

ORIGINAL

IN THE SUPREME COURT OF OHIO

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

BRIEF OF AMICUS CURIAE NATIONAL RIFLE ASSOCIATION OF AMERICA, INC., IN SUPPORT OF APPELLANT STATE OF OHIO

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INTRODUCTION

This case concerns the whether the General Assembly, in recognition of changes in society, changes in patterns and frequency of travel, and changes in thinking and attitudes as to how best insure public safety, may enact a statute for the purpose of enabling the constitutional rights of the state's citizens and visitors to keep and bear arms, unimpaired by a patchwork of inconsistent municipal regulation, and in so doing to afford them the ability to protect their lives, families, and property as intended by the Assembly. The City of Cleveland, however, seeks to maintain, within the boundaries of the City, its own regimen of regulation, providing criminal penalties for those in full compliance with all state and federal regulation of firearms, and effectively negating the need recognized by the members of the General Assembly, representing all corners of the state, for uniform regulation such that citizens may exercise their rights to keep and bear arms free from concern that merely crossing a municipal boundary may unwittingly turn their activity from law-abiding to criminal.

Since the inception of this case in the Court of Common Pleas of Cuyahoga County, this Court, in *Ohioans for Concealed Carry, Inc. v. City of Clyde*, 120 Ohio St.3d 96, 2008-Ohio-4605 has addressed the issue of whether R.C. 9.68, and other statutes amended in Sub. H.B. 347 ("H.B. 347"), may invalidate a local ordinance in conflict with them, and has ruled that an ordinance of the City of Clyde in conflict with such statutes was unconstitutional. The Court's opinion, which should provide the guidance needed to decide the case before the bar, stated unequivocally that "[s]imply put, the General Assembly, by enacting R.C. 9.68(A), gave persons in Ohio the right to carry a handgun unless federal or state law prohibits them from doing so. . . [a] municipal ordinance can not infringe on that broad statutory right." *Id.* at ¶ 20. As discussed *infra*, R.C. 9.68 pertains to more than handguns, it established limits on municipal regulation of

all firearms, their components and ammunition, and for the very same reasons the statute was found constitutional in the application of its limits to the municipal ordinance in *Clyde*, so too, is R.C. 9.68 valid and constitutional with respect to other municipal ordinances which conflict and restrict the rights R.C. 9.68 seeks to protect.

The Court of Appeals, Eighth Appellate District, County of Cuyahoga (“Eighth District”) in its judgment and opinion in Case No. 92663, erred in declaring R.C. 9.68 unconstitutional and finding that the General Assembly’s enactment of the statute violated the separation of powers doctrine of the Ohio Constitution, coming to its conclusion in clear disregard of the determination of this Court in *Clyde* and prior Home Rule jurisprudence, and for those reasons, as more fully described below, the judgment of the Eight District should be reversed.

STATEMENT OF INTEREST OF AMICUS CURIAE

The National Rifle Association of America, Inc. (“NRA,” “amicus”) is a New York not-for-profit membership corporation founded in 1871. NRA has roughly four million individual members and 10,700 affiliated members (clubs and associations) nationwide. Its purposes and objectives, as set forth in its Bylaws, are:

1. To protect and defend the Constitution of the United States, especially with reference to the inalienable right of the individual American citizen guaranteed by such Constitution to acquire, possess, transport, carry, transfer ownership of, and enjoy the right to use arms, in order that the people may always be in a position to exercise their legitimate individual rights of self-preservation and defense of family, person, and property, as well as to serve effectively in the appropriate militia for the common defense of the Republic and the individual liberty of its citizens;
2. To promote public safety, law and order, and the national defense;
3. To train members of law enforcement agencies, the armed forces, the militia, and people of good repute in marksmanship and in the safe handling and efficient use of small arms;

4. To foster and promote the shooting sports, including the advancement of amateur competitions in marksmanship at the local, state, regional, national and international levels;

5. To promote hunter safety, and to promote and defend hunting as shooting sport as a viable and necessary method of fostering the propagation, growth and conservation, and wise use of our renewable wildlife resources.

The NRA has a strong interest in upholding the rights of its members and all law-abiding citizens to keep and bear arms as protected in the constitutions of each state, including Ohio, and in ensuring the right to notice and due process of law regarding the carrying and possession of firearms. The NRA regularly litigates and files amicus curiae briefs in matters related to the right to keep and bear arms as guaranteed in the state and federal constitutions. This brief seeks to assist the Court by providing textual analysis and comparative law that may not be set forth in the briefs of the parties and the other amici.

In addition to representing the interests of its Ohio members, the NRA has numerous members nationwide who travel to and in Ohio and who are adversely affected by local ordinances that are inconsistent with uniform statewide standards in Ohio. Ohio law provides for reciprocity agreements with other states entered into by the Attorney General under which licenses to carry concealed handguns are honored within such states. Inconsistent local ordinances in effect nullify such agreements and violate the rights of all qualified persons.

STATEMENT OF THE CASE

The City of Cleveland, on March 14, 2007, the effective date of R.C. 9.68, filed a declaratory judgment action against the State of Ohio (“State”) in the Court of Common Pleas of Cuyahoga County (Case No. 618492) in which Cleveland sought to have R.C. 9.68 declared unconstitutional as infringing on powers reserved to municipalities under the Home Rule Amendment to the Ohio Constitution, Article XVIII, Section 3, Ohio Constitution.

The Attorney General for the State of Ohio filed an Answer on April 17, 2009, generally denying factual assertions and asserting that R.C. 9.68 is constitutional in all respects.

Subsequent to a pretrial hearing on May 2, 2007, Cleveland and the State filed motions for summary judgment on July 16, 2007, briefs in opposition to the opposing motions for summary judgment on July 30, 2007, and reply briefs on August 13, 2007.

