here—each one was asked to leave a Parks facility, and each one did so without arrest or criminal citation, even though each knowingly and intentionally entered the facilities in

violation of the Parks Policy. The Plaintiffs' own experiences are the best illustration of the non-criminal nature of the Policy.<sup>2</sup>

In the event that an individual refused to leave a designated area of a park or community center, the person could be subject to citation for trespass in parks—if the person “knowingly enters or remains in a park from which he or she has been excluded.” SMC 18.12.279 (emphasis added). The act giving rise to liability in this case is entering or remaining in a park after permission to visit has been revoked. Indeed, to adopt Plaintiffs' reading of the trespass laws would actually add an element to the crime of trespass relating to the underlying conduct, when all that is required is that the individual remain in a park from which the individual is excluded. This is not an artificial distinction because “[t]he general trespass statutes criminalize the entering and remaining upon premises when not licensed, invited, or privileged to enter or remain.” State v. Olson, 47 Wn. App. 514, 517, 735 P.2d 1362 (1987) (emphasis added).

While the Parks Policy touches upon the controversial subject of firearms, it is, at bottom, a condition “placed upon a person’s permission to enter or remain at a designated Parks Department facility.” CP 21. The conditions were promulgated in a Department of Parks and Recreation Rule/Policy, and in that sense are no different than the many other rules and policies governing City parks, which do not fundamentally criminalize

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<sup>2</sup> The Seattle Municipal Code provides that the Superintendent may exclude a person from a park for violating any “park rule.” SMC 18.12.278(A). “The offender need not be charged, tried, or convicted of any crime or infraction in order for an exclusion notice to be issued.” Id.

a whole host of annoying and sometimes dangerous conduct that is incompatible with the safe operation and use of parks. Consider just two examples of conduct prohibited in City parks:

- Possession of glass containers at athletic fields, beaches or children’s playgrounds; and
- Smoking, chewing, or other tobacco uses within 25 feet of other park patrons and in play areas, beaches, playgrounds, or picnic areas.

Department of Parks and Recreation Rule/Policy P 060 7.21.00, available at [http://www.cityofseattle.net/parks/Publications/code\\_of\\_conduct.pdf](http://www.cityofseattle.net/parks/Publications/code_of_conduct.pdf).

Such rules were put into place in parks for the same fundamental reason the Parks Policy was issued—the City’s “interest in promoting facility users’ and visitors’ confidence, particularly families with children, that such facilities are safe and secure places to visit.” CP 17. As with the Parks Policy relating to firearms, if an individual brought a glass container onto a playground or was smoking near a family in a picnic area, that individual could be asked to leave by Parks Department personnel for violating a park rule. And like the Parks Policy relating to firearms, if the individual refused to leave, that person could face a citation for trespass. Yet Plaintiffs could not seriously argue that a trespass citation in this example amounts to a criminal regulation of glass containers or tobacco on playgrounds. But that is precisely the argument Plaintiffs advance here. The conduct amounting to trespass in each case is the same—entering or remaining without permission.

Similarly, a private homeowner may ask a person to leave the homeowner's property. If that person fails to do so, he may be prosecuted for criminal trespass. The fact that the person was asked to leave the homeowner's property because the person was carrying a firearm, or for any other reason, would not render the prosecution for trespass a de facto criminalization of firearms possession. Rather, the criminal act is remaining on the homeowner's property when not privileged to do so.

Plaintiffs' citation to Estes v. Vashon Maury Island Fire Prot. Dist. No. 13, No. 55950-8-I, 2005 WL 2417641, at \*2 (Wash. Ct. App. Oct. 3, 2005), Resp. Br. at 21 n.5, illustrates the limits of their strained argument concerning application of trespass statutes.<sup>3</sup> In Estes, the plaintiff sought to overturn a fire district's policy prohibiting "the possession and use of firearms and other dangerous weapons by its officers and members or by visitors . . . while on [D]istrict property," arguing in part that the policy was preempted under RCW 9.41.290. CP 175 (alteration in original). The Fire District then moved for summary judgment on the question: "Does RCW 9.41.290 prohibit a public agency and employer from banning firearms on premises owned by the agency?" CP 176. The trial court, after considering the pleadings, said no and granted the defendant's motion for summary judgment. CP 187-88. The Court of Appeals,

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<sup>3</sup> In opposition to Plaintiffs' motion for summary judgment below, Defendants cited the trial court opinion in Estes v. Vashon Maury Island Fire Prot. Dist. No. Thirteen, No. 05-2-02732-1 KNT (King County Super. Ct. Mar. 9, 2005). CP 148; CP 175-88. Washington courts permit parties to cite the unpublished opinions of one trial court to another trial court. Oltman v. Holland Am. Line USA, Inc., 163 Wn.2d 236, 248, 178 P.3d 981 (2008). Plaintiffs have cited the unpublished trial and appellate decisions from Estes in their brief. Resp. Br. at 21. Defendants discuss Estes here to reply to Plaintiffs' arguments.

