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 District
v.	:	
STATE OF OHIO,	:	Court of Appeals Case No. 92663
Defendant-Appellant.	:	

REPLY BRIEF OF DEFENDANT-APPELLANT STATE OF OHIO

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INTRODUCTION

The General Assembly in R.C. 9.68 established a clear division of authority for firearm regulation in Ohio. It left untouched the power of municipalities to restrict the discharge of firearms within their borders—who may fire a gun, what type of gun may be fired, and where it may be fired. But in the same breath, the General Assembly prohibited municipalities from regulating the ownership and possession of firearms. The legislature expressed concern that, absent a "uniform law[] throughout the state," law-abiding Ohio gun owners would face a confusing patchwork of city-specific licensing requirements, possession restrictions, and criminal penalties whenever they entered a new jurisdiction.

The City of Cleveland and their amici now attack the constitutionality of R.C. 9.68, claiming that the law infringes on municipal home rule authority and that it violates the separation-of-powers doctrine. Neither ground has merit.

As to the first claim, the City wrongly casts R.C. 9.68 as an unconstitutional attempt by the General Assembly to preempt municipal firearm regulations. It is true that a naked "statement by the General Assembly of its intent to preempt a field of legislation . . . does not trump the constitutional authority of municipalities to enact legislation." *Am. Fin. Serv. Ass'n v. City of Cleveland* ("*AFSA*"), 112 Ohio St. 3d 170, 2006-Ohio-6043, ¶ 31. But such "preclusionary language . . . can act to bar municipal legislation if it is part of a comprehensive legislative scheme of regulation." George D. Vaubel, Municipal Home Rule in Ohio (1995), 22 Ohio N.U.L. Rev. 143, 199. The Court has applied this distinction without difficulty for decades, affirming the State's authority to enact broad legislative schemes that prohibit local regulation of watercraft, hazardous waste, private detective agencies, consumer lending, and the like.

The Court should affirm R.C. 9.68 for the same reason. The statute here meets all parts of the *Canton* test: (1) It is one component of a statewide and comprehensive legislative scheme

regulating firearms; (2) that scheme 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. *City of Canton v. State*, 95 Ohio St. 3d 149 2002-Ohio-2005, ¶ 21. Because R.C. 9.68 is a "general law" of the State, it displaces the City's firearm ordinances.

In response, the City and their amici complain repeatedly that Ohio's firearm laws do not go far enough. But the fact that Ohio does not restrict gun ownership and possession to the degree advocated by the City and their amici is irrelevant. Under the *Canton* test, a "general law" does not need to be a *burdensome* law. It simply must address the regulated subject matter in a comprehensive way. Ohio's body of firearms laws, of which R.C. 9.68 is a part, does just that. It speaks to firearm sales, purchases, ownership, possession, discharge, licensing, and penalties, and therefore satisfies the *Canton* inquiry.

As to the second claim, the City argues that the General Assembly's decision to award attorney fees and costs to prevailing plaintiffs in R.C. 9.68(B) invades the province of the judiciary. This novel theory has no support. The judiciary's inherent function is "to hear and determine a controversy between adverse parties." *Fairview v. Giffee* (1905), 73 Ohio St. 183, 190. Because awards of attorney fees and costs occur only *after* a court adjudicates the controversy, these awards do not (and logically cannot) impair that judicial function. They are entirely "a matter of legislative concern." *Sorin v. Warrensville Hts. Sch. Dist. Bd. of Educ.* (1976), 46 Ohio St. 2d 177, 180.

As shown by the number of amici in this case, a vigorous debate over the legitimacy and effectiveness of gun control is occurring in this State. That debate will only intensify now that

the U.S. Supreme Court has extended the Second Amendment to the States and their political subdivisions. See *McDonald v. City of Chicago* (June 28, 2010), No. 08-1521, 2010 U.S. Lexis 5523. But this case is about something much simpler: the General Assembly's well-established authority to promulgate one comprehensive, uniform body of regulations for all Ohioans. And this Court has long authorized the legislature to exercise "th[at] power—despite the Home Rule Amendment"—so long as it does so "within the existing framework of the *Canton* test." *AFSA*, 2006-Ohio-6043, at ¶¶ 27, 30. Because R.C. 9.68 falls within that framework as a "general law" of the State, the City's firearm ordinances must give way.

ARGUMENT

A. A state law that bars municipal regulation does not violate Home Rule if it is part of a comprehensive, legislative scheme.