After notice of related proceedings pending with the Supreme Court of Ohio in *Ohioans for Concealed Carry, Inc. v. City of Clyde*, 120 Ohio St.3d 96, 2008-Ohio-4605, the court held its rulings on the motions for summary judgment as well as the motion to intervene of the NRA, pending decision in the Supreme Court case.

On September 18, 2008 the Ohio Supreme Court announced its decision in the *Clyde case*, ruling that the local firearm ordinance under consideration was unconstitutional, including within its opinion the statement that “[s]imply put the General Assembly, by enacting R.C. 9.68(A), gave persons in Ohio the right to carry a handgun unless federal or state law prohibits them from doing so. . . [a] municipal ordinance can not infringe on that broad statutory right.” *Id.* at ¶ 20.

On January 2, 2009, the trial court in this case, entered its journal entry of final judgment, ordering that pursuant to the decision of the Ohio Supreme Court in *Ohioans for Concealed Carry v. Clyde*, that R.C. 9.68 is constitutional and does not violate the Home Rule Amendment of the Ohio Constitution, that the General Assembly did not abuse its power in enacting R.C. 9.68 nor did the enactment violate the single subject rule.

Subsequent to the entry of final judgment Cleveland filed its notice of appeal on January 9, 2009, CA No. 9266. The Eighth Appellate District released its decision and opinion on the appeal in November of 2009, reversing the decision of the trial court, and finding that R.C. 9.68

was not a general law of the state, that it unconstitutionally attempted to limit municipalities home rule police powers, and that the enactment of R.C. 9.68 violated the separation of powers doctrine espoused by the Ohio Constitution.

FACTS

Relevant facts of the case primarily concern the filings of the parties as stated in the Statement of the Case. The parties filed cross-motions for summary judgment in the trial court predicated on no material issues of fact.

Without significant factual issues, and none of note in dispute, the factual circumstances of the present case are principally contextual. However, in that regard, amicus rejects the statement of facts previously provided in Cleveland's merit brief filed in the Eighth District Appeal to the extent they are subjective and argumentative, in particular the statement that R.C. 9.68, jeopardizes the safety and welfare of Cleveland's citizens.

Cleveland, in stating its position, has entirely neglected the safety and welfare benefits that the right to keep and bear arms provides to law abiding citizens in urban areas such as the City of Cleveland and the substantial risk such citizens face by the restrictions Cleveland places on their ability to personally defend their lives and property. In support, amicus cites to pages 16 through 18 of the appellate court merit brief of the amici curiae Legal Community Against Violence, et al., purportedly filed to support Cleveland's positions in the Eighth District appeal, but in fact demonstrative of the substantially higher rate of violent crime perpetrated in the City of Cleveland compared to other areas of the state, despite decades of significant restrictions on firearm ownership and possession within the city.

Similarly, the enactment of concealed carry statutes in Ohio, and in the majority of states of the Union as well,¹ demonstrates that the attempt to provide public safety by restrictive firearms ordinances, such as Cleveland has enacted, has been recognized as ineffective, and that public safety is in fact enhanced, rather than being imperiled, by permitting law-abiding citizens the means to defend themselves, their families, and property from the kind of crimes cited in the statistics noted above. Those statistics reveal that citizens, both residents of Cleveland and those visiting or travelling through, are at a much higher risk in urban environments, despite the restrictive municipal firearms regulations purportedly adopted to further public safety.

APPLICABLE STANDARDS

The Home Rule Amendment and R.C. 9.68

The central issue of the case before the bar is whether Revised Code Section 9.68 takes precedence over municipal ordinances regulating firearms or whether, under the provisions of the Home Rule Amendment, the statute is unconstitutional in prohibiting municipalities from enacting ordinances regulating firearms which exceed the limitations provided in the statute.

The Home Rule Amendment, Ohio Constitution. Art. XVIII , Section 3, states:

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.

R.C. 9.68 provides:

(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

¹ As of 2007, forty-six states allowed the carrying of concealed weapons in some form, Baldwins Oh. Prac Crim L § 106.2 (2007).

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.

The Canton Test

The Ohio Supreme Court, in *Canton v. State*, 95 Ohio St.3d 149, 2002-Ohio-2005, set forth the three-part test to determine whether a provision of a state statute takes precedence over a municipal ordinance. A state statute takes precedence over a local ordinance when (1) the ordinance is in conflict with the statute, (2) the ordinance is an exercise of the police power, rather than of local self-government, and (3) the statute is a general law. *Id.* at ¶9. The Court further stated that to constitute a general law for purposes of home-rule analysis, a statute 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) set forth 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. *Id.* at ¶21.

ARGUMENT

This Court, in *Ohioans for Concealed Carry, Inc. v. Clyde*, 120 Ohio St.3d 96, 2008-Ohio-4605; clearly resolved the issues presented in this case as demonstrated by the aforementioned statement that “[s]imply put, the General Assembly, by enacting R.C. 9.68(A), gave persons in Ohio the right to carry a handgun unless federal or state law prohibits them from doing so . . . [a] municipal ordinance cannot infringe on that broad statutory right.” *Id.* at ¶ 20. The statutory right referred to in that statement was not limited to the right to carry a handgun. R.C. 9.68 addressed regulation of all firearms, their components, and ammunition (with no specific mention of handguns), and this Court’s recognition that no municipal ordinance could infringe on that broad right was a definitive statement that R.C. 9.68 was a general law of this state, as it has been fundamental since the time of the enactment of Home Rule, that only a general law of this state could invalidate a conflicting municipal ordinance. The Eighth District’s assertion that this Court in *Clyde* did not hold that R.C. 9.68 was a general law, *City of Cleveland v State* (8th Dist.), No. 92663, 2009-Ohio-5968, ¶ 16, simply disregards that fundamental fact. If R.C. 9.68 was not a general law, this Court could not have invalidated Clyde’s municipal ordinance without overruling decades of precedent in Home Rule jurisprudence.