Division 1, in the unpublished opinion cited by Respondents, affirmed, finding that because “the fire district policy here . . . does not fall within the scope of the criminal firearms regulations that the Cherry court viewed as governed by RCW 9.41.290, we reject Estes’ claim of statutory preemption.” 2005 WL 2417641, at \*2. Notably, even though citizens on Maury Island were required to enter the fire district property to vote—a right of citizenship to which Attorney General McKenna alluded in his Opinion—the court upheld the trial court’s grant of summary judgment.

Plaintiffs attempt to distinguish Estes by arguing that “[t]he rule in Estes contained no penalty whatsoever, much less a penalty akin to the criminal trespass sanction” in the Parks Policy. Resp. Br. at 21 n.5. This argument is without merit. As the City has established, its Parks Policy contains no criminal penalty either. Moreover, if a visitor to the offices of the fire district in Estes brought a firearm in violation of the fire district’s rule and refused to leave, fire officials would have had the same ability to contact police and request a trespass citation as Seattle Parks Department employees. As with the Parks Policy here, the act of calling police to enforce the rule through a trespass citation would not amount to a criminal regulation of firearms.

**C. The Parks Policy is Not a General Regulation of Firearms.**

Plaintiffs also argue that the Parks Policy is “imposed upon **any member of the general public** who chooses to visit a **public** park or recreation center.” Resp. Br. at 17 (emphasis in original). From this

premise Plaintiffs draw the incorrect conclusion that the Policy is preempted because it is a general regulation of firearms. Plaintiffs' argument is an exercise in sophistry that confuses the issue whether a policy is an exercise of the legislative power to regulate conduct or an exercise of property rights, and fails to heed the lessons of Sequim.

In Sequim, any member of the general public was also invited to attend and take part in the gun show that gave rise to the action. In fact, the promoters of the gun show alleged that the city's unlawful permit conditions had damaged them by reducing the number of members of the general public who would be interested in attending and participating, including as unlicensed dealers. Pac. Nw. Shooting Park Ass'n v. Sequim, 158 Wn.2d 342, 347, 144 P.3d 276 (2006) ("PNSPA claims that many vendors packed up and left the show and attendance by the public was significantly lower than expected."). As Defendants explained in their Opening Brief, the State Supreme Court's analysis in Sequim did not rest on identifying who might be impacted, and whether the impact fell on the "general public" or some subgroup. Opening Br. at 21. That is because the analysis flowed from the City's rights as an owner of property to set conditions for use, and acknowledging equivalence between public and private property rights. Id. Plaintiffs cannot harmonize this aspect of Sequim with their construction of RCW 9.41.290.

Notwithstanding membership in the "general public," each person's privilege to enter and use another's property is subject to the

conditions the owner sets, and is inherently individual and private. Any “member of the general public” can also attempt to enter a restaurant or business, but a private property owner’s policy excluding patrons with firearms and excluding visitors does not become a law of general application because it applies to all comers. In these instances, just as with the City’s Parks facilities, the power to exclude any individual member of the general public flows not from regulation of the “general public,” but from the owner’s fundamental right to exclude others and set conditions for use. In this respect—setting conditions for use—the City of Seattle acted in exactly the same capacity as the City of Sequim.

Because they start with the wrong question, Plaintiffs fail to arrive at a correct answer. The question is not whether a rule applies to “every member of the general public” who requests entry, but whether the City has purported to legislate or regulate conduct—in particular, criminal conduct—of “every member of the general public” throughout its jurisdiction. For example, if Seattle had passed an ordinance, enforced by penalty, prohibiting guns at all public and private facilities where children congregate within the boundaries of the City, that ordinance would regulate “every member of the general public,” and would go beyond the exercise of the rights of a property owner. Obviously, to affect behavior outside its own facilities, the City would need to act by ordinance, and include some coercive penalty to obtain compliance. These essential hallmarks of a law of general application are absent from the City’s Parks

Policy.

