

ORIGINAL

In the
Supreme Court of Ohio

CITY OF CLEVELAND, : Case No. 2009-2280
: :
Plaintiff-Appellee, : On Appeal from the
: Cuyahoga County
v. : Court of Appeals,
: Eighth Appellate District
STATE OF OHIO, :
: Court of Appeals Case
Defendant-Appellant. : No. 92663
:

MERIT BRIEF OF DEFENDANT-APPELLANT STATE OF OHIO

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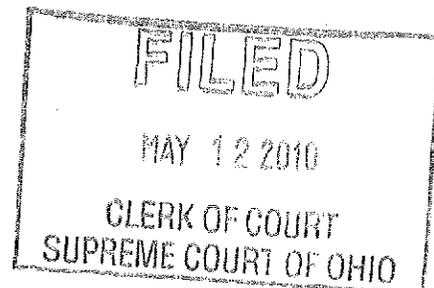


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INTRODUCTION

In December 2006, the General Assembly determined that it “need[ed] to provide uniform laws throughout the state” governing firearm possession. R.C. 9.68(A). It preserved specific areas of local authority: municipalities could regulate where firearms may be discharged and where firearms and ammunitions may be sold. R.C. 9.68(A), (D). But the General Assembly restricted the ability of political subdivisions to regulate the ownership, licensing, and possession of firearms. Such matters could be restricted only by “the United States Constitution, Ohio Constitution, state law, or federal law.” R.C. 9.68(A). At the time of the legislation, this division of authority—exclusive state regulation of firearm ownership and possession, but continued local control of where firearms may be discharged—had been adopted in thirty-eight States. See *City of Cincinnati v. Baskin*, 112 Ohio St. 3d 279, 2006-Ohio-6422, ¶ 47 n.8 (surveying state laws).

The City of Cleveland, which had a series of more stringent ordinances restricting firearm possession, sued the State, assailing the General Assembly’s action as an infringement of its home rule authority. The City also attacked the General Assembly’s decision to provide for the recovery of costs and attorney fees by plaintiffs who successfully challenged a municipal firearm ordinance, claiming that it violated separation of powers. R.C. 9.68(B). The Eighth District agreed and invalidated the law on both grounds. In doing so, the court misapplied this Court’s established precedents.

R.C. 9.68 displaces the City’s firearm ordinances because it is a general state law: The statute (1) is “part of a statewide and comprehensive legislative enactment,” (2) “operate[s] uniformly throughout the state,” (3) “set[s] forth police, sanitary, or similar regulations, rather than purport[ing] only to grant or limit legislative power of a municipal corporation,” and (4) “prescribe[s] a rule of conduct upon citizens generally.” *City of Canton v. State*, 95 Ohio St. 3d

149, 2002-Ohio-2005, ¶ 21. The Eighth District perverted the *Canton* general-law test in two distinct ways. First, it wrongly concluded that Ohio does not have a “comprehensive” legislative regime governing firearms. In doing so, the court ignored the fact that state law currently touches every facet of gun ownership—who can own firearms, where they can be possessed and discharged, how they may be sold, when an individual can carry a firearm in public, and the like.

Second, the Eighth District held that R.C. 9.68 violated *Canton* because it does not set forth police regulations or prescribe a rule of conduct upon citizens generally; it simply restricts the legislative authority of municipalities. This finding disregards this Court’s repeated admonition to consider the *entire* state regulatory scheme under *Canton*. The question is not whether R.C. 9.68 itself satisfies the *Canton* factors, but whether R.C. 9.68 “[is] part of a comprehensive and uniform statewide enactment setting forth a police regulation that prescribes a general rule of conduct.” *Am. Fin. Serv. Ass’n v. City of Cleveland* (“*AFSA*”), 112 Ohio St. 3d 170, 2006-Ohio-6043, ¶ 36. When the appropriate inquiry is used, the answer is clear: R.C. 9.68 is part of a comprehensive firearms regime that prescribes a general rule of conduct for all citizens. As such, the law displaces conflicting local ordinances.

The Eighth District’s separation-of-powers analysis was similarly flawed. The court held that the General Assembly’s decision to provide attorney fees and costs to prevailing plaintiffs unconstitutionally usurps the courts’ discretion to make such awards. This reasoning has no support. Although the General Assembly may not “limit the inherent powers of the judicial branch,” *State v. Hochhausler* (1996), 76 Ohio St. 3d 455, 464, the judiciary never had “inherent power” to order awards for costs and fees at common law. The General Assembly therefore acted well within its authority to provide for such awards here, just as it has done in a litany of other areas—public records, property appropriation, wrongful imprisonment, age discrimination

suits, and child support orders, to name a few.

To be sure, gun regulation is a contentious topic in this State and in this country, but that debate is not before the Court. Rather, the issue is the General Assembly's well-established authority to enact a uniform, comprehensive statutory framework that regulates conduct for all Ohioans. In this case, the City of Cleveland seeks to exercise its police power to regulate locally gun possession and ownership. Under Ohio's constitutional framework, that exercise of the municipal police power is "susceptible to displacement" by a general law of the State. *Baskin*, 2006-Ohio-6422 at ¶ 11. Because R.C. 9.68 qualifies as such a law under the *Canton* test, it "takes precedence" over the City's ordinances. *Id.* at ¶ 10. The Eighth District was wrong to say otherwise, and this Court should now reverse.

STATEMENT OF THE CASE AND FACTS

A. The General Assembly has enacted a comprehensive list of laws governing firearm ownership in Ohio.

The General Assembly has promulgated a litany of statutes governing the ownership, possession, and use of firearms. A brief summary of those laws reveals their broad scope.

State law prohibits the possession of firearms in certain places. See, e.g., R.C. 1547.69 (vessels), R.C. 2921.36 (detention and mental health facilities); R.C. 2923.121 (liquor establishments), R.C. 2923.122 (school zones), R.C. 2923.123 (courthouses). It further prohibits the discharge of firearms in other venues. See, e.g., R.C. 1541.19 (state parks), R.C. 2909.08 (airports), R.C. 2923.16 (motor vehicles), R.C. 2923.161 (habitation areas), R.C. 2923.162 (schoolhouses, churches, dwellings, charities, and public roads).

State law disqualifies certain individuals from possessing firearms. See R.C. 2923.13 (felons and incompetents), R.C. 2923.15 (individuals under the influence), R.C. 2923.211 (minors). It additionally bans the acquisition and possession of certain firearms, such as

automatic weapons, sawed-off firearms, zip guns, and semiautomatic weapons. R.C. 2923.11(E),(K); R.C. 2923.17. It also prohibits the reckless transfer of a firearm to an individual with a disability, R.C. 2923.20; it bans defacement of identification marks on firearms, R.C. 2923.201; it authorizes interstate firearm transactions, R.C. 2923.22; and it specifies that locking devices shall be offered with all firearm sales, R.C. 2923.25.

Beyond these direct prohibitions and regulations, the General Assembly has incorporated several firearm-related “specifications” into the State’s criminal sentencing laws. A defendant who commits certain offenses with a firearm will face a mandatory sentencing enhancement. See, e.g., R.C. 2941.141 (one-year general firearm specification); R.C. 2941.144 (six-year specification for use of automatic firearms); R.C. 2941.145 (three-year specification for display or brandishing firearm); R.C. 2941.146 (five-year specification for discharging firearm from motor vehicle); R.C. 2941.1412 (seven-year specification for discharging firearm at police or corrections officer).

