

HONORABLE PALMER ROBINSON
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With Oral Argument

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SUPERIOR COURT OF WASHINGTON
IN AND FOR KING COUNTY

PHILIP WATSON, an individual; RAY
CARTER, an individual; FARWEST SPORTS,
INC., dba OUTDOOR EMPORIUM, a
Washington corporation; PRECISE
SHOOTER, LLC, a Washington limited
liability company; THE SECOND
AMENDMENT FOUNDATION, INC., a
Washington nonprofit corporation;
NATIONAL RIFLE ASSOCIATION OF
AMERICA, INC.; a New York non-profit
association; AND NATIONAL SHOOTING
SPORTS FOUNDATION, a Connecticut non-
profit association,

Plaintiffs,

v.

CITY OF SEATTLE, a municipality;
ED MURRAY, Mayor of the City of Seattle,
in his official capacity; SEATTLE
DEPARTMENT OF FINANCE AND
ADMINISTRATIVE SERVICES, a
department of the City of Seattle; and GLEN
LEE, Director of Finance and Administrative
Services, in his official capacity,

Defendants.

No. 15-2-20613-3SEA

**PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT**

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8 state law shall not be enacted and are preempted and repealed.”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

9 The City of Seattle is well aware of this restriction on its legislative power, in part because
10 its most recent attempt to regulate firearms was emphatically struck down by the Court of Appeals.
11 *See Chan v. City of Seattle*, 164 Wn. App. 549, 265 P.3d 169 (2011) (holding that the City’s ban
12 on firearms in city parks was preempted and unenforceable). Frustrated by this constraint,
13 members of the Seattle City Council met with anti-firearms groups in 2015 to try to “brainstorm
14 opportunities at the local level to work-around preemption as it relates to gun laws.” Declaration
15 of Steve Fogg (“Fogg Decl.”), Ex. 1. Those meetings culminated in the passage of an ordinance
16 that unabashedly seeks to limit access to firearms and ammunition by imposing what amounts to
17 a regulatory fee on the sale of all firearms and ammunition within City limits. *See* Statement of
18 Councilmember John Okamoto, Seattle City Council (August 10, 2015) (showing his support for
19 the Ordinance by reading a citizen statement that “[p]rohibiting guns completely will not stop
20 every shooting, but I do believe that making it more difficult to access guns and ammunition will
21 save more lives”).

22 In a transparent bid to avoid preemption, the City has labelled this regulatory fee a “tax.”
23 But it is the substance and the intent, and not the label, of an ordinance that a court must examine
24 when determining whether a charge imposed by a governmental entity is a tax or a regulatory fee.
25

1 See *Covell v. City of Seattle*, 127 Wn.2d 874, 878-79, 905 P.2d 324 (1995). Here, the ordinance
2 clearly qualifies as a regulatory fee under the three factors set forth in *Covell*:

- 3 • First, because the primary purpose of the ordinance is regulatory, “the charges
4 are properly characterized as tools of regulation, rather than taxes.” *Id.* at 879
5 (citation omitted).
- 6 • Second, the ordinance does not raise tax revenue for the general public welfare,
7 but instead imposes a fee that is allocated to an “authorized regulatory purpose,”
8 *i.e.*, gun violence research and prevention programs. *Id.*; Fogg Decl., Ex. 2
9 (council talking points state that the fund created from the charges is a
10 “dedicated revenue source” that may only be used to fund gun violence
11 programs).
- 12 • Third, in passing the ordinance, the City intended for there to be a direct
13 relationship “between the fee charged and the burden produced by the fee
14 payer.” *Covell*, 127 Wn.2d at 879. Indeed, in an op-ed piece authored by Tim
15 Burgess, president of the City Council, he expressed this relationship in no
16 uncertain terms: “Let’s tax the gun industry to help pay for the damage their
17 products produce.” Fogg Decl., Ex. 3.

