

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' REPLY BRIEF

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I. INTRODUCTION

The so-called “firearms and ammunition tax” is unconstitutional. Whether the Court finds that it is preempted as a law relating to firearms or that it exceeds the limitations on Seattle’s taxing power, the Ordinance unquestionably and impermissibly invades the State’s domain.

Seattle’s arguments to the contrary distill to a single plea: do not look behind the curtain. Stuck with a public record and legislative history that indelibly portray the regulatory roots and intent of the Ordinance, Seattle urges this Court to ignore this powerful evidence and look no further than the face of the statute. Similarly, Seattle urges this Court to join it in ignoring express restrictions on the City’s power to tax the retail sale of tangible goods.

In drafting the Ordinance, the City has carefully sewn a curtain intended to hide the City’s regulatory intent. To get to the truth, the Court should look beneath the City’s words and examine the substantive background and practical impact of Seattle’s fee on the sale of firearms and ammunition. In so doing, the Court will conclude that the Ordinance is unconstitutional.

II. ARGUMENT

A. **Seattle Seeks an Improperly Superficial Inquiry into Whether the Ordinance is a Regulation or a Tax Because a Substantive Review Reveals its Regulatory Purpose and Impact**

The City believes that the Ordinance is a tax because the Ordinance’s text says it is a tax. Opp. at 14. Quite literally to the City, nothing else matters: because the Ordinance tautologically says the tax is a

tax, Seattle asks this Court to sweep away the overwhelming evidence that the City Council passed the Ordinance as a means of disincentivizing access to firearms. Opp. at 15-18.

In addition to ignoring the evidence surrounding the passage of the Ordinance, Seattle suggests that the Court also ignore the practical implications of the Ordinance that would be improper if they were instituted on their own—such as tracking, reporting, and monitoring the sale of firearms and ammunition—because the text “says nothing about reducing access to guns or tracking gun ownership.” Opp. at 3. Finally, Seattle claims that the Ordinance could not possibly be a regulation because Seattle failed to calculate or textually rationalize how the fees of \$25 per firearm and \$0.02 to \$0.05 per round of ammunition are related to the burden Seattle claims is added to gun violence by each firearm or round of ammunition. Opp. 22-23. In short, Seattle argues that no matter how unconstitutional the intent or impact of the Ordinance may be, this Court is powerless to act so long as the Ordinance is carefully drafted to pay lip service to the *Covell* test.

Washington law does not permit this sort of legislative gamesmanship. The Washington Supreme Court has warned that there is “an inherent danger that legislative bodies might circumvent constitutional constraints” by levying charges that are labeled as a tax or regulation even though they “possess all the basic attributes” of the other. *Okeson v. City of Seattle*, 150 Wn.2d 540, 552, 78 P.3d 1279 (2003). The Court can and should use the *Covell* factors as a means of discarding the Ordinance’s

textual wrapping paper to determine the true purpose of the Ordinance. *See Hillis Homes, Inc. v. Public Util. Dist. 1*, 105 Wn.2d 288, 299, 714 P.2d 1163 (1986); *Teter v. Clark County*, 104 Wn.2d 227, 239, 704 P.2d 1171 (1985). To hold otherwise is to allow municipalities veto power over the *Covell* test by disingenuously shaping the specific text of an ordinance to fit into whatever category they wish in order to avoid statutory restrictions on their power.

For example, although Seattle carefully avoided using traditional regulatory language in an obvious attempt to skirt the *Covell* test’s inquiry into the Ordinance’s primary purpose, Seattle unquestionably passed the Ordinance to burden the sale of firearms and ammunition the City believed to be at the root of a public health crisis. *See, e.g.*, 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 the Ordinance by discussing limiting access to firearms and ammunition). Seattle seeks exclusion of these statements¹ precisely because this