The State’s firearm laws also incorporate (as they must) federal firearm laws. R.C. 2923.22(C). Those federal laws require firearm dealers to possess certain qualifications and obtain a license, and they criminalize the transport and sale of firearms by unlicensed individuals. 18 U.S.C. §§ 922(a), 923. Federal laws also impose mandatory national background checks for firearm purchasers, and they prohibit individuals with certain disabilities—such as prior felony convictions, mental defects, or illegal alien status—from possessing firearms. *Id.* § 922(g), (t).

Finally, the General Assembly in 2004 created a complex licensing procedure for concealed-carry handgun owners. An individual desiring a concealed-carry handgun permit must submit an application to his county sheriff, provide a photograph, fingerprints, and other

identifying information, and complete a firearm safety course. R.C. 2923.125. The individual must also satisfy a criminal background check. *Id.* If a license is issued, the individual “may carry a concealed handgun anywhere in th[e] state,” except as provided in R.C. 2923.126. The list of prohibited areas includes law enforcement offices, jails, schools, courthouses, liquor establishments, universities, houses of worship, child-care centers, aircraft, and state and local office buildings. R.C. 2923.126(B). The statute additionally affords private landowners and employers the right to prohibit gun possession on their property. R.C. 2923.126(C).

Shortly after the General Assembly promulgated the 2004 handgun laws, several municipalities attempted to enforce more restrictive local ordinances. Notably, the City of Clyde passed an ordinance prohibiting the possession of firearms in its city parks. See *Ohioans for Concealed Carry, Inc. v. Clyde*, 120 Ohio St. 3d 96, 2008-Ohio-4605, ¶ 18; see also Kristin McAllister, Arcanum Gun Ban Challenged, *Dayton Daily News*, June 9, 2004, at A1 (same). The City of Toledo attempted to enforce a similar ordinance against an individual with a state license after authorities found him in a city park with a concealed handgun. See *City of Toledo v. Beatty* (6th Dist.), 169 Ohio App. 3d 502, 2006-Ohio-4638, ¶ 25. In *Clyde*, this Court rejected the cities’ claim that these local firearm ordinances were “a valid exercise of the municipality’s home-rule power” under Section 3, Article XVIII of the Ohio Constitution. 2008-Ohio-4605 at ¶ 1. Because those ordinances “conflict[ed] with a general law” of the State, they were unconstitutional. *Id.*

B. The General Assembly enacted R.C. 9.68 to displace the patchwork of local ordinances regulating the possession of firearms.

Concerned with these developments, the General Assembly enacted Sub. H.B. 347 (“H.B. 347”) in December 2006. The bill extensively amended and revised Ohio’s firearm laws. Having determined that it “need[ed] to provide uniform laws throughout the state” governing

firearm possession, R.C. 9.68(A), the General Assembly restricted the ability of political subdivisions to enact local ordinances regulating firearm ownership and possession: “Except as specifically provided by the United States Constitution, Ohio Constitution, state law, or federal law, a person, without further license, permission, restriction, delay, or process, may own, possess, purchase, sell, transfer, transport, store, or keep any firearm, part of a firearm, its components, and its ammunition.” *Id.*

The General Assembly nevertheless preserved three important areas of local control. First, by its terms, R.C. 9.68(A) does not prohibit local ordinances that restrict the discharge of firearms. Second, localities retain authority to “regulate[] or prohibit[] the commercial sale of firearms, firearm components, or ammunition for firearms in areas zoned for residential or agricultural uses.” R.C. 9.68(D)(1). Third, cities and townships may enact zoning ordinances “that specif[y] the hours of operation or the geographic areas where the commercial sale of firearms, firearms components, or ammunition for firearms may occur.” R.C. 9.68(D)(2).

Finally, the General Assembly provided for the recovery of “costs and reasonable attorney fees to any person, group, or entity that prevails in a challenge to an ordinance, rule, or regulation as being in conflict with this section.” R.C. 9.68(B).

The floor statements reflect the General Assembly’s intent in passing H.B. 347. The lead sponsor in the House, Representative Jim Aslanides, noted that “we live in a highly mobile society.” House Session (March 8, 2006), 126th Gen. Assem. (Statement of Rep. Aslanides). “Without uniformity,” he emphasized, “local firearms ordinances result[] in a complex patchwork of restrictions changing from one jurisdictional district to another.” *Id.* He then argued that it was “simply not reasonable” to ask law-abiding gun owners “to gain knowledge and understanding of hundreds of different ordinances while traveling from city to city in Ohio.”

Id. In urging passage of the bill, Representative Aslanides observed that forty-three states had adopted similar uniformity laws, and that Ohio municipalities would retain local authority to regulate the discharge and sale of firearms. *Id.*; see also *Baskin*, 2006-Ohio-6422 at ¶ 47 n.8 (O'Connor, J., concurring in judgment) (noting that thirty-eight states prohibit most local regulation of firearms).

Similar statements were made in the Senate. The lead sponsor, Senator Jim Jordan, expressed concern that a patchwork of local firearm ordinances “put[s] the law-abiding citizen in some kind of conflict from one jurisdiction to the next.” Senate Session (Nov. 29, 2006), 126th Gen. Assem. (Statement of Sen. Jordan). “It is important,” he urged, “that we have a uniform standard.” *Id.*

C. The City of Cleveland sought a declaration that R.C. 9.68 was unconstitutional.

The City of Cleveland had adopted a series of ordinances regulating the possession and registration of firearms within its municipal limits. Shortly after H.B. 347 came into force, the City sued the State in common pleas court, seeking a declaration that R.C. 9.68: (1) is an unconstitutional infringement of Cleveland’s home rule powers under Section 3, Article XVIII of the Ohio Constitution; (2) is an abuse of legislative power; and (3) violates the single-subject provision of Section 15(D), Article II of the Ohio Constitution. With respect to the first claim, although the City argued that R.C. 9.68 infringed on its home-rule authority, its complaint did not allege (or even identify) the city ordinances that were purportedly in conflict with the state law.

On cross motions for summary judgment, the trial court ruled for the State. Referencing this Court’s decision in *Clyde*, 2008-Ohio-4605, the court found that R.C. 9.68 “does not violate the Home Rule Amendment of the Ohio Constitution” because it “is a general law that is part of a comprehensive statewide legislative enactment.” It further found that the General Assembly

did not abuse its legislative power or the single-subject rule in passing H.B. 347.

D. The Eighth District held that the General Assembly’s enactment of R.C. 9.68 violated home rule and separation of powers.

The Eighth District reversed, holding that R.C. 9.68(A) violates the Home Rule Amendment because it is not a general law under *Canton*. See *City of Cleveland v. State* (8th Dist.), No. 92663, 2009-Ohio-5968, ¶ 29 (“App. Op.”). The court held that H.B. 347 “leaves a great deal of firearm activity unregulated” and, therefore, is not a statewide comprehensive enactment under *Canton*’s first prong. *Id.* at ¶ 19. It further stated that R.C. 9.68(A) fails *Canton*’s third and fourth prongs because it “limits legislative power of municipal corporations” and it “does not prescribe a rule of conduct upon citizens generally.” *Id.* at ¶¶ 25, 27.

The Eighth District next found that R.C. 9.68(B) violated separation of powers because it “usurp[s] judicial discretion in the award of attorney’s fees and costs.” *Id.* at ¶ 33. The court complained that the law “invites unwarranted litigation and attempts to coerce municipalities into repealing or refusing to enforce longstanding local firearm regulations.” *Id.* at ¶ 34.