Similarly, because they refuse to acknowledge the distinction between legislative powers and property rights, Plaintiffs make an exaggerated argument that Defendants' construction of the Preemption Statute "would permit a municipality to regulate firearms to its heart's content as long as it did so under the guise of a 'rule' or 'policy.'" Resp. Br. at 23. Quite to the contrary, because the City is acting in its capacity as a property owner, its ability to set conditions for behavior does not extend beyond its own properties, and it does not have the power to impose coercive criminal penalties.

The limitations on the City's power are coterminous with the limitation on any owner of property. Like any property owner, Defendants may set conditions for entry upon and use of the City's own property, but not their neighbors'. Defendants cannot set "rules" or "policies" for private facilities, they cannot set "rules" or "policies" of general application throughout the City, and they cannot enact coercive criminal penalties by "rule" or "policy." To enact any criminal firearms regulation of general application, the City would need to enact an ordinance through the exercise of the City's legislative powers, and as Mayor Nickels complained to Speaker Chopp, in that endeavor they would be barred by preemption. But the preemption statute does not reach the action challenged here.

**D. The Plaintiffs Failed To Prove The Elements for Issuance of a Permanent Injunction**

To support the grant of a permanent injunction, Plaintiffs make two arguments. First, Plaintiffs argue that RCW 9.41.290 gives rise to a “clear legal right to carry a firearm.” Resp. Br. at 27. Second, Plaintiffs argue that the evidence established a well-grounded fear of immediate invasion of this right. *Id.* at 29. Both positions are wrong.

**1. RCW 9.41.290 does not create a clear legal right to carry a firearm.**

In their Opening Brief, Defendants explained that the trial court committed reversible error when it concluded that Plaintiffs have a “clear legal right to carry firearms” under the Federal and State Constitutions. Opening Br. at 29. Because the matter was not presented for decision, Defendants asked the Court to reverse the trial court’s ruling that such a right exists. Opening Br. at 6, 29-37. Plaintiffs have not offered argument to defend the trial court’s ruling in this regard, and so this erroneous ruling should be reversed. In fact, they have conceded that the trial court’s constitutional pronouncements were “background” or “dicta,” and are to be disregarded. Resp. Br. at 27-28. As a result, this case does not present the question whether the Federal Constitution or the State Constitution might give rise to a constitutional right to carry firearms in City parks. *Id.*

On appeal, the Plaintiffs argue simply that they have “the clear legal right to carry a firearm anywhere the state has not expressly prohibited,” and they cite only RCW 9.41.290 as authority. Resp. Br. at 27. But they make no effort to point to any language in RCW 9.41.290

that gives rise to this right, and that is because there clearly is none.

Instead, having spent the first half of their brief trumpeting their membership in the “general public,” Plaintiffs attempt to “back in” to a private legal right by arguing that if a private right did not exist, “no one would ever be able to challenge a firearms regulation that violates preemption.” Resp. Br. at 27. This ends-justifies-the-means approach to statutory construction is not supported by citation to any authority, and ironically for the National Rifle Association and the Second Amendment Foundation, is a naked request for “judicial activism”—for the Court to imply a private right of action in a statute where the Legislature had not indicated any intention to include one. If resort to judicial principles to create private rights in the absence of a declared legislative intent is ever justified, it is not here.<sup>4</sup>

Defendants established in their Opening Brief that in enacting RCW 9.41.290, the Legislature did not create new private legal rights. Opening Br. at 29. Defendants submit that if a private right to carry firearms on public property exists, it must be based on constitutional rights, but Plaintiffs made a conscious and deliberate decision not to assert the existence of rights under any constitution, both here and in the trial

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<sup>4</sup> Plaintiffs state in their introduction that “adults have the statutory right to carry a concealed firearm in most public locations – including city parks – if they have a valid Concealed Pistol License.” Resp. Br. at 5 (emphasis added). This particular argument was not made below, and was waived. In any event, for authority, Plaintiffs cite to the entirety of RCW chapter 9.41, perhaps invoking a “penumbra” of rights to be found floating within the statutory framework, because they cite no particular provision that supports this broad contention other than RCW 9.41.290. Id. at 5, 12. The statute that comes closest to addressing this topic, RCW 9.41.050, does not carry an affirmative grant of rights. Id.

court. Having failed to identify another basis for a “clear legal right” to carry a firearm in City parks, they have failed to establish the first element necessary to sustain the permanent injunction.

