Supreme Court No. 99596-6
Court of Appeals No. 80755-2-I

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

CITY OF EDMONDS, a municipality; DAVE EARLING, Mayor of the City of Edmonds, in his official capacity; EDMONDS POLICE DEPARTMENT, a department of the City of Edmonds; and AL COMPAAN, Chief of Police, in his official capacity,

Petitioners,

v.

BRETT BASS, an individual; SWAN SEABERG, an individual; CURTIS McCULLOUGH, an individual; THE SECOND AMENDMENT FOUNDATION, INC., a Washington non-profit corporation; and NATIONAL RIFLE ASSOCIATION OF AMERICA, INC., a New York non-profit association

Respondents.

PETITION FOR REVIEW
FROM DIVISION I OF THE COURT OF APPEALS

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I. IDENTITY OF PETITIONER

Petitioner is the City of Edmonds (the "City" or "Edmonds"), appellant in the Court of Appeals.

II. COURT OF APPEALS DECISION

The City seeks review of the decision of Division One of the Court of Appeals, filed February 22, 2021, in *City of Edmonds v. Bass*, __ Wn. App. 2d __, 2021 Wash. App. LEXIS 362 (2021). A copy of the decision is attached as Appendix 1 ("App.").

III. ISSUES PRESENTED FOR REVIEW

In the summer of 2018, the City of Edmonds responded to public concern about the risks of unsafe firearm storage and unauthorized firearm access by enacting an ordinance containing two provisions: the first requires gun owners in Edmonds to responsibly store their firearms ("the Storage Provision," codified at Edmonds Muni. Code § 5.26.020); the second provision penalizes irresponsible storage that leads to access by minors and unauthorized persons ("the Access Provision," Edmonds Muni. Code § 5.26.030; together with the Storage Provision, the "Edmonds Ordinance" or the "Ordinance")). The Respondents (referred to as Plaintiffs for clarity) engaged in conduct that violates the Storage Provision, but no Plaintiff alleged or testified that he engaged in or intended to engage in conduct that

would violate the Access Provision. Plaintiffs contend that both provisions are preempted by RCW 9.41.290.

The City of Edmonds seeks review of these issues:

1. Whether a court reviews a challenge to justiciability under the Uniform Declaratory Judgment Act ("UDJA") using CR 12(b)(6)'s "hypothetical facts" standard, or whether CR 12(b)(1) applies and a plaintiff must allege (and then prove) "an actual, present and existing dispute," and not a "hypothetical [or] speculative" injury. *Diversified Indus. Dev. Corp. v. Ripley*, 82 Wn.2d 811, 815, 514 P.2d 137 (1973).

2. Whether the public importance exception to UDJA justiciability applies where no Plaintiff has shown that he has suffered or will suffer a concrete harm from the challenged law, and, if so, whether "public importance" requires something more than showing that a decision may have broader impact than the instant case, especially when other persons who have suffered a concrete harm would have standing.

3. Whether Washington's firearms preemption statute, RCW 9.41.290, preempts all local regulation related to firearms, or whether local regulation is preempted only when it falls within the enumerated topics defining the preempted "field" that are listed in the statute.

IV. STATEMENT OF THE CASE

At the center of this lawsuit is a local law enacted by the City of Edmonds to prevent needless gun deaths and injuries. Plaintiffs have neither alleged that they are adversely impacted by one of the two provisions of the Ordinance nor introduced evidence showing adverse impact, yet they seek to invalidate the law in its entirety. This case thus raises important questions about when a party may request, under the UDJA, that courts invalidate a democratically enacted law. Given the broad preemption standard announced by the Court of Appeals, this case also raises the issue of whether localities have *any* power to pass democratically supported gun safety measures.

Prior to enacting the Ordinance, the Edmonds City Council reviewed empirical research demonstrating that safe firearm storage laws reduce firearm deaths and injuries, and engaged in a full, open and deliberative process. Clerk's Papers ("CP") 90-91. For City residents, the dangers of unsafe firearm storage are far from hypothetical. Before voting, Edmonds City Council heard testimony from a resident whose daughter knew a victim of the nearby Marysville Pilchuck High School shooting, from a community member who mourned the death of a boy in her church after he found an unlocked gun and was unintentionally shot in the head,

and from a Council Member who lost a brother to suicide when his brother accessed his father's unsecured firearm. CP 109-119.

The Ordinance contains two substantive provisions. First, the Storage Provision requires gun owners to lock their guns in a safe or with a trigger or cable lock, when a gun is outside of the owner's control. Edmonds Muni. Code § 5.26.020. Second, the Access Provision punishes owners who store their guns in a manner where they reasonably should have known "that a minor, an at-risk person, or a prohibited person is likely to gain access to a firearm" and such a person does in fact access the firearm. *Id*. § 5.26.030. Both provisions are punishable only by civil fines or community service. *Id*. § 5.26.040.

Plaintiffs filed this lawsuit days after the Edmonds Ordinance was passed. CP 293-300. They sought to invalidate the Ordinance as preempted by Washington's firearms preemption statute, which reads:

> The state of Washington hereby fully occupies and preempts the entire field of firearms regulation within the boundaries of the state, including the registration, licensing, possession, purchase, sale, acquisition, transfer, discharge, and transportation of firearms, or any other element relating to firearms or parts thereof, including ammunition and reloader components. Cities, towns, and counties or other municipalities may enact only those laws and ordinances relating to firearms that are specifically authorized by state law, as in RCW 9.41.300, and are consistent with this chapter. Such local ordinances shall have the same penalty as provided for by state

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

RCW 9.41.290. While this statute contains broad language, and enumerates many preempted topics, it says nothing about storage laws.

Nowhere in their complaint did Plaintiffs allege that they intended to engage in conduct that would violate the Access Provision (such as leaving a gun where it would be accessible to a minor) or that might bring about any risk that the Access Provision would be enforced against them. Nor did they allege that they would have to change their behavior to bring themselves into compliance with the Access Provision. CP 293-300.