Two judges on the panel concurred only in the judgment, refusing to adopt the authoring judge’s analysis of the constitutional issues. They did not, however, issue separate opinions.

The State appealed, and the Eighth District stayed the execution of its judgment. This Court accepted jurisdiction over the case on March 10, 2010.

ARGUMENT

Because all “statutes enacted in Ohio are presumed to be constitutional,” the City of Cleveland has the burden of “prov[ing] beyond that a reasonable doubt that [R.C. 9.68] is clearly unconstitutional.” *State v. Williams* (2000), 88 Ohio St. 3d 513, 521. It has not done so here. R.C. 9.68 is one component of a comprehensive statutory scheme that regulates the ownership and possession of firearms in Ohio. The law offends neither home rule nor separation of powers.

Appellant State of Ohio's Proposition of Law No. I:

Because R.C. 9.68 is part of a comprehensive, statewide legislative scheme that regulates firearms, it is a general law that displaces municipal firearm ordinances.

Under Section 3, Article XVIII of the Ohio Constitution, “[m]unicipalities shall have the authority to exercise all local powers of local self-government and to adopt and enforce within their limits such police, sanitary and other regulations, as are not in conflict with general laws.” Invoking this provision, the City of Cleveland asserts a constitutional right to impose more stringent firearm regulations on its residents, notwithstanding the General Assembly’s contrary determination that firearm laws should be “uniform . . . throughout the state.” R.C. 9.68(A).

When refereeing a home-rule dispute between a municipal ordinance and a state law, this Court employs a familiar three-step analysis. The Court first asks whether the subject matter implicates the exercise of local self-government or the police power. *AFSA*, 2006-Ohio-6043 at ¶ 23. If the dispute relates only to municipal self-governance, “the analysis stops, because the Constitution authorizes a municipality to exercise all powers of local self-government within its jurisdiction.” *Id.* But if the dispute implicates health and safety issues, the Court proceeds to step two; it asks whether the disputed state law is “a general law” under the *Canton* test. *Id.* at ¶ 32 (citing *Canton*, 2002-Ohio-2005 at ¶ 21). If the statute is a “general law,” the Court then moves to step three, asking whether “the [municipal] ordinances are in conflict with th[e] state statute[.]” *Id.* at ¶ 37. If a conflict exists, the ordinances are unconstitutional. *Id.* at ¶ 48.

The first and third steps of the *Canton* inquiry are not at issue in this case. As to the first step, the City has acknowledged that its gun ordinances implicate the municipal “police power.” Mem. in Opp. to Jur. (“Opp. Jur.”), at 9. This Court, too, has classified firearm ordinances as an exercise of the “police power.” *Clyde*, 2008-Ohio-4605 at ¶ 35. As to the third step, the City has never argued a lack of a conflict between its local firearm ordinances and R.C. 9.68. See App.

Opp. at ¶ 10 n.2 (“[T]he City challenges the constitutionality of R.C. 9.68 without determining whether it conflicts with any specific City ordinance.”).

The entire dispute between the City and the State pertains to the second step of the home-rule analysis—the application of the *Canton* test. And R.C. 9.68 satisfies all four prongs of that test: (1) it is part of a statewide and comprehensive legislative enactment; (2) it applies to all parts of the State alike and operates uniformly throughout the State; (3) it sets forth police, sanitary, or similar regulations, rather than purporting only to grant or limit legislative power of a municipal corporation; and (4) it prescribes a rule of conduct upon citizens generally. *Canton*, 2002-Ohio-2005 at ¶ 21.

The Eighth District reached the contrary conclusion only by disregarding this Court’s clear directive. Instead of reading *all* firearm statutes “in pari material to determine whether [R.C. 9.68] is part of a statewide regulation” that “as a whole prescribes a rule of conduct upon citizens generally,” the lower court “considered [the provision] in isolation.” *Mendenhall v. City of Akron*, 117 Ohio St. 3d 33, 2008-Ohio-270, ¶ 27. That crabbed application of *Canton* finds no support in this Court’s precedents. When the proper scope is used, the answer is clear: R.C. 9.68 qualifies as a general law.

A. R.C. 9.68 is part of a statewide, comprehensive legislative scheme regulating firearms.

Under *Canton*’s first prong, the challenged statute, R.C. 9.68, must be “part of [a] comprehensive statewide legislative regulation that relates to” firearm possession. *AFSA*, 2006-Ohio-6043 at ¶ 33. The Court has used two markers to evaluate this prong. It asks whether the General Assembly “express[ed] its intent for statewide comprehensive . . . laws” on the subject. *Clyde*, 2008-Ohio-4605 at ¶ 41. It also determines whether a “comprehensive statewide legislative regulation” in fact exists. *AFSA*, 2006-Ohio-6043 at ¶ 33.

With respect to the first marker, the General Assembly's intent in passing R.C. 9.68 is clear; it sought "to provide uniform laws throughout the state" for firearm ownership and possession. R.C. 9.68(A). The Court referenced this same language in *Clyde* when it determined that "[t]he General Assembly could not have been more direct in expressing its intent for statewide comprehensive handgun-possession laws." 2008-Ohio-4605 at ¶ 41.

No dispute can be had on the second marker either. R.C. 9.68 is one component of a comprehensive regime that touches every facet of gun ownership and possession in Ohio. As discussed above, state law bars certain classes of people from possessing firearms, it prohibits the possession and discharge of firearms in certain places, and it strictly bans the sale and possession of dangerous firearms. State law also addresses the manner in which firearms can be sold, to whom they can be sold, and how they must be kept. Furthermore, the legislature has instituted a detailed application and licensing regime to allow citizens to carry concealed firearms in public, provided that they complete the requisite safety courses and pass the required background checks. Finally, the General Assembly has added firearm sentencing enhancements to a host of criminal offenses.

Furthermore, state law expressly incorporates an assortment of federal laws pertaining to the sale and purchase of firearms. R.C. 2923.22(C). (As discussed above, federal law imposes additional licensing mandates and background check requirements.) This incorporation of federal law only confirms the capacious nature of the State's regulatory program under *Canton*. See *AFSA*, 2006-Ohio-6043 at ¶ 33 (holding that statute was "part of [a] comprehensive statewide legislative regulation" because, among other things, it "in effect incorporated parts of" a related federal law).

By every objective measure, the General Assembly has enacted a comprehensive regulatory plan for firearms. State laws touch on the entire bundle of rights pertaining to firearm ownership—who can sell firearms, who can purchase firearms, what types of firearms can be sold, how those firearms may be sold, where firearms can and cannot be possessed, where they can and cannot be discharged, who can get a license to carry concealed firearms in public, and what penalties inure to individuals who violate these requirements. Indeed, during a previous home-rule challenge to the State’s firearm laws, the City of Cincinnati did not even bother contesting this prong of *Canton*; it frankly (and correctly) conceded that Ohio’s “[l]aws regulating possession of firearms” were comprehensive in nature. Merit Br. of Appellant, *City of Cincinnati v. Baskin*, No. 2004-1829, 2005 WL 1169184, at *3 (Apr. 5, 2005); see also *Baskin*, 2006-Ohio-6422 at ¶ 14.