18 The ordinance is thus unquestionably a regulation under *Covell* and other similar cases.
19 Moreover, not only does the “tax” flunk the *Covell* test, it also fails to satisfy the three statutory
20 criteria required for a business and occupational (“B&O”) tax, which is the taxing authority the
21 City relied upon in passing the Ordinance. A B&O tax must: a) apply a strict percentage tax rate
22 across all retail receipts; b) apply uniformly to all retailers; and c) not exceed a statutory maximum
23 percentage rate. See RCW 35.21.710. The Ordinance a) does not apply a percentage rate at all,
24 and instead impermissibly imposes a per item charge on a subset of retail products (firearms and
25 ammunition); b) applies only to a subset of retailers; and c) exceeds the statutory maximum rate
(because the City already charged all retailers the statutory maximum rate for a B&O tax before
the Ordinance, any additional B&O taxes, let alone the exorbitant fees imposed by the Ordinance,
exceed the statutory maximum).

The Ordinance’s inability to satisfy not a single statutory requirement of a B&O tax further
proves an obvious point: the Ordinance doesn’t look like a B&O tax because it is not a B&O tax

1 at all. The Ordinance is instead a regulatory tool designed to penalize and limit access to firearms
2 and ammunition. Because only the state of Washington may regulate firearms, the Ordinance
3 must be preempted. Accordingly, Plaintiffs respectfully request that this Court grant Plaintiffs'
4 motion for summary judgment now, before the ordinance becomes effective on January 1, 2016,
5 and issue declaratory and injunctive relief barring the implementation or enforcement of the
6 ordinance.

7 **I. FACTUAL BACKGROUND**

8 In early 2015, members of the Seattle City Council engaged in meetings with anti-firearms
9 groups to “brainstorm opportunities at the local level to work-around preemption as it relates to
10 gun laws” to “keep up an ‘all-fronts’ strategy and to get creative about how we curtail gun
11 irresponsibility.” *See* Fogg Decl., Ex. 1. These meetings, including “Local Gun Laws Table
12 Meetings” on March 21, 2015, and May 26, 2015, discussed preemption in detail and concluded
13 that a “tax” provided an opportunity to evade the barrier of preemption. *See* Fogg Decl., Ex. 4.
14 Attracted to the notion that restrictions on firearm sales could be accomplished by simply labeling
15 them as taxes, the Seattle City Council introduced Bill 118437 as “[a]n Ordinance related to
16 imposing a tax on engaging in the business of making retail sales of firearms and ammunition.”
17 *See* Fogg Decl., Ex. 5.

18 The Seattle City Council did little to hide the regulatory and punitive purpose of the
19 ordinance, issuing talking points and an op-ed stating that the goal of the bill was to “tax the gun
20 industry to help pay for the damage their products produce.” *See* Fogg Decl., Exs. 2 & 3. The
21 City Council also released materials proclaiming that the firearms “tax” was part of a “continuing
22 effort” to promote “gun safety actions in Seattle.” *See* Fogg Decl., Ex. 6 at 7 (enumerating
23 imposition of the “tax” as part of a set of “gun safety measures.”).

1 On August 10, 2015, the Seattle City Council considered Council Bill 118437. Statements
2 by Seattle Council Members in support of the legislation further demonstrated the legislation’s
3 regulatory intent:

- 4 • Council member John Okamoto showed his support for the legislation by
5 reading a statement that said “[p]rohibiting guns completely will not stop every
6 shooting, but I do believe that making it more difficult to access guns and
7 ammunition will save more lives”
- 8 • Council member Bruce Harrell issued his support for the ordinance by stating
9 “[t]he fact is, in simple terms, access to guns is too high”; and
- Council member Sally Bagshaw stated that the action was necessary because
“we cannot rely upon our federal government to do what’s right here.”¹

10 Following these statements, the City Council passed Council Bill 118437. On August 21,
11 2015 Mayor Murray approved and signed the Council Bill, making Ordinance 124833
12 (“Ordinance”) effective and in force on September 20, 2015. The Ordinance states that beginning
13 on January 1, 2016, the “tax” itself will be imposed on every person engaging within the City in
14 the business of making sales of firearms or ammunition. *See* Fogg Decl., Ex. 5 at 15, Section 17.