¹ The City misrepresents the Supreme Court’s statement that “interpretation of a statute by an individual legislator does not show legislative intent.” *State ex. rel. Citizens against Tolls (CAT) v. Murphy*, 151 Wn.2d 226, 238, 88 P.3d 375, 381 (2004). This “well settled” principle is aimed at excluding legislators’ ex-post interpretations. *See id.* at 237 (denying plaintiff’s attempt to “contact legislators concerning their interpretation” of the statute at issue); *Scott v. Cascade Structures*, 100 Wn.2d 537, 544, 673 P.2d 179 (1983) (refusing to consider a later law review article written by the chairman of the drafting committee); *Woodson v. State*, 95 Wn.2d 257, 264, 623 P.2d 683 (1980) (rejecting affidavits signed in 1980 by members of the 1959 legislature about their impression of a statute). In fact, the only irrelevant statements by a legislator in this case are put forth by Seattle, who submits an ex-post declaration by Tim Burgess drafted months after the Ordinance was passed. CP 131-33. Comparatively, the

evidence so clearly evinces the regulatory intent the *Covell* test is intended to ferret out. *Compare Covell v. City of Seattle*, 127 Wn.2d 874, 886, 905 P.2d 324 (1995) (holding that a general charge to pay for streets must be a tax because there “are no references to how street utility charges are going to enhance the health, safety or welfare of Seattle residents”), *with Teter*, 104 Wn.2d at 233 (holding that a charge to prevent flooding was regulatory because it sought to protect the public’s health, safety, and welfare).

Similarly, Seattle contends that the Ordinance cannot be a regulation under the *Covell* test because the Ordinance “says nothing about reducing access to guns or tracking gun ownership” and fails to explicitly identify a mathematical relationship between the fee and the supposed harm imposed by each firearm or round of ammunition. Opp. at 20 & 22-23. This myopic view of the *Covell* test asks the Court to ignore the practical impacts of the Ordinance and focus strictly on the language that Seattle chose to put before this Court knowing that the Ordinance was an unconstitutional outlier that would be the subject of a court challenge. *See* CP 164 (contemporaneous statement by City Council President Tim Burgess, originator of the bill, admitting that the proposed law “is clearly pushing the edge of the envelope”). *Covell* does not permit a judicial

contemporaneous statements of the legislators while a bill is pending are routinely relied upon to interpret the meaning of a statute even if they may not be strictly authoritative. *See Seattle Times Co. v. Benton County*, 99 Wn.2d 251, 255 n.1, 661 P.2d 964 (1983).

review that merely accepts the text of a challenged law at face value; to the contrary, the Court must carefully assess the manner in which the challenged law actually operates. *See Okeson*, 150 Wn.2d at 552 (noting that “classifying a charge as either a tax or a fee is critical” because municipalities could seek to “avoid the constitutional limitations on taxes by simply charging its citizens a ‘fire department fee’ or a ‘police fee.’”).

Thus, the issues raised by Plaintiffs in their opening brief are not the dismissible paranoia that Seattle mockingly claims, but instead reflect the practical application and impact that lie beneath the intentionally sparse language of the Ordinance. *See Br.* at 10-14. For example, the fees collected by the Ordinance are allocated to reducing the burden allegedly caused by each firearm or round of ammunition sold. *Compare CP 57-59* (contemporary op-ed piece authored by Tim Burgess stating: “Let’s tax the gun industry to help pay for the damage their products produce.”), *with Okeson*, 150 Wn.2d at 552-53 (“[A] regulatory fee raises money . . . to pay for or regulate the burden those who pay have created.”). Moreover, the Ordinance requires Plaintiffs to produce records of how many firearms and rounds of ammunition they are selling, which it could not otherwise be required to do by the City under RCW 9.41.290.² *See, e.g., Covell*, 127

² Seattle is simply incorrect that the obligation to maintain books for potential State tax review is relevant to Seattle’s regulatory purpose, *see Opp.* at 20, because State action is not bound by either RCW 9.41.290 or the *Covell* test and because the State’s gross receipts tax and sales tax collection require reporting of gross sale numbers and not an individual count of how many firearms or rounds of ammunition have been sold.