Amicus adopts the Propositions of Laws espoused in the Merit Brief of the State of Ohio filed in this case (“State’s Merit Brief”):

Proposition of Law No. 1.

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.

- A. The appellate court erred by failing to consider the entire scope of firearm regulation applicable to the state.

The Eighth District, in its opinion, stated that it based its determination that R.C. 9.68 was unconstitutional on its application of the test established by this Court in *Canton v. State of Ohio*, 95 Ohio St.3d. 149, 2002-Ohio-2005. As more fully described in the State's Merit Brief, the Eighth District found that R.C. 9.68 failed the *Canton* test after determining that R.C. 9.68 was not a general law of the state. This Court in *Canton* stated that to constitute a general law for purposes of home-rule analysis, a statute 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) set forth 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 *Id.* at 21. The Eighth District concluded that the statute failed prongs (1), (3), and (4) of the above test, conceding that it met the second criteria, i. e. applying to all parts of the state and operating uniformly therein.

Amicus adopts the conclusions of the State in its Merit brief finding the Eighth District's analysis to be in error primarily due to its failure to comport with the precedents of this Court requiring a statute to be analyzed for purposes of a Home Rule determination in *pari materia* with other statutory enactments pertaining to like subject matter. Without repeating the full discussion of the issue as presented in the State of Ohio's recently filed Merit Brief, it is clear that in Ohio, firearms are subject to substantial regulation under federal and state statutory law. As an example, an area that the Eighth District described as being left unregulated in Ohio (*see*

infra) relates to assault weapons. However, Federal and Ohio statutes comprehensively restrict assault weapons and other fully automatic machineguns.² See 18 U.S.C. § 922(o); 26 U.S.C. § 5845(a)(6), 5861; R.C. 2923.11, R. C. 2923.17. Federal law temporarily regulated what it called "semiautomatic assault weapons," but that provision expired.³ Chapter XI, Subchapter A of the Violent Crime Control and Law Enforcement Act of 1994, P.L. 103-322, 108 Stat. 1796 (1994), codified at 18 U.S.C. §§ 921(a)(30), 922(v) (expired 2004). Generally speaking, semiautomatic firearms are commonly possessed by law-abiding persons for lawful purposes.⁴

Only by disregarding this Court's clear precedent of Home Rule analysis that requires a statute to be analyzed in *pari materia* with other relevant statutory law concerning the same subject matter and by analyzing R.C. 9.68 in a vacuum, can the conclusions of the Eighth District be supported. The Eighth District's analysis suffered from this same error in its consideration of each of the prongs of the general law test.

The discussion in the Eighth District's opinion regarding the statutory scheme of Sub. H.B. No. 347 ("H.B. 347"), in which R.C. 9.68 was enacted, is unpersuasive in its contention that the statutory scheme fails to comprehensively regulate because it left unregulated several

² See *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 804 (1988) (describing the M-16 selective fire rifle as the "standard assault rifle"); "Assault rifles are . . . selective-fire weapons Assault rifles . . . are capable of delivering effective full automatic fire" Harold E. Johnson, *Small Arms Identification & Operation Guide - Eurasian Communist Countries* (Defense Intelligence Agency 1980), p. 105.

³ A Department of Justice study concluded about that provision: "Such firearms are rarely used in crime. "Should it be renewed, the ban's effects on gun violence are likely to be small at best and perhaps too small for reliable measurement. AWs [assault weapons] were rarely used in gun crimes even before the ban." Christopher S. Koper, *An Updated Assessment of the Federal Assault Weapons Ban: Impacts on Gun Markets and Gun Violence, 1994-2003* (Report to the National Institute of Justice, U.S. Dep't. of Justice 2004), at 3, http://www.sas.upenn.edu/jerrylee/research/aw_final2004.pdf.

⁴ Constitutionally arms are those that "are commonly kept and used by law-abiding people for hunting purposes or for the protection of their persons and property, such as semi-automatic shotguns, semi-automatic pistols and rifles." *Rinzler v. Carson*, 262 So. 2d 661, 666 (Fla. 1972).

topics, i.e. (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 minors, (5) registration of handguns (6) registration and licensure of firearms dealers, (7) permit or licensing requirements before an individual purchases a handgun and (8) background checks before purchase or transfer of firearms. (Journal Entry and Opinion, p. 12). First, as noted above, it is not correct to say that all such topics have been left unregulated in the state. Moreover, the Eighth District failed to explain how or why, despite the omission of the same topics in the concealed carry statutory scheme, that scheme was nevertheless considered comprehensive by this Court in the *Clyde* decision. Ironically, the Eighth District, in its opinion, used the case of *American Fins. Servs. Assn. v. Cleveland*, 112 Ohio St.3d 170, 2006-Ohio-6043 (“AFSA”) as an example depicting a statutory scheme regulating lending practices which did constitute a comprehensive law. The irony is apparent in that the code sections involved, R.C. 1349.25 through 1349.37, only regulate a relatively minor segment of lending practices, i.e. lending practices for “covered loans” which are defined as:

“Covered loan” means a consumer credit mortgage loan transaction, including an open end credit plan, that involves property located within this state, is secured by the consumer’s principal dwelling, and meets either of the following criteria:

- (1) The annual percentage rate at consummation of the transaction exceeds the amount established under section 152(a) of the “Home Ownership and Equity Protection Act of 1994,” 108 Stat. 2190, 1602, as amended, and the regulations adopted thereunder by the federal reserve board, as amended.
- (2) If the total loan amount is twenty-five thousand dollars or more, the total points and fees payable by the consumer at or before loan closing exceed five per cent of the total loan amount. If the total loan amount is less than twenty-five thousand dollars, the total points and fees payable by the consumer at or before loan closing exceed eight per cent of the total loan amount.