15 The Ordinance added Chapter 5.50 to the Seattle Municipal Code, which states, in part:

16 **5.50.030 Tax imposed; rates**

17
18 A. There is imposed a tax on every person engaging within the City in the business
19 of making retail sales of firearms or ammunition. The amount of the tax due shall
20 be equal to the quantity of firearms sold at retail and the quantity of ammunition
21 sold at retail multiplied by the applicable tax rates that are stated in Section
22 5.50.030.B.

23
24 B. The tax rate shall be \$25 per firearm sold at retail, \$.02 per round of ammunition
25 that contains a single projectile that measures .22 caliber or less sold at retail, and
\$.05 per round of ammunition for all other ammunition sold at retail.

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

1 *Id.* at 11, Section 11. The funds collected from the Ordinance are to be segregated in a “Firearms
2 and Ammunition Tax Fund”, which shall be used only to fund programs that “address in part the
3 costs of gun violence in the city” and for “administrative costs to manage the fund and make tax
4 system modifications as needed.” *Id.* at 13, Sections 12 & 13. The Ordinance also amended
5 5.55.220 of the Seattle Municipal Code to make failure to pay the firearm and ammunition tax a
6 gross misdemeanor, punishable by a fine of up to \$5,000, imprisonment for a term not to exceed
7 364 days, or both. *Id.* at 6-8, Sec. 9.

8 Plaintiffs bring this case because they, or their members, purchase or sell firearms or
9 ammunition in the City of Seattle. Outdoor Emporium and Precise Shooters are retailers who sell
10 firearms and ammunition (as well as an array of other retail merchandise not covered by the
11 purported tax.) Phillip Watson and Ray Carter are individuals who purchase firearms or
12 ammunition from retailers in Seattle. The National Rifle Association of America (“NRA”),
13 National Shooting Sports Foundation (“NSSF”), and Second Amendment Foundation (“SAF”)
14 are organizations who have members who purchase or sell firearms or ammunition in the City of
15 Seattle. The parties may dispute the impact of the “tax” on Watson, Carter, and the members of
16 the NRA, NSSF, and SAF. However, there can be no dispute that Outdoor Emporium and Precise
17 Shooter will be required to pay the \$25 fee on every firearm they sell, and either \$.02 or \$.05 on
18 every round of ammunition, if the “tax” goes into effect on January 1, 2016.

19 **II. STATEMENT OF ISSUES**

20 Whether the City of Seattle’s so-called “firearms and ammunition tax” is preempted by
21 RCW 9.41.290 for impermissibly regulating the sale of firearms and ammunition through the
22 imposition of a regulatory fee on retail businesses for every sale of a firearm or round of
23 ammunition.²

24 _____
25 ² Plaintiffs’ claims encompass two related, yet separately judiciable theories of preemption. The subject of this motion is the contention that the “tax” is actually a regulatory fee in its purpose and substance, and is therefore preempted. The public record concerning the gestation, passage, and structure of the Ordinance is the only relevant evidence

1 legislation in question is to "regulate" the fee payers or to collect revenue to finance broad-based
2 public improvements. *Id.* "It is a misnomer to simply ask whether the charges raise revenue,
3 because both taxes and regulatory fees raise revenue. What is important is the purpose behind the
4 money raised—a tax raises revenue for the general public welfare, while a regulatory fee raises
5 money . . . to pay for or regulate the burden those who pay have created." *Okeson*, 150 Wn.2d at
6 552-53. A court may look to the "overall plan" of regulation in construing the purpose of the
7 challenged charge. *See Hillis Homes, Inc. v. Public Util. Dist. 1*, 105 Wn.2d 288, 299, 714 P.2d
8 1163 (1986). Indeed, courts can look beyond the legislation implementing the charge in order to
9 determine the legislation's purpose. *See Teter v. Clark County*, 104 Wn.2d 227, 239, 704 P.2d
10 1171 (1985). The **second** factor is whether the money collected must be allocated only to the
11 authorized regulatory purpose. *Covell*, 127 Wn.2d at 879. The **third** factor is whether there is a
12 direct relationship between the fee charged and the burden produced by the fee payer. *Id.* "Where
13 such a relationship exists, then the charge may be deemed a regulatory fee even though the charge
14 is not individualized according to the benefit accruing to each fee payer or the burden produced
15 by the fee payer." *Id.*