Wn.2d at 886 (charge was a tax because it did not attempt to monitor, quantify, or alter any rate payor activities). Finally, although Seattle readily concedes that it believes that there is a relationship between firearms and gun violence, *see* Opp. at 22, it denies the simple fact that Seattle settled on an amount that it believed offset the burden it alleged: \$25 a firearm and \$0.02 to \$0.05 per round of ammunition. *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”).

The Court should probe the Ordinance further than the face value approach advocated by the City and accepted by the trial court. If the Court does so, it will conclude that the primary purpose and inherent structure of the Ordinance is regulatory.

B. The Ordinance is Unconstitutional as a Tax Because Seattle Does Not Have Unlimited Power to Tax the Retail Sale of Tangible Personal Property

“Statutes should be construed to effect their purpose, and unlikely, absurd or strained consequences should be avoided.” *State v. Stannard*, 109 Wn.2d 29, 36, 742 P.2d 1244 (1987). RCW 35.102 *et seq.* and RCW 35.21.710 both seek to equalize and control the taxes that may be imposed on a retailer’s sale of tangible personal property. RCW 35.21.710 in particular seeks to ensure not only that all retailers are paying the same rate no matter the type of goods they sell, but that retailers as a whole pay no more than a maximum rate on the act of selling tangible personal property. Uniformity and a maximum tax rate: these are understandable

and reasonable limitations on a municipality's taxing power. *See Western Telepage, Inc. v. City of Tacoma*, 140 Wn.2d 599, 613-14, 998 P.2d 884 (2000) (noting that RCW 35.21.710 was "designed to severely restrict the tax rates local governments could assess"). Seattle's proposed interpretation of these statutes renders these restrictions meaningless and leads to the absurd consequence that Seattle and every other municipality have no limits whatsoever on the taxes they may impose on the retail sale of tangible personal property.

The central flaw in Seattle's argument is its assumption that because Seattle has the power to extract fees and taxes from a business for licensing purposes under RCW 35.22.280(32), other statutory restrictions on that power (for instance, RCW 35.21.710) simply do not apply. Seattle relies heavily, for example, on the existence of municipal taxes or fees imposed on the amount of square footage used or number of employees hired by a business as proof that municipalities may impose taxes on measures other than gross proceeds. *See Opp.* at 27-29. However, none of these license fees or taxes are imposed on the retail sale of tangible personal property; therefore, these license fees and taxes are irrelevant because they are not subject to the restrictions of RCW 35.21.710.

The same goes for the 100-year-old cases Seattle cites that upheld fees to license businesses that used coupons and vehicles. Not only were these cases decided well before the institution of the modern B&O taxing system and the passage of RCW 35.21.710, they involved minimal yearly fees imposed only on the issuance of a license to conduct business and not

on the actual business activity of the individual retail sale of tangible personal goods. *See City of Seattle v. King*, 74 Wn. 277, 133 P. 442 (1913) (\$4 annual fee for any vehicle used for commercial transportation); *Fleetwood v. Read*, 21 Wn. 547, 58 P. 665 (1899) (\$100 annual fee to receive a license to use coupons in sales promotions).

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 to do with restrictions on how the retail sale of tangible personal property may be taxed. *See id.*

Seattle’s weak attempts to distinguish *Western Telepage* only highlight its refusal to accept the fact that there are limits on the City’s power to tax. In *Western Telepage*, Tacoma passed an ordinance that recategorized paging services from a “service” to a “utility.”³ *Id.* The

³ Seattle, like Tacoma and all other taxing municipalities, delineates different categories of businesses and applies a different tax rate on each category based on the relevant statutory restrictions. *See* SMC 5.45.050 (providing, *inter alia*, for a .00215 rate on the gross proceeds of making sales at retail and wholesale while imposing a .00415 rate upon motor carriers). As discussed in the opening brief, *see* Br. at 17-18, this shared structure of categorizing businesses comes from the Model Municipal Business and Occupation Tax Statute, which mandates certain tax classifications that identify the types of business activities that are taxed (*i.e.* retailing, manufacturing, services) and the imposition of a tax on those

plaintiff, Western Telepage, challenged this recategorization because taxes on utilities were subject to a statutory cap of 6% of gross income rather than a lower tax cap placed on services. *Id.* at 605-06. The Supreme Court held that Tacoma had reasonably recategorized paging services as a utility instead of a service according to evolving technology and State law and that it was therefore permissible to tax paging services at the higher rate applicable to utilities. *Id.* at 613-14. The Court cautioned, however, that the recategorization would have been improper if it were “mere subterfuge meant to circumvent the express restrictions on local taxing authority.” *Id.*

