NO. 74534-4

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

PHILIP WATSON, an Individual, et al.,

Appellants,

v.

CITY OF SEATTLE, a Municipality, et al.,

Respondents.

AMICUS BRIEF OF THE STATE OF WASHINGTON

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. ARGUMENT 2

A. State Law Does Not Preempt Seattle's Firearm and Ammunition Tax 2

1. Seattle's Ordinance Imposes a Tax, Not a Regulation 2

a. The purpose of the charge is funding public health research and education, not regulation 3

b. None of the money raised is allocated to a regulatory purpose 5

c. There is no relationship between the tax amount charged and the service received by the business or purchaser 7

2. RCW 9.41.290 Does Not Preempt Taxes Like Seattle's 8

a. The plain language of RCW 9.41.290 preempts local regulation of firearms—not taxation 9

b. Plaintiffs have failed to show that RCW 9.41.290 was intended to preempt local taxation of firearms 13

B. The Ordinance Imposes a Lawful Excise Tax 14

III. CONCLUSION 17

TABLE OF AUTHORITIES

Cases

Arborwood Idaho, L.L.C. v. City of Kennewick
151 Wn.2d 359, 89 P.3d 217 (2004) 5

Chan v. City of Seattle
164 Wn. App. 549, 265 P.3d 169 (2011) 13

City of Seattle v. Ballsmider
71 Wn. App. 159, 856 P.2d 1113 (1993) 14

City of Virginia Beach v. Virginia Restaurant Association, Inc.
231 Va. 130, 341 S.E.2d 198 (1986) 10-12

Commonwealth Title Ins. Co. v. City of Tacoma
81 Wn.2d 391, 502 P.2d 1024 (1972) 15-16

Covell v. City of Seattle
127 Wn.2d 874, 905 P.2d 324 (1995) 1-3, 5-9

Eastlake Cmty. Council v. City of Seattle
64 Wn. App. 273, 823 P.2d 1132 (1992) 8

Enterprise Leasing, Inc. v. City of Tacoma
93 Wn. App. 663, 970 P.2d 339 (1999) 16

Franks & Son, Inc. v. State
136 Wn.2d 737, 966 P.2d 1232 (1998) 10

Hillis Homes, Inc. v. Snohomish County
97 Wn.2d 804, 650 P.2d 193 (1982) 3, 4

Okeson v. City of Seattle
150 Wn.2d 540, 8 P.3d 1279 (2003) 6, 16-17

Puget Sound Energy, Inc. v. City of Bellingham
163 Wn. App. 329, 259 P.3d 345 (2011) 15

Shoop v. Kittitas County
149 Wn.2d 29, 65 P.3d 1194 (2003) 8

Teter v. Clark County
104 Wn.2d 227, 704 P.2d 1171 (1985) 4

Town of Cicero v. Fox Valley Trotting Club, Inc.
65 Ill. 2d 10, 357 N.E.2d 1118 (1976) 11-12