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

18 First, the City Council made very clear that the express purpose of the Ordinance was "gun
19 safety," not revenue generation. Even a cursory review of the legislative history shows that the
20 Seattle City Council sought to reduce the access to firearms and ammunition by imposing a
21 regulatory fee on their purchase within the city limits. *See, e.g.*, Fogg Decl., Ex. 6 at 7 (identifying
22 the "tax" along with the City's other attempts at gun control); August 10, 2015 Seattle City
23 Council Meeting at 1:24:39, 1:25:44 & 1:27:39 (statements by Seattle City Council Members
24 speaking in favor of limiting access to firearms and ammunition); Fogg Decl., Exs. 1 & 4
25 (describing meetings attended by Seattle Council Members as a way to "brainstorm opportunities

1 at the local level to work-around preemption as it relates to gun laws” to “keep up an ‘all-fronts’
2 strategy and to get creative about how we curtail gun irresponsibility”).

3 Second, the money collected pursuant to the Ordinance is specifically segregated from the
4 general fund. *See* Fogg Decl., Ex. 5 at 13, Sections 12 & 13. Fees collected on the sale of firearms
5 and ammunition must be allocated only to the authorized regulatory purpose of funding gun
6 violence programs, defraying the administrative costs of managing the fund, and making
7 modifications to the firearms and ammunition “tax” system. *Id.* Despite copying the correct
8 terminology from *Covell*, the City’s characterization of this fee as collecting funds for “broad-
9 based improvements” does not match the restricted and particularized purposes for which the
10 funds must be used.

11 Third, the Seattle City Council earmarked the fees generated by the Ordinance for a
12 specific fund intended to defray the costs that are imposed on Seattle by gun violence. *See* Fogg
13 Decl., Ex. 2 (talking points created for the City Council which indicated that the “tax” was
14 specifically intended to “mitigate the public health impacts” from gun violence and that it was
15 “time for the gun industry to chip in to help defray those costs”); Fogg Decl., Ex. 3 (op-ed from
16 Councilmember Burgess noting that the goal of the Ordinance was to “tax the gun industry to help
17 pay for the damage their products produce”). Accordingly, the charge to firearm and ammunition
18 retailers was created to pay only for the burden that those sales purportedly impose on the City of
19 Seattle, demonstrating a regulatory purpose rather than an attempt to raise general revenue for
20 broad-based public improvements.

21 As the above discussion makes clear, the Ordinance does not set forth a percentage tax to
22 be applied across the value of all retail products sold by Plaintiffs Outdoor Emporium and Precise
23 Shooter, but instead imposes a hefty fee these Plaintiffs must pay for the privilege of selling each
24 firearm or round of ammunition. These fees are then segregated into a special fund that can only
25 be used to address the burdens that the Defendants believe stem from sales by firearm and

1 ammunition retailers in the City. No local tax looks like this. This Court should label the
2 Ordinance for what it is: an impermissible local regulation specifically targeted at burdening the
3 sale of firearms and ammunition.