Subterfuge is a word that comes to mind when describing what occurred here. By imposing an additional tax on retailers of tangible personal property who happen to sell firearms or ammunition, Seattle has violated both the uniformity and the maximum rate aspects of RCW 35.21.710. The tax rate among retailers is no longer uniform—non-firearm retailers pay .00215 of their gross sales, while plaintiff Outdoor Emporium pays .00215 of its gross sales, plus some additional amount based on the quantity of firearms and ammunition it sells. And because SMC 5.45.050(C) was already imposing the maximum rate of tax on the retail sale of tangible personal property allowed by RCW 35.21.710, then any additional tax on a subset of personal property, no matter how small,

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.

would cause Outdoor Emporium's tax rate to exceed the RCW 35.21.710 cap.

Seattle has continued to categorize (and tax) firearms businesses as retailers but has also extracted double taxation by requiring those businesses to also simultaneously pay taxes under a newly created category that it fashioned out of whole cloth. The outcome in *Western Telepage* would have been very different if Tacoma had double taxed "paging" by classifying it as both a service and a utility instead of simply shifting it from one category to the other. This Court should follow *Western Telepage* and strike down the subterfuge inherent in Seattle's argument that it may tax retail products like firearms and ammunition to its heart's content so long as it creates a new tax that avoids the phrase "gross proceeds."

Seattle similarly misses the point of *Okeson*. In *Okeson*, much like the case here, Seattle created a wholly new tax to cover the City's own electrical costs because it could not increase the rate for general electrical services, which was already at its maximum. *Okeson*, 150 Wn.2d at 553. The Supreme Court held that the City could not simply pass an ordinance imposing a separate rate on a newly fabricated measure of "streetlight usage" when the practical effect of the new tax was to increase the tax burden relating to electrical services. *Id.* at 556. Here, the Ordinance is directly imposing a cost on the retail sale of tangible personal property, the very same act that is subject to statutory cap in RCW 35.21.710. No matter how Seattle frames that charge, retail businesses are still paying in

excess of the maximum cap every time they sell a firearm or round of ammunition. It is irrelevant that the cap is measured using gross receipts and the new burden is imposed on a per item basis: a cap is a cap, and the Ordinance increases the burden on the retail sale of tangible goods beyond the cap no matter how it is measured. *Id.* (focusing on the maximum tax rate and not the varying measures used to collect the total tax).

“Seattle ‘freely admits’ that the Ordinance does not satisfy the gross receipts tax requirements of RCW 35.21.710.” Opp. at 33. This should be the end of the inquiry. The City’s argument that the Ordinance’s failure to satisfy RCW 35.21.710 is permissible because the Ordinance taxes individual firearms and rounds of ammunition rather than gross sales, would render RCW 35.21.710 a nullity. Under Seattle’s reasoning, a city could enact one ordinance that (properly) imposes a universally-applied tax on all retailers of personal property, then enact a second ordinance that imposes an additional tax on any subset of retailers that the city chooses. By the City’s logic, so long as that city enacted two ordinances instead of one—and the second one does not 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 any type of tangible personal property.

That outcome makes no sense. This Court should reject the City’s efforts to abrogate the restrictions found in RCW 35.21.710 and declare the Ordinance unconstitutional if it is a tax.