Woodson v. State
95 Wn.2d 257, 623 P.2d 683 (1980) 4

Statutes

Ala. Code § 13A-11-61.3(a), (g) 12

Ariz. Rev. Stat. Ann. § 13-3108(A) 12

Fla. Stat. § 790.33 12

Ind. Code § 35-47-11.1-2 12

Kan. Stat. Ann. § 12-16,124(a) 12

Ky. Rev. Stat. Ann. § 65.870 12

La. Rev. Stat. Ann. § 40:1796 12

Md. Code Ann., Crim. Law § 4-209(a) 12

Me. Rev. Stat. tit. 25, § 2011 12

Mich. Comp. Laws § 123.1102 12

Mo. Rev. Stat. § 21.750(2) 12

Mont. Code Ann. § 45-8-351(1) 12

N.C. Gen. Stat. § 14-409.40(b) 12

N.H. Rev. Stat Ann. § 159:26(I) 12

Okla. Stat. tit. 21, § 1289.24(B) 12

R.I. Gen. Laws § 11-47-58 12

RCW 35.21.280 17

RCW 35.21.710 15-17

RCW 35.21.715 17

RCW 35.21.850 17

RCW 35.21.870(1) 16-17

RCW 35.22.280(32) 14, 17

RCW 48.14.020(5) 10

RCW 66.08.120 10

RCW 82.02.020 10

RCW 82.04.080 15

RCW 82.14.030 17

RCW 82.21.030(2) 6

RCW 82.23A.020(2) 6

RCW 82.32A.030(3) 7

RCW 82.38.280 10

RCW 82.42.090 6

RCW 9.41
(Washington Uniform Firearms Act) 9

RCW 9.41.290 ..... 1-2, 8-9, 12-14, 17

Tenn. Code. Ann. § 39-17-1314(a) 12

Wis. Stat. § 66.0409(2) 12

Wyo. Stat. Ann. § 6-8-401(c) 12

Regulations

WAC 458-20-254(3)(b)(i) 7

Other Authorities

Seattle Ord. 124833 § 12 (Aug. 2015) 5

Seattle Ord. 124833 § 13 (Aug. 2015) 3

SMC 5.50.030(B) 15-16

SMC 5.55.060 6-7

I. INTRODUCTION

Nothing in state law prohibits local governments from imposing a tax on the sale of firearms and ammunition like the one Seattle has imposed here. The National Rifle Association and other plaintiffs in this case (NRA) offer three contrary arguments. All fail.

First, the NRA contends that Seattle's tax is really a regulatory fee, and thus preempted by RCW 9.41.290, which preempts local "regulation" of firearms. But under the case law, Seattle's ordinance imposes a tax, not a fee. The tax raises revenue for general governmental purposes, is not used to fund a regulatory scheme, and is not related to any service provided or burden created by those paying the tax. See Covell v. City of Seattle, 127 Wn.2d 874, 905 P.2d 324 (1995).

Second, the NRA claims that even if the ordinance imposes a tax, it is still preempted by RCW 9.41.290. But that statute preempts local "regulation" of firearms, not taxation. The distinction is well established in both case law and legislative practice. The legislature knows how to preempt local taxes and does so often; it has not done so here.

Finally, the NRA claims that Seattle's tax exceeds its taxing authority. Not so. The state law's cap on local taxes on gross income has no bearing here, where the tax is not based on gross income at all.

For these reasons, this Court should affirm the superior court.

II. ARGUMENT

A. State Law Does Not Preempt Seattle's Firearm and Ammunition Tax

Plaintiffs make two arguments that state law preempts Seattle's tax. First and foremost, they argue that Seattle's ordinance does not actually impose a tax, but instead imposes a regulatory fee, and thus amounts to local "regulation" of firearms preempted by RCW 9.41.290. Alternatively, they argue that even if the ordinance imposes a true tax, it is still preempted by RCW 9.41.290.

Neither argument holds water. Under this Court's precedent, the Seattle ordinance imposes a tax, not a regulatory fee. And RCW 9.41.290 does not preempt firearm taxes like the one Seattle has imposed here.

1. Seattle's Ordinance Imposes a Tax, Not a Regulation

Seattle's ordinance is an exercise of its tax authority, rather than a fee imposed as part of regulating an activity. Whether a charge is a tax or a fee is determined by applying the three-part test set forth in Covell. The test considers: (1) whether the primary purpose is to raise revenue for general governmental purposes, or to regulate; (2) whether the money collected is used solely for the regulatory purpose; and (3) whether there is a direct relationship between the amount charged and the service received

or burden produced by those paying the charge. Covell, 127 Wn.2d at 879. Based on the three-part test, Seattle's ordinance is a tax, not a regulatory fee. The purpose of the charge is to raise funds for broad public purposes, not to regulate; the money raised is not allocated to any regulatory purpose; and there is no relationship between the amount charged and a service provided to businesses selling firearms or a burden produced by sellers.

a. The purpose of the charge is funding public health research and education, not regulation

The first Covell factor asks whether the primary purpose of the charge is regulation or "'accomplish[ing] desired public benefits which cost money[.]'" Covell, 127 Wn.2d at 879 (quoting Hillis Homes, Inc. v. Snohomish County, 97 Wn.2d 804, 809, 650 P.2d 193 (1982)). The purpose of a charge is "derived from the language of the authorizing and implementing legislation." Id. at 886.