The City moved to dismiss for lack of UDJA justiciability. CP 645-60. The trial court permitted Plaintiffs to amend their complaint, but even after amending and adding a plaintiff, Plaintiffs still failed to allege that they would experience any concrete effect from the Access Provision. CP 280, 565-67. The City again moved to dismiss. CP 548-60. The trial court concluded that Plaintiffs did "not have standing to challenge the [Access Provision]" and could only challenge the Storage Provision. CP 405-06.

The reason that there were no allegations concerning the Access Provision became clear after discovery: no Plaintiff testified that he would

face any adverse impact from that provision. They did not engage in conduct that might violate the Access Provision and did not intend to do so. Nor did any Plaintiff suggest that he had changed his behavior to comply with the Access Provision. The closest they came was asserting that *one* of the Plaintiffs was a gun owner whose children lived at home. CP 44. But that plaintiff testified during his deposition that he stored his gun in such a manner that his children *would not be able to access the guns*. CP 349. The other Plaintiffs did not have any children or other unauthorized visitors who came to their homes. CP 367-68, 375.

The parties cross-moved for summary judgment. The trial court cited its decision on the motion to dismiss, ruling that "Plaintiffs do not have standing to challenge, pursuant to the Court's oral ruling and prior written order, Edmonds City Code 5.26.030." CP 17. The Superior Court ruled that the Storage Provision—which Plaintiffs had standing to challenge under the UDJA—was preempted by RCW 9.41.290. *Id*.

The parties cross-appealed. Following oral argument, the Court of Appeals reversed the standing decision and held that both provisions of the Edmonds Ordinance were preempted by RCW 9.41.290. For standing under the UDJA, the Court of Appeals relied primarily on its previous decision in *Alim v. City of Seattle*, 14 Wn. App. 2d 838, 474 P.3d 589 (2020), a case involving a similar challenge to a similar law enacted by the

City of Seattle. But while *Alim* reviewed a decision granting a motion to dismiss, the parties here appealed the Superior Court's summary judgment decision. CP 1, 10. The Court of Appeals stated that it would review the Superior Court decision on standing as though it had been decided under CR 12(b)(6). App. at 5 n.2. But then it also apparently looked at the evidence submitted for the cross-motions for summary judgment and concluded that the "evidence suffices" that the gun owners' rights had been "adversely affected" by the Edmonds Ordinance. App. at 7. The Court of Appeals further held that, in any event, the appeal "presents an issue of significant public interest" and therefore fit into an exception to *Diversified Industries*' requirements. *Id*.

As to preemption, the Court of Appeals determined that RCW 9.41.290 preempted the entire Ordinance. It reasoned that the phrase "entire field of firearms regulation" was not ambiguous as to what constitutes the "field," and that the list of preempted topics in the statute was merely "illustrative," such that any local regulation related to firearms would be invalid. App. at 9-10.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. This Court Should Accept Review to Clarify Whether "Hypothetical Facts" May Be Considered to Establish UDJA Justiciability.

The Court of Appeals decision conflicts with earlier Supreme Court decisions about whether UDJA justiciability implicates a court's subject matter jurisdiction and should be raised under CR 12(b)(1) or CR 12(b)(6). This distinction is significant because, under CR 12(b)(6), a court may consider "hypothetical facts"—unalleged and unproven assertions without basis in pleadings or the record. *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 120, 744 P.2d 1032 (1987). *Alim*, upon which the Court of Appeals relied, was wrong in holding that justifiability under the UDJA was non-jurisdictional and that it could invoke "hypothetical facts." That ruling conflicts with *Diversified Industries*, which held that courts lack jurisdiction over "hypothetical" UDJA disputes.

(i) The Court of Appeals Decision Conflicts with This Court's Precedent.

When Washington first enacted the UDJA in 1935, this Court emphasized that declaratory judgment statutes raised constitutional issues when they "require[] performance of acts non-judicial in character," such as issuing advisory opinions. *Acme Fin. Co. v. Huse*, 192 Wash. 96, 103, 73 P.2d 341 (1937). Accordingly, this Court has long held that the UDJA does not extend to non-adversarial proceedings and that courts must not

"render advisory opinions or pronouncements upon abstract or speculative questions." *Wash. Beauty College, Inc. v. Huse*, 195 Wash. 160, 164, 80 P.2d 403 (1938). This Court further articulated the justiciability standard in *Diversified Industries*, establishing the governing test:

> [B]efore the jurisdiction of a court may be invoked under the act, there must be a justiciable controversy: (1) which is an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive.

82 Wn.2d at 815. Under *Diversified Industries*, UDJA justiciability is jurisdictional and requires an actual, non-hypothetical dispute.

The Court of Appeals, however, cited *Alim* for the proposition that UDJA standing is non-jurisdictional. The *Alim* court relied upon *In re Marriage of Buecking*, in which this Court sought to resolve "confusion" about subject matter jurisdiction in a case concerning procedural requirements in a marriage dissolution proceeding. 179 Wn.2d 438, 447, 316 P.3d 999 (2013). *Buecking* held that "'[s]ubject matter jurisdiction' refers to a court's ability to entertain a type of case, not to its authority to enter an order in a particular case" and that "[t]he legislature cannot restrict the court's jurisdiction where the constitution has specifically granted the

court jurisdiction." *Id*. at 448. But *Buecking* did not address the unique issues raised by USDA justiciability. And as *Alim* acknowledged: "the Supreme Court has, in the past, framed standing and ripeness under the UDJA in jurisdictional terms." *Alim*, 14 Wn. App. 2d at 847.

The result: the Court of Appeals decision guts *Diversified Industries*' requirement that the dispute not be "hypothetical." If, per *Alim*, the UDJA is not jurisdictional, any motion to dismiss is evaluated under the CR 12(b)(6) standard, which permits a court to consider "hypothetical facts" in determining whether plaintiffs have stated a claim. *Alim*, 14 Wn. App. 2d at 851 (quoting *Haberman*, 109 Wn.2d at 120). That cannot be reconciled with *Diversified Industries* and presents an important question for this Court's consideration.