C. The Ordinance is Preempted Because RCW 9.41.290 Exerts Field Preemption and the Ordinance is a Law Relating to Firearms That Has Not Been Specifically Authorized by State Law

RCW 9.41.290 could not be more emphatic about the all-encompassing scope of its preemption. The statute fully occupies the entire field and “[c]ities, towns, and counties or other municipalities may enact only those laws and ordinances relating to firearms that are specifically authorized by state law, as in RCW 9.41.300.” Accordingly, when an Ordinance relates to firearms and is not specifically authorized by RCW 9.41.300, RCW 9.41.290 unambiguously preempts it no matter whether it is civil or criminal, tax or regulation.⁴ *See, e.g., Chan v. City of*

⁴ Plaintiffs have not waived the argument that taxes are preempted by RCW 9.41.290. *See, e.g.,* CP 142 at n.1 (“Plaintiffs are confident that the Ordinance fails on its face and further inquiry will be unnecessary, but have explicitly reserved the secondary question of whether a tax is subject to RCW 9.41.290. Thus, the Court should ignore Defendants’ disingenuous claims that Plaintiffs have abandoned this argument”). Importantly, there is a direct conflict between: 1) Defendants’ claim that the argument regarding the preemption of a tax was waived by Plaintiffs; and 2) Defendants’ argument that all issues have been decided by the trial court—including the reserved argument that taxes are preempted by RCW 9.41.290—and thus there is nothing left to adjudicate on remand. Defendants cannot have it both ways. Either the trial court decided that there was no merit to the issues flagged for reservation by Plaintiffs and this Court should take up those issues, *see* CP 34 at n.2; CP 142 at n.1, or the trial court erred by failing to allow discovery and argument on those issues and the case should be remanded to adjudicate those issues if the trial court is affirmed on the present appeal. Regardless, as to the question of the preemption of a tax by RCW 9.41.290, Defendants point out that no new argument has been submitted and instead arguments about the scope of the preemption statute are presented here as they were presented below with only a slight variation in the choice of wording. The question is the same before this Court as it was for the trial court: what is the scope of the preemptive effect of RCW 9.41.290 on the face of the Ordinance? Seattle admits as much when it included a statement of issue asking this Court to determine whether the “trial court properly determined

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).

Seattle's arguments to the contrary that preemption is limited to criminal laws are a misreading of the statute. As detailed in the opening brief, the statute itself has been amended several times by the Legislature to abrogate any leeway read into the statute that would avoid preemption based on the subject matter of the restriction. *See, e.g.*, Br. at 32-34; Laws of 1985, ch. 428 §§ 1-2 (amending the statute to include full field preemption in abrogation of *Second Amendment Foundation v. City of Renton*, 35 Wn. App. 583, 668 P.2d 596 (1983)); Laws of 1994, 1st Sp. Sess., ch. 7, §§ 428-29. (abrogating *City of Seattle v. Ballsmider*, 71 Wn. App. 159, 856 P.2d 1113 (1993) by mandating that local laws and ordinances are only permitted as specifically delineated in RCW 9.41.300). Moreover, Seattle fails to even address the fact that RCW 9.41.300 preempts civil zoning laws with regard to the location of firearm retailers, except in limited circumstances. *See* Br. at 34-35; Final Bill Report, E2SHB 2319 at 8 (1994) (explicit permission for municipalities to use zoning with regard to firearms retailers 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

that RCW 9.41.290 does not preempt Ordinance 124833 because RCW 9.41.290 preempts only regulation, not taxation, of guns and ammunition?" Opp. at 4.

be sold.”), available at <http://apps.leg.wa.gov/documents/billdocs/1993-94/Htm/Bill%20Reports/House/2319-S2.FBR.htm>. The failure to raise any explanation for the Legislature’s inclusion of civil zoning laws in the scope of preemption is itself fatal to any claim that the statute applies only to criminal legislation.