No one disputes the City's assertion that "[a]n expressed intention by the General Assembly to preempt [municipal ordinances] will not 'trump' the City's constitutional home rule authority." City Br. at 9. This Court has explained that a legislative "express[ion] [of] intent to preempt municipal regulation and occupy the field of regulation" is not enough to extinguish a municipality's constitutional right "to enact legislation pursuant to the Home Rule Amendment." *AFSA*, 2006-Ohio-6043, at ¶ 31. The State therefore agrees that the language of R.C. 9.68, standing alone, cannot displace the City's firearm ordinances.

But R.C. 9.68 does not stand alone; it is one part of a comprehensive legislative landscape. And this Court has long affirmed the constitutionality of state laws that preclude municipal legislation when those laws are part of a broader regulatory program. In *State ex rel. McElroy v. City of Akron* (1962), 173 Ohio St. 189, for instance, the Court rejected a home rule challenge to a statute that prevented municipalities from imposing licensing requirements and fees on boaters. That statute was one of many provisions in the Ohio Watercraft Act, R.C. Chapter 1547,

regulating "watercraft operat[ion] on waters of this state." *Id.* at 190. The Court held that the General Assembly had authority to pass that Act—and preclude all related municipal legislation—because the "matter ha[d] become of such general interest . . . so as to require uniform statewide regulation." *Id.* at 194.

The Court has consistently followed that approach—upholding state laws that proscribe municipal lawmaking when they are part of a broad legislative scheme—for fifty years. In *Clermont Environmental Reclamation Co. v. Wiederhold* (1982), 2 Ohio St. 3d 44, the Court rejected a challenge to a statute that prohibited municipalities from "requir[ing] any additional zoning or other approval, consent, permit, certificate, or other condition for the construction or operation of a hazardous waste facility" beyond that mandated by state law. *Id.* at 46 (quoting R.C. 3734.05(D)(3)). Although this law tied the hands of municipalities, the Court found no home rule violation because the law was one component of a "comprehensive [statutory scheme] enacted to insure that such facilities are designed, sited, and operated in the manner which best serves the statewide public interest."[1] *Id.* at 48.

Likewise, in *Ohio Association of Private Detective Agencies, Inc. v. City of North Olmsted* (1992), 65 Ohio St. 3d 242, the Court rejected a home rule challenge to R.C. 4749.09, which barred municipalities from licensing private investigators and security guard providers. Although the statute "prohibit[ed] a municipality from exercising a local police power," the

[1] The City incorrectly claims that *Fondessy Enterprises, Inc. v. Oregon* (1986), 23 Ohio St. 3d 213, undercuts *Clermont*. Rather, the *Fondessy* Court reaffirmed *Clermont*'s holding that R.C. 3734.05 is a general law. *Id.* at 214. It then reviewed R.C. 3734.05(D)(3) under a conflict analysis and concluded that the statutory language did not actually prohibit municipal legislation on the issue under review. *Id.* at 217. Therefore, the municipality could continue to enforce its ordinance. *Id.* at 218. At no point did the Court revisit its determination in *Clermont* that R.C. 3734.05(D)(3)'s limitation on municipal lawmaking was a constitutional exercise.

Court found no infringement on the city's home rule powers because "R.C. Chapter 4749 in its entirety does provide for uniform statewide regulation of security personnel." *Id.* at 245.

Finally, in *AFSA*, the Court rejected a home rule challenge to a statute that banned all municipal regulation of consumer loans: "The state solely shall regulate the business of originating, granting, servicing, and collecting loans and other forms of credit in the state." R.C. 1.63(A). After reviewing Ohio's predatory lending laws, R.C. 1349.25 through 1349.37, the Court held that "R.C. 1.63, considered in context as part of [this statutory scheme], is a general law" that "affects the [municipal] ordinances at issue." 2006-Ohio-6043, at ¶ 49.

McElroy, *Clermont*, *Ohio Detectives*, and *AFSA* all take the same approach. As Ohio's leading home rule scholar has observed, the Court "substain[ed] and enforce[d] the provision" at issue "because it was not solely a power-denying mechanism, but rather was part of a comprehensive regulatory scheme." George D. Vaubel, Municipal Home Rule in Ohio (1995), 22 Ohio N.U.L. Rev. 143, 199 (cited with approval in *AFSA*, 2006-Ohio-6043, at ¶¶ 27, 29, 33).