In reaching the opposite conclusion, the Eighth District erred in three serious ways. First, it stated that H.B. 347 (which enacted R.C. 9.68) “le[ft] a great deal of firearm activity unregulated,” and therefore, was “not comprehensive.” App. Op. at ¶ 19. But the Eighth District should have examined all firearm laws in the existing legislative scheme, not simply those new provisions inserted into the scheme by H.B. 347. Two cases confirm this point. In *Ohio Ass’n of Private Detective Agencies v. City of North Olmsted* (1992), 65 Ohio St. 3d 242, the Court rejected a challenge to new language in R.C. 4749.09 that prohibited local licensing requirements and fees for private investigators. The Court held that “R.C. Chapter 4749 *in its entirety* does provide for uniform statewide regulation of security personnel.” *Id.* at 245 (emphasis added). Therefore, the challenged provision was “a general law of statewide application.” *Id.* Similarly, in *Clermont Evntl. Reclamation Co. v. Wiederhold* (1982), 2 Ohio St. 3d 44, the Court reviewed an amendment to R.C. Chapter 3734 that prohibited local regulation of hazardous waste. The

Court stated that the new provision must be interpreted next to “the other sections of R.C. Chapter 3734 dealing with the state’s control of the disposal of hazardous wastes.” *Id.* at 48. It then held that the entire statutory scheme, when “read in pari materia,” “is a comprehensive one.” *Id.*

Second, the Eighth District observed that Ohio law was not comprehensive because it did not address the discharge of firearms, the possession and sale of assault weapons, the carrying of firearms in public places, the possession and use of firearms by minors, the registration of handguns, the registration and licensing of firearm dealers, the licensing of firearm owners, and background checks for firearm purchasers. App. Op. at ¶ 20. This observation is factually wrong and legally irrelevant. Current law—state and federal—addresses firearm discharges, assault weapons, concealed carry licensure, dealer licensure, and background checks. And even though the Eighth District identified a few regulations that the State does not currently have, a state law need not regulate every aspect of a subject matter in order to be “comprehensive” under *Canton*. See *Marich v. Bob Bennett Constr. Co.*, 116 Ohio St. 3d 553, 2008-Ohio-92, ¶ 20 (“There is no requirement that a statute must be devoid of exceptions to remain statewide and comprehensive in effect.”).

Third, the Eighth District relied heavily (and mistakenly) on Justice O’Connor’s statement in *Baskin* that, “in comparison to other states, Ohio has barely touched upon the subject of firearm possession, use, transfer, and ownership.” 2006-Ohio-6422 at ¶ 53 (O’Connor, J., concurring in judgment). (Justice O’Connor then highlighted four states—California, Connecticut, Hawaii, and Massachusetts—that regulate firearms more extensively and invasively than Ohio. *Id.* at ¶ 53 n.19.) This reliance is misplaced. Justice O’Connor’s observations—

made in the course of a preemption inquiry—do not resolve the *Canton* inquiry.¹ It may be true that, in comparison to those four States, Ohio has fewer gun laws and less burdensome licensing and registration requirements. But this Court has never mandated that a statutory regime be complex, intricate, or onerous to pass muster under *Canton*'s first prong; it has simply required that the statutory regime be “comprehensive.” That is, the statutory regime must address key facets of the regulated subject matter. See, e.g., *Mendenhall*, 2008-Ohio-270 at ¶ 23 (“[R.C.] Chapter 4511 . . . as a whole regulates traffic laws and the operation of motor vehicles in the state of Ohio.”); *Marich*, 2008-Ohio-92 at ¶ 18 (“[T]hese statutes place restrictions on the permissible size of nearly all vehicles on every public road in the state.”); *AFSA*, 2006-Ohio-6043 at ¶ 33 (“Sub. H.B. No. 386 is clearly part of comprehensive statewide legislative regulation that relates to all consumer mortgage lending”); *Clermont*, 2 Ohio St. 3d at 48 (“[T]he statutory scheme . . . is a comprehensive one enacted to insure that such [hazardous waste] facilities are designed, sited, and operated in the manner which best serves the statewide public interest.”).

Ohio's collection of firearm laws, of which R.C. 9.68 is a part, fits that bill. It addresses sales, purchases, ownership, possession, discharge, licensing, and criminal penalties, and therefore easily “meets the statewide-and-comprehensive-legislation element” of *Canton*'s first prong. *Marich*, 2008-Ohio-92 at ¶ 18.

B. The legislative scheme operates uniformly throughout the State.

The City of Cleveland does not dispute that the State's firearm laws operate uniformly throughout Ohio, thereby satisfying *Canton*'s second prong. App. Op. at ¶ 24.

¹ As noted above, the City in *Baskin* conceded that Ohio's gun laws were “comprehensive” under *Canton*. 2006-Ohio-6422 at ¶ 14.

C. The legislative scheme sets forth police regulations.

Under *Canton*'s third prong, the legislative scheme must do more than "restrict the ability of a municipality to enact legislation." *AFSA*, 2006-Ohio-6043 at ¶ 35. It must also "set[] forth police, sanitary or similar regulations." *Id.* (citation omitted).

Applying this prong, the Eighth District held that "R.C. 9.68 does not establish police regulations but instead limits legislative power of municipal corporations." App. Op. at ¶ 25. The City of Cleveland has similarly claimed that, by enacting R.C. 9.68, the General Assembly unconstitutionally waived a "magic wand" . . . to preempt all local firearms laws." Opp. Jur. at 11.

The problem with this reasoning is that it again takes R.C. 9.68 in isolation. But R.C. 9.68 is not the only law on the books pertaining to firearms in Ohio. And this Court has consistently affirmed the General Assembly's authority to displace municipal regulations when that displacement is part of a broader legislative scheme that promulgates police, sanitary, or safety regulations. In *Ohio Ass'n of Private Detectives*, 65 Ohio St. 3d at 245, the Court reviewed the validity of R.C. 4749.09, which "prohibits the imposition of a local registration fee for private security personnel." It acknowledged that the statute, when "[c]onsidered in isolation," "may fail to qualify as a general law because it prohibits a municipality from exercising a local police power." *Id.* The Court nevertheless held that "R.C. Chapter 4749 in its entirety does provide for uniform statewide regulation of security personnel," and, therefore, R.C. 4749.09 was "a general law" for purposes of the home rule analysis. *Id.* The *AFSA* Court repeated this admonition. Under *Canton*'s third prong, a court must ask whether the entire "comprehensive regulatory plan" "set[s] forth police, sanitary, or similar regulations." *AFSA*, 2006-Ohio-6043 at ¶ 35 (citation omitted); see also *Mendenhall*, 2008-Ohio-270 at ¶ 27 ("When interpreted as part of a whole, R.C. 4511.21 applies to all citizens generally as part of a statewide regulation."); George

D. Vaubel, *Municipal Home Rule in Ohio* (1995), 22 *Ohio N.U.L. Rev.* 143, 199 (“[P]reclusionary language becomes a general law and can act to bar municipal legislation if it is part of a comprehensive legislative scheme of regulation.”).

R.C. 9.68 is one component of a comprehensive regulatory plan that promulgates a litany of police and safety regulations pertaining to firearms. That this regulatory scheme also contains a restriction on municipal authority is of no moment. A scheme that is “both an exercise of the state’s police power and an attempt to limit legislative power of a municipal corporation” does not offend *Canton*’s third prong. *Clyde*, 2008-Ohio-4605 at ¶ 50.

D. The legislative scheme prescribes a rule of conduct upon citizens generally.

The fourth *Canton* prong requires that the legislative scheme under review “prescribe a rule of conduct upon citizens generally.” *AFSA*, 2006-Ohio-6043 at ¶ 36.