It is difficult to envision how the statutory provisions covering such a limited aspect of lending practices, i.e. high interest rate, high fee, residential mortgage loans, leaving untouched

credit card lending, payday lending, equipment purchase lending, and substantial other areas of lending practice, can be considered to be comprehensive, yet firearm regulation that excepts the relatively few specific topics cited as examples by the appellate court, must be considered to fail the test of a comprehensive law.

In reviewing the Eighth District's explanation for its determination that R.C. 9.68 and related regulation are not comprehensive, it is hard to characterize the appellate court's conclusion as anything other than arbitrary.

B. Enactment of R.C. 9.68 by the General Assembly was a valid regulatory exercise of the State's police power intended to protect and define the constitutional rights of all persons within the State, and is consistent with history of federal and state legislative bodies in enacting statutes to protect such rights.

R.C. 9.68(A) declares that, other than as provided by the Constitutions and Laws of the United States and Ohio, a person may possess a firearm without further restriction. It also declares that such uniformity is necessary to protect a constitutional right as follows:

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.

That the right predated said Constitutions was made clear in the Ohio Constitution of 1802, the Bill of Rights of which began with the following preamble: "That the general, great and essential principles of liberty and free government may be recognized and forever unalterably established, we declare:" Ohio Const., Art. VIII (1802). The various guarantees followed, including the following: "That the people have a right to bear arms for the defense of themselves and the State" *Id.* § 20.

While the preamble was edited out of the Bill of Rights in the 1851 Constitution, it remains implicit as a statement of the nature of a declaration of rights. Thus, Ohio Const., Art. I, § 1, continues to provide: “All men . . . have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and seeking and obtaining happiness and safety.” Referring to this clause and the arms guarantee, *In re Reilly* (Ohio Com. Pl. 1919), 31 Ohio Dec. 364, 1919 WL 1022, *3, noted: “These rights are inalienable, and fundamental, and can not be abridged or restricted by a city council”

“Under Section 1, Article II of the Ohio Constitution, and with the exception of the municipal Home Rule Amendment contained in Section 3, Article XVIII of the Ohio Constitution, the police power of this state is entrusted to the Ohio General Assembly.” *Holiday Homes, Inc. v. Butler Cty. Bd. of Zoning Appeals* (1987), 35 Ohio App.3d 161. It would be difficult to think of a higher duty of the General Assembly than would be striking the proper balance between the protection of Bill of Rights guarantees and protecting the public safety. Indeed, the General Assembly clearly understood that regulating the bearing of arms according to statewide standards promotes – as the Constitution declares – “defense and security.”

Exclusive regulation of the right to bear arms for defense and security by Federal and State law, constitutional and statutory, provides uniform rules necessary for meaningful exercise of the right without overcriminalization of otherwise lawful conduct. Even under that standard, the right to bear arms is the only substantive right for which one may be arrested and tried, and one must prove that he or she was acting as a prudent person under the circumstances. See *Klein v. Leis* (2003), 99 Ohio St.3d 537, (upholding prohibition on carrying concealed weapon with “prudent person” affirmative defense). R.C. 9.68 was enacted to bring certainty to, and make

less hazardous, the exercise of this right. A patchwork of local laws interferes with this objective and leaves exercise of the right filled with uncertainties.

In opposition to the legislative declaration in R.C. 9.68(A), Cleveland argued below that it is for the judiciary, not the legislature, “to decide constitutional questions.” Cleveland’s Appellate Merit Brief, p.18. Yet not only is the legislature bound by the Constitution, it may recognize and enforce civil rights more expansively than the bare constitutional minimum.⁵ The issue here is not whether Cleveland’s ordinances violate the Ohio Constitution, but whether the legislature has passed a valid statute which precludes such ordinances.

Uniform state regulation contributes to knowledge allowing persons who exercise the right to be aware that they are acting lawfully and are not stepping on hidden local land mines. Having uniform rules facilitates exercise of this right which under state and federal law alone is subject to numerous restrictions.

In other states, legislation to regulate firearms in a manner consistent with the right to bear arms has been held to displace local ordinances. *Ortiz v. Commonwealth* (1996), 545 Pa. 279, 286, 681 A.2d 152, 156, held that, in a home-rule state, an assault weapon ban ordinance was preempted by state law as a matter of statewide concern. The court rejected the city’s claim that the state firearms law was not uniform, noting that “the act limiting municipal regulation of firearms and ammunition, applies in every county including Philadelphia.” *Id.* at 285. Similar to that of Ohio, Pennsylvania’s Constitution guarantees “The right of the citizens to bear arms in defense of themselves,” and this affects the preemption analysis as follows:

Because the ownership of firearms is constitutionally protected, its regulation is a matter of statewide concern. . . . Thus, regulation of firearms is a matter of

⁵ See J. Nathanson, “Congressional Power to Contradict the Supreme Court’s Constitutional Decisions,” 27 Wm. & Mary L. Rev. 331 (1986); Comment, “When the Supreme Court Restricts Constitutional Rights, Can Congress Save Us?” 141 Univ. Pa. L. Rev. 1029 (1993).

concern in all of Pennsylvania, not merely in Philadelphia and Pittsburgh, and the General Assembly, not city councils, is the proper forum for the imposition of such regulation.

Id. at 287.

Doe v. Portland Housing Authority (Me. 1995), 656 A.2d 1200, 1203, holding that a state law “was enacted to reinforce the [right-to-bear arms] amendment and to ensure uniformity in the regulation of guns,” invalidated a municipal ordinance banning firearms in public housing. Similarly, *Schwanda v. Bonney* (Me. 1980), 418 A.2d 163, 166-67, rejected home-rule arguments and invalidated an ordinance restricting concealed-weapon licensees because “the need for uniform application of the concealed weapons law precludes local regulation resulting in such inconsistencies.”