What is more, the Court of Appeals also erred in reviewing the Superior Court's decision as a motion to dismiss under CR 12(b)(6) when the issue was decided again at the summary judgment stage and on a full factual record—one where no plaintiff testified to concrete harm.[1] App. at 5 n.2. Under either CR 12(b)(1) or CR 56 the result should have been the same: there are no allegations and no evidence that any Plaintiff faced any

[1] At oral argument, Acting Chief Judge Andrus asked why the Court could not consider "hypothetical facts" in evaluating UDJA standing. Counsel for the City of Edmonds noted that the decision on appeal was a summary judgment decision, fully briefed and on a full evidentiary record. *Bass v. City of Edmonds*, Oral Argument (Jan. 15, 2021), at 23:07-24:40, available at: https://perma.cc/UUD5-K8EE.

likelihood of adverse impact from the enforcement of the Access Provision, so the challenge to that provision should have been dismissed.

(ii) The Public Interest Will Be Served by Review.

Not only is there a conflict of authority, but this justiciability issue has substantial public importance. The UDJA is frequently invoked to invalidate democratically enacted laws, as the Plaintiffs did here. Requiring plaintiffs to show that they will experience a direct adverse effect and that the dispute not be hypothetical protects the adversary process. Plaintiffs must show that their opposition to a law is rooted in an actual dispute, otherwise anyone who merely disagreed with a law could challenge it. And the requirements of *Diversified Industries* date back to the earliest decisions under the UDJA, when courts across the country were grappling with whether declaratory judgment statutes required them to issue advisory opinions. *Acme Fin. Co.*, 192 Wash. at 103-04. Requiring that a party challenging a statute be adversely impacted assuages concerns that the UDJA invites courts to exceed their constitutional role. *Id.*

B. This Court Should Accept Review to Resolve Confusion Amongst Lower Courts About the Public Importance Exception to UDJA Justiciability.

The Court of Appeals, in the alternative, invoked the public importance exception to the *Diversified Industries* standing requirement. That too raises an issue warranting this Court's review because there is

diverging authority about when this exception should be applied and how narrow it is, and the Court of Appeals added to this confusing situation by applying its own *sui generis* standard.

The public importance exception applies only in "rare cases," and this Court has long limited it to cases in which the plaintiff can show actual harm. *Lewis Cnty. v. State*, 178 Wn. App. 431, 440, 315 P.3d 550 (2013). In *Walker v. Munro*, this Court rejected an argument that Washington courts regularly "dispensed with the justiciability test" in "cases of major public import," noting that this was "an overstatement." 124 Wn.2d 402, 415, 879 P.2d 920 (1994). Instead, the Court concluded: "even if we do not always adhere to all four requirements of the [UDJA] justiciability test, this court will not render judgment on a hypothetical or speculative controversy, where concrete harm has not been alleged." *Id*. The Court also noted that it had, on "rare occasion, rendered an advisory opinion as a matter of comity for other branches of the government or the judiciary." *Id*. at 417. Later that year, this Court clarified that "a statute implicating the public interest is not sufficient to support the examination of an issue which is otherwise not justiciable," but that courts evaluate "the *extent to which public interest would be enhanced by reviewing the case*." *Snohomish Cnty. v. Anderson*, 124 Wn.2d 834, 841, 881 P.2d 240 (1994) (emphasis in original).

Ten years later, in *Grant Cnty. Fire Protection District No. 5 v. City of Moses Lake*, this Court articulated a different test for the public importance exception, which applied only where the issues would otherwise "escape review" and which required "a controversy . . . of substantial public importance, [that] immediately affects significant segments of the population, and has a direct bearing on commerce, finance, labor, industry, or agriculture." 150 Wn.2d 791, 803, 83 P.3d 419 (2004). The Court did not explain whether this test was in addition to or replaced *Walker*'s requirement that plaintiffs show some "concrete harm."

The result has been confusion in the lower courts. Some cases apply only the *Anderson* test. *See, e.g. Kitsap Cnty. v. Smith*, 143 Wn. App. 893, 908, 180 P.3d 834 (2008). Other decisions have created *sui generis* tests or merely found that an issue is "important." *See, e.g. Kightlinger v. Pub. Util. Dist. No. 1,* 119 Wn. App. 501, 505, 81 P.3d 876 (2003) (concluding that a dispute about whether public utility districts are permitted to repair appliances was an issue of public importance); *Am. Traffic Sols., Inc. v. City of Bellingham*, 163 Wn. App. 427, 433, 260 P.3d 245 (2011) (applying public importance exception in a case about automated traffic safety cameras). What is missing in these decisions is a framework that constrains the public importance exception beyond what a judge or litigant believes is

important to the public, so that Washington courts do not exceed their constitutional role.

In this case, there was no showing of "concrete harm" (*Walker*), and there was no allegation that the Edmonds Ordinance would have any "bearing on commerce, finance, labor, industry, or agriculture" (*Grant Cnty.*), and the issues here will almost certainly see review as a person who does have to change his or her practices would have standing. That is what the Superior Court found. VRP 28:10-12. But the Court of Appeals concluded that the issues presented were "of significant public interest" because "whether a municipality has the authority to enact gun regulations affects every gun owner and every municipality in the state" and because the question of preemption was "a question of law that requires no further factual development." App. at 7-8. But most questions of state law have statewide implications, so adoption of this test would lead to the public importance exception swallowing the doctrine of UDJA justiciability. This Court should accept review so that it can articulate what criteria should guide and limit judicial discretion in invoking this "rare" exception.

C. This Case Is an Ideal Vehicle for Resolving the Scope of the Firearms Preemption Statute.

This Court should also accept review to define the scope of preemption under RCW 9.41.290. The Court of Appeals announced a limitless standard for interpreting the firearms preemption statute that is at

odds with the reasoning employed by this Court in previous cases and is in direct conflict with at least one other Court of Appeals decision. Following this decision, it is unclear whether local governments have *any* authority to enact regulations that relate in any manner to firearms.

(i) The Court of Appeals Decision Creates Ambiguity for Lower Courts and Municipalities and Conflicts with Division Two Precedent.