The Eighth District concluded that R.C. 9.68 failed this prong because the statute was merely “a limitation upon law making by municipal legislative bodies.” *App. Op.* at ¶ 27 (citation omitted). The City of Cleveland advances an identical proposition: “R.C. § 9.68 fails to prescribe a rule of conduct upon citizens generally because it establishes no positive regulation”; it simply “subtract[s] municipal legislative authority.” *Opp. Jur.* at 14.

This reasoning is flawed because, again, the Eighth District and the City examined R.C. 9.68 in isolation. Under the fourth prong of *Canton*, the Court must instead ask whether R.C. 9.68 “[is] *part of* a comprehensive and uniform statewide enactment . . . that prescribes a general rule of conduct.” *AFSA*, 2006-Ohio-6043 at ¶ 36 (emphasis added); accord *Mendenhall*, 2008-Ohio-270 at ¶ 27 (asking “whether the chapter as a whole prescribes a rule of conduct upon citizens generally”). The legislative scheme governing firearms, of which R.C. 9.68 is a component, passes muster. This comprehensive body of laws unquestionably “prescribes a rule of conduct for any citizen seeking to carry a” firearm. *Clyde*, 2008-Ohio-4605 at ¶ 51.

The City's home rule challenge fails because R.C. 9.68 satisfies all four *Canton* prongs. The statute is part of a statewide and comprehensive legislative enactment that uniformly prescribes a rule of conduct upon the citizens of Ohio with respect to the possession of firearms; it is therefore a general law that displaces all municipal firearm ordinances.

Appellant State of Ohio's Proposition of Law No. II:

The authorization for awards of attorney fees and costs in R.C. 9.68 does not violate separation of powers.

Under the separation-of-powers doctrine, “[t]he legislative branch has no right to limit the inherent powers of the judicial branch of the government.” *Hochhausler*, 76 Ohio St. 3d at 464. Any attempt by the General Assembly to “interfere[] with the exercise of a court’s judicial functions” is unconstitutional. *Id.*

Invoking this doctrine, the Eighth District invalidated R.C. 9.68(B), which provides for the award of costs and reasonable attorney fees to litigants who successfully challenge a municipal firearm ordinance. The court held that the provision unconstitutionally “usurp[ed] judicial discretion in the award of attorney’s fees and costs,” and “invite[d] unwarranted litigation and attempt[ed] to coerce municipalities into” complying with state law. App. Op. at ¶¶ 33, 34.

Neither conclusion has merit. As to the first rationale, the Eighth District apparently believed that Ohio courts have inherent power and discretion to issue attorneys fees and costs. This is wrong. At common law in this State, each party bore the cost of litigation. See *Wilborn v. Bank One Corp.*, 121 Ohio St. 3d 546, 2009-Ohio-306, ¶ 7 (“Ohio has long adhered to the ‘American rule’ with respect to the recovery of attorney fees: a prevailing party in a civil action may not recover fees as a part of the cost of litigation.”). Therefore, the General Assembly’s decision to provide attorneys fees and costs to successful litigants in these cases does not infringe on any inherent power of the judiciary.

As to the second rationale, the Eighth District concluded that the General Assembly was improperly attempting to coerce municipalities into complying with state law. But the separation-of-powers doctrine is not concerned with attempts by the legislature to influence the behavior of municipalities. Rather, the doctrine guards against attempts by the legislature to impair “the substance and scope of powers granted to [another] branch[] of *state* government.” *South Euclid v. Jemison* (1986), 28 Ohio St. 3d 157, 159 (emphasis added). And R.C. 9.68(B) does not in any way infringe upon or affect the judiciary’s inherent function “to hear and determine a controversy between adverse parties.” *Fairview v. Giffie* (1905), 73 Ohio St. 183, 190.

The General Assembly has enacted dozens of similar statutes providing for the award of attorney fees and costs to parties who prevail in litigation. See, e.g., R.C. 149.43(C)(2)(b) (public records); R.C. 163.09(G) (property appropriation); R.C. 169.08(F) (unclaimed funds); R.C. 1305.10(E) (letters of credit); R.C. 1310.06(D) (consumer leases); R.C. 1311.011(B)(3) (home construction and purchase contract liens); R.C. 1345.75(A) (non-conforming motor vehicle law); R.C. 2151.23(G) (child support orders); R.C. 2743.48(F)(2) (wrongful imprisonment); R.C. 3105.18(G) (spousal support orders); R.C. 3501.90(C)(2) (voter harassment claims); R.C. 4112.14(B) (age discrimination suits). The General Assembly has also passed a number of statutes that treble jury damage awards against defendants for certain statutory violations. See, e.g., R.C. 901.51 (unauthorized removal of timber); R.C. 1331.08 (Valentine Act violations); R.C. 1345.09 (Consumer Sales Practices Act violations); R.C. 2307.61 (willful damage or theft to a property owner); R.C. 2923.34(E) (engaging in a pattern of corrupt activity); R.C. 4905.61 (public utilities law violations). By their very nature, these attorney fee and treble damages statutes encourage would-be plaintiffs to initiate litigation and they increase the

financial exposure of would-be defendants, just as R.C. 9.68(B) does in firearm cases. But the City has never cited, and the State is not aware of, any authority supporting the Eighth District's holding that such laws violate the separation of powers doctrine.

Rather, this Court has affirmed the opposite proposition: that the General Assembly may grant attorney fees and costs to plaintiffs who prevail on certain causes of action. See *Sorin v. Warrensville Hts. School Dist. Bd. of Educ.* (1976), 46 Ohio St. 2d 177, 179-80 (“[A]ny departure from [the ‘American rule’] is a matter of *legislative* concern.”) (emphasis added).

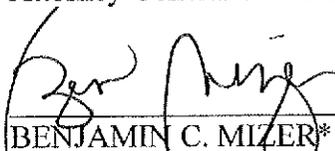
All told, the General Assembly acted well within its legislative authority when it authorized the award of attorney fees and costs in R.C. 9.68(B).

CONCLUSION

For these reasons, the Court should reverse the decision below.

Respectfully submitted,

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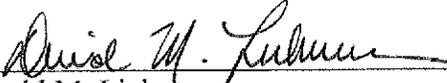
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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Merit Brief of Defendant-Appellant State of Ohio was served by U.S. mail this 12th day of May, 2010, upon the following counsel:

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APPENDIX

ORIGINAL

In the
Supreme Court of Ohio

CITY OF CLEVELAND,

Plaintiff-Appellee,

v.

STATE OF OHIO,

Defendant-Appellant.

Case No. 09-2280

On Appeal from the
Cuyahoga County
Court of Appeals,
Eighth Appellate District
Court of Appeals Case
No. 92663

NOTICE OF APPEAL OF DEFENDANT-APPELLANT STATE OF OHIO

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FILED
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CLERK OF COURT
SUPREME COURT OF OHIO

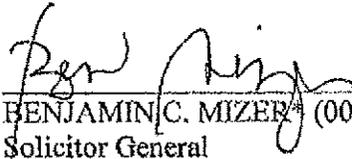
NOTICE OF APPEAL OF DEFENDANT-APPELLANT STATE OF OHIO

Defendant-Appellant State of Ohio gives notice of its discretionary appeal to this Court, pursuant to Ohio Supreme Court Rule II, Section 1(A)(3), from a decision of the Cuyahoga County Court of Appeals, Eighth Appellate District, journalized in Case No. 92663 on November 23, 2009. Date-stamped copies of the Court of Common Pleas' Judgment Entry and the Eighth District's Judgment and Decision are attached as Exhibits 1 and 2, respectively, to Defendant-Appellant's Memorandum in Support of Jurisdiction.