Seattle’s reliance on caselaw fares no better. Neither *Pacific Northwest* nor *Cherry* stand for the proposition that RCW 9.41.290 applies only to criminal statutes. See Br. at 32 n.9; *Pacific Northwest Shooting Park Ass’n v. City of Sequim*, 158 Wn.2d 342, 356, 144 P.3d 276 (2006); *Cherry v. Municipality of Metropolitan Seattle*, 116 Wn.2d 794, 799, 808 P.2d 746 (1991). Those cases reviewed legislative history only for the purpose of determining whether “laws and ordinances” included 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. Notably, *Cherry* was decided before specific references to zoning were added by the Legislature and *Pacific Northwest* did not conduct any review of that 1994 amendment. See *Pacific Northwest*, 158 Wn.2d at 356-57 (simply reciting the analysis in *Cherry* as supporting “the general proposition that when a municipality acts in a capacity that is comparable to that of a private party, the preemption

clause does not apply”). Thus, despite Seattle’s claims, the Supreme Court has never decided that RCW 9.41.290 applies only to criminal laws and this Court is certainly not bound by any such non-existent holding.

Finally, the Ordinance would be preempted even if Seattle were correct that RCW 9.41.290 applies only to criminal laws. Both the trial court and this Court in *Chan v. City of Seattle* recognized that a municipality may not disclaim the criminal impact of a statute by adding an extra step between the regulated conduct and the criminal penalty. *See* CP 179 at ¶¶ 18-25; *Chan*, 164 Wn. App. at 565-66 (holding that a rule banning firearms from public parks which disclaimed any criminal penalties was preempted because Seattle intended to use existing trespass laws to prosecute anyone who violated the ban).

The cases cited by Seattle are not in disagreement. *See Pac. Tel. & Tel. Co. v. City of Seattle*, 172 Wash. 649, 21 P. 721 (1933); *City of Seattle v. Campbell*, 27 Wn. App. 37, 39, 611 P.2d 1347 (1980). *Pac. Tel. & Tel. Co.* addressed the question of whether a fee was a tax or a regulation, but did not include any analysis of whether failure to pay was subject to criminal penalties or if that had any impact on preemption because that was irrelevant to the issue before the Court. 172 Wash. at 654 (deciding whether a tax was preempted by implication where there was no express preemption statute). And although the plaintiff in *Campbell* did raise the specter of criminal penalties as a basis for finding preemption, the issue was whether a license fee of general application to all businesses could be said to specifically burden lawyers in a way that would interfere with the

State's preemptive power to regulate the practice of law. 27 Wn. App. at 38. Plaintiffs do not claim that laws of general application are preempted because of criminal enforcement, but a law targeted specifically and exclusively at firearms and ammunition is certainly preempted, at the very least, if it is enforced criminally. *Chan*, 164 Wn. App. at 565-66.

RCW 9.41.290 unambiguously preempts the field as to firearms and ammunition. The Ordinance seeks to burden the sale of firearms and ammunition despite the clear mandate that “[c]ities, towns, and counties or other municipalities may enact only those laws and ordinances relating to firearms that are specifically authorized by state law, as in RCW 9.41.300.” RCW 9.41.290. The Ordinance is thus preempted.

D. Injunctive Relief is Necessary to Ensure the Unconstitutional Ordinance Will Not Be Enforced

If a law is unconstitutional, the only relief that is of any use to plaintiffs is an injunction preventing enforcement. Otherwise, there is no mechanism by which plaintiffs can ensure that they are abiding by the law when faced with a municipality that could otherwise seek to enforce an ordinance that has been ruled unconstitutional. *See, e.g., 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).

While Seattle does not disagree that declaratory relief should be granted if the Ordinance is unconstitutional, it curiously asks the Court to avoid any enforcement mechanism because “declaration of invalidity means there is no injury.” Opp. at 46. The implication of this argument is that the Court should trust Seattle to not seek to enforce an ordinance that has been ruled unconstitutional. With all fairness to Seattle, the City passed an unconstitutional ordinance knowing that it was pushing the edge of the envelope. Being a municipality does not make one infallible and it is unclear why the City should be given the benefit of the doubt that it will not seek to push the edge of the envelope any further by enforcing an unconstitutional law. If Seattle chooses to continue targeting firearm and ammunition retailers by enforcing the Ordinance after it is declared unconstitutional, Plaintiffs would be faced with the choice of paying a tax for which they must seek refund through the courts or being charged with a gross misdemeanor that they must quash by reference to the declaratory judgment. There is no grounds upon which Seattle should be permitted to entertain this continuing injury. Just as Seattle was barred from enforcing its ban on firearms in city parks, it must be barred from enforcing the Ordinance. *Chan*, 164 Wn. App. at 558 & 567.

