

ORIGINAL

IN THE SUPREME COURT OF OHIO

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| 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 |) | |

REPLY BRIEF OF AMICI CURIAE NATIONAL RIFLE ASSOCIATION OF AMERICA, INC., AND OHIOANS FOR CONCEALED CARRY, INC. IN SUPPORT OF APPELLANT STATE OF OHIO

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INTRODUCTION

Amici Curiae National Rifle Association of America, Inc. and Ohioans for Concealed Carry, Inc. concur with and adopt the arguments presented by the State of Ohio, in the State's Merit and Reply Briefs.

Amici are submitting this Reply Brief principally to address the application of recent decisions of the United States Supreme Court in the cases of *District of Columbia v. Heller*, 128 S.Ct. 2783 (2008) and *McDonald v. Chicago*, 130 S.Ct. 3020 (2010) to the issues of this case, and in particular, to articulate how those decisions support the conclusion that legislative enactments of the General Assembly for the purpose of broadly supporting fundamental constitutional rights are properly recognized as general laws for the purpose of Home Rule analysis.

ARGUMENT

A. PROPER RECOGNITION OF THE ROLE AND EFFECT OF R.C. 9.68 IN THE STATE'S STATUTORY SCHEME OF FIREARMS REGULATION ESTABLISHES THE VALIDITY OF THE STATUTE FOR PURPOSES OF HOME RULE ANALYSIS

Statutory enactments for the purpose of ensuring uniformity in the protection of fundamental constitutional rights have historically been recognized as appropriate under federal law, Ohio law, and the law of Ohio's sister states. Such enactments, in the context of Home Rule analysis, are correctly perceived as a general law under the test established in *City of Canton v. State*, 95 Ohio St.3d 149, 2002-Ohio-2005, as they are "part of a statewide and comprehensive legislative enactment;" as they are "setting forth police . . . regulations, rather than purport only to . . . limit legislative power of a municipal corporation;" and as they are "prescribing a rule of conduct upon citizens generally," thus satisfying the first, third, and fourth prongs of the *Canton*

test, the prongs the Eighth District erroneously concluded had not been met in its analysis of R.C. 9.68.

Correctly perceived, what the General Assembly has done through enactment of R.C. 9.68, when considered with all related regulation, both pre-existing and adopted concurrently with the statute, is to fill in any blanks in the regulatory scheme of firearm regulation. This is accomplished by R.C. 9.68's positive statement of the rights of persons within the state, expressed, indirectly but appropriately and practically, as a limitation of restrictions that may be placed on the exercise of the fundamental individual rights established by the Second Amendment to the United States Constitution and Section 4, Article I of the Ohio Constitution. The propriety of this methodology has only been further strengthened by the U.S. Supreme Court's decision in *McDonald*, removing all doubt as to the applicability of the Second Amendment to the States and their political subdivisions, including, *a priori*, those subdivisions granted certain plenary powers under Home Rule regimens.

The proper recognition of the effect of R.C. 9.68 is that although it is worded in the inverse, it permits the free expression of the right to bear arms except as specifically prohibited or limited by federal or state regulation. Likewise, the avowed purpose of R.C. 9.68, expressed in its initial paragraph, to ensure the uniform application of laws affecting the fundamental right to bear arms, is consistent with the Equal Protection provisions of the State and federal constitutions. As such, by stating that regulation may extend only so far as the federal and state governments have provided, and no further, R.C. 9.68, is fully comprehensive. It can be said that the addition of R.C. 9.68 complements and completes the State's previously existing regulation of firearms in positively reserving the freedom of persons to exercise the rights to bear arms in all manners not otherwise prohibited, restricted, or limited by State or federal

enactments, and thus with the enactment of the statute, the General Assembly has “covered the waterfront” with respect to firearm regulation.¹

The proper, appropriate, and the only truly logical way to construe R.C. 9.68, is that its purpose is not to limit the legislative power of municipal corporations, but to enable the rights of persons in the state that have been guaranteed to them under the state and federal constitutions. As such, its role and purpose are identical to pre-existing state and federal civil rights laws. When the statute is considered in *pari materia* with all other firearm regulation, as it must be under the precedents of this Court,² the statutory scheme clearly meets the first, third, and fourth criteria of the general law test of *Canton*, it is a statewide and comprehensive enactment, it sets forth police regulations rather than purport only to limit legislative power of a municipal corporation, and prescribes rules of conduct not only upon citizens generally, but upon all persons within the State of Ohio.

