

Fax: (614) 462-5135
Email: jmcdonald@szd.com
ssmith@szd.com
mgreen@szd.com

Barry W. Bova (0041047)
817 Kilbourne Street, P.O. Box 448
Bellevue, Ohio 44811
Tel: (419) 483-7119
Fax: (419) 483-7224
Email: bbova@clydeohio.org

Counsel for Appellant City of Clyde

Ohio Attorney General's Office
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
Tel: (614) 466-8980
Fax: (614) 466-5087
Email: wmarshall@ag.state.oh.us

*Counsel for Intervenor-Appellee
Ohio Attorney General Marc Dann*

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INTRODUCTION

Amicus Curiae, City of Cleveland, submits this reply brief for the limited purpose of responding to the misleading arguments concerning R.C. § 9.68 contained in the merit brief of the Appellees, the State of Ohio (“State”) and the Ohioans for Concealed Carry, Inc. (“OCC”), and the supporting brief of the *Amicus Curiae*, National Rifle Association of America, Inc. (“NRA”).

While the State virtually avoids any analysis concerning the constitutionality of R.C. § 9.68 and downplays the actual scope of the statute, the OCC and the NRA seek to inject extraneous issues such as the right-to-bear-arms clause under the Ohio Constitution¹ and federal constitutional issues related to the Commerce Clause and the Privileges and Immunities and Due Process Clauses. These issues amount to nothing more than an effort to confuse the Court and avoid the real issue: Does R.C. § 9.68 violate the Home Rule Amendment under the Ohio Constitution when it seeks to preempt all local firearm regulation even in the absence of a conflict with a general state law? The answer is clearly yes.

Consequently, because R.C. § 9.68 is an unconstitutional law, it cannot be the basis for preempting Clyde’s firearm ordinance or any other municipal ordinance, and therefore the lower court’s decision should be reversed.

¹ Reasonable local firearm regulations do not violate the right to bear arms. For example, this Court has previously held that Cleveland’s local assault weapons ordinance “is a proper exercise of the police power under Section 3, Article XVIII of the Ohio Constitution and does not violate Section 4, Article I.” *Arnold v. Cleveland*, (1993), 67 Ohio St.3d 35 at ¶ 4 of syllabus.

LAW AND ARGUMENT

A. The General Assembly cannot foreclose all local firearm regulations when there is no conflict with a general state law: Preemption is not the law in Ohio.

The Ohio Constitution does not bestow the General Assembly with blanket preemption powers. *American Fins. Servs. Assn. v. Cleveland*, 112 Ohio St.3d 170, 2006-Ohio-6043 (“AFSA”), ¶ 31, citing *Fondessy Enterprises, Inc. v. City of Oregon* (1986), 23 Ohio St.3d 213, 216. Conversely, the Ohio Constitution grants legislative authority to municipalities to enact and enforce local police regulations that do not conflict with general state laws. See Section 3, Article XVIII of the Ohio Constitution (“the Home Rule Amendment”).

As this Court recently reiterated in *Mendenhall v. Akron*, -- N.E.2d --, 2008-Ohio-270, the preemption doctrine has no place in a home rule analysis, regardless of any stated intent by the General Assembly. In *Mendenhall*, some parties advanced a preemption argument, claiming that the state had intended to completely occupy the field of traffic regulation, thereby preempting any action by municipalities. In rejecting this argument, this Court expressly recognized that “[s]uch home rule analysis has never been adopted by a majority of this court.” *Id.* at ¶ 38. See also *Cincinnati v. Baskin* 112 Ohio St.3d 279, 2006 -Ohio- 6422, at ¶ 61, concurring opinion of Justice O’Donnell (“Because the Constitution is immutable, pronouncements by the General Assembly regarding preemption or statewide concern, while instructive in considering legislative intent, are powerless to affect the language of the Constitution that empowers municipalities to enact legislation, provided such legislation is not in conflict with a general law.”).

Here, R.C. § 9.68 constitutes nothing less than an attempt by the State to broadly preempt all local regulation in the field of firearms. The State even identifies R.C. § 9.68 as the “Preemption Provision” (State Merit Brief at p. 1), though arguing, to the limited extent the statute is addressed therein, that R.C. § 9.68 should be analyzed as part of a comprehensive statewide scheme governing the more limited field of concealed carry of handguns in Ohio. For example, the State argues that “the text of the statute conveys the General Assembly’s intent that the state laws regulating the ‘transport’ and ‘carrying’ of handguns apply uniformly throughout the state.” (State Merit brief at p. 6). The actual scope of R.C. § 9.68’s attempted preemption of local authority far exceeds the limited area of transport and carry.² Sub. H.B. 347, and its identification with the limited issue of “concealed carry”, is no more than the Trojan Horse through which the State seeks to expressly preempt all local firearm ordinances, even in the absence of any discernible conflict between a local firearm regulatory ordinance and any existing general law on the same firearm subject.