E. Substantive Issues Remain for Adjudication Should the Court Affirm, and Remand is Necessary to Develop the Factual and Legal Record

The trial court did not address all of the issues in this case on summary judgment. For example, the question of whether the Ordinance could still be preempted if it were a tax was reserved for future argument

because it could require evidence regarding the Retail Plaintiffs' gross margins and whether the added tax would render the sale of firearms and ammunition economically impractical or impossible. CP 34 at n.2; CP 142 at n.1. Notably, as detailed to the trial court, the splitting of Plaintiffs' arguments was done out of deference to Defendants. Plaintiffs initially proposed a summary judgment on all issues prior to the January 1, 2016 effective date of the Ordinance, but Defendants balked at a compressed discovery schedule. Plaintiffs, in the spirit of cooperation, agreed to limit its first summary judgment motion to issues that did not require discovery from Plaintiffs:

Plaintiffs bring the current motion on the first contention alone to prevent the irreparable damage faced by the Plaintiffs if the Ordinance goes into effect as scheduled on January 1, 2016 and to accommodate the Defendants' concerns that the second contention of de facto regulation would require a longer discovery and briefing schedule that cannot be accommodated prior to the end of the year.

CP 34 at n.2. Seattle recognized the need to address the outstanding issues later in the case when it filed a "partial" summary judgment and made no argument whatsoever that the remaining issues were not ripe because there was a month until the fee would be instituted.⁵ *See* CP 89.

⁵ Seattle's newly-raised ripeness claims are inapposite, at any rate. The Ordinance was already enacted at the time of the lawsuit and was set to be applied within weeks of the time of the hearing on summary judgment. Plaintiffs' central argument requiring discovery was whether the addition of a \$25 per firearm and \$0.02 to \$0.05 per round of ammunition would negate any gross profit on those items and make their sale infeasible within City limits. Nothing about that argument required waiting until the already enacted fee was assessed because the inquiry would have mainly involved Plaintiffs' gross

Given all this, Seattle’s response that no remand is necessary if this Court should affirm the trial court’s partial findings is remarkable in its audacity. Seattle’s attempt to use Plaintiffs’ compromise on the timing of presenting issues to the trial court as a means to cut off substantive discussion is not only poor sportsmanship, it is error. *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.”). The trial court—likely by inadvertent mistake since there is a complete lack of any relevant discussion in the order—dismissed the case in its entirety and, along with it, a swath of arguments that Plaintiffs were entitled to present to the court. While Plaintiffs are confident that the issues currently before the Court will settle the dispute through reversal of the trial court, any affirmation of the trial court must be accompanied with a remand to determine the remaining arguments against the constitutionality of the Ordinance.

margins prior to the institution of the fee. This sets Plaintiffs’ reserved issues far apart from those cases cited by Seattle where ripeness was an issue. *See, e.g., Iiso Verde Int’l Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 770, 49 P.3d 867 (2002) (finding lack of ripeness not simply because a fee had not been imposed, but because there was no written decision on the fees under LUPA which was the only way to obtain judicial review); *Asarco Inc. v. Dep’t of Ecology*, 145 Wn2d. 750, 759, 43 P.3d 471 (2002) (holding that a case was not justiciable because no final determination had been made and there was thus nothing to review).

III. 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 as preempted.

DATED this 3rd day of June, 2016.

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CERTIFICATE OF SERVICE

The undersigned hereby declares as follows:

1. I am employed at Corr Cronin Michelson Baumgardner Fogg & Moore LLP, attorneys of record for Appellants herein.

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: June 3, 2016, at Seattle, Washington.

s/ Christy A. Nelson _____
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