The State acknowledges that R.C. 9.68 prevents all municipal regulation of gun ownership and possession. But that fact alone does not establish an infringement on home rule. Because R.C. 9.68 "is part of a comprehensive legislative scheme of regulation" for firearms in Ohio, the statute is "a general law" that "act[s] to bar municipal legislation." Vaubel, Municipal Home Rule in Ohio, at 199.

B. R.C. 9.68 is a "general law" under *Canton* because it is part of a comprehensive legislative scheme that regulates firearm activities across Ohio.

The State, the City, and the amici all agree that resolution of this case turns on the *Canton* "general law" test. R.C. 9.68 will trump the City's firearm ordinances if (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 City and their amici, however, err in adopting the Eighth District's myopic application of that test. They isolate R.C. 9.68 from Ohio's other firearm laws and then attack it for not complying with *Canton*. A proper home rule inquiry, however, examines the entire regulatory scheme. And when that inquiry is undertaken, the result is clear: R.C. 9.68 is a "general law" of the State that prevails over the City's ordinances.

1. R.C. 9.68 is one component of a comprehensive legislative scheme.

As the State's merit brief cataloged, Ohio law currently touches 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. See State Merit Br. at 3-5. Ohio law also incorporates federal gun laws, R.C. 2923.22(C), which impose a host of additional regulatory burdens: licensing and record-keeping requirements for firearm dealers, background checks for firearm purchases, prohibitions on firearm transportation, and the criminalization of firearm possession by certain individuals. 18 U.S.C. § 921 *et seq*. By any objective measure, these laws collectively function as a "comprehensive statewide legislative regulation" of firearms under *Canton*'s first prong. *AFSA*, 2006-Ohio-6043, at ¶ 33.

The City and their amici urge the Court to ignore portions of this regulatory framework when conducting this inquiry, but they are wrong on all of them.

First, they ask the Court to disregard the State's incorporation of federal law, despite the Court's contrary approach in *AFSA*. Specifically, they say that "the State of Ohio cannot rely on

federal law to fill the gaps left by the Ohio Legislature." Englewood Br. at 6; City Br. at 20. But in *AFSA*, the Court noted in reviewing Ohio's consumer lending laws that Ohio expressly "incorporated parts of . . . the federal predatory-lending law[] into the Revised Code." *AFSA*, 2006-Ohio-6043, at ¶ 33. After evaluating both the state law *and* the federal law, the Court determined that the State had a "comprehensive statewide legislative regulation that relate[d] to all consumer mortgage lending." *Id.* Here, just as in *AFSA*, a state law that incorporates federal law must be considered in its entirety—including the federally derived aspects—for home rule purposes.

Second, the City and their amici mistakenly insist a "comprehensive legislative scheme" only can exist when "the regulations are either passed as part of the same legislative act, or as part of the same chapter of the Ohio Revised Code." Englewood Br. at 13; City Br. at 19. This Court's precedents say otherwise. Contrary to the first assertion, this Court has repeatedly examined the entire legislative scheme at issue—the older pre-existing statutes *and* the recent amendments—when assessing its comprehensiveness. See *Ohio Detectives*, 65 Ohio St. 3d at 24; *Clermont*, 2 Ohio St. 3d at 48; accord *State ex rel. Pratt v. Weygandt* (1956), 165 Ohio St. 463, 466 ("Statutes relating to the same matter or subject, although passed at different times and making no reference to each other, are *in pari materia* and should be read together."). And as to the second assertion, the Court has examined legislative schemes that spanned different code chapters. For example, *AFSA* held that the General Assembly had enacted a comprehensive consumer lending scheme even though the applicable provisions—R.C. 1.63 and R.C. 1349.25 through 1349.37—were codified in two different chapters. 2006-Ohio-6043, at ¶ 33.

Finally, the City and their amici attack the comprehensiveness of Ohio's firearm scheme by supplying lists of perceived "gaps." This endeavor is futile because a "comprehensive"

regulatory program need not regulate every aspect of the disputed conduct, nor must it regulate that conduct in a particularly invasive fashion. 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."); accord *Dayton v. State* (2d Dist.), 157 Ohio App. 3d 736, 2004-Ohio-3141, ¶ 89 ("[C]omprehensive does not mean 'perfect.'"). Otherwise, no state law could survive home rule scrutiny because a municipality could always hypothesize more regulations and restrictions that might have imposed. Rather, to satisfy *Canton*, the State must simply address the regulated subject matter in a comprehensive fashion. And it has done so here for firearms.