Notably, the State, the OCC, and the NRA avoid any actual general law analysis with respect to R.C. § 9.68. The parties utterly fail to rebut Cleveland’s showing that R.C. § 9.68 is not a general law. There was no statewide and comprehensive legislative enactment regulating firearms in Ohio prior to the enactment of R.C. § 9.68, and clearly this statute developed no such comprehensive set of regulations.³ Instead, the statute

² R.C. § 9.68 attempts to nullify all long-standing local gun regulations regarding the ownership, possession, purchase, sale, transfer, transport, storage, or keeping of any firearm, part of a firearm, its components, and its ammunition.

³ The OCC’s analysis on this issue is predicated on the premise “Who is to say what a comprehensive scheme entails...” (See OCC Merit brief at p. 26). Clearly as recently as December, 2006 Justice O’Connor in her concurring *Baskin* opinion noted that “Ohio has barely touched upon the subject of firearm possession, use, transfer, and

only attempts to withdraw the legislative authority of Cleveland and all other municipalities to reasonably regulate in the field -- even when long standing ordinances present no conflict with general law. R.C. § 9.68 is not a general law under the test established in *City of Canton v. State of Ohio*, 95 Ohio St.3d 149, 2002-Ohio-2005, and more recently again recognized in *Mendenhall*, *supra*. (See generally Cleveland's *Amicus* Brief, pgs. 15-21).

Accordingly, because the General Assembly is not authorized to displace all local firearm regulation by express preemption, and because the State seeks to strip municipalities of their right to protect their citizens while failing to regulate in their place, this Court must declare the statute unconstitutional.

B. Reasonable municipal regulation of firearms is not prohibited under the Ohio Constitution when there is no conflict with a general state law.

The OCC incorrectly argues that the General Assembly through R.C. § 9.68 is only honoring “the constitutionally protected right of individuals to bear arms that this Court has recognized time and again, but which the Cleveland ordinances do not.” (OCC merit brief at p. 27). While wholly ignoring the Home Rule Amendment and a long history of contrary decisions, the OCC implies that the Ohio Constitution does not authorize municipal firearm regulation. This argument is clearly flawed.

First, the judiciary and not the General Assembly is the conclusive authority on constitutional questions in Ohio. See e.g. *Cincinnati, Wilmington & Zanesville RR. Co. v. Commrs. of Clinton Cty.* (1852), 1 Ohio St. 77; *State ex rel. Shkurti v. Withrow*, (1987),

ownership...Municipalities have been left to fill in the gaps left by Ohio law regarding possession, transfer, and use of firearms to such a degree that I cannot say that the legislature intended to occupy the field of firearms regulation.” *Id.* at ¶ 53. R.C. § 9.68 serves the concept of firearm comprehensiveness solely by withdrawing the ability of municipalities to “fill in the gaps.”

32 Ohio St. 3d 424, 429 (Interpretation of the Ohio Constitution presents “not a legislative but a judicial question, which ultimately this court must decide.”). Thus, the General Assembly has no authority to nullify all local firearm regulations in one broad preemptive swoop even should the legislature believe that local firearm regulations are unconstitutional. Not only do they lack the authority, but in doing so, they invade this Court’s province.

Second, this Court has never declared that municipalities lack authority to regulate in the field of firearms. Nor has this Court found that Cleveland’s ordinances are unconstitutional. Quite the opposite, this Court has recognized that Cleveland’s reasonable exercise of local police power in the field of firearm regulation is not only a right but a duty. See *Arnold v. Cleveland* (1993), 67 Ohio St.3d 35, 47. Indeed, this Court specifically recognized in *Arnold* that reasonable local regulations do not violate constitutional rights:

*** * * [T]here must be some limitation on the right to bear arms to maintain an orderly and safe society while, at the same time, moderating restrictions on the right so as to allow for the practical availability of certain firearms for purposes of hunting, recreational use and protection. In our opinion, appellee has, under the present legislation, properly balanced these competing interests.**

Id. at 48. Cleveland’s firearm ordinances were reasonably undertaken and do not violate Section 4, Article I of the Ohio Constitution simply because the OCC argues otherwise, or because the General Assembly attempts to preempt them by way of R.C. § 9.68.