B. THE LEGISLATURE CORRECTLY DECLARED THAT IT IS ENFORCING A FUNDAMENTAL RIGHT, MEANINGFUL EXERCISE OF WHICH REQUIRES UNIFORMITY

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:

¹ Query, would the language of the First Amendment, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof” be considered to be “not comprehensive” because it broadly prohibits restrictive regulation, rather than a point by point enumeration of the manners in which one may exercise one’s religion? Such a conclusion would defy logic and any common understanding of the word, comprehensive. The arguments of Cleveland would appear to suffer from such a strained construction of the word.

² See Reply Brief of Defendant-Appellant State of Ohio, p.3 *et seq.*, in particular, its reference to *Clermont Environmental Reclamation Co. v. Wiederhold* (1982) 2 Ohio St.3d 44, providing that a particular statute [regarding hazardous waste disposal] must be read in *pari materia* with all such sections dealing with the same subject matter for purposes of a Home Rule, general law, analysis. *Id.* at 48

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.

Enacted in 2006, the above statement in R.C. 9.68 remarkably anticipated the U.S. Supreme Court's decisions in *District of Columbia v. Heller*, 128 S.Ct. 2783 (2008), and *McDonald v. Chicago*, 130 S.Ct. 3020 (2010). Taken together, *Heller* and *McDonald* recognize the right to keep and bear arms as expressed in the federal Second Amendment³ and in State constitutions such as that of Ohio⁴ to be a fundamental, individual right that predated those instruments and which apply in every part of the United States. The opening clause in R.C. 9.68, which embodies those principles, is the premise for the finding that follows regarding the need for uniform, State-wide laws to enforce this constitutional right.

The declaration in R.C. 9.68(A) that the right “predates” the federal and Ohio constitutions was confirmed by *Heller*'s statement that “the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right.” *Heller*, 128 S.Ct. at 2797. Consistent therewith, the preamble to Ohio's 1802 Bill of Rights declared the arms guarantee and other provisions “[t]hat the general, great and essential principles of liberty and free government may be recognized and forever unalterably established”⁵ Similarly, Ohio Const., Art. I, § 1, provides: “All men . . . have certain inalienable rights, among which are those of enjoying and

³ “A well regulated militia, being necessary for the security of a free state, the right of the people to keep and bear arms, shall not be infringed.” U.S. Const., Amend. II.

⁴ “The people have the right to bear arms for their defense and security” Ohio Const., Art. I, § 4.

⁵ Ohio Const., Art. VIII (1802). The arms guarantee provided: “That the people have a right to bear arms for the defense of themselves and the State” *Id.* § 20.

defending life and liberty, acquiring, possessing and protecting property, and seeking and obtaining happiness and safety.”⁶

The declaration in R.C. 9.68(A) that the right is “fundamental” reflected Blackstone’s view “that the right to keep and bear arms was ‘one of the fundamental rights of Englishmen,’” which was “shared by the American colonists.” *McDonald*, 130 S.Ct. at 3037. “The right to keep and bear arms was considered no less fundamental by those who drafted and ratified the Bill of Rights.” *Id.*

The same understanding persisted thereafter, including in the nine states that “adopted state constitutional provisions protecting an individual right to keep and bear arms between 1789 and 1820.” *Id.*, citing *Heller*, 128 S.Ct., at 2802-2804. One of these, of course, was Ohio’s 1802 constitution. *Heller*, *id.* at 2793 n.8. *Heller* also cited the treatise of Ohio’s pioneer legal commentator Timothy Walker, *Introduction to American Law* 198 (1837) (“Thus the right of self-defence [is] guaranteed by the [Ohio] constitution”); see also *id.*, at 157 (“equating Second Amendment with that provision of the Ohio Constitution”).⁷ *Heller*, *id.* at 2793-94.