But even if the Court were to entertain the City's proffered lists, the City still would not prevail. Nearly all of the identified gaps are inventions of the Eighth District, the City, and their amici:

Possession and/or discharge of firearms	Prohibited in vessels, aircrafts, detention facilities, mental health facilities, liquor establishments, school zones, courthouses, state parks, motor vehicles, churches, habitation areas, public roads, private property, and the like. See State Merit Br. at 3-5. Localities may impose further restrictions on discharge within their borders. R.C. 9.68(A).
Possession of assault weapons	Automatic weapons, sawed-off-firearms, zip guns, semiautomatic weapons, military-style weapons, and other dangerous ordinances are banned. R.C. 2923.11, 2923.17; 18 U.S.C. § 922(a)(4).
Use of firearms by minors	No furnishing of handguns to individuals under the age of twenty-one and no furnishing of any firearms to individuals under the age of eighteen except for hunting, sporting, or educational activities. R.C. 2923.21.
Penalizing adults who negligently allow minors access to firearms.	Addressed by common law negligence action. See *Gay v. O.F. Mossberg & Sons, Inc.* (11th Dist.), No. 2008-P-06, 2009-Ohio-2954.

Licensing of handgun purchasers	Required for concealed carry handguns. R.C. 2923.125.
Background checks on firearm purchasers	Dealers must run background checks on purchasers. 18 U.S.C. § 922(s),(t).
Limits on number of firearms purchased	Sale of two or more firearms must be reported to Attorney General and state law enforcement. 18 U.S.C. § 923(g)(3)(a).
Waiting period to allow background check before firearms purchase	No longer needed because Ohio participates in the National Instant Criminal Background Check System. 28 C.F.R. § 25.
Licensure of firearm dealers	Performed by the U.S. Attorney General. 18 U.S.C. § 923(a).
Limits on where firearms may be sold	Delegated to municipalities to determine geographic areas and hours of operation for sales. R.C. 9.68(D).
Reporting obligations of firearms dealer	Records of importation, production, shipment, receipt, sale, or other disposition of firearms must be maintained and are subject to inspection. 18 U.S.C. § 923(g)(1).
Design and safety standards	Locking devices must be offered. R.C. 2923.25.

Simply put, even a cursory inspection of state and federal law confirms that Ohio's regulatory framework touches on all the purported deficiencies alleged by the City.

If the City and their amici had their way, many of these provisions might well be more restrictive—a longer list of banned weapons, greater limitations on where firearms can be possessed, expanded registration requirements for all firearms, and tougher restrictions on private transactions at gun shows. But *Canton*'s first prong tests breadth, not depth. A regulatory program, even if permissive, is still "comprehensive" if it addresses all the key facets of regulated subject matter. And because Ohio's regulatory scheme for firearms does just that, it

satisfies "the statewide-and-comprehensive-legislation element" of *Canton*. *Marich*, 2008-Ohio-92, at ¶ 18.

2. The legislative scheme operates uniformly throughout the State.

As to *Canton*'s second prong, the Eighth District correctly observed that Ohio's firearm laws operate uniformly throughout the State. App. Op. at ¶ 24. The City did not contest this point below, and it does not do so here.

3. The legislative scheme sets forth police regulations.

The third prong of *Canton* tests whether the legislative scheme "set[s] forth police, sanitary or similar regulations" rather than "purport[ing] only to grant or to limit the legislative powers of a municipal corporation." *AFSA*, 2006-Ohio-6043, at ¶ 35 (citation omitted). In addressing this step, the City restates the obvious: "R.C. 9.68 . . . does not set forth any specific regulations with regard to firearms controls . . . but operates solely to limit the City's home rule powers." City Br. at 22. The amici do so as well: "R.C. 9.68 sets forth absolutely no police, sanitary, or similar regulations with regard to firearms in Ohio." Englewood Br. at 15.

This analysis perverts the *Canton* inquiry by artificially segregating R.C. 9.68 from the rest of the Revised Code. Under the third prong, the Court must decide whether Ohio's *entire collection of firearms laws*, of which R.C. 9.68 is a part, sets forth police or sanitary regulations. See *Clermont*, 2 Ohio St. 3d at 48 (stating that all code sections "dealing with the state's control of the disposal of hazardous wastes" must be "read *in pari materia*" to discern whether they "merely prohibit political subdivisions of the state from regulation"). If the rule were otherwise, a municipality could attack any statutory restraint on its legislative power by simply detaching it from the State's broader regulatory scheme.