For the reasons set forth in the accompanying Memorandum in Support of Jurisdiction, this case presents substantial constitutional questions and is one of public and great general interest.

Respectfully submitted,

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NOV 23 2009

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92663

CITY OF CLEVELAND

PLAINTIFF-APPELLANT

vs.

STATE OF OHIO

DEFENDANT-APPELLEE

**JUDGMENT:
REVERSED AND REMANDED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-618492

BEFORE: Cooney, A.J., Stewart, J., and Dyke, J.

RELEASED: November 12, 2009

JOURNALIZED: NOV 23 2009

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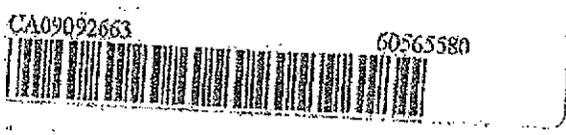
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FILED AND JOURNALIZED
PER APP.R. 22(C)

NOV 23 2009

GERALD E. FURST
CLERK OF THE COURT OF APPEALS
BY *[Signature]* DEP.

ANNOUNCEMENT OF DECISION
PER APP.R. 22(B) AND 26(A)
RECEIVED

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

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COLLEEN CONWAY COONEY, A.J.:

Plaintiff-appellant, the city of Cleveland ("City"), appeals the trial court's grant of summary judgment to defendant-appellee, state of Ohio ("State") on the City's declaratory judgment action. Finding merit to the appeal, we reverse the trial court's grant of summary judgment to the State and direct that the trial court enter summary judgment for the City, thereby declaring R.C. 9.68 unconstitutional.

This case arose in March 2007, when the City filed a complaint for declaratory judgment challenging the constitutionality of R.C. 9.68. The National Rifle Association ("NRA") and Ohioans for Concealed Carry ("OCC") moved to intervene as defendants and to bring cross-claims against the City alleging that local firearm ordinances were unconstitutional.

In July 2007, both the City and the State moved for summary judgment. The trial court denied the NRA's and OCC's motions to intervene, denied the City's motion for summary judgment, and granted the State's motion for summary judgment.¹ The trial court found that based upon the Ohio Supreme Court's holding in *Ohioans for Concealed Carry v. Clyde*, 120 Ohio St.3d 96, 2008-Ohio-4605, 896 N.E.2d 967, R.C. 9.68 is constitutional and does not violate

¹The NRA and OCC appealed the denial of their motion to intervene in Appeal No. 92735.

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the Home Rule Amendment of the Ohio Constitution. The court found that R.C. 9.68 was a "general law that is part of a comprehensive statewide legislative enactment." It also found that Sub.H.B. No. 347 did not violate the single-subject rule and that the General Assembly did not abuse its legislative power in enacting the law.

The City appeals, raising three assignments of error for our review.

Factual and Procedural Background

In December 2006, the Ohio General Assembly passed Sub.H.B. No. 347, entitled "Firearms-Conceal Carry Licenses." The bill addressed 23 statutes, amending 22 concealed carry and concurrent penalty provisions and enacting a new statute, R.C. 9.68, which asserted that only federal or state regulations could limit Ohioans' individual right to bear arms. But at the time, the City had already enacted several ordinances regulating firearms, including Cleveland Codified Ordinance (C.C.O.) 627.08, possession of firearms by minors; C.C.O. 627.09, possessing deadly weapons on public property; C.C.O. 627.10, possessing certain weapons at or about public places; C.C.O. 627A.02, access to firearms, prohibiting children access to firearms; C.C.O. 628.03, unlawful conduct, prohibiting possession and sale of assault weapons; and C.C.O. 674.05, registration of handguns. The Ohio Supreme Court had upheld the

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constitutionality of the ordinance dealing with assault weapons. *Arnold v. Cleveland* (1993), 67 Ohio St.3d 35, 616 N.E.2d 163.

Law and Analysis

In its first assignment of error, the City claims that the trial court erred in denying its motion for summary judgment and granting summary judgment for the State because R.C. 9.68 violates the Home Rule Amendment of the Ohio Constitution.

We must first observe the strong presumption that all statutes are constitutional. *State v. Bloomer*, 122 Ohio St.3d 200, 2009-Ohio-2462, 909 N.E.2d 1254, ¶41, citing *State v. Carswell*, 114 Ohio St.3d 210, 2007-Ohio-3723, 871 N.E.2d 547, ¶6, citing *Desenco, Inc. v. Akron* (1999), 84 Ohio St.3d 535, 538, 706 N.E.2d 923. Thus, the City bears the burden to demonstrate beyond a reasonable doubt that R.C. 9.68 is unconstitutional. *Id.*, citing *State v. Ferguson*, 120 Ohio St.3d 7, 2008-Ohio-4824, 896 N.E.2d 110, ¶12; *State v. Williams* (2000), 88 Ohio St.3d 513, 521, 728 N.E.2d 342.

R.C. 9.68 states, in pertinent part:

"(A) The individual right to keep and bear arms, being a fundamental individual right that predates the United States Constitution and Ohio Constitution, and being a constitutionally protected right in every part of Ohio, the general assembly finds the need to provide uniform laws throughout the state regulating the ownership, possession, purchase, other acquisition, transport, storage, carrying, sale, or other transfer of firearms, their components, and their ammunition. Except as specifically provided by the

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United States Constitution, Ohio Constitution, state law, or federal law, a person, without further license, permission, restriction, delay, or process, may own, possess, purchase, sell, transfer, transport, store, or keep any firearm, part of a firearm, its components, and its ammunition.

"(B) In addition to any other relief provided, the court shall award costs and reasonable attorney fees to any person, group, or entity that prevails in a challenge to an ordinance, rule, or regulation as being in conflict with this section."

A. The Home Rule Amendment and "General Laws"

Section 3, Article XVIII of the Ohio Constitution is known as the Home Rule Amendment and states as follows:

"Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."

In short, municipalities may exercise police and other powers so long as they do not conflict with "general laws." Here, the City seeks a declaratory judgment that R.C. 9.68 is unconstitutional because it is not a general law and attempts to curtail the City's police powers.² The City argues that with Sub.H.B. 347 and its new provision R.C. 9.68, the State did not enact a comprehensive scheme to regulate firearms. The City concedes that Ohio maintains a comprehensive scheme to regulate the *concealed carry* of firearms but not to regulate firearms altogether. The State counters that reading R.C.

² We note that the City challenges the constitutionality of R.C. 9.68 without determining whether it conflicts with any specific City ordinance.

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9.68 together with Sub.H.B. No. 347 demonstrates a comprehensive scheme to regulate firearms. We find the City's argument more persuasive.

We begin our analysis with a definition of the term "general law." A general law must (1) be part of "a statewide and comprehensive legislative enactment," (2) "apply to all parts of the state alike and operate uniformly throughout the state," (3) establish "police, sanitary, or similar regulations, rather than purport only to grant or limit legislative power of a municipal corporation to set forth police, sanitary, or similar regulations," and (4) "prescribe a rule of conduct upon citizens generally." *Canton v. State*, 95 Ohio St.3d 149, 2002-Ohio-2005, 766 N.E.2d 963, syllabus, ("the *Canton* test").