To be sure, the text of RCW 9.41.290 is broad. But the Court of Appeals' interpretation of that statute in this case has no meaningful limits and also fails to acknowledge that this Court has already rejected a reading that would preempt "the entire field of gun-related laws and ordinances." *Watson v. City of Seattle*, 189 Wn.2d 149, 172, 401 P.3d 1 (2017). The Court of Appeals' analysis here emphasized the first clause of the first sentence of RCW 9.41.290 (the state "fully occupies and preempts the entire field of firearms regulation"). But it did not give any meaning to the list of topics that follows that first clause ("including the registration, licensing, possession, purchase, sale, acquisition, transfer, discharge, and

transportation of firearms"). The Court stated that this list "described the field," but then it also found the list only "illustrative." App. at 10-11.[2]

Ignoring the import of the listed topics, the Court held that RCW 9.41.290 is unambiguous about the scope of the preempted field. But the decision tells lower courts and municipalities nothing about the scope of the preempted field. Does the "field" encompass *any* regulation related to firearms? Or is the "field of firearms regulation" narrower, allowing some municipal enactments when they are distinct from any topic enumerated in the statute? After reading this opinion, municipal governments across Washington State will have no clear answer as to where the bounds of the "field" lie.

The Court of Appeals was not writing on a blank slate, yet it jettisoned the narrow approach used by this Court in *Watson*, 189 Wn.2d 149, and *Pacific Northwest Shooting Park Association v. City of Sequim*, 158 Wn.2d 342, 144 P.3d 276 (2006) ("*PNSPA*"), and opted for an

[2] Even assuming the list is illustrative, *ejusdem generis* applies, such that an illustrative list is understood as constraining the general category ("firearms regulations") to the topics that are closely associated with the listed examples. The Court of Appeals held that storage was close enough to "possession" (one of the enumerated topics), but that is wrong. As detailed in Petitioner's opening brief to the Court of Appeals (at 35-38), the Ordinance does not apply when the gun is in someone's possession or control. And throughout the rest of Chapter 9.41 of the RCW, possession is used in such a way as to exclude constructive possession, unless the Legislature specified explicitly that it intended to include constructive possession or ownership as it did in RCW 9.41.040. Unfortunately, the Court of Appeals drew the wrong lesson from RCW 9.41.040, concluding that it meant that the Legislature always intended possession to include constructive possession.

interpretation of RCW 9.41.290 that directly conflicts with the decision of Division II of the Court of Appeals in *Kitsap Cnty. v. Kitsap Rifle & Revolver Club*, 1 Wn. App. 2d 393, 405 P.3d 1026 (2017). In *Watson*, plaintiffs argued that a local tax was preempted because the Legislature intended to preempt "the entire field of gun-related laws and ordinances." 189 Wn.2d at 172. The *Watson* Court rejected these arguments because the local law was a tax, not a regulation, but in the process, it made plain that not all gun-related ordinances are preempted and that the scope of the field is the key question. *Id*. This is consistent, too, with the narrow interpretation that this Court applied in *PNSPA*, which held that RCW 9.41.290 was unclear in whether it applied to municipal enactments in which the municipality is acting in its proprietary capacity. 158 Wn.2d at 356-58. As with *Watson*, *PNSPA* is factually distinguishable, but the analysis acknowledged ambiguities in the statute and accordingly construed it in favor of municipal enactments. *Id*.

The Court of Appeals tried to distinguish the *Kitsap Rifle & Revolver Club* decision because it was "so different," but the analysis and holdings of the two decisions cannot be squared. App. at 15. The regulation at issue in *Kitsap Rifle* prohibited discharge of firearms in certain areas, with an exception allowing discharge of firearms in permitted shooting facilities, and also imposed a set of standards and requirements on permitted shooting

facilities. 1 Wn. App. 2d at 402-03. The court concluded that this regulation was not encompassed within the "field of firearms regulation" because it was not listed within RCW 9.41.290's list of preempted categories. *Id*. at 406-07. The *Kitsap Rifle* Court acknowledged that the local ordinance did indirectly regulate discharge, which is one of the expressly preempted topics, but held that an indirect relationship to an enumerated topic of preemption did not bring the local ordinance within the preempted field. *Id*. at 407. The Court of Appeals in this case ignored the *Kitsap Rifle* Court's reasoning, emphasizing instead that the regulation in that case was indirect and regulated a business's activities. App. at 15. But to the extent that the regulation here has any connection to any listed topic in RCW 9.41.290, it is an indirect one.[3]

Plaintiffs argued for a broad interpretation below, one which encompassed all local regulations relating to firearms, but to be consistent with precedent they were forced to carve out one-off exceptions to their broad rule to reflect the precedent that has upheld local gun regulations ("as long as the regulation pertains to firearms, and not shooting ranges or convention center permitting, municipalities may not regulate firearms")

[3] The Court of Appeals also relied upon the fact that Edmonds did not contend "that its Ordinance is an exercise of police power under RCW 36.32.120(7)." App. at 15. That is, of course, technically true because Chapter 36.32 of the RCW describes the police powers of *counties*, while Edmonds enacted this ordinance under the police powers granted to *code cities* (RCW 35A.11.010 *et seq*).

without explaining where those exceptions could be found in the statute (Resp. Br. at 20). They cannot be—the fact is that their (and the Court of Appeals') rule is inconsistent with precedent.

(ii) The Public Interest Will Be Served by Review.

Given this conflict, municipal governments across the state have no meaningful guidance about how RCW 9.41.290 is likely to apply to regulations they have enacted or are considering enacting pursuant to their police power. Should they take the approach used by the *Kitsap Rifle* Court—which gives primacy to the list of preempted topics—or should they opt for the broader, but confusing, approach employed in this case? How far does the field of firearms regulation extend under the Court of Appeals' approach in this case? Could a municipality require that gun owners take certain steps to safely dispose of firearms or ammunition, rather than simply dumping them at a landfill? It is now far from clear that a local government could take this step, as it arguably relates to "possession." What about a local regulation requiring (or incentivizing) gun owners to report lost or stolen firearms? Is that close enough to "possession" that it gets shoehorned in? Could a municipality require that school marksmanship clubs follow certain safety practices? The hypotheticals abound and municipal governments need guidance.