Ohio Detectives illustrates the need to focus on the entire scheme. There, the Court acknowledged that the challenged provision, R.C. 4749.09, when "[c]onsidered in isolation,"

"may fail to qualify as a general law because it prohibits a municipality from exercising a local police power." 65 Ohio St. 3d at 245. After all, the statute accomplished one feat—it denied municipalities the right to regulate private security personnel. The Court nevertheless held that "consideration of R.C. 4749.09 alone is not dispositive of the . . . controversy" because "R.C. Chapter 4749 *in its entirety* does provide for uniform statewide regulation." *Id.* (emphasis added).

AFSA employed the very same approach. In that case, the statute at issue, R.C. 1.63, prohibited all municipal regulation of the consumer lending field. When assessing *Canton*'s third prong, however, the Court did not examine R.C. 1.63 in isolation. Rather, it stated that the entire "comprehensive regulatory plan"—R.C. 1.63 *and* R.C. 1349.25 through 1349.37—"involve[d] the use of police power." *AFSA*, 2006-Ohio-6043, at ¶ 35.

In this case, Ohio's firearm laws, when considered as a whole, indisputably "relate[] to public health and safety as well as the general welfare of the public." *Marich*, 2008-Ohio-92, at ¶ 14. This collection of laws delineates a set of rights and responsibilities for any citizen who wishes to own or possess a gun in this State and it promulgates a litany of civil and criminal punishments for violators. Such a regulatory scheme, which "represents both an exercise of the state's police power and an attempt to limit legislative power of a municipal corporation," satisfies *Canton*'s third prong. *Ohioans for Concealed Carry, Inc. v. Clyde*, 120 Ohio St. 3d 96, 2008-Ohio-4605, ¶ 50.

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

Canton's fourth prong asks whether the challenged legislative scheme "prescribe[s] a rule of conduct upon citizens generally." *AFSA*, 2006-Ohio-6043, at ¶ 36. Again, the City seeks to isolate R.C. 9.68 from the rest of the legislative scheme when addressing this step: "R.C. 9.68 . . . fails to prescribe a rule of conduct upon citizens generally 'because the statute applies to

municipal legislative bodies.'" City Br. at 23 (alteration omitted). And again, this Court has already rejected that isolated-provision approach. Instead, under the fourth prong of *Canton*, the Court assesses whether the *entire legislative scheme* prescribes a rule of conduct on citizens generally. See *Mendenhall v. City of Akron*, 117 Ohio St. 3d 33, 2008-Ohio-270, ¶ 27 ("When interpreted as part of a whole, R.C. 4511.21 applies to all citizens generally as part of a statewide regulation.").

AFSA makes this clear. When analyzing *Canton*'s fourth prong, the Court did not examine R.C. 1.63 in isolation. Rather, it concluded "that Ohio's predatory-lending statutes"—R.C. 1.63 *and* R.C. 1349.25 through 1349.37—"prescribe[d] a general rule of conduct for lending in Ohio." *AFSA*, 2006-Ohio-6043, at ¶ 36. Ohio's firearm laws operate in the same fashion. They "prescribe[] a rule of conduct for any citizen seeking to carry a . . . []gun," *Clyde*, 2008-Ohio-4605, at ¶ 51, and, therefore, fulfill this part of the *Canton* test.

R.C. 9.68 is in every sense a "general law" of the State: It is "part of a comprehensive and uniform statewide enactment setting forth a police regulation that prescribes a general rule of conduct for [firearms ownership and possession] in Ohio." *AFSA*, 2006-Ohio-6043, at ¶ 36. The state law thus withstands the City's constitutional attack.[2]

C. The City's reliance on Justice O'Connor's *Baskin* concurrence is misplaced; that opinion does not implicate the *Canton* "general law" test.