4 **B. Interpreting the Ordinance as a Tax Would Violate the City’s Limited Taxing**
5 **Authority**

6 The City’s attempt to label the Ordinance as a tax is also entirely undermined by the fact
7 that the Ordinance would be unconstitutional even if it could somehow be considered a tax under
8 *Covell*. A city’s taxing authority is strictly limited and can only be exercised pursuant to specific
9 powers granted by state statute. *Covell*, 127 Wn.2d at 878-79. Due to these constraints, the City
10 may enact just three general types of taxes: business and occupational taxes (“B&O”), sales taxes,
11 or property taxes.³

12 Implicitly conceding that the Ordinance would fail as a sales tax or a property tax,⁴ the
13 City has attempted to pass the Ordinance as a B&O tax. But B&O taxes must satisfy each of three
14 strict requirements, and the Ordinance—because it is not a tax at all—fails every one. *See* RCW
15 35.21.710. First, a B&O tax must impose a percentage to be applied across all of a retailer’s gross
16 receipts, yet the Ordinance does not utilize a percentage at all, and instead impermissibly imposes
17 a per item charge on a subset (firearms and ammunition) of select retail products. Second, a B&O
18 tax must be imposed uniformly upon all retailers, but the Ordinance applies only to retailers who
19 sell firearms and ammunition. Third, a B&O tax may not exceed a maximum statutory percentage
20 rate. The City’s existing B&O tax already applies the statutory maximum rate, meaning that the
21 hefty fees sought by the Ordinance are far outside the statutory maximum B&O tax the City

22 ³ The Washington Legislature may also empower cities to levy taxes on specific items or activities, such as on
23 gambling. *See* RCW 9.46.110. There is no similar power granted to cities to tax firearms or ammunition.

24 ⁴ The Ordinance is not a property tax because it applies to the sale of an item, not the possession of that item. Further,
25 the Ordinance would also fail as a sales tax, even if Seattle were to attempt to recast it under that authority. State law
mandates that local retail sales taxes must use one uniform rate and be limited to a maximum rate (which Seattle
already applies). *See* RCW 82.02.020 (preempting retail sales taxes except as explicitly permitted); RCW 82.14.030
(authorizing limited sales and use taxes).

1 already charges and collects. The failure to satisfy any one of these three requirements is fatal to
2 a proposed B&O tax; here, the Ordinance fails all three. The Ordinance’s three-part failure is of
3 a piece with its failure to satisfy *Covell*, and further demonstrates that the Ordinance is a regulatory
4 fee, not a tax.

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

6 Local governments do not have the inherent power to tax. *Covell*, 127 Wn.2d at 878-79.
7 Instead, a city’s power to tax derives exclusively from state statute. *See* WASH. CONST. ART. 11
8 § 12; *see also Arborwood Idaho, L.L.C. v. City of Kennewick*, 151 Wn.2d 359, 365-66, 89 P.3d
9 217 (2004) (as the police powers granted to cities in the Constitution do not include the power to
10 tax, municipalities must have express legislative authority); *State ex rel. Pacific Tel. & Tel. Co. v.*
11 *Department of Pub. Serv.*, 19 Wn.2d 200, 272, 142 P.2d 498 (1943) (holding that a city only
12 exercises delegated taxing powers). The State’s grant of the power to tax to a city is to be strictly
13 construed and “[i]f any doubt exists as to the meaning of a taxation statute, the statute must be
14 construed most strongly against the taxing power and in favor of the taxpayer.” *Ski Acres, Inc. v.*
15 *Kittitas County*, 118 Wn.2d 852, 857, 827 P.2d 1000, 1003 (1992); *see P. Lorillard Co. v. Seattle*,
16 8 Wn. App. 510, 513, 507 P.2d 1212 (1973).

17 A city has the statutory authority to levy B&O taxes, but that authority is limited. *See*
18 *Dravo Corp. v. City of Tacoma*, 80 Wn.2d 590, 593, 496 P.2d 504 (1972). As an initial matter,
19 B&O taxes are, by definition, imposed only on the gross receipts of a business. RCW 35.102.030
20 (defining city B&O taxes—a “business and occupation tax” or “gross receipts tax”—as that
21 “measured by the value of products, the gross income of the business, or the gross proceeds of
22 sales”); RCW 35.102.040 (requiring cities to comply with the provisions of RCW 35.102.020 to
23 35.102.130, which includes the definition of B&O taxes as a gross receipts tax). Practically, this
24 means that a B&O tax is a percentage applied to a retailer’s total sales (*i.e.* a retailer earned
25 \$100,000 in gross sales, against which a 2% tax is applied, resulting in \$2,000 in B&O taxes).