In *Clyde*, the Ohio Supreme Court recently considered the OCC's home-rule challenge to the city of Clyde's ("Clyde") ordinance banning deadly weapons in city parks, alleging that it conflicted with a general law created in H.B. 12, which created a licensing system for the carrying of concealed handguns. In that case, the Ohio Supreme Court examined R.C. 2923.126(A), which provides that a licensed handgun owner "may carry a concealed handgun anywhere in this state," except as provided in R.C. 2923.126(B) and (C). The bill contained an uncodified section stating, "[n]o municipal corporation may adopt or continue in existence any ordinance * * * that attempts to restrict the places where a person possessing a valid license to carry a concealed handgun may carry a handgun

safety zones and courthouses; and (6) modify the rules regarding transport of loaded weapons in motor vehicles.⁴

But Sub.H.B. No. 347 leaves unregulated: (1) the discharge of firearms, (2) the possession and sale of assault weapons, (3) the open carry of firearms on public property and public places, (4) the possession and use of firearms by miners, (5) the registration of handguns as required by the City, (6) the registrations and licensure of firearms dealers, (7) permit or licensing requirements before an individual purchases a handgun, and (8) background checks before the purchase or transfer of firearms.

Even the "intent to preempt" language contained in R.C. 9.68 fails to cover a broad range of firearm activity. It refers to the rights to "own, possess, purchase, sell, transfer, transport, store, or keep any firearm," but does not address discharging firearms or openly carrying them.

The instant case is similar to *Canton*, in which the Ohio Supreme Court struck down R.C. 3781.184, a statute barring local governments from prohibiting the location of certain manufactured homes in areas zoned for single-family homes. The *Canton* court held that the statute was not part of a statewide and

⁴Sub.H.B. No. 347 describes itself as revising laws regarding possession of concealed handguns, broadening the definition of "peace officers," exempting certain individuals from firearms training programs, increasing the penalty for theft of a firearm in certain cases, and augmenting individual rights to own and use firearms.

comprehensive zoning plan because the law was part of a chapter varying widely in topic and lacked rules regarding zoning plans. *Id.* at ¶23-24.

In contrast, in *AFSA*, the Ohio Supreme Court held that Sub.H.B. 386, which regulated lending practices, was a comprehensive law. It reasoned that Sub.H.B. 386 (1) "incorporated parts of the Home Ownership and Equity Protection Act of 1994, * * * the federal predatory-lending law," into the Ohio Revised Code at R.C. 1349.25 through 1349.37, (2) defined covered loans through R.C. 1349.25(D), and (3) "authorized the state to 'solely * * * regulate the business of originating, granting, servicing, and collecting loans and other forms of credit in the state and the manner in which any such business is conducted, * * * in lieu of all other regulation of such activities by any municipal corporation or other political subdivision,' R.C. 1.63(A). (Emphasis added.)"

(2) Uniform Operation Throughout the State

It is undisputed that R.C. 9.68 meets the second prong of *Canton*. It applies to all parts of the state and operates uniformly to every individual.

(3) Establishing Police Regulations Rather than Granting or Limiting Legislative Power

Under the third prong of the *Canton* test, a general law must set forth police, sanitary, or similar regulations rather than simply granting or limiting legislative power. In the instant case, R.C. 9.68 does not establish police regulations but instead limits legislative power of municipal corporations, thus

failing to meet the third prong of the *Canton* test. Our reasoning on this prong closely follows that of the first prong of *Canton*. With R.C. 9.68, the State attempts to curtail the City's home-rule police powers without enacting legislation to remedy the purported ill of a confusing "patchwork" of municipal regulations involving firearms. As outlined above, R.C. 9.68 and Sub.H.B. No. 347, along with existing state and federal firearm regulations, leave many gaps. In her concurring opinion in *Cincinnati v. Baskin*, 112 Ohio St.3d 279, 2006-Ohio-6422, 859 N.E.2d 514,⁵ Justice O'Connor stated:

"Ohio legislation currently touches on only a handful of areas in regard to firearms: Prohibition on ownership of certain items, prohibition on possession of firearms by certain classes of persons, limitations on the discharge and transport of firearms, limits on places where a firearm may be discharged or possessed, sentencing rules and specifications applied when a firearm is used or possessed during commission of a crime, limitations on interstate sales, concealed-firearm provisions, and various laws related to things such as immunity for firearm manufacturers.

* * *

"Although this may appear to be a broad array of firearms regulation, in comparison to other states, Ohio has barely touched upon the subject of firearm possession, use, transfer, and ownership."

As outlined above, Sub.H.B. No. 347 did little to fill in the gaps that Justice O'Connor recognized. Thus, R.C. 9.68 fails the third prong of *Canton*.

⁵*Baskin* was decided the same year Sub.H.B. No. 347 was enacted.

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(4) Prescription of a Rule of Conduct for Citizens

Finally, R.C. 9.68 does not prescribe a rule of conduct upon citizens generally. Like the challenged laws in *Canton*, supra, *Linndale v. State* (1999), 85 Ohio St.3d 52, 706 N.E.2d 1227, and *Youngstown v. Evans* (1929), 121 Ohio St. 342, 168 N.E. 844, R.C. 9.68 is "not a general law in the sense of prescribing a rule of conduct upon citizens generally. It is a limitation upon law making by municipal legislative bodies." *Canton* at ¶34, quoting *Youngstown*. We distinguish this case from *AFSA*, which held that Sub.H.B. 386, a provision similar to R.C. 9.68 and Sub.H.B. No. 347, prescribed a rule of conduct upon citizens because Sub.H.B. 386 "establishe[d] rules of conduct for all lenders in Ohio and also provide[d] remedies for all consumers subject to predatory loans if lenders violato[d] the state statute." *AFSA* at ¶36. Instead, the instant case is analogous to *Linndale* and *Youngstown*.

Accordingly, R.C. 9.68 fails to satisfy the general law test, and we conclude that it is not a general law.

Because R.C. 9.68 unconstitutionally attempts to limit municipalities' home-rule police powers, we find that the trial court erred in denying the City's motion for summary judgment.

The first assignment of error is sustained.

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General Assembly's Abuse of Legislative Power

In the second assignment of error, the City claims that the trial court erred in finding that the General Assembly did not abuse its legislative power in enacting R.C. 9.68.

Section 32, Article II of the Ohio Constitution precludes the legislature from violating the separation of powers by exercising judicial powers. In *State v. Hochhausler* (1996), 76 Ohio St.3d 455, 668 N.E.2d 457, the Ohio Supreme Court explained:

"The principle of separation of powers is embedded in the constitutional framework of our state government. The Ohio Constitution applies the principle in defining the nature and scope of powers designated to the three branches of the government. *State v. Warner* (1990), 55 Ohio St.3d 31, 43-44, 564 N.E.2d 18, 31. See *State v. Harmon* (1877), 31 Ohio St. 250, 258. It is inherent in our theory of government that each of the three grand divisions of the government, must be protected from the encroachments of the others, so far that its integrity and independence may be preserved. * * * *S. Euclid v. Jemison* (1986), 28 Ohio St.3d 157, 159, 28 OBR 250, 252, 503 N.E.2d 136, 138, quoting *Fairview v. Giffey* (1905), 73 Ohio St. 183, 187, 76 N.E. 865, 866.