The City and their amici rely almost exclusively on Justice O'Connor's concurring opinion in *City of Cincinnati v. Baskin*, 112 Ohio St. 3d 279, 2006-Ohio-6422, to make their case for a

[2] When a state statute qualifies as a "general law" under *Canton*, this Court would normally proceed to the last step of the home rule analysis and ask whether the disputed local "ordinances are in conflict with th[e] state statute[]." *AFSA*, 2006-Ohio-6043, at ¶ 37. In this litigation, however, the City has not contested this step of the analysis. See Eighth Dist. App. Op. at ¶ 20 n.2. ("[T]he City challenges the constitutionality of R.C. 9.68 without determining whether it conflicts with any specific City ordinance."). Therefore, the Court need not conduct the conflict inquiry.

home rule violation. They claim that her survey of Ohio's firearm laws shows a "serious lack of statewide comprehensive laws regulating in the field of firearms." City Br. at 17. Therefore, the City and the amici say, R.C. 9.68 cannot survive the *Canton* test.

This attempt to conflate Justice O'Connor's concurrence with the *Canton* test is misplaced. It ignores the facts of *Baskin* and the substance of the concurrence. As Justice O'Connor herself said, her separate opinion is relevant only for "determining whether an ordinance conflicts with a state statute," *not* for assessing whether the state statute is a "general law" under *Canton*. 2006-Ohio-6422, at ¶ 45.

In *Baskin*, the defendant was charged with violating a Cincinnati ordinance prohibiting the possession of a semiautomatic weapon "with a capacity of more than ten rounds." 2006-Ohio-6422, at ¶ 1. State law, however bans possession of only those semiautomatic weapons with a capacity of "more than thirty-one cartridges." *Id.* at ¶ 3 (quoting R.C. 2923.11(E)). The defendant moved to dismiss the charges, claiming that the Cincinnati ordinance was in conflict with, and thus displaced by, a general law of the State. *Id.* at ¶ 2.

The Court disagreed. It first held that the state gun statute was "a general law" under *Canton*. *Id.* at ¶ 13. The Court then applied the well-worn "conflict test," asking whether "'the state statute . . . positively permit[s] what the ordinance prohibits.'" *Id.* at ¶ 20. If a conflict exists, then the "municipal ordinance is displaced by [the] state measure." *Id.* at ¶ 9. But the Court found no conflict between the state weapons law and the Cincinnati ordinance. *Id.* at ¶ 23. Therefore, the ordinance was not displaced.

Justice O'Connor concurred separately. She reaffirmed the *Canton* test and agreed that the state firearm statute qualified as a "general law" under that framework. *Id.* at ¶ 29. Justice O'Connor then focused on the second step of the home rule analysis, urging the Court to replace

the "conflict test" with a "preemption test." Under her approach, a "general law" will displace a local ordinance in two circumstances: (1) when "the legislature clearly indicate[s] that it intended to occupy the field of . . . regulation" in the statute itself ("express preemption"); or (2) where "the facts and circumstances surrounding the legislation" indicate that "the legislature intended to preempt the field" ("implied preemption"). *Id.* at ¶¶ 33, 44. Justice O'Connor then observed that, as of 2006, the General Assembly had not "expressly indicated its intent to preempt." *Id.* at ¶ 47. She further stated that she could not infer preemption because, "in comparison to other states," there were too many "gaps left by Ohio law regarding possession, transfer and use of firearms." *Id.* at ¶ 53. Therefore, Justice O'Connor concluded that state law did not preempt the Cincinnati ordinance, and that the defendant's prosecution could proceed.

The City now invites this Court to import Justice O'Connor's preemption analysis into the *Canton* "general law" test. That request is improper for three reasons. First, Justice O'Connor made clear that *Canton* and preemption were two discrete inquiries. She concurred with the Court's conclusion that the Ohio's semiautomatic weapons law satisfied *Canton*'s "statewide and comprehensive legislative enactment" prong. She then indicated that her preemption discussion implicated only the "conflict test" of the home rule analysis. *Id.* at ¶ 45. This juxtaposition, whereby Justice O'Connor agreed that the state statute satisfied *Canton* but failed her preemption test, demonstrates that these two issues are analytically distinct.