1 This is fundamentally different than imposing a fee on the sale of every item, especially where
2 the fee is applied as a set charge (*i.e.* \$25) rather than as a percentage of the sales price.

3 Further, a B&O tax on retail sales must be a single uniform rate that is applied to all
4 retailers. *See* RCW 35.22.283 & RCW 35.21.710 (“Any city which imposes a license fee or tax
5 upon business activities consisting of the making of retailer sales of tangible personal property
6 which are measured by gross receipts or gross income from such sales, shall impose such tax rate
7 at a single uniform rate upon all such business activities.”). This uniformity prohibits a city from
8 imposing a higher rate on a specific type of retailer while maintaining a lower rate against all other
9 retailers. *See* RCW 35.21.710. Notably, the need for uniformity stems from the Washington
10 Legislature’s desire to eliminate excessive and multiple taxation faced by Washington businesses.
11 *See, e.g.*, RCW 35.102.010 (stating the findings of the Washington Legislature in requiring
12 municipalities to adopt a model system related to B&O taxes).

13 Finally, a B&O tax rate cannot exceed a maximum rate, generally set at 2% and currently
14 set at 2.15% in Seattle. RCW 35.21.710 (setting the state-wide maximum rate at 2%); SMC
15 5.45.050(C) (raising the statutory maximum in Seattle to 2.15% by a vote of Seattle citizens
16 pursuant to RCW 35.21.711). RCW 35.21.710 was specifically “designed to severely restrict the
17 tax rates local governments could assess” and a tax that exceeds the maximum rate is void.
18 *Western Telepage, Inc. v. City of Tacoma*, 140 Wn.2d 599, 613, 998 P.2d 884 (2000). In *Okeson*,
19 for example, the City of Seattle passed a cost-shifting ordinance intended to have Seattle residents
20 and businesses pay the electric utilities used by the City itself. 150 Wn.2d at 556. The Washington
21 Supreme Court struck down the ordinance because, among other things, it represented a tax that
22 violated the statutory limit of 6% for taxes on an electric utility. *Id.* In particular, Seattle City
23 Light already imposed the maximum 6% tax on its ratepayers, meaning that any additional
24 payments automatically exceeded the cap. *Id.* This same restriction applies to the 2% statutory
25 cap on retailers found in RCW 35.21.710. *See Lane v. City of Seattle*, 164 Wn.2d 875, 886, 194

1 P.3d 977 (2008) (declining to apply the maximum rate restriction in RCW 35.21.710 to a tax on
2 a water utility, only because the statute had an express exception for taxes on public utilities).

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

4 In passing the Ordinance, the City sought to invoke its B&O taxing authority, but violated
5 every single strict constraint on B&O taxes. *See, e.g.*, Ordinance 124833(16) (making the
6 ordinance subject to RCW 35.21.706, which relates to challenging the institution or increase in a
7 rate of a B&O tax through referendum); Fogg Decl., Ex. 6 at 4 (“Under Business and Occupation
8 tax provisions, the City has the authority to tax sellers of a good by volume of the goods sold.”).

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

15 Second, the Ordinance does not apply a uniform tax rate to all retailers. The Ordinance
16 singles out retailers that sell firearms or ammunition and imposes upon them a separate tax that is
17 in addition to the general B&O tax that the City already applies to all retailers. *See* SMC
18 5.45.050(C). Accordingly, firearm and ammunition retailers are subject to a higher B&O tax than
19 other retailers simply because of the products they sell.