City of Portland v. Lodi (1989), 94 Or. App. 735, 737-38, 767 P.2d 108, noted: “Cities are empowered under home rule to enact ordinances that punish the same conduct that is punished by state criminal law. . . . The limitation on their power is that ordinances cannot conflict or be incompatible with state statutes.” The ordinance was held invalid on the basis that “the statutory policy has been to preserve broadly the right to bear arms Thus the Portland ordinance prohibits an act that the statute permits” *Id.* at 438.

In another home rule state, a uniform state law establishing the places where a person with a license to carry a concealed pistol may or may not carry such firearm was held to preclude a local ordinance prohibiting possession of a firearm in municipal buildings. *Michigan Coalition for Responsible Gun Owners v. City of Ferndale* (2003), 256 Mich. App. 401, 414, 662 N.W.2d 864, 872 (“the Legislature made a clear policy choice to remove from local units of government the authority to dictate where firearms may be taken”).

California has no arms guarantee in its constitution, but it has “state laws allowing private citizens to possess handguns for self-protection and other lawful purposes” which were displaced by a local handgun ordinance. *Fiscal v. City & County of San Francisco* (Cal. App. 1 Dist. 2008), 158 Cal. App.4th 895, 909, 70 Cal. Rptr.3d 324. The ordinance was not saved by that state’s home-rule guarantee for the following reasons:

These laws of statewide application reflect the Legislature’s balancing of interests—on the one side the interest of the general public to be protected from the criminal misuse of firearms, on the other, the interests of law-abiding citizens to be able to purchase and use firearms to deter crime, to help police fight crime, to defend themselves, and for hunting and certain recreational purposes. If every city and county were able to opt out of the statutory regime simply by passing a local ordinance, the statewide goal of uniform regulation of handgun possession, licensing, and sales would surely be frustrated.⁶

Id. at 919.

Local ordinances have been held in conflict with comprehensive state-wide firearms statutes in a variety of other contexts.⁷

In sum, the right to bear arms for defense and security is constitutionally protected and is thus a matter of statewide concern. The General Assembly, in enacting R.C. 9.68, has enacted general law which provides uniform rules for exercise of this right consistent with and to

⁶ See also *Doe v. City & County of San Francisco* (1982), 136 Cal. App.3d 509, 512, 186 Cal. Rptr. 380, 385 (in home-rule state, “in an area of statewide concern a local legislative body may act only if the state has not revealed an intention to occupy the field to the exclusion of all local regulation”; state preempted local ordinance prohibiting handguns).

⁷ *Dwyer v. Farrell* (1984), 193 Conn 7, 14, 475 A.2d 257 (“the [firearms] ordinance effectively prohibits what the state statutes clearly permit” and was thus void); *Montgomery County v. Maryland* (1985), 302 Md. 540, 548-49, 489 A.2d 1114, 1118 (statute preempted local laws restricting the carrying or transport of loaded handguns); *City of Chicago v. Haworth* (1999), 303 Ill.App.3d 451, 708 N.E.2d 425, 429, 236 Ill.Dec. 839 (“the City’s [handgun] registration requirement places an unreasonable burden on private detectives who live outside Chicago”; home rule held not to preclude preemption of local law); *NRA v. City of South Miami* (Fla. 3d DCA 2002), 812 So.2d 504, 506 (gun storage ordinance preempted); *HC Gun & Knife Shows, Inc. v. City of Houston* (5th Cir. 2000), 201 F.3d 544, 548 (storage and registration ordinance preempted).

promote public safety. The General Assembly has a full right to do so under the constitution of the state, and the Home Rule Amendment has no power to invalidate such a general law.

C. The appellate court erroneously equated regulation solely with prohibition, failing to consider the role of regulation in broadly enabling civil rights

It is apparent from the Eighth District's opinion that the court appears to equate regulation only with prohibition or restriction, and neglects the role of regulation in enforcing rights, and enabling citizens to enjoy the benefit of such rights. Furthermore, under this method of analysis the General Assembly would have no power to broadly enforce constitutional rights as a general law.

In considering the role and effect of R.C. 9.68, the parallels to civil rights enactments of the General Assembly are readily apparent. R.C. 2921.45 states that

No public servant, under color of his office, employment, or authority, shall knowingly deprive, or conspire or attempt to deprive any person of a constitutional or statutory right.

R. C. 4112.02 (G) states that

it shall be an unlawful discriminatory practice] [f]or any proprietor or any employee, keeper, or manager of a place of public accommodation to deny to any person, except for reasons applicable alike to all persons regardless of race, color, religion, sex, military status, national origin, disability, age, or ancestry, the full enjoyment of the accommodations, advantages, facilities, or privileges of the place of accommodation.”

The simple language of those statutes would clearly fail the test as the Eighth District applied it below to R.C. 9.68. Despite the sweeping breadth of the civil rights statutes, a municipality could complain that they do not embody a comprehensive scheme of regulation because there is no specific detailed state regulation dealing with a particular constitutional or statutory right that a particular ordinance might impair (such as an ordinance affecting, e.g. only night clubs, or barber shops, or delineating a particular activity as discriminatory), and thus R.C.

2921.45 and R. C. 4112.02 (G), if judged by a standard as used by the Eighth District, by failing to specifically address all conceivable circumstances, could not be considered part of a comprehensive enactment.

The viewpoint the appellate court seeks to impose on the question has no logical bearing on statutes, like R.C. 9.68, which seek to empower the constitutional rights of citizens, and protect those rights from infringement by ordinances which a municipality enacts under the shield of Home Rule.