Second, Justice O'Connor focused solely on state law in her preemption inquiry. *Id.* at ¶¶ 52-53. By contrast, this Court examines state law *and* federal law when determining whether a comprehensive legislative scheme exists under *Canton*'s first prong. *AFSA* is demonstrative. The Court recognized that Ohio's consumer lending statutes "incorporated parts of . . . the

federal predatory-lending law[]." 2006-Ohio-6043, at ¶ 33. It then reviewed both sources of law and concluded that Ohio had a "comprehensive statewide legislative regulation." *Id.*

Third, Justice O'Connor observed that "*in comparison to other states*, Ohio has barely touched upon the subject of firearm possession, use, transfer, and ownership." *Baskin*, 2006-Ohio-6422, at ¶ 53 (emphasis added). That comparison may be relevant to her preemption inquiry, but in fifty years of home rule jurisprudence, the Court has never once looked to the laws of another State. The manner in which another jurisdiction crafts its regulatory scheme has no bearing on the central issue in this case—whether Ohio has adopted "statewide and comprehensive legislative enactment" for firearms under *Canton*'s first prong.[3]

As confirmed by the Court's later decisions in *Marich*, *Mendenhall*, and *Clyde*, Justice O'Connor's concurrence has not altered the blackletter *Canton* inquiry. It therefore has no effect on the central issue here—whether R.C. 9.68 is a "general law" of the State.

D. R.C. 9.68 does not violate separation of powers because the award of attorney fees and costs does not impair the judiciary's authority to resolve legal disputes.

Finally, the City offers no sound legal theory to justify its claim that the General Assembly's decision to award attorney fees and costs to prevailing plaintiffs in R.C. 9.68(B) violates separation of powers. See City Br. 24-26.

First, the City restates the bedrock constitutional principle that "the judiciary and not the General Assembly is the conclusive authority on constitutional questions." City Br. at 24. But it then fails to explain how a statutory award of attorney fees and costs to prevailing plaintiffs

[3] Justice O'Connor's comparison should be confined to her preemption analysis for an additional reason. Her survey did not measure Ohio's firearm laws next to all forty-nine sister States, but rather to four of the most of the stringent gun-control jurisdictions in this country. See Brady Center, State Gun Law Scorecards (2010), at http://www.bradycampaign.org/stategunlaws (last visited July 19, 2010) (ranking California, Massachusetts, Connecticut, and New York as having the first, third, fourth, and sixth strongest gun laws in the United States).

"interferes with the exercise of [that] function," thereby violating the separation-of-powers doctrine. *State v. Hochhausler* (1996), 76 Ohio St. 3d 455, 464. Such awards are made at the end of the litigation, *after* the court has adjudicated the controversy in dispute. As such, these awards do not in any way impair the courts' inherent power "to hear and determine a controversy between adverse parties." *Fairview*, 73 Ohio St. at 190

Second, the City complains that the mandatory award of attorney fees and costs to prevailing plaintiffs "invites unwarranted litigation" against municipalities. City Br. at 25. The separation-of-powers doctrine, however, does not implicate the relationship between the General Assembly and the State's political subdivisions. Rather, it polices against attempts by the General Assembly to trench on "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). Because R.C. 9.68 does not attempt to regulate the state executive or the judiciary, the doctrine is not triggered.

Third, the City asserts that the General Assembly "invaded the province of the judiciary by requiring that courts award mandatory attorneys fees and costs," City Br. at 26, but it is mistaken. As the State has already explained, Ohio courts had no inherent authority at common law to award attorneys fees and costs. See *Wilborn v. Bank One Corp.*, 121 Ohio St. 3d 546, 2009-Ohio-306, ¶ 7 ("Ohio has long adhered to the 'American rule.'"). Thus, the General Assembly's decision to provide such awards to prevailing plaintiffs does not impinge on any inherent prerogative of the judicial branch. See *Sorin*, 46 Ohio St. 2d at 179 (recognizing that "'the subject of costs is one entirely of *statutory allowance and control*'") (quoting *State ex rel. Michaels v. Morse* (1956), 165 Ohio St. 599, 607) (emphasis added and alteration omitted).

As the State's merit brief observed, the General Assembly has provided for awards of attorney fees and costs against all types of parties (private parties, public officials, municipalities, and the State itself) in all types of litigation (public records, property appropriate, unclaimed funds, child support, voter harassment, and the like). No court has ever found such statues to violate separation of powers. Given the dearth of support for the City's contrary position, this Court should conclude that R.C. 9.68(B) is a constitutional enactment.

CONCLUSION

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

Respectfully submitted,

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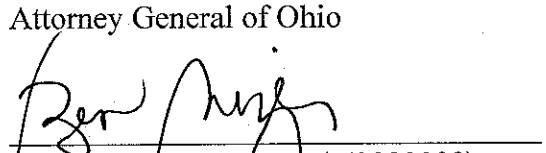

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Reply Brief of Defendant-Appellant State of Ohio was served by U.S. mail this 20th day of July, 2010, upon the following counsel:

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