20 Third, the tax is in excess of the maximum statutory rate. RCW 35.21.710 set the
21 maximum rate at 2% and RCW 35.21.711 permits a city to raise that maximum by a full vote of
22 its citizens. Seattle previously chose to raise the maximum B&O tax to 2.15% by a vote of Seattle
23 residents. *See* SMC 5.45.050(C). The City then imposed that maximum 2.15% rate on all retailers
24 in Seattle. *Id.*; Association of Washington Cities, City Business (B&O) Tax Rates Effective
25 January 1, 2015 (June 11, 2015) (listing Seattle as already applying the maximum rate for B&O

1 taxes on retailers).⁵ By applying the maximum B&O tax rate to firearm and ammunition retailers
2 in their capacity as general retailers and then charging them another B&O tax based only on their
3 sales of firearms and ammunition, the City is engaging in double taxation far in excess of the
4 statutory limit.

5 Ultimately, the failure of the Ordinance to meet the requirements of a B&O tax may be
6 best demonstrated by comparing it to the B&O tax that the City already imposed on retailers
7 before it passed the Ordinance:

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

13 SMC 5.45.050(C). This B&O tax meets all of the statutory requirements. It is imposed as a
14 percentage of “gross proceeds.” It is uniformly applied to all retailers. It is set at the maximum
15 of 2.15%. It is a B&O tax. The Ordinance, on the other hand, with its per item fee, lack of
16 uniformity, and excessive rate is anything but a B&O tax.

17 The fact that the Ordinance violates RCW 35.21.710 in so many ways comes as no
18 surprise, for the Ordinance is not a tax at all, but an intentional effort to evade preemption by
19 attempting to transform by label alone a regulatory fee into a “tax”. Accordingly, the City’s
20 attempt to obscure its regulatory actions by calling them a “tax” does not pass muster. The City
21 does not have the power under its taxing authority to impose the types of charges found in the
22 Ordinance against businesses selling firearms and ammunition. The so-called B&O tax looks
23 nothing like a municipal B&O tax, and there is no other taxing authority under which the City
24 could impose similar fees on individual retail sales. Interpreting the Ordinance as a tax would
25 exceed the City’s taxing authority and render the entire endeavor an unconstitutional exercise of
taxing authority.

⁵ Available at <http://www.awcnet.org/Portals/0/Documents/Legislative/bandotax/botaxrates.pdf>.

1 **C. Declaratory and Injunctive Relief Is Appropriate.**

2 Plaintiffs have demonstrated that the Ordinance is a regulation rather than a tax. Thus,
3 because the Ordinance regulates the sale of firearms or ammunition by imposing a fee to engage
4 in that activity, it is preempted and unconstitutional. RCW 9.41.290; WASH. CONST. ART. 11 §
5 11 ("POLICE AND SANITARY REGULATIONS. Any county, city, town or township may
6 make and enforce within its limits all such local police, sanitary and other regulations as are not
7 in conflict with general laws."); *Chan*, 164 Wn. App. at 549. Because the Ordinance is preempted
8 and unconstitutional, the Court can and should grant declaratory and injunctive relief to bar the
9 operation of the statute. *See, e.g., Okeson*, 150 Wn.2d at 549 ("The issues in this case pertain to
10 constitutional limitations and statutory authority, and so are issues of law to be determined de
11 novo by this court.").

12 In particular, a person may ask a court to determine the validity of an ordinance, and obtain
13 a declaration of rights under that ordinance, if that person's "rights, status or other legal relations
14 are affected by" that rule. RCW 7.24.020. Such declaratory relief is "peculiarly well suited to
15 the judicial determination of controversies concerning constitutional rights and, as in this case,
16 the constitutionality of legislative action or inaction." *Seattle Sch. Dist. v. State*, 90 Wn.2d 476,
17 490, 585 P.2d 71 (1978). A party may show the need for a declaratory judgment where a
18 justiciable controversy is established through: (1) an actual, present, and existing dispute, as
19 opposed to a dispute that is possible, hypothetical, moot, or speculative; (2) between parties that
20 have genuine and opposing interests; (3) which involves direct and substantial interests as opposed
21 to potential, theoretical, or abstract interests; and (4) a judicial determination of which will
22 conclusively terminate the controversy. *See To-Ro Trade Shows v. Grant Collins*, 144 Wn.2d
23 403, 411, 27 P.3d 1149 (2001); RCW 7.24.060. Similarly, a party may obtain injunctive relief by
24 showing: (1) a clear legal or equitable right; (2) a well-grounded fear of immediate invasion of
25

1 that right; and (3) that the acts complained of either result in or will result in actual and substantial
2 injury. *Chan*, 164 Wn. App. at 567.