The City of Edmonds, like other municipal governments across the State, faces a patchwork of confusing and contradictory points of authority. In the face of ambiguity about what regulations related to firearms fall within the preempted field, cities and counties may be hesitant to employ their police power to protect the health and safety of Washingtonians. This case is a perfect vehicle to provide clarity and guidance to local governments and to the community members who push their local governments to act to prevent tragedies.

VI. CONCLUSION

For these reasons, the City respectfully requests that the Court grant this Petition for Review and vacate the Court of Appeals decision.

DATED this 24th day of March, 2021.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury according to the laws of the State of Washington that on this date she caused to be electronically filed the foregoing PETITION FOR REVIEW with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record, including the following:

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APPENDIX 1

FILED
2/22/2021
Court of Appeals
Division I
State of Washington

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

CITY OF EDMONDS, a municipality; DAVE EARLING, Mayor of the City of Edmonds, in his official capacity; EDMONDS POLICE DEPARTMENT, a department of the City of Edmonds; and AL COMPAAN, Chief of Police, in his official capacity, Appellants, v. BRETT BASS, an individual; SWAN SEABERG, an individual; and CURTIS McCULLOUGH, an individual, Respondents.	)	No. 80755-2-I DIVISION ONE PUBLISHED OPINION

ANDRUS, A.C.J. — Three individual gun owners (the Gun Owners) challenge an Edmonds ordinance making it a civil infraction to store unlocked any firearm and to allow access to such a firearm by children or others not permitted by law to possess it. They contend the ordinance is a firearm regulation preempted by state law. We conclude the Gun Owners have standing to raise their pre-enforcement challenge and hold that the ordinance is, regardless of its arguable benefits to public safety, preempted by RCW 9.41.290.

FACTUAL BACKGROUND

In 2018, the Edmonds City Council enacted Ordinance Number 4120, now codified as Edmonds City Code (ECC) 5.26.010-070 (the Ordinance). The Ordinance states in part:

> It shall be a civil infraction for any person to store or keep any firearm in any premises unless such weapon is secured by a locking device, properly engaged so as to render such weapon inaccessible or unusable to any person other than the owner or other lawfully authorized user. Notwithstanding the foregoing, for purposes of this section, such weapon shall be deemed lawfully stored or lawfully kept if carried by or under the control of the owner or other lawfully authorized user.

EDMONDS CITY CODE 5.26.020. It further provides:

> It shall be a civil infraction if any person knows or reasonably should know that a minor, an at-risk person, or a prohibited person is likely to gain access to a firearm belonging to or under the control of that person, and a minor, an at-risk person, or a prohibited person obtains the firearm.

EDMONDS CITY CODE 5.26.030. The Ordinance also contains a penalty schedule, subjecting violators of ECC 5.26.020 and .030 to fines ranging from $500 to $10,000. EDMONDS CITY CODE 5.26.040.

Also in 2018, Washington voters passed Initiative 1639, which makes it a crime to store or leave a firearm "in a location where the person knows, or reasonably should know, that a prohibited person may gain access to the firearm, . . . a prohibited person obtains access and possession of the firearm" and subsequently misuses that firearm.

Soon after the Edmonds City Council enacted the Ordinance, two gun-owning residents of Edmonds brought this suit under the Uniform Declaratory Judgment Act (UDJA) against the City of Edmonds, its Mayor, the Edmonds Police

Department, and its Chief of Police (collectively referred to as "the City"). The complaint alleged that RCW 9.41.290 preempts the Ordinance and sought declaratory and injunctive relief.

RCW 9.41.290 states in its entirety:

> The state of Washington hereby fully occupies and preempts the entire field of firearms regulation within the boundaries of the state, including the registration, licensing, possession, purchase, sale, acquisition, transfer, discharge, and transportation of firearms, or any other element relating to firearms or parts thereof, including ammunition and reloader components. Cities, towns, and counties or other municipalities may enact only those laws and ordinances relating to firearms that are specifically authorized by state law, as in RCW 9.41.300, and are consistent with this chapter. Such local ordinances shall have the same penalty as provided for by state law. Local laws and ordinances that are inconsistent with, more restrictive than, or exceed the requirements of state law shall not be enacted and are preempted and repealed, regardless of the nature of the code, charter, or home rule status of such city, town, county, or municipality.

The City moved to dismiss this challenge under CR 12(b)(1), arguing the plaintiffs lacked standing to challenge the Ordinance because none alleged an intent to violate its terms.[1] At the Gun Owners' request, the trial court deferred ruling on the motion to dismiss to allow the Gun Owners to amend their complaint or to submit declarations to support standing and permitted the parties to submit additional briefing thereafter. The Gun Owners filed an amended complaint, in which they named a third individual plaintiff, also a resident of Edmonds, and alleged more facts about the Gun Owners' firearms storage practices.

[1] As this court explained when faced with a nearly identical issue in Alim v. City of Seattle, 14 Wn. App. 2d 838, 474 P.3d 589, 595-96 (2020), "justiciability under the UDJA is not a question of subject matter jurisdiction" and CR 12(b)(1) is the incorrect rule under which to bring a challenge to a case's justiciability. We therefore review the trial court's standing determination as an order to dismiss under CR 12(b)(6).

In this amended complaint, Bass alleged that, although he stores several of his firearms in a gun safe, he keeps one unsecured and unlocked in his home for easy access in the event of a home invasion. He alleged that he desires to continue doing so and fears enforcement of the Ordinance against him. Seaberg alleged that, while he has a gun safe, he stores several long guns throughout his home in a manner that violates the Ordinance. He also alleged fear of enforcement of the Ordinance. Lastly, McCullough alleged that he keeps at least three firearms unlocked and unsecured in his home, where he resides with his wife and two minor children.

After receiving additional briefing, the trial court concluded that the Gun Owners had standing to challenge ECC 5.26.020, the storage provision of the Ordinance, but not .030, the unauthorized access provision. But it also concluded that "as Plaintiffs have standing to raise preemption to at least one portion of the ordinance and such challenge is ripe, it is further ORDERED that defendants' Motion to Dismiss is denied."