Here, the ordinance explicitly states that its purpose is to provide "broad-based public benefits" related to gun violence, including research, prevention, youth education and employment programs. Seattle Ord. 124833 § 13 (Aug. 2015). The ordinance does not indicate or accomplish any regulatory purpose. There is no connection between the flat charge and any regulation of gun or ammunition sales. None of the funds raised

are used to regulate sales requirements, such as background checks, waiting periods, or lock requirements. Nor are the revenues used to pay for or regulate a burden caused by businesses selling guns and ammunition, or by gun ownership.

Because the ordinance makes no reference to any type of regulatory purpose, the NRA contends that the Court should instead determine whether individual city council members had a regulatory purpose. Appellants' Opening Br. at 10. The Supreme Court has consistently held that the comments of individual lawmakers cannot be used to establish the intent of the entire legislative body. E.g., Woodson v. State, 95 Wn.2d 257, 264, 623 P.2d 683 (1980). In asking the Court to turn a blind eye to the plain language of the ordinance, the NRA incorrectly contends that the Supreme Court relied solely on legislative history in determining the purpose of the measures at issue in Teter v. Clark County, 104 Wn.2d 227, 704 P.2d 1171 (1985). Appellants' Opening Br. at 11. In Teter, the Court did note that a management board report indicated intent to pass a regulatory ordinance. Id. at 239. But the NRA neglects to mention that the determining factor was the language of the county resolution and city ordinance at issue, which both decisively indicated a regulatory purpose and effect, and collected money to pay for regulatory action. Id.; see also, e.g., Hillis Homes, Inc., 97 Wn.2d at 810 (relying on

the language of county ordinances to determine that the primary purpose was to raise taxes rather than to regulate); Arborwood Idaho, L.L.C. v. City of Kennewick, 151 Wn.2d 359, 371-72, 89 P.3d 217 (2004) (analyzing the language and effect of a flat $2.60 a month charge, in holding that the charge is a tax).

Because Seattle's ordinance directs that the flat fee will fund public health studies and education, rather than regulating businesses or gun owners, there is no regulatory purpose. The first Covell factor weighs heavily in favor of the ordinance being a tax.

b. None of the money raised is allocated to a regulatory purpose

The second Covell factor considers whether the money collected is "allocated only to the authorized regulatory purpose." Covell, 127 Wn.2d at 879. The money collected pursuant to the ordinance may be used only to implement its expressed purpose. Seattle Ord. 124833 § 12 (Aug. 2015). Since the ordinance does not contain any regulatory purpose or provisions, this factor also points to the conclusion that the ordinance establishes a tax.

The NRA contends that because the money collected is segregated from the general fund, it must be a regulatory fee. Appellants' Opening Br. at 11. There is no legal support for this argument. To the contrary, in

Okeson v. City of Seattle, 150 Wn.2d 540, 554, 78 P.3d 1279 (2003), the Supreme Court held that an ordinance raising money solely to pay for streetlights imposed a tax, "even though the revenues collected . . . remained only in the Light Fund." See also Covell, 127 Wn.2d 874 (holding that a charge was a tax, even though the funds raised were placed in a segregated account). Placing taxes in a segregated or dedicated fund is a common legislative decision at the State level as well. See, e.g., RCW 82.21.030(2) (funds collected under the hazardous substance tax are segregated in a toxics control account); RCW 82.23A.020(2) (funds collected under the petroleum products tax are segregated in a pollution liability insurance program trust account); RCW 82.42.090 (monies collected under the aircraft fuel excise tax are credited to the aeronautics account). It has no bearing on whether a charge is a tax or a fee.