The Eighth's district's interpretation of the concurrence of Justice O'Connor in *Cincinnati v. Baskin*, 112 Ohio St.3d 279, 2006-Ohio-6422, cited by the Eighth District (pp. 14-15 of its Journal Entry and Opinion), in which the Justice states Ohio has no comprehensive scheme of firearm regulation, appears to be based upon the same limited viewpoint of what constitutes regulation, in that the examples cited from other states appear to primarily address restrictive and prohibitory regulation. Notably, the concurrence was issued before the enactment of R.C. 9.68 which elucidated the General Assembly's determination that firearm regulation should be uniform throughout the state (and limited), and removed any doubt that the General Assembly had addressed, and sought to govern, the field comprehensively, addressing both restrictions and rights.

It should also be noted that Justice O'Connor qualified her remarks as to whether Ohio's statutory firearm regulation was comprehensive by noting her conclusions referred to the state of regulation as it stood prior to enactment of R.C. 9.68.⁸ It appears that Justice O'Connor did

⁸ Justice O'Connor noted that her analysis relied on the state of the law at the time of the *Baskin* opinion and prior to the enactment of R.C. 9.68, and intimated that action of the legislature intended to preempt the area of firearm regulation at the time of *Baskin* could change her conclusions

recognize that enactment of a statute limiting the extent of local regulation could, in effect, fill in the blanks she discerned in firearm regulation by specifically stating that no further restriction should apply and thereby remove doubt as to whether the legislatures' firearm regulation was comprehensive for purposes of Home Rule analysis.

To argue that regulation that seeks to empower the rights of citizens is not a comprehensive statutory scheme because it is broadly worded ignores the inherent differences between regulation that promotes rights versus regulation that restricts or curtails such rights.⁹ Legislation that empowers rights must speak broadly to prevent erosion of such rights by real and presumed differentiation intended to circumvent the regulation, whereas legislation that is prohibitive or restrictive needs specificity and particularity to be enforceable and avoid vagueness with respect to the conduct to be controlled.

The General Assembly, just as does Congress, has the power to enact statutes which prohibit governmental bodies, and their agents, from impairing the rights of citizens established by constitutional provisions, as jurisprudence involving federal and state civil rights laws attests. To allow municipalities to invalidate statutes within their boundaries, because they speak broadly

As noted above, Ohio is one of six states that lack a statute preempting regulation in the area of firearms regulations. The legislature has never made clear that it intends to preempt local ordinances concerning firearms, and as long as the local regulations are reasonable and are not in direct conflict with existing Ohio law, this court should not infer preemption. If the legislature intends to preempt any other area of firearms regulation beyond the concealed-firearm provision, it needs to do so explicitly. As the legislature has neither expressly nor implicitly preempted the area of firearms regulation and the local ordinance and state statute may coexist, I find that there is no conflict between Cincinnati Municipal Code 708-37 and Ohio state law.FN23

FN23. This court is aware of the current proposed legislation that would purport to preempt all local firearms ordinances. Any action by the General Assembly would be prospective, and that proposed legislation, therefore, has no influence on this case.

Cincinnati v. Baskin, 112 Ohio St.3d 279, 2006 -Ohio- 6422 at ¶ 58.

⁹ See the 10th Amendment to the United States Constitution, would it be argued that it is not comprehensive?

of rights, rather than attempt to perceive and describe every instance and circumstance in which a right of citizen could be impaired by a local regulation, would cripple the ability of the General Assembly to protect the rights of its citizens.

The General Assembly, in enacting R.C. 9.68, determined that regulating firearms through uniform laws throughout the state is in the best interests of its citizens, and appropriately recognized the federal and constitutional rights the statute seeks to protect. It is clear that the statute was enacted to provide statewide, a regulatory scheme that comprehensively stated what was to be permitted, and what was to be prohibited, in total, with respect to the specific activities involving firearms addressed in the statute. In doing so, it is clear that the intent of the General Assembly was to expand law enforcement and security from being a function exercised solely by the police to being a wider function exercised by good citizens who are on the front lines of protecting themselves from being victims of crime and violence. The General Assembly decided that a balance of public security and constitutional rights precluded a patchwork of local regulations which interfered with these interests by criminalization of conduct which should be lawful statewide.

The statute, in *pari materia* with the regulation it incorporates by reference, comprehensively covers the entire field with respect to the activities it addresses, it provides for citizens the extent to which their rights may be controlled, limited or impaired, and where they may be exercised free of restriction. It is comprehensive in every respect in that it says to municipalities, in effect, that with respect to firearm regulation, “that you can do this much, but beyond this, the rights of all persons are protected.”

D. R.C. 9.68, and the related state and federal firearm regulation it countenances, exercise the police power of the state and do not purport only to limit legislative power of municipalities

R.C. 9.68 and the federal and state regulation it refers to, and essentially incorporates, establish a uniform statewide regulatory scheme that is unquestionably an exercise of police power, concerned with rights and responsibilities of individuals in this state, and not intended merely to limit legislative power of a municipality.

1. The General Assembly may validly exercise its police power to authorize, or even require, citizens to possess firearms to promote public safety notwithstanding contrary provisions in ordinances.

The state has a fundamental interest in law enforcement, including choice of citizen and peace officer participation in promoting security, that may not be overridden by a locality. The legislature has determined that authorizing citizens to possess firearms for their defense and security free of inconsistent local ordinances promotes the public safety. This is hardly a counterintuitive proposition, given that the arms guarantees under the State and Federal constitutions presuppose as much. But the legislature could have gone further and required citizens, or some of them, to possess firearms in defined circumstances, and no ordinance could contradict that state policy.