The NRA’s attempt to equate the enforcement of Clyde’s local ordinance with the exercise of Roman law under Caligula is quite misplaced. (See Brief of Amicus Curiae NRA at p. 22). A municipality’s authority to exercise its police power by way of local ordinance is quite a modern development in Ohio and such authority flows directly from

the Ohio Constitution as amended in 1912. See e.g. *Village of West Jefferson v. Robinson* (1965), 1 Ohio St.2d 113, 115, (“The power of any Ohio municipality to enact local police regulations is no longer dependent upon any legislative grant thereof, as it was prior to the adoption in 1912 of [Section 3 of Article XVIII of the Ohio Constitution]. That power is now derived directly from those constitutional provisions.”); *Fondessy Enterprises, Inc. v. City of Oregon* (1986), 23 Ohio St.3d 213, 215 (“[T]he same police power cannot be extinguished by a legislative provision”); *Struthers v. Sokol* (1923), 108 Ohio St. 263, syllabus. (“Municipalities in Ohio are authorized to adopt local police, sanitary and other similar regulations * * * and derive no authority from* * * the General Assembly...”). R.C. § 9.68 is not a general law and cannot serve as the authority for withdrawing Clyde’s or any other municipality’s ability to regulate in the field of firearms.

CONCLUSION

This Court has repeatedly recognized that the preemption doctrine has no place in a home rule analysis and that the General Assembly does not have blanket preemption powers: Such laws directly contravene the Home Rule Amendment. The General Assembly nevertheless, through R.C. § 9.68, improperly seeks to preempt all local firearm regulations, even in the absence of any conflict with a general state law. Revised Code § 9.68 constitutes an improper attempt to preempt Clyde, and all other municipalities, from exercising their home rule powers and will continue to confuse lower courts unless declared unconstitutional. Accordingly, Cleveland urges this court to reverse the lower court’s decision and hold that R.C. § 9.68 cannot preempt Clyde’s

firearm ordinance or any other municipal ordinance.

Respectfully submitted,

Robert J. Triozzi (0016532)
Director of Law

By: Bridget M. O'Brien / per consent
Gary S. Singletary (0037329) *Kristen Snad*
Bridget M. O'Brien (0074169)
Room 106 – City Hall
601 Lakeside Avenue
Cleveland, Ohio 44114
Tel. (216) 664-2800
Fax. (216) 664-2663
Email: gsingletary@city.cleveland.oh.us
bo'brien@city.cleveland.oh.us
Attorneys for *Amicus Curiae*,
City of Cleveland

firearm ordinance or any other municipal ordinance.

Respectfully submitted,

Robert J. Triozzi (0016532)
Director of Law

By: Bridget M. O'Brien / per consent
Gary S. Singletary (0037329) *Kristen Snow*
Bridget M. O'Brien (0074169)
Room 106 – City Hall
601 Lakeside Avenue
Cleveland, Ohio 44114
Tel. (216) 664-2800
Fax. (216) 664-2663
Email: gsingletary@city.cleveland.oh.us
bo'brien@city.cleveland.oh.us
Attorneys for *Amicus Curiae*,
City of Cleveland

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing was served via regular mail
this 26th day of February, 2008, upon the following:

John C. McDonald (0012190)
Stephen J. Smith (0001344)
Matthew T. Green (0075408)
SCHOTTENSTEIN ZOX & DUNN CO., LPA
250 West Street
Columbus, Ohio 43215-2538

Barry W. Bova (0041047)
817 Kilbourne Street, P.O. Box 448
Bellevue, Ohio 44811

Counsel for Appellant City of Clyde

John F. Kostyo (0019389)
1100 E. Main Street
Suite, 200, North Entrance
Findlay, Ohio 45840

Stephen P. Halbrook
10560 Main Street, Suite 404
Fairfax, Virginia 22030

*Counsel for Amicus Curiae
National Rifle Assoc. of America, Inc.*

Daniel T. Ellis (0038555)
Lydy & Moan
4930 Holland Sylvania Road
Sylvania, Ohio 43560

L. Kenneth Hanson, III (0064978)
Firestone, Brehm, Hanson, Wolf,
Young, LLP
15 West Winter Street
Delaware, Ohio 43015

*Counsel for Appellee Ohioans for
Concealed Carry, Inc.*

William P. Marshall (0038077)
Stephen P. Carney (0063460)
Todd A. Nist (0079436)
Ohio Attorney General's Office
30 East Broad Street, 17th Floor
Columbus, Ohio 43215

*Counsel for Intervenor-Appellee Ohio
Attorney General Marc Dann*

*Bridget M. O'Brien / per consent
Kirsten Snow*
Bridget M. O'Brien