**2. Plaintiffs have not established a well-grounded fear of immediate invasion of their rights, or substantial Injury.**

Each of the Plaintiffs went to City parks, looking for a gun-rights lawsuit to join. CP 151-156. Each engaged in activity intended to prompt a request that they leave a Parks facility. *Id.* But in their eagerness to serve as litigants, which is certainly their “right,” they all engaged in atypical behavior. Drawing all reasonable inferences in Defendants’ favor in this de novo review, this Court must conclude from the record that the typical behavior of each Plaintiff at City parks—walking in open areas in parks—was not impeded by the Parks Policy, and that they suffered no substantial injury.

**a. Plaintiff Carter**

Mr. Carter declares that he “no longer visits” parks such as Alki Beach “because they are subject to the city’s Firearms Rule and I do not feel safe going there.” CP 45. However, in his deposition, Mr. Carter admitted that there were times when he would visit Alki Beach without his firearm when he planned to go straight to a bar from the park because firearms are prohibited in bars. CP 223-25. Given how readily Mr. Carter disregarded his need for firearms when it conflicted with his desire to visit a bar, the Court may infer that Mr. Carter’s interest in personal safety is substantially outweighed by the City’s interest in creating a safe and

secure environment, and that Mr. Carter has in fact suffered no substantial injury.

**b. Plaintiffs Chan and Kennar**

In their depositions, Ms. Chan and Mr. Kennar testified that they visited Seattle parks principally to walk with friends and family. CP 191; CP 206-10. Their declarations asserted that the Parks Policy now prevented them from visiting these parks. CP 54; CP 71. But neither Ms. Chan nor Mr. Kennar made any effort to contact the City to determine which portions of parks remained available to persons carrying firearms, and whether any of the trails or beaches they used in the past were designated pursuant to the Parks Policy. Indeed, with one questionable exception, neither of these plaintiffs had even visited their favorite parks to see whether signs were posted. At best, there is a disputed issue of fact whether these plaintiffs suffered substantial injury because Defendants submitted evidence that the trail and walking areas plaintiffs testified they used were not designated under the Parks Policy. CP 117.

**c. Plaintiff Peterson**

Before the Parks Policy was issued, Mr. Peterson made only a couple of visits to Seattle Parks. CP 244-49. Like the other plaintiffs, Mr. Peterson admitted that he made no effort to travel from his home in Lynnwood to Seattle to ascertain whether parks he used for walks included areas prohibiting firearms. CP 253. To the contrary, Mr. Peterson testified to his inaccurate understanding that firearms were

banned from all areas of all parks. Id. In this respect, he was in error. CP 117. Again, drawing all inference in Defendants’ favor, Mr. Peterson was free to use the same parks he used formerly, for all of the purposes for which he used them. At best, there is a disputed issue of fact whether Mr. Peterson suffered substantial injury, and if he did, whether it was sufficiently compelling to warrant an injunction.

**d. Plaintiff Goedecke**

Mr. Goedecke’s declaration indicates that he visited or traveled “through” Victor Steinbrueck approximately once a month. CP 79. Traveling through a park once a month is not a substantial use, and given that Victor Steinbrueck Park is very small and is easily circumvented on adjacent sidewalks to get to and from nearby locales, Mr. Goedecke has suffered no substantial injury. As with all of the individual Plaintiffs, Mr. Goedecke’s “use” of the park as an occasional throughway when sidewalks are available is at best incidental and insubstantial, and does not support issuance of an injunction.

As a result, not only do the undisputed facts fail to establish substantial injury justifying an injunction, the public interest in having the City establish safe conditions for the use of parks by its 1.8 million visitors annually greatly outweighs any private interest—especially given that no constitutional rights are at issue on this appeal.

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**IV. CONCLUSION**

For the reasons stated, Defendants ask that the order granting summary judgment be reversed and that the permanent injunction be vacated.

DATED this 22nd day of November, 2010.

Respectfully submitted,

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I, Charlene L. Bruns, do hereby certify and declare under penalty of perjury under the laws of the State of Washington, as follows:

That I am an employee of Orrick, Herrington & Sutcliffe LLP, 701 5th Avenue, Suite 5600, Seattle, Washington 98104. I caused the following documents to be filed with the Court of Appeals on Monday, November 22, 2010; and I caused the following documents to be served on counsel of record on Monday, November 22, 2010, at the address and in the manner described below:

1. Appellants' Reply Brief;
2. Certificate of Service

**Via Messenger on 11/22/2010**

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