A premise of R.C. 9.68(A) is that the right to keep and bear arms applies in Ohio not only through the Ohio Constitution, but also the federal Second Amendment. *McDonald* held the latter, i.e., that the Second Amendment right is incorporated into the Fourteenth Amendment because it passed the tests of “whether the right to keep and bear arms is fundamental to *our*

⁶ “These rights are inalienable, and fundamental, and can not be abridged or restricted by a city council” *In re Reilly* (Ohio Com. Pl. 1919), 31 Ohio Dec. 364, 1919 WL 1022, *3 (referring to this clause and the arms guarantee).

⁷ Walker co-founded what became the University of Cincinnati College of Law, which at its 175 year anniversary recalled this treatise: “Dean Timothy Walker [in 1837] publishes *Introduction to American Law*, one of the first major publications by law professors. The book gained a reputation as the ‘American Blackstone,’ as 11 editions were published over 68 years.” <http://www.law.uc.edu/175/history/timeline.shtml> (visited July 19, 2010).

scheme of ordered liberty,” or is “deeply rooted in this Nation’s history and tradition” 130 S.Ct. at 3036. “Our decision in *Heller* points unmistakably to the answer. Self-defense is a basic right, . . . and in *Heller*, we held that individual self-defense is ‘the *central component*’ of the Second Amendment right.” *Id.*

The Fourteenth Amendment was intended and understood to invalidate the Reconstruction era Black Code provisions which prohibited African Americans from possession of firearms. “[T]he Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty.” *Id.* at 3042. *McDonald* concluded that the Second Amendment is “a provision of the Bill of Rights that protects a right that is fundamental from an American perspective” and thus “applies equally to the Federal Government and the States.” *Id.* at 3050.

McDonald rejected the municipalities’ argument “to treat the right recognized in *Heller* as a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees” *Id.* at 3044. The Court noted: “Municipal respondents therefore urge us to allow state and local governments to enact any gun control law that they deem to be reasonable” *Id.* at 3046. “Unless we turn back the clock or adopt a special incorporation test applicable only to the Second Amendment, municipal respondents’ argument must be rejected.”⁸ *Id.*

It is well established that a right is “fundamental” if it is “explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny.” *San Antonio*

⁸ No constitutional right is “less ‘fundamental’ than” others, and “we know of no principled basis on which to create a hierarchy of constitutional values” *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 484 (1982). “To view a particular provision of the Bill of Rights with disfavor inevitably results in a constricted application of it. This is to disrespect the Constitution.” *Ullmann v. United States*, 350 U.S. 422, 428-29 (1956).

Independent School District v. Rodriguez, 411 U.S. 1, 17, 33 (1973).⁹ “[C]lassifications affecting fundamental rights . . . are given the most exacting scrutiny.” *Clark v. Jeter*, 486 U.S. 456, 461 (1988). “Under the strict-scrutiny test,” the government has the burden to prove that a restriction “is (1) narrowly tailored, to serve (2) a compelling state interest.” *Republican Party of Minnesota v. White*, 536 U.S. 765, 774-75 (2002). See *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 54 (1983) (“strict scrutiny [is] applied when government action impinges upon a fundamental right protected by the Constitution”).

Accordingly, *Heller* rejected use of the rational-basis standard of review: “Obviously, the [rational-basis] test could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right, be it the freedom of speech, the guarantee against double jeopardy, the right to counsel, or the right to keep and bear arms.” *Heller*, 128 S.Ct. at 2818 n.27.

Similarly, *McDonald* rejected the power “to allow state and local governments to enact any gun control law that they deem to be reasonable” 130 S.Ct. at 3046. The term “reasonable” is a synonym of “rational.” *Webster’s New World Dictionary* (3rd College Ed. 1991), 1118.

Heller also rejected Justice Breyer’s “judge-empowering ‘interest-balancing inquiry’ that ‘asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute’s salutary effects upon other important governmental interests.’” 128

⁹ This Court routinely applied the rule that the existence of a fundamental right requires strict scrutiny after *Rodriguez* was decided, and it still does today. E.g., *Lyle Const., Inc. v. Ohio Dept. of Natural Resources*, 34 Ohio St.3d 22, 27, 516 N.E.2d 209 (1987) (rational basis applied absent a fundamental right, citing *Rodriguez*); *Harrold v. Collier*, 107 Ohio St.3d 44, 836 N.E.2d 1165 (2005) (“If the challenged legislation impinges upon a fundamental constitutional right, courts must review the statutes under the strict-scrutiny standard.”). *Arnold v. Cleveland*, 67 Ohio St.3d 35, 46-47, 616 N.E.2d 163 (1993), departed from that standard rule in holding that restrictions on the fundamental right to bear arms would be determined under a “reasonable basis” test. In an appropriate case, this Court may wish to revisit that issue in light of *Heller* and *McDonald*.

S.Ct. at 2821. Such a test would allow “arguments for and against gun control” and the upholding of a handgun ban “because handgun violence is a problem” *Id.* *Heller* explained:

Like the First, it [the Second Amendment] is the very *product* of an interest-balancing by the people And whatever else it leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.

Id.

The “interest-balancing inquiry” that *Heller* rejected relied on a committee report and empirical studies which sought to justify the firearm prohibitions at issue. *Id.* at 2854-61 (Breyer, J., dissenting). Without any consideration of the report and studies, *Heller* used a categorical approach in invalidating the prohibitions and explained:

We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding “interest-balancing” approach. The very enumeration of the right takes out of the hands of government – even the Third Branch of Government – the power to decide on a case-by-case basis whether the right is *really worth* insisting upon.

Id. at 2821.

Similarly, *McDonald* barely mentioned Chicago’s legislative finding and accorded it no discussion. 130 S.Ct. at 3026. Instead, *McDonald* upheld the right of residents to enhance their safety by having arms for their defense, noting that “the Second Amendment right protects the rights of minorities and other residents of high-crime areas whose needs are not being met by elected public officials.” *Id.* at 3049.

This Court’s analysis should be guided by the principle that R.C. 9.68(A) enforces a fundamental right under the United States and Ohio constitutions. Enforcement of this fundamental right is the basis of the mandate that, other than as provided in the constitutions and laws of the United States and Ohio, a person may possess a firearm without further restriction.

Cleveland's argument that this mandate precludes its restrictive prohibitions on this right and that this results in too little regulation wholly disregards that uniform rules are necessary for citizens to exercise the right in a meaningful way. Allowing each of the many political subdivisions of the State essentially to plant inconsistent legal landmines for the unwary citizen to step on makes a mockery of this fundamental right.

CONCLUSION

R.C. 9.68 was enacted to enable and empower all persons within the State of Ohio to exercise the rights guaranteed to them by the United States and Ohio constitution. Like other civil rights laws, it operates to prevent political subdivisions from abrogating those rights, and ensures Equal Protection through the establishment of uniform application throughout the state. The analysis of the Eighth District suffers from a strained and illogical construction of the term comprehensive, refusing to acknowledge that a statute may comprehensively address a field of regulation by stating the limits of restrictions of fundamental rights rather than enumerating all circumstances and manners in which those rights may be exercised. This misconception of the nature of the statute, and its role in the statutory scheme of the state's firearm regulation, is the root cause of the Appellate Court's error in its analysis of the *Canton* test and its conclusion that the statute should not be considered general law for the purpose of Home Rule analysis.

Amici Curiae, the National Rifle Association of America, Inc. and Ohioans for Concealed Carry, Inc. respectfully request that the judgment of the Eighth District Court of Appeals be reversed in recognition of the validity of the General Assembly's enactment of R.C. 9.68 as a general law of the State of Ohio and as it shall pertain to Ohio's Home Rule Amendment.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of August, 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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