Cleveland argued below that the legislature has no power to pass a law prohibiting localities from banning firearms, for instance, that it chooses to call “assault weapons.” Cleveland’s Appellate Merit Brief, p.20. The legislature not only has such power, it has the further power to require persons to possess such firearms. Ohio Const., Art. IX, § 1, provides: “All citizens, residents of this state, being seventeen years of age, and under the age of sixty-seven years, shall be subject to enrollment in the militia and the performance of military duty, in such manner, not incompatible with the Constitution and laws of the United States, as may be

prescribed by law.” The legislature may require that citizens provide their own arms, as it did in 1803 when the Ohio became a State, or it could provide the arms to the citizens.¹⁰

The legislature could also require citizens other than the militia to be armed to promote the public safety. Indeed, the provisions at issue evolved in part from a historical tradition explained in *Blackman v. City of Cincinnati* (1941), 66 Ohio App. 495, 498, aff’d., (1942), 140 Ohio St. 25, as follows:

From earliest times, an officer charged with the duty of preserving the peace and arresting offenders has had the authority to call upon bystanders to assist him in so doing. . . . The officer always had the right to call to his aid the posse comitatus. . . . It was one of the trinoda necessitas at common law. On call, it was the citizen who was obliged to report armed, appareled, and with horse. . . . Hue and cry, watch and ward and posse comitatus were closely related, and were all a part of the one duty to help defend the realm.¹¹

Id. at 498.

The *Blackman* Court of Appeals added: “The officer may call upon the whole community under such circumstances. This common-law obligation of citizens is a part of the statute law of this state.” *Id.* 499, citing General Code § 12857. As noted by the Supreme Court in *Blackman*, that statute “impose[d] the duty upon an individual, when requested, to render personal services

¹⁰ See *Houston v. Wright*, 15 Ohio St. 318, 322-23, 1864 WL 37 (Ohio 1864) (“The general assembly in its ample discretion as to the ‘manner’ in which military duty shall be performed, has seen proper primarily to require its performance in a volunteer organization”); *Sargent v. Moore*, 12 Ohio Dec. Reprint 511, 1855 WL 3262, *3 (Ohio Super. 1855) (“The commandant of each brigade shall have the right to distribute the arms assigned to his brigade, to such uniformed companies as he may think most entitled thereto”); *Witt v. Madigan*, 14 Ohio C.D. 263, 1902 WL 1260, *1 (Ohio Cir. Ct. 1902) (noting statute that provided for authority “to organize, arm and equip an independent infantry company . . . to be known as the Cleveland City Guards” to be called out “in case of insurrection or riot”; held to be part of the state militia).

¹¹ See *State ex rel. Hayes v. Davies* (Ohio Cir. Ct. 1905), 17 Ohio C.D. 601, 1905 WL 1140, *3 (“hue and cry shall be raised upon the felons, and they that keep the town shall follow with hue and cry with all the town and the towns near”) (quoting 4 Blackstone, *Commentaries* *293).

with the means at his command in assisting a peace officer to apprehend or subdue a suspected or convicted criminal” 140 Ohio St. at 27. See current R.C. § 2921.23.

Finally, *Blackman* noted “the primary purpose of government to preserve the peace and punish disturbers thereof” 66 Ohio App. at 499. In addition to assisting law enforcement, citizens have a constitutional right to bear arms for their own defense and security. The legislature is entitled to set uniform, state-wide rules to promote the public safety through participation by both peace officers and citizens.

Klein v. Leis (2003), 99 Ohio St.3d 537, 541, upheld a previous version of the law on the carrying of handguns as follows: “The General Assembly has determined that prohibiting the carrying of concealed weapons helps maintain an orderly and safe society. We conclude that that goal and the means used to attain it are reasonable.” *Id.* at 541. Through passage of R.C. 9.68 and 2923.126, the General Assembly has determined, inter alia, that the carrying of concealed weapons by qualified licensees, subject to the specified exceptions but not subject to municipal regulation, helps maintain an orderly and safe society. As in *Klein*, that goal and the means used to attain it are reasonable.

Wholly aside from the above reasons, the legislature may pass uniform, state-wide firearms laws so that citizens will be subject to consistent rules of criminal conduct and not be subject to vague and unknown local restrictions. *Arnold v. Cleveland* (1993), 67 Ohio St.3d 35, upheld an “assault weapon” ordinance on other grounds but did not consider general law-home rule issues. Assault weapon ordinances with similar definitions as that of Cleveland were held unconstitutionally vague in *Springfield Armory, Inc. v. City of Columbus* (6th Cir. 1994), 29 F.3d 250, and *Peoples Rights Organization, Inc. v. City of Columbus* (6th Cir. 1998), 152 F.3d 522. The provisions at issue have the valid purpose of instituting a clear and comprehensive

firearm regulatory scheme without constitutional defects. See *State v. Ulrich* (1984), 17 Ohio App.3d 182, 186, (the legislature is “presumed to be aware of, and to legislate in light of, the construction given to an area of law by other state courts”).

Due process of law requires notice of the law.¹² While state criminal law is accessible to residents and nonresidents alike, local criminal ordinances are difficult or impossible to locate, particularly by nonresidents. “To enforce such [an ordinance] would be like sanctioning the practice of Caligula who ‘published the law, but it was written in a very small hand, and posted up in a corner, so that no one could make a copy of it.’” *Screws v. United States* (1945), 325 U.S. 91, 96, quoting Suetonius, *Lives of the Twelve Caesars*, p. 278.

In short, the general law of the state includes the right of citizens to possess and carry firearms for defense and security pursuant to state regulations. The General Assembly concluded that the laws at issue were necessary to promote public safety, in the same manner as it enacts legislation empowering law enforcement to protect public safety. A municipality has no authority to override such general law passed under the General Assembly’s police power.

2. The General Assembly enacted R.C. 9.68 in exercise of its police powers and such enactment did not purport only to limit legislative power of a municipal corporation to set forth police, sanitary or similar regulations.

As demonstrated above, the enactment of R.C. 9.68 fulfilled a valid police power objective of the General Assembly. In no way was such enactment intended, nor did it in effect, purport solely to limit the legislative power of municipalities contrary to Home Rule.