The NRA also argues the money is used for "collection, tracking, and auditing of the number of firearms and rounds of ammunition sold" in order to enforce collection of the tax. Appellants' Opening Br. at 11. The ordinance does not regulate firearm sales or require the creation of lists for regulatory purposes. Rather, it requires that businesses maintain the records necessary to determine the amount of tax owed. SMC 5.55.060. This is not unique to businesses selling guns and ammunition. Every

business paying Seattle's gross receipts tax must comply with this record keeping requirement. SMC 5.55.060. Like the City, the State also requires businesses to maintain complete records, so that tax audits may be conducted. See, e.g., RCW 82.32A.030(3). Contrary to the NRA's assertion, the State tax auditors are able to see individual sales, since businesses must maintain "all purchase invoices, sales invoices, contracts, and such other records as may be necessary to substantiate gross receipts and sales." WAC 458-20-254(3)(b)(i); Appellants' Reply Br. at 5 n.2. These record keeping requirements allow tax laws to be enforced. They do not transform a tax into a regulatory fee by imposing any requirements or limitations on sales.

c. There is no relationship between the tax amount charged and the service received by the business or purchaser

The last Covell factor asks whether there is "a direct relationship between the fee charged and the service received by those who pay the fee or between the fee charged and the burden produced by the fee payer." Covell, 127 Wn.2d at 879. This tax funds no service provided to businesses selling guns and ammunition. Nor is there a relationship between the tax charged and the burden produced by the business. For example, the tax in no way turns on whether a particular business tends to sell guns that are later used to commit crimes.

The NRA appears to concede that there is no relationship between the amount charged and any service received or burden produced by the businesses paying the fee. Instead, the NRA argues that the "textual wrapping paper" of the ordinance should be ignored, and the Court should rely on "talking points created for the City Council" and op-ed opinion pieces. Appellants' Reply Br. at 3; Appellants' Opening Br. at 13. As the Supreme Court has cautioned, "[i]t is inappropriate to look to the legislative history where the intent can clearly be divined from the plain language of the ordinance." Shoop v. Kittitas County, 149 Wn.2d 29, 36, 65 P.3d 1194 (2003) (quoting Eastlake Cmty. Council v. City of Seattle, 64 Wn. App. 273, 279, 823 P.2d 1132 (1992)).

In summary, the three Covell factors all weigh decisively in favor of the flat charge being a tax.

2. RCW 9.41.290 Does Not Preempt Taxes Like Seattle's

The Seattle ordinance imposes a tax, not a regulatory fee. As such, it does not run afoul of RCW 9.41.290, which preempts the field of "firearms regulation." The legislature routinely distinguishes between taxation and regulation in its preemption statutes, and knows how to preempt local taxation when it means to. Since RCW 9.41.290 preempts only the local regulation of firearms, it does not prohibit Seattle's tax.

a. The plain language of RCW 9.41.290 preempts local regulation of firearms—not taxation

The Washington Uniform Firearms Act regulates the possession, sale, and use of firearms. RCW 9.41. The statute contains a section on state preemption, RCW 9.41.290, which provides:

> 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.

Significantly, the word "taxation" appears nowhere in the statute; it preempts only the field of "firearms regulation." RCW 9.41.290.

The distinction between regulation and taxation is not one of mere semantics. The law distinguishes between regulatory activities and taxes because each derives from distinct legal authority. See Covell, 127 Wn.2d at 879. Regulatory fees and taxes also serve legally distinct purposes—fees are used "exclusively for the purpose of financing regulation," while

"revenues from a tax may be used for other purposes." Franks & Son, Inc. v. State, 136 Wn.2d 737, 749, 966 P.2d 1232 (1998).