* * *

"We have held that '[t]he administration of justice by the judicial branch of the government cannot be impeded by the other branches of the government in the exercise of their respective powers.' *State ex rel. Johnston v. Taillhee* (1981), 66 Ohio St.2d 417, 20 O.O.3d 361, 423 N.E.2d 80, paragraph one of the syllabus. We have also held that '[c]ourts of general jurisdiction, whether named in the Constitution or established pursuant to the provisions thereof, possess all powers necessary to secure and safeguard the free and untrammelled exercise of their judicial functions and cannot be directed, controlled or impeded therein by other branches

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of the government.' (Citations omitted.) *Id.* at paragraph two of the syllabus.

"The legislative branch has no right to limit the inherent powers of the judicial branch of the government. *Hale v. State* (1896), 55 Ohio St. 210, 212-213, 45 N.E. 199, 200."

R.C. 9.68(B) is offensive for two reasons. First, it violates the separation of powers by usurping judicial discretion in the award of attorney's fees and costs. R.C. 9.68(B) mandates that courts award costs and "reasonable attorney fees to any person, group, or entity that prevails in a challenge to an ordinance, rule, or regulation as being in conflict with this section."

Second, the General Assembly invites unwarranted litigation and attempts to coerce municipalities into repealing or refusing to enforce longstanding local firearm regulations using the significant burden of financial litigation penalties.⁶ The conflict analysis is complex, as even the Ohio Supreme Court has recognized. *Baskin* at ¶31 (O'Connor, J., concurring in judgment only). Therefore, municipalities face a grave challenge in complying with this law—they must negotiate the complex conflict analysis while avoiding a minefield of potential litigation that they would have to finance.

⁶The Ohio Supreme Court recently upheld the State's valid interest in preserving the financial soundness of its political subdivisions. See *Oliver v. Cleveland Indians Baseball Co. Ltd. Partnership*, Slip Opinion No. 2009-Ohio-5030, ¶10.

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Based on the foregoing, we find that R.C. 9.68 violates the separation-of-powers doctrine espoused by the Ohio Constitution. Accordingly, the second assignment of error is sustained.

Single-Subject Rule

In the third assignment of error, the City further asserts that Sub.H.B. No. 347 and R.C. 9.68 violate the one-subject rule. We need not reach this issue because our disposition of the first two assignments of error renders this argument moot.

Judgment is reversed. The case is remanded for entry of summary judgment for the City.

It is ordered that appellant recover of said appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

FILED AND JOURNALIZED
PER APPR. 22(C)

NOV 23 2009

Colleen Conway Cooney
COLLEEN CONWAY COONEY, ADMINISTRATIVE JUDGE

RECEIVED E. FURST
BY

MELODY J. STEWART, J., CONCURS IN JUDGMENT ONLY;
ANN DYKE, J., CONCURS IN JUDGMENT ONLY

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LEXSTAT OHIO CONST ART 18 § 3

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*** CURRENT THROUGH LEGISLATION PASSED BY THE 128TH OHIO GENERAL ASSEMBLY AND
FILED WITH THE SECRETARY OF STATE THROUGH FILE 30 ***
*** ANNOTATIONS CURRENT THROUGH JANUARY 1, 2010 ***
*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH MARCH 3, 2010 ***

CONSTITUTION OF THE STATE OF OHIO
ARTICLE XVIII. MUNICIPAL CORPORATIONS

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Oh. Const. Art. XVIII, § 3 (2010)

§ 3. Powers

Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.

(Adopted September 3, 1912.)

NOTES:

Section Notes

The provisions of § 3 of HB 386 (149 v --) read as follows:

SECTION 3. (A) The provisions of the Revised Code, including, but not limited to, Titles XI, XIII, XVII, and XLVII, relating to the origination, granting, servicing, and collection of loans and other forms of credit prescribe rules of conduct upon citizens generally, comprise a comprehensive regulatory framework intended to operate uniformly throughout the state under the same circumstances and conditions, and constitute general laws within the meaning of *Section 3 of Article XVIII of the Ohio Constitution*.

(B) The provisions of the Revised Code, including, but not limited to, Titles XI, XIII, XVII, and XLVII, relating to the origination, granting, servicing, and collection of loans and other forms of credit have been enacted in furtherance of the police powers of the state.



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OHIO REVISED CODE GENERAL PROVISIONS
CHAPTER 9. MISCELLANEOUS
MISCELLANEOUS

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ORC Ann. 9.68 (2010)

§ 9.68. Need to provide uniform laws with respect to regulation of firearms

(A) The individual right to keep and bear arms, being a fundamental individual right that predates the United States Constitution and Ohio Constitution, and being a constitutionally protected right in every part of Ohio, the general assembly finds the need to provide uniform laws throughout the state regulating the ownership, possession, purchase, other acquisition, transport, storage, carrying, sale, or other transfer of firearms, their components, and their ammunition. Except as specifically provided by the United States Constitution, Ohio Constitution, state law, or federal law, a person, without further license, permission, restriction, delay, or process, may own, possess, purchase, sell, transfer, transport, store, or keep any firearm, part of a firearm, its components, and its ammunition.

(B) In addition to any other relief provided, the court shall award costs and reasonable attorney fees to any person, group, or entity that prevails in a challenge to an ordinance, rule, or regulation as being in conflict with this section.

(C) As used in this section:

(1) The possession, transporting, or carrying of firearms, their components, or their ammunition include, but are not limited to, the possession, transporting, or carrying, openly or concealed on a person's person or concealed ready at hand, of firearms, their components, or their ammunition.

(2) "Firearm" has the same meaning as in *section 2923.11 of the Revised Code*.

(D) This section does not apply to either of the following:

(1) A zoning ordinance that regulates or prohibits the commercial sale of firearms, firearm components, or

ammunition for firearms in areas zoned for residential or agricultural uses;

(2) A zoning ordinance that specifies the hours of operation or the geographic areas where the commercial sale of firearms, firearm components, or ammunition for firearms may occur, provided that the zoning ordinance is consistent with zoning ordinances for other retail establishments in the same geographic area and does not result in a de facto prohibition of the commercial sale of firearms, firearm components, or ammunition for firearms in areas zoned for commercial, retail, or industrial uses.

HISTORY:

151 v H 347, § 1, eff. 3-14-07.

NOTES:

Section Notes

Governor Taft's veto of HB 347 was overridden by the Ohio General Assembly.

Related Statutes & Rules

Ohio Constitution

Regulation of firearms, *OConst art I § 4*.

Case Notes & OAGs

ANALYSIS Attorney fees and costs Declaratory judgment Municipal authority

ATTORNEY FEES AND COSTS.

Defendant did not "prevail," entitling him to attorney fees pursuant to *RC § 9.68*, where the city voluntarily dismissed a charge of improper transportation of a firearm on the basis of a change in state law while the charge was pending: *City of Medina v. Osiecki*, 154 Ohio Misc. 2d 7, 916 N.E.2d 541, 2009 Ohio Misc. LEXIS 293, 2009 Ohio 5574, (2009).

DECLARATORY JUDGMENT.

When a gun owner sued a city for a declaratory judgment that the city's ordinances on assault weapons were unenforceable, the owner's suit was properly dismissed because, inter alia, the owner's suit presented neither a controversy nor a justiciable issue, as it was undisputed that the city had ceased enforcing the ordinances to which the owner objected. *Smolak v. City of Columbus*, 2007 Ohio App. LEXIS 4207, 2007 Ohio 4671, (Sept. 11, 2007).

MUNICIPAL AUTHORITY.

As the Ohio Legislature clearly intended to provide general and uniform operation throughout Ohio of the concealed carry laws, Clyde, Ohio, Codified Ordinance 2004-41 was pre-empted by *RC §§ 9.68* and *2923.126* and it