3 Where a law is preempted, the factors for declaratory and injunctive relief are easily met.
4 *See, e.g., Gen. Tel. Co. of the N.W., Inc. v. City of Richmond*, 105 Wn.2d 579, 587, 716 P.2d 879
5 (1986) (affirming trial court’s decision to grant declaratory relief where a city ordinance requiring
6 telephone franchisees to move underground lines at its own expense was declared null and void
7 because a state regulation required the expense to be paid for by the party requesting the move);
8 *State v. City of Seattle*, 94 Wn.2d 162, 166-67, 615 P.2d 461 (1980) (granting declaratory and
9 injunctive relief where a Seattle ordinance regarding historic landmarks was declared
10 unconstitutional because it conflicted with a state statute expressly permitting the University of
11 Washington to alter and demolish certain University-owned property).

12 *Chan* is an obvious and instructive example. In that case, Judge Shaffer granted a
13 summary judgment motion that plaintiffs brought shortly after filing their lawsuit. *Chan*, 164 Wn.
14 App. at 558. Finding that the City of Seattle’s attempt to regulate firearms by banning them from
15 city parks was preempted by state law and therefore void, Judge Shaffer ordered immediate
16 declaratory and injunctive relief that prevented the City from enforcing the preempted regulations.
17 *Id.* The Court of Appeals affirmed Judge Shaffer’s decision, including the declaratory judgment
18 and injunction that she ordered as a remedy. *Id.* at 567.

19 The Plaintiffs in this case are entitled to the same relief afforded the plaintiffs in *Chan*;
20 like the parks ban at issue in *Chan*, the Ordinance is preempted by state law, and is thus “null and
21 void.” *Id.* at 558. As to the firearm and ammunition retailers Outdoor Emporium and Precise
22 Shooter, at the very least,⁶ there can be no dispute that they sell firearms and ammunition in the

23 ⁶ Plaintiffs limit their discussion of the declaratory and injunctive factors to the named firearm and ammunition retailer
24 Plaintiffs. Although the remaining Plaintiffs have similar interests, Defendants have expressed a concern that
25 affidavits submitted in support of this motion might require a 56(f) stay while discovery is taken to test their assertions.
Accordingly, Plaintiffs restrict the argument on this point to those facts that cannot be disputed, namely the existence
of the firearm and ammunition retailer Plaintiffs as businesses that would be subject to the impending “tax”.

1 City of Seattle and would be subject to the “tax” to be imposed by the Ordinance starting on
2 January 1, 2016. Accordingly, the retailer Plaintiffs’ challenge to the “tax” presents an actual,
3 present, and existing dispute between the parties that involves the retailers’ statutory and
4 constitutional rights to be free from the substantial fees that are imposed under the threat of
5 criminal prosecution. This Court can, and should, conclusively terminate the controversy created
6 by the City’s unconstitutional local interference with the sale of firearms and ammunition by
7 issuing declaratory and injunctive relief.

8 **VI. CONCLUSION**

9 For all the foregoing reasons, Plaintiffs respectfully request that the Court grant summary
10 judgment on behalf of the Plaintiffs and issue declaratory judgment and permanent injunctive
11 relief as requested in the Complaint.

12 DATED this 23rd day of October, 2015.

13 **CORR CRONIN MICHELSON**
14 **BAUMGARDNER FOGG & MOORE LLP**

15 *s/ Steven W. Fogg*
16 Steven W. Fogg, WSBA No. 23528
17 David B. Edwards, WSBA No. 44680
18 1001 Fourth Avenue, Suite 3900
19 Seattle, WA 98154
20 (206) 625-8600
21 sfogg@corrchronin.com
22 dedwards@corrchronin.com
23 *Attorneys for Plaintiffs*