The Gun Owners moved for summary judgment, arguing that RCW 9.41.290 preempted both ECC 5.26.020 and .030. They each submitted declarations in which they testified that they store their firearms, unlocked, in their homes, that they do not intend to stop storing their firearms in that manner, and that they feared enforcement of the ordinance because they often left firearms unsecured and ready for self-defense even when no authorized user was in the same room.

Once again, the City argued the Gun Owners lacked standing to challenge the unauthorized access provision of the ordinance, ECC 5.26.030. The City cited

deposition testimony in which McCullough testified he stored his guns in a locked gun safe in compliance with the Edmonds ordinance. Bass similarly stores his firearms in a gun safe but removes a rifle when he comes home in the evening and places it next to his bed stand overnight. Bass confirmed he did not want children to access his firearms and does not leave them in a place where it is likely children would access them. Seaberg testified he stores long guns in concealed places, unsecured, in his home at all times. He too stated he does not think it is likely children could access his guns if they came to his home. He does not leave his gun where he thinks it is likely a person prohibited from owning a firearm could gain access to it.

The trial court granted the Gun Owners' motion for summary judgment in part, concluding that RCW 9.41.290 and I-1639 preempt ECC 5.26.020, but it affirmed its earlier ruling that the Gun Owners lack standing to challenge ECC 5.26.030.[2] It permanently enjoined Edmonds from enforcing ECC 5.26.020.

The City appeals the summary judgment order invalidating ECC 5.26.020 and the Gun Owners cross appeal the dismissal of their challenge to ECC 5.26.030 on standing grounds.

[2] The parties disagree whether the standing decision should be reviewed under CR 12(b)(6) or CR 56. The court stated that "as to the summary judgment motion on Edmonds Ordinance 5.26.030, I make no summary judgment ruling. I continue to indicate that my prior ruling remains in effect that . . . the plaintiffs have been determined to have no standing to raise that issue." Therefore, with regard to the Gun Owners' standing to challenge ECC 5.26.030, we review the trial court's order under the standard of review applicable to CR 12(b)(6).

ANALYSIS

A. Standing

The Gun Owners argue the trial court erred in concluding that they lacked standing to challenge ECC 5.26.030, the unauthorized access provision. We agree. The Gun Owners have standing to challenge both ECC 5.26.020 and .030. Even if the Gun Owners have no intention of violating ECC 5.26.030, whether that provision is preempted by state law is an issue of public importance sufficient to confer standing.

The UDJA provides that "[a] person . . . whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the statute, municipal ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder." RCW 7.24.020.

A party initiating a UDJA action must establish the existence of a justiciable controversy, including standing. Diversified Indust. Dev. Corp. v. Ripley, 82 Wn.2d 811, 815, 514 P.2d 137 (1973). A party initiating a pre-enforcement challenge to an ordinance must show interests that are "direct and substantial," rather than potential, theoretical, abstract, or academic. To-Ro Trade Shows v. Collins, 144 Wn.2d 403, 411, 27 P.3d 1149 (2001). "The kernel of the standing doctrine is that one who is not adversely affected by a statute may not question its validity." Walker v. Munro, 124 Wn.2d 402, 419, 879 P.2d 920 (1994). A party must demonstrate that they have suffered or will suffer an "injury in fact." Lakehaven Water and Sewer Dist. v. City of Federal Way, 195 Wn.2d 742, 769, 466 P.3d 213 (2020).

The City argues the Gun Owners cannot advance a pre-enforcement challenge to the unauthorized access ordinance, ECC 5.26.030, because they do not intend to ever violate that ordinance and thus have not suffered any injury in fact. But in Alim v. City of Seattle, 14 Wn. App. 2d 838, 852, 474 P.3d 589 (2020), this court recently held that "the test under the UDJA is not whether a party intends to violate the law being challenged but merely whether their rights are adversely affected by it." The Gun Owners testified that they have an interest in keeping their firearms unsecured in the presence of unauthorized users, and they will have to deviate from their storage practices to avoid violating both provisions of the ordinance. This evidence suffices under Alim.

Moreover, our Supreme Court has recognized an exception to Diversified's standing test when a party raises an issue of "broad overriding public import." Walker v. Munro, 124 Wn.2d at 432; Lewis County v. State, 178 Wn. App. 431, 440 (1994); Diversified, 82 Wn.2d at 814-815. Whether an issue is one of major public importance depends on the extent to which public interest would be enhanced by reviewing the case. Snohomish County v. Anderson, 124 Wn.2d 834, 841, 881 P.2d 240 (1994) (emphasis omitted). We conclude this appeal presents an issue of significant public interest and considering the challenge to the storage and the unauthorized access provisions in a single pre-enforcement challenge advances the public interest.[3]

[3] The City relies on Lewis County to argue that we should review the trial court's decision not to invoke the "broad overriding public import" exception to Diversified under an abuse of discretion standard. But the case on which Lewis County relies applied a de novo standard of review to the question of whether an issue is one of broad overriding public import. See Nollette v. Christianson, 115 Wn.2d 594, 600, 800 P.2d 359 (1990). Division One has previously held that justiciability is a question of law to be reviewed de novo. American Traffic Solutions, Inc. v. City of Bellingham, 163

We reach this conclusion for two reasons. First, whether a municipality has the authority to enact gun regulations affects every gun owner and every municipality in the state. Edmonds is not the only municipality to enact these storage regulations, as is evident from this court's decision in Alim, a case addressing an identical ordinance passed in Seattle. Firearm storage in particular became a matter of statewide importance as an initiative directly relating to the issue was on the statewide ballot, passed, and is now codified in RCW 9.41.360.

Second, whether RCW 9.41.290 preempts these municipal ordinances is a question of law that requires no further factual development. The preemption analysis is the same whether we evaluate only ECC 5.26.020 or evaluate both provisions at the same time. A conclusion that the state statute preempts ECC 5.26.020 necessarily means that it also preempts ECC 5.26.030. We can see no basis for concluding one provision of the ordinance is preempted while the other is not. Either the entire ordinance falls within the scope of the preempted "field of firearm regulations" or it does not. There is no reason to delay an authoritative determination on the preemption of ECC 5.26.030 here.