This distinction has been repeatedly recognized by the legislature in its preemption statutes. When the legislature preempts local taxing authority, it does so explicitly. See, e.g., RCW 82.02.020 (preempting fields of taxing cigarettes and building construction); RCW 82.38.280 (prohibiting municipal excise taxes on special fuel); RCW 48.14.020(5) (preempting the field of imposing excise or privilege taxes on insurers); RCW 66.08.120 (preempting municipal excise taxes on liquor but permitting "police ordinances and regulations not in conflict with this title"). If the legislature had intended to preempt the taxation of firearms, it would have said so, as it has done in other arenas. Instead, it chose to limit the scope of the statute's preemptive effect to regulatory activities.

Two state supreme courts have likewise distinguished between taxation and regulation when interpreting similar preemption statutes. In City of Virginia Beach v. Virginia Restaurant Association, Inc., 231 Va. 130, 133, 341 S.E.2d 198 (1986), the Virginia Supreme Court considered whether a state statute prohibiting cities from adopting "any ordinance or resolution regulating or prohibiting the manufacture, bottling, possession, sale, distribution, handling, transportation, drinking, use, advertising or dispensing of alcoholic beverages in Virginia" precluded a local ordinance

that imposed a tax on alcoholic beverages sold at restaurants. The court concluded that this broad language prohibiting local regulation of alcoholic beverages left room for local taxation. It found significance in the fact that the statute "nowhere mentions taxation" and agreed that the Virginia state legislature was "well aware of how to say taxation when it means taxation." City of Virginia Beach, 231 Va. at 133-34.

Another instructive case, Town of Cicero v. Fox Valley Trotting Club, Inc., 65 Ill. 2d 10, 14-15, 357 N.E.2d 1118 (1976), considered whether a local tax on attending horse racing events was preempted by a set of Illinois statutes known as "the Racing Acts." While acknowledging that the acts created a comprehensive scheme regulating horse racing in Illinois, the court nevertheless found that the acts did not preempt the local tax at issue. Id. at 16-17. It recognized that "[t]he power to regulate and the power to tax are separate and distinct powers," and that even assuming all local regulation was preempted, "it does not necessarily follow that the power to tax in that area would also be preempted." Id. at 17.

As City of Virginia Beach and Town of Cicero show, legislatures know how to preempt local taxes where that is their goal, and the preemption of regulation does not imply the preemption of local taxation. That commonsense point is confirmed by looking to the firearm preemption statutes of other states. Unlike Washington, several other

states have enacted firearms preemption statutes that expressly preempt both the taxation and regulation of firearms. Montana has specified that municipalities "may not prohibit, register, *tax*, license, or *regulate* the purchase, sale or other transfer (including delay in purchase, sale, or other transfer), ownership, possession, transportation, use, or unconcealed carrying of any weapon . . . ." Mont. Code Ann. § 45-8-351(1) (emphases added). Arizona likewise preempts "any ordinance, rule or tax relating to . . . firearms or ammunition." Ariz. Rev. Stat. Ann. § 13-3108(A).[1] These statutes reflect that legislatures understand regulation and taxation to be distinct concepts for purposes of state preemption.

Conversely, nothing in RCW 9.41.290 expresses legislative intent to preclude local taxation of firearms. Like the statutes at issue in City of Virginia Beach and Town of Cicero, RCW 9.41.290 preempts only "regulation," not taxes.

In a last ditch effort to get around the omission of taxation from the list of preempted topics in RCW 9.41.290, Plaintiffs point to the later clause saying that "[c]ities, towns, and counties or other municipalities

[1] Other states that address taxation in their preemption statute include: Ala. Code § 13A-11-61.3(a), (g); Fla. Stat. § 790.33; Ind. Code § 35-47-11.1-2; Kan. Stat. Ann. § 12-16,124(a); Ky. Rev. Stat. Ann. § 65.870; La. Rev. Stat. Ann. § 40:1796; Me. Rev. Stat. tit. 25, § 2011; Md. Code Ann., Crim. Law § 4-209(a); Mich. Comp. Laws § 123.1102; Mo. Rev. Stat. § 21.750(2); N.H. Rev. Stat Ann. § 159:26(I); N.C. Gen. Stat. § 14-409.40(b); Okla. Stat. tit. 21, § 1289.24(B); R.I. Gen. Laws § 11-47-58; Tenn. Code. Ann. § 39-17-1314(a); Wis. Stat. § 66.0409(2); Wyo. Stat. Ann. § 6-8-401(c).

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." RCW 9.41.290. But taxes like the one Seattle has imposed here are "authorized by state law," as detailed in the final section of this brief. Thus, this section does not somehow add taxation to the list of preempted topics. Accordingly, this Court should adhere to the principle of upholding municipal ordinances wherever possible and find that Seattle's firearms tax is not preempted.

b. Plaintiffs have failed to show that RCW 9.41.290 was intended to preempt local taxation of firearms

Although RCW 9.41.290's plain language nowhere preempts local taxation, Plaintiffs argue that the legislature intended to preempt local taxes. Appellants' Opening Br. at 32-35; Appellants' Reply Br. at 12-16. But their "evidence" fails to support their point.

Plaintiffs cite no legislative history suggesting that RCW 9.41.290 was intended to preempt local taxes. Instead, they cite a number of legislative amendments to RCW 9.41.290 that broadened its preemptive scope in response to specific local ordinances or court decisions. Appellants' Opening Br. at 32-35. But all of those amendments and cases dealt with regulations, not taxes. *See* Chan v. City of Seattle, 164 Wn.

App. 549, 559, 265 P.3d 169 (2011) ("Except as otherwise authorized, RCW 9.41.290 preempts firearms regulation."); City of Seattle v. Ballsmider, 71 Wn. App. 159, 161, 856 P.2d 1113 (1993) (recognizing that the statute "declared [the legislature's] intent to preempt the field of firearms regulation"); Final Bill Report on Engrossed Second Substitute H.B. 2319, at 8, 53d Leg., 1st Sp. Sess. (Wash. 1994) ("the state has preempted the area of firearms regulation"). And Plaintiffs' examples actually contradict their point here. Their point seems to be that the legislature often overrides local ordinances related to firearms or court decisions upholding such ordinances. But here, the superior court ruling upholding Seattle's firearms tax was issued before the 2016 legislative session, and the legislature did nothing to expand RCW 9.41.290 to preempt local taxation.

In reality, Plaintiffs cite no case, bill report, or other source suggesting that the legislature intended RCW 9.41.290 to preempt local taxes. That the legislature has expanded the statute's preemptive scope in the past does not mean the legislature intended to preempt topics, like taxation, that it never mentioned.

B. The Ordinance Imposes a Lawful Excise Tax

Seattle's flat tax on firearm sales is a proper exercise of its broad authority to levy licensing taxes under RCW 35.22.280(32). A city "'may

define its taxation categories as it sees fit unless it is restrained by a constitutional provision or legislative enactment.'" Puget Sound Energy, Inc. v. City of Bellingham, 163 Wn. App. 329, 337, 259 P.3d 345 (2011) (quoting Commonwealth Title Ins. Co. v. City of Tacoma, 81 Wn.2d 391, 394, 502 P.2d 1024 (1972)). Nonetheless, the NRA argues that Seattle's tax is contrary to state law because state law limits certain types of local taxes. Appellants' Opening Br. at 16-19. These statutory limits have no applicability to Seattle's firearms tax, and the tax should accordingly be upheld.

The NRA contends that Seattle's statutory authority to assess a flat tax is limited by RCW 35.21.710, which provides that if a city imposes a license fee or tax on the business of making "retail sales of tangible personal property *which are measured by gross receipts or gross income* from such sales," the rate must not exceed .002 percent. (Emphasis added.) A tax on gross receipts or gross income is assessed on the value of sales. See RCW 82.04.080 (defining "gross income of the business" for tax purposes).

But Seattle's ordinance is not measured by the businesses' gross receipts or gross income. A uniform flat tax of $25 is imposed on each gun sale, regardless of whether the gun is sold for $50 or $500 or whether the business is Walmart or a pawn shop. SMC 5.50.030(B). Thus, gross

receipts and gross income are irrelevant to the tax. Similarly, the tax on businesses selling ammunition is assessed at a flat rate, depending on the type of ammunition sold, rather than the value of the ammunition. SMC 5.50.030(B). Because the ordinance does not impose a tax measured by gross receipts or gross income, it is not limited by RCW 35.21.710.

Lacking support for their argument in the plain language of RCW 35.21.710, the NRA encourages the Court to assume that the legislature really intended to prohibit all municipal taxes from exceeding .002 percent, not just taxes measured by the gross receipts or gross income of sales. But that is not what the statute says, and a departure from the plain language of the statute is particularly inappropriate in a tax case. Courts have repeatedly held that a restraint on the taxing authority will be found only if there is "specific, express statutory language." Enterprise Leasing, Inc. v. City of Tacoma, 93 Wn. App. 663, 669, 970 P.2d 339 (1999) (citing Commonwealth Title Ins. Co. v. City of Tacoma, 81 Wn.2d 391, 502 P.2d 1024 (1972)).

The NRA incorrectly contends that their argument that the legislature cannot limit one type of tax, while allowing other types of taxation, is supported by Okeson, 150 Wn.2d 540. Appellants' Opening Br. at 24-25. In reality, the tax the Supreme Court struck down in Okeson was specifically prohibited by statute. RCW 35.21.870(1) prohibited

cities from imposing a tax "on the privilege of conducting an electrical energy . . . business" in excess of six percent, unless first approved by the voters. Because Seattle had imposed the maximum six percent tax, the Court held that it could not increase the tax rate on electrical energy above six percent. Okeson, 150 Wn.2d at 556. In contrast to the increased tax rate at issue in Okeson, the firearms tax at issue in this case does not raise the rate of the tax on gross receipts. Instead, it imposes an entirely independent tax.

The NRA is unable to cite any authority for the proposition that a cap on a specific type of tax limits the ability to impose different taxes. While the NRA contends that RCW 35.21.710 was intended to enforce "statewide uniformity," the legislature has given local governments the statutory authority to enact a variety of taxes, and placed different caps on different types of taxes. See, e.g., RCW 82.14.030 (sales and use tax); RCW 35.22.280(32) (licensing taxes); RCW 35.21.280 (admission tax); RCW 35.21.715 (tax on network telephone services); RCW 35.21.850 (tax on motor carriers). A cap specifically limited to one tax does not impliedly limit other, separately calculated taxes.

III. CONCLUSION

Seattle's flat tax on sales of firearms and ammunition is an appropriate exercise of its tax authority. RCW 9.41.290 only preempts

local regulation of firearms—not taxation. Therefore, the Attorney General respectfully requests that Seattle's ordinance be upheld.

RESPECTFULLY SUBMITTED this 20th day of June 2016.

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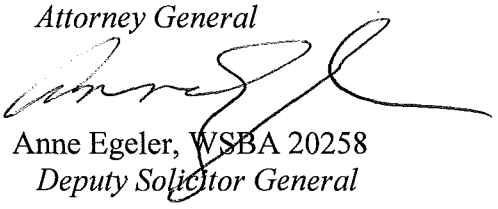

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CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the state of Washington, that on this date I have caused a true and correct copy of the foregoing Amicus Brief Of The State Of Washington to be served via electronic mail on the following:

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