¹² “[B]ecause we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.” *Grayned v. City of Rockford* (1972), 408 U.S. 104, 108.

As an illustration, probably the best example of a statute intended to limit legislative power of a municipality rather than establish police power regulations was discussed in this Court's opinion in *Linndale v. State* (1999) 85 Ohio St.3d 52. In that case the statute under review had literally no regulatory provisions whatsoever, it said nothing about permissible speeds, safe operation, standards of maintenance or required equipment on vehicles, or any other provision that could be considered and exercise of police power, only that a municipality was precluded from issuing speeding and excess weight citations on interstate freeways where (1) the locality had less than eight hundred eighty yards of the interstate freeway within its jurisdiction, (2) when local law enforcement officers must leave their jurisdiction to enter the freeway, and (3) the primary purpose of local law enforcement officers to enter onto the interstate system was to issue citations for speed or weight violations. *Id.* at 53. Clearly that statute had no "regulatory purpose" as it said nothing about how persons must operate, equip, or maintain vehicles on state highways and was intended expressly to limit powers of municipalities in a way that was offensive to Home Rule in letter and spirit. The intent and spirit of R.C. 9.68, on the other hand, is all about the rights and responsibilities of persons in this state as they relate to firearms, specifically how an individual may exercise his or her rights to own, possess, purchase, sell, transfer, transport, store, or keep any firearm, part of a firearm, its components, and its ammunition, and confirms the General Assembly's determination of the necessity for uniform regulatory scheme addressing such matters.

E. R.C. 9.68, and the related state and federal firearm regulation it countenances, prescribe rules of conduct upon citizens generally

Lastly, it is clear that R.C. 9.68 and the state's overall regulatory scheme prescribe a rule of conduct on citizens generally, establishing the extent of regulation to which the citizens must conform while at the same time, protecting their constitutional right to bear arms under the state

and federal constitutions. R.C. 9.68 specifically enables those rights by preventing their erosion by an inconsistent intrastate patchwork of local ordinances.

Proposition of Law No. 2.

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

The Eighth District stated that R.C. 9.68(B), providing that courts shall award costs and “reasonable attorney’s 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” is offensive for two reasons, first, in that it violates separation of powers by usurping judicial discretion in awarding attorney’s fees and costs and second, in that it invites unwarranted litigation and attempts to coerce municipalities into repealing or refusing to enforce longstanding firearm regulations.

The States Merit Brief, pp. 17-20 clearly elucidates the error in the appellate court’s reasoning on this issue, as well as the lack of any authority for such novel positions. Statutory mandates for the payment of attorney fees and costs are not uncommon in state and federal statutory schemes but are rather unremarkable features generally. Perhaps the best known is 42 U.S.C. § 1988(b), which provides for fee awards to prevailing parties in civil rights cases. Far from questioning its constitutionality, the courts routinely apply that provision. E.g., *Perdue v. Kenny*, 2010 WL 1558980, *5 (U.S. 2010) (“Congress enacted 42 U.S.C. § 1988 in order to ensure that federal rights are adequately enforced”); *id.* at 10 (“Section 1988 serves an important public purpose by making it possible for persons without means to bring suit to vindicate their rights.”).

Localities are not immune from paying attorney’s fees when they violate rights. “A prevailing party should be allowed attorney fees unless ‘special circumstances’ would render awarding fees unjust.” *Thomas v. Cleveland*, 176 Ohio App.3d 401, 407, 892 N.E.2d 454 (2008)

(fee award proper where Cleveland's seizure of vehicles violated due process rights of owners). Cleveland should not be immune from fee awards when it violates the rights of firearm owners protected by State law.¹³ See *Kellogg v. City of Gary*, 562 N.E.2d 685 (Ind. 1990) (upholding attorney's fee award under § 1988 where city violated rights under state law which "recognize[d] a liberty or property interest in carrying a handgun with a license").

Certainly, under the viewpoint espoused by the Eighth District, state and federal civil rights laws would have been considered similarly "offensive" and "coercive" in eliminating discriminatory ordinances of past years.

CONCLUSION

In *State v. Williams* (2008), 88 Ohio St.3d 513 this Court stated that "statutes enacted in Ohio are presumed to be constitutional" and that a challenger to their constitutionality has the burden of "proving beyond a reasonable doubt that [the statute in question] is clearly unconstitutional." *Id.* at 521. The record below clearly demonstrates that Cleveland has failed to meet such a burden. Amicus Curiae, the National Rifle Association of America, Inc., respectfully requests that the judgment of the appellate court be reversed, in recognition of the validity of the General Assembly's enactment of R.C. 9.68 and the constitutionality of such statute.

¹³ As explained in *Cleveland v. Fulton*, 178 Ohio App.3d 451, 459, 898 N.E.2d 983 (2008):

[T]he Second Amendment, although not unfettered, guarantees the individual right of every American to possess and carry weapons unconnected to militia service. *District of Columbia v. Heller* (2008), – U.S. –, 128 S.Ct. 2783, 171 L.Ed.2d 637, paragraph one of the syllabus.

This court certainly understands and shares the trial court's concerns about dangerous guns in our society and the damage and violence they can cause. That does not entitle the city, however, to deprive a person of his private property without due process of law. . . .Fulton's unregistered handgun not being contraband per se, he was entitled to have his property returned to him

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of May, 20 10, a copy of the foregoing was duly served by first class mail, postage prepaid upon Counsel of Record for the City of Cleveland; Gary S. Singletary, Esq., Assistant Director of Law, City of Cleveland at City of Cleveland, Department of Law, 601 Lakeside Avenue, Room 106, Cleveland, Ohio 44114-1077; and Counsel of Record for the State of Ohio, Benjamin C. Mizer, Soliciter General, at 30 East Broad Street, 17th Floor, Columbus, Ohio 43215.

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