For these reasons, we conclude that the public would benefit greatly by decision on the validity of both ECC 5.26.020 and 5.26.030 and we conclude the Gun Owners have standing on that basis.

B. Preemption

The City argues that the trial court erred in holding that RCW 9.41.290 preempts its gun storage regulations because (1) RCW 9.41.290 is ambiguous as

Wn. App. 427, 432, 260 P.3d 245 (2011). We therefore review standing under both the Diversified test and the alternative "broad public import" test de novo.

to its application to ordinances which regulate the storage of firearms and (2) this ambiguity must be resolved in favor of the validity of the Ordinance. We disagree and conclude that the legislature's express preemption of "the entire field of firearms regulation" is unambiguous and necessarily extends to regulations of the storage of firearms.

Appellate courts review an order granting summary judgment de novo and perform the same inquiry as the trial court. Borton & Sons, Inc. v. Burbank Properties, LLC, 196 Wn.2d 199, 205, 471 P.3d 871 (2020). Statutory interpretation is a matter of law that we review de novo. Jametsky v. Olsen, 179 Wn.2d 756, 761, 317 P.3d 1003 (2014).

Municipal ordinances are presumed to be valid and grants of municipal power are to be liberally construed. City of Bothell v. Gutschmidt, 78 Wn. App. 654, 659–60, 898 P.2d 864 (1995). Similarly, the person challenging an ordinance bears the burden of proving that the ordinance is unconstitutional. Id. at 660. Nevertheless, an ordinance will be found to be invalid if a general statute preempts city regulation of the subject. Brown v. City of Yakima, 116 Wn.2d 556, 559, 807 P.2d 353 (1991). When the legislature has expressly stated its intent to preempt the field, a city may not enact any ordinances affecting the given field. Id. A state statute will be deemed to preempt a city ordinance when there is an express legislative intent to occupy the entire field. Watson v. City of Seattle, 189 Wn.2d 149, 171, 401 P.3d 1 (2017).

Our legislature expressed its intent to "fully occup[y] and preempt[] the entire field of firearms regulation." RCW 9.41.290. The City argues that, notwithstanding this declaration of intent, the legislature did not include regulations

on the storage of firearms within this preempted field. This argument, however, conflicts with the plain language of RCW 9.41.290.

The primary goal of statutory interpretation is to determine and give effect to the legislature's intent. Jametsky v. Olsen, 179 Wn.2d 756, 762, 317 P.3d 1003 (2014). To determine legislative intent, we first look to the plain language of the statute. Id. If a statute is unambiguous, Washington courts apply the statute's plain meaning as an expression of legislative intent without considering other sources of such intent. Id. at 762. We conclude RCW 9.41.290 is unambiguous in the expression of intent on the breadth of the preempted field.

The City first argues the phrase "entire field of firearms regulation" is ambiguous because it does not establish the field's boundaries. The legislature described the field as "including the registration, licensing, possession, purchase, sale, acquisition, transfer, discharge, and transportation of firearms." RCW 9.41.290. The City contends this list is exclusive and "storage" regulations are not preempted because the legislature did not include storage in this list.

But our Supreme Court generally recognizes that a statute that uses the term "including" is one of enlargement, not restriction. Queets Band of Indians v. State, 102 Wn.2d 1, 4, 682 P.2d 909 (1984). "[T]he word *include* does not ordinarily introduce an exhaustive list, while *comprise* . . . ordinarily does." ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS at 132 (2012). The legislature's use of the word "including" plainly indicates a list that is illustrative and not exhaustive. The absence of the word "storage" from the list in RCW 9.41.290 does not indicate an intent to allow cities to regulate this aspect of firearm ownership.

This conclusion is further supported by the legislature's sweeping language that the state "fully occupies" "the entire field" of firearms regulation "within the boundaries of the state." RCW 9.41.290. The City's offered interpretation necessitates a conclusion that the enumerated nine categories of regulation — "the registration, licensing, possession, purchase, sale, acquisition, transfer, discharge, and transportation of firearms" — is the "entire field of firearms regulations." But such an interpretation would render the inclusion of the word "including" and the list surplusage. A legislative body is presumed not to have used superfluous words. Applied Indus. Materials Corp. v. Melton, 74 Wn. App. 73, 79, 872 P.2d 87 (1994). See also Scalia & Garner at 174 (under the surplusage canon, every word and every provision is to be given effect).

The City argues that the doctrine of *ejusdem generis* should apply to render the statutory list exhaustive, rather than illustrative. Under this rule, specific words modify and restrict the meaning of general words when they occur in a sequence. State v. Flores, 164 Wn.2d 1, 13, 186 P.3d 1038 (2008). But State v. Larson, 184 Wn.2d 843, 849, 365 P.3d 740 (2015), a case on which the City relies for this argument, actually supports a contrary result. In Larson, the Supreme Court held that a criminal statute defining retail theft, former RCW 9A.56.360(1)(b), that included the phrase "including, but not limited to lined bags or tag removers" was intended to provide illustrative examples of devices designed to overcome security systems rather than an exhaustive list. Id. It did, however, indicate that under the rule of *ejusdem generis*, the "including" clause expressed a legislative intent to limit the types of devices covered by that statute to devices similar to those items explicitly identified. Id.

If we apply the doctrine of *ejusdem generis* to the illustrative examples of the firearm regulations preempted under RCW 9.41.290, the City's argument still fails because the storage of firearms is similar to and necessarily falls within the concept of firearm "possession." The City argues the word "possession" in RCW 9.41.290 should be interpreted to mean actual possession only and to exclude the concept of constructive possession. "Possession" is not defined in RCW 9.41.290. Where the legislature has not defined a term, we may look to dictionary definitions, the statute's context, and related statutes to determine the legislative understanding of a term. Matter of Detention of J.N., 200 Wn. App. 279, 286, 402 P.3d 380 (2017). The dictionary defines "possession" as "the act or condition of having in or taking into one's control or holding at one's disposal." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1770 (2002). Thus, the common sense understanding of "possession" includes the concept of physically holding a firearm in one's hands as well as having that firearm under one's control. It seems without question that a gun owner must possess a firearm in order to store it inside his home.

Moreover, under RCW 9.41.040, the unlawful possession of a firearm statute, a person may be guilty of this crime if they have the firearm "in his or her possession," or "in his or her control." "Possession" of a firearm under this related statute may be actual or constructive. State v. Chouinard, 169 Wn. App. 895, 899, 282 P.3d 117 (2012). The City's argument thus conflicts with both the dictionary definition of "possession," as well as related statutes in which the term is defined. We therefore conclude RCW 9.41.290 preempts ECC 5.26.020.

We reach the similar conclusion as to ECC 5.26.030. That provision of the ordinance makes it a civil infraction when "any person knows or reasonably should know that a minor, an at-risk person, or a prohibited person is likely to gain access to a firearm belonging to or under the control of that person, and a minor, an at-risk person, or a prohibited person obtains the firearm." This provision attempts to regulate both the possession and the transfer of firearms to individuals who by law are prohibited from possessing them.

The prior cases discussing the scope of preemption under RCW 9.41.290 are all distinguishable. In Watson, the Supreme Court concluded that RCW 9.41.290 did not preempt a Seattle ordinance imposing a tax on firearms and ammunition sold within the city limits. But the basis for its holding was that the ordinance was a tax and not a "regulation" at all. Watson, 189 Wn.2d at 172. The court rejected the challengers' preemption argument because RCW 9.41.290 only preempted "regulations," and not taxation. Id. In this case, the City does not argue, as the City of Seattle in Watson, that the ordinance is not a firearm regulation.

In Cherry v. Municipality of Metropolitan Seattle, 116 Wn. 2d 794, 795, 808 P.2d 746 (1991), the Supreme Court ruled that RCW 9.41.290 did not preempt a Seattle Metro policy prohibiting its employees from possessing concealed weapons while on duty or on Metro property. The court concluded that "RCW 9.41.290 is intended to preempt regulatory city, town or county firearms laws and ordinances, but does not address internal employment rules limiting on-duty possession of firearms by public employees in the workplace." Id. at 798. Again, this case differs from Cherry because the City concedes ECC 5.26.020 is a regulation. It certainly is not a workplace policy.

In Pacific Northwest Shooting Park Ass'n v. City of Sequim, 158 Wn.2d 342, 144 P.3d 276 (2006), a shooting association challenged conditions the city imposed when it issued a permit to use the city convention center for a gun show. The permit provided that only dealers could sell handguns and only to state residents, only dealers could purchase firearms from unlicensed individuals, and unlicensed dealers could not sell firearms at all. Id. at 347. The association contended the permit conditions were impermissible under RCW 9.41.290.

The Supreme Court rejected that argument, holding that RCW 9.41.300(2)(b)(ii) explicitly permitted cities to restrict the "possession" of firearms in any convention center and the permit conditions fell within the scope of that statutory carve-out. Id. at 355. Because one necessarily had to "possess" a firearm to show and sell it, it followed that the city had the authority to regulate those sales under RCW 9.41.300. Id. It alternatively held that even if not explicitly permitted under that statute, the permit conditions were analogous to workplace policies imposed by an employer, and not regulations of general application, and thus fell outside the scope of RCW 9.41.290's preemption. Id. at 356-57. "Cherry supports 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." Id.

Neither of the holdings of Pacific Northwest applies here. The City does not contend its ordinance is permitted under the carve-out of RCW 9.41.300(2) and its ordinances are regulations of general application and not action taken by the city in its capacity as either a landowner or an employer.

Finally, in Kitsap County v. Kitsap Rifle & Revolver Club, 1 Wn. App. 2d 393, 405 P.3d 1026 (2017), Division Two of this court held that a Kitsap County

ordinance requiring shooting ranges to obtain operating permits was not preempted by RCW 9.41.290. Id. at 403. The Kitsap Rifle & Revolver Club argued the permit requirement was expressly preempted because it sought to regulate the discharge of firearms. Id. at 406. The court rejected the argument and concluded the ordinance was not a "firearm regulation" within the scope of RCW 9.41.290. It reached this conclusion because the legislature did not make a reference to the regulation of shooting facilities in RCW 9.41.290, the county's permit requirement neither prohibited nor regulated the discharge of firearms by gun owners, and regulating shooting ranges fell within the statutory authorization of police and sanitary regulations not in conflict with state law under RCW 36.32.120(7). Id.

The court alternatively held that even if the permit requirement were a "firearm regulation," RCW 9.41.290 explicitly permitted local governments to enact laws restricting the discharge of firearms where "there is a reasonable likelihood that humans, domestic animals, and property will be jeopardized." RCW 9.41.300(2)(a). It concluded the county shooting range permit requirement fell within the scope of this exception. Id. at 412.

Kitsap County is distinguishable because the local ordinances at issue are so different. The Edmond Ordinance, unlike Kitsap County's shooting range permit requirement, directly regulates the manner in which gun owners possess, store, and allow others to access their firearms. It is not regulating a business's activities, like the county ordinance does. And the City does not contend here that its Ordinance is an exercise of police power under RCW 36.32.120(7). Additionally, unlike Kitsap County, the City does not argue that any statutory exception in RCW

9.41.300 applies explicitly authorizing the regulation. The Ordinance is therefore a "firearm regulation" within the meaning of RCW 9.41.290.

We therefore conclude that RCW 9.41.290 unambiguously preempts both ECC 5.26.020 and ECC 5.23.030.

CONCLUSION

Although the trial court erred in dismissing the Gun Owners' challenge to ECC 5.26.030 on standing grounds, we affirm the trial court's determination that RCW 9.41.290 unambiguously preempts ECC 5.26.020 and further conclude that ECC 5.26.030 is also preempted.

Affirmed in part, reversed in part.

Andrus, A.C.J.

WE CONCUR: