IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

CITY OF COLUMBUS	:	
90 West Broad Street	:	**Case No.** _____
Columbus, Ohio 43215	:	
	:	**Judge** _____
Plaintiff,	:	
	:	
v.	:	
	:	
STATE OF OHIO	:	
30 East Broad Street, 17th Floor	:	
Columbus, Ohio 43215	:	
	:	
Defendant.	:	
	:	
SERVE ALSO:	:	
Attorney General Dave Yost	:	
30 East Broad Street, 17th Floor	:	
Columbus, Ohio 43215	:	

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Now comes the City of Columbus, by and through counsel, and for its complaint, states the following:

1. The Plaintiff City of Columbus is a home rule charter municipality located predominantly in Franklin County, Ohio.

2. As a municipality of the State of Ohio, the City of Columbus has the "authority to exercise all powers of local self-government and to adopt and enforce within [its] limits such local police, sanitary and other similar regulations, as are not in conflict with general laws." Ohio Constitution, Article XVIII, Section 3.

3. The City of Columbus has exercised its home rule authority, as that authority is enshrined in the Ohio Constitution, to enact ordinances pertaining to the ability to own or possess firearms and firearm accessories.

4. Defendant State of Ohio is the state in which the City of Columbus is located.

18. Article XVIII, Section 7 of the Ohio Constitution provides that "Any municipality may frame and adopt or amend a charter for its government and may, subject to the provisions of section 3 of this article, exercise thereunder all powers of local self-government."

19. The citizens of Ohio, acting as Sovereign, prohibited the Ohio General Assembly from interfering with the rights of any municipality to exercise their powers of local self-government except in very limited, enumerated circumstances.

Local, State, and National Public Policy Concerns

20. Nationally, gun violence has reached epidemic proportions.

21. According to the Centers for Disease Control and Prevention ("CDC"), 39,773 people were killed by firearms in the United States in 2017, the last year that statistics are available. Centers for Disease Control and Prevention, National Center for Injury Prevention and Control, *2017, United States Firearm Deaths and Rates per 100,000*, https://webappa.cdc.gov/sasweb/ncipc/mortrate.html (accessed Mar. 4, 2019).

22. In 2017, there were approximately 12 deaths per 100,000 people in the United States due to firearms. *Id.*

23. Comparatively, in 1999, the CDC reported 28,874 deaths from a firearm or approximately 10.3 deaths per 100,000 people. Centers for Disease Control and Prevention, National Center for Injury Prevention and Control, *1999, United States Firearm Deaths and Rates per 100,000,* https://webappa.cdc.gov/sasweb/ncipc/mortrate.html (accessed Mar. 4, 2019).

24. In 2017, deaths from a firearm nationally reached the highest level in the entire time since the Center for Disease Control started keeping statistics about firearm deaths in 1979. Gstalter, *CDC Report: U.S. Gun Deaths Reach Highest Level in Nearly 40 Years*, The Hill (Dec. 13, 2018), available at https://thehill.com/policy/healthcare/421306-cdc-report-us-gun-deaths-reach-highest-level-in-nearly-40-years (accessed Mar. 4, 2019).

25. This ever-increasing death rate from firearms has also affected the State of Ohio.

26. According to the CDC, 1,116 people in Ohio were killed by a firearm in 2005. Centers for Disease Control and Prevention, National Vital Statistics Reports Vol. 56, No. 10, Deaths: Final Data for 2005 (April 24, 2008).

27. In 2014, the CDC reported that 1,211 people were killed by a firearm in Ohio. Centers for Disease Control and Prevention, National Vital Statistics Reports Vol. 65, No. 4, Deaths: Final Data for 2014 (June 30, 2016).

28. In 2015, that number had risen to 1,397. Centers for Disease Control and Prevention, National Vital Statistics Reports Vol. 66, No. 6, Deaths: Final Data for 2015 (November 27, 2017).

38. The study went on to find that when one includes non-economic factors, such as reduced quality of life, the total economic impact of gun violence in the State of Ohio is $7.3 billion. *Id.*

39. The study further determined that the true cost of gun violence in Ohio is actually much higher than that because the $7.3 billion figure fails to include things such as lost business opportunities, lowered property values, and reductions in tax bases. *Id.*

40. Perhaps the most alarming gun violence statistics deal with domestic violence and intimate partner violence.

41. Abused women are five times more likely to be killed by their abuser if the abuser owns a firearm. Giffords Law Center to Prevent Gun Violence, *Domestic Violence & Firearms*, https://lawcenter.giffords.org/gun-laws/policy-areas/who-can-have-a-gun/domestic-violence-firearms/ (accessed Mar. 4, 2019).

42. Women in the United States are 16 times more likely to be murdered with a firearm than women in peer countries. *Id.*

43. Between 1980 and 2008, more than two-thirds of spouse and ex-spouse homicide victims were killed by firearms. *Id.*

44. From January 2009 through July 2014, 57% of all mass shootings involved killing a family member, or a current or former intimate partner of the shooter. *Id.*

45. On October 1, 2017, a gunman opened fire on a crowd of concert goers at a music festival on the Las Vegas strip killing 58 and injuring 869 individuals.

46. On June 12, 2016, 49 people were killed and another 53 injured at a mass shooting at the Pulse Nightclub in Orlando, Florida.

47. Between May of 2017 and February 2018, three local law enforcement officers were killed in Central Ohio by individuals who had previously committed actions of domestic violence and who were illegally in possession of a firearm.

48. Against this backdrop, the Bureau of Alcohol, Tobacco, Firearms, and Explosives has decided that it is time to prohibit possession of bump stocks. 83 Fed. Reg. 66514.

49. And former Governor John Kasich repeatedly attempted to persuade the General Assembly that it is time to pass some common sense gun regulation.

62. Am. Sub. H.B. 228 was introduced in the Senate on November 19, 2018.

63. On December 6, 2018, the Senate passed an amended version of Am. Sub. H.B. 228.

64. On that same date, the House voted to adopt the Senate Amendments.

65. Governor John Kasich vetoed Am. Sub. H.B. 228 on December 19, 2018.

66. On December 27, 2018, both the House and Senate voted to override the Governor's veto.

67. As enrolled, Am. Sub. H.B. 228 amended R.C. 9.68, in pertinent parts, as follows:

> (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, manufacture, taxation, keeping, and reporting of loss or theft of firearms, their components, and their ammunition. The general assembly also finds and declares that it is proper for law-abiding people to protect themselves, their families, and others from intruders and attackers without fear of prosecution or civil action for acting in defense of themselves or others. Except as specifically provided by the United States Constitution, Ohio Constitution, state law, or federal law, a person, without further license, permission, restriction, delay, or process, including by any ordinance, rule, regulation, resolution, practice, or other action or any threat of citation, prosecution, or other legal process, may own, possess, purchase, ~~sell, transfer~~ acquire, transport, store, carry, sell, transfer, manufacture, or keep any firearm, part of a firearm, its components, and its ammunition. Any such further license, permission, restriction, delay, or process interferes with the fundamental individual right described in this division and unduly inhibits law-abiding people from protecting themselves, their families, and others from intruders and attackers and from other legitimate uses of constitutionally protected firearms, including hunting and sporting activities, and the state by this section preempts, supersedes, and declares null and void any such further license, permission, restriction, delay, or process.
>
> (B) A person, group, or entity adversely affected by any manner of ordinance, rule, regulation, resolution, practice or other action enacted or enforced by a political subdivision in conflict with division (A) of this section may bring a civil action against the political subdivision seeking damages from the political subdivision, declaratory relief, injunction relief, or a combination of those remedies. Any damages awarded shall be awarded against, and paid by, the political subdivision. In addition to any actual damages awarded against the political subdivision and other relief provided with respect to such an action, the court shall award ~~costs and~~ reasonable ~~attorney fees~~expenses to any person,

Third Cause of Action
(Violation of Home Rule Authority)

77. The Plaintiff restates and reincorporates by reference each and every allegation contained in Paragraphs 1 through 76 of the Complaint.

78. Am. Sub. H.B. 228 and R.C. 9.68 by their express terms attempt to prohibit any local legislation concerning the "ownership, possession, purchase, other acquisition, transport, storage, carrying, sale, other transfer, manufacture, taxation, keeping, and reporting of loss or theft of firearms, their components, and their ammunition."

79. Am. Sub. H.B. 228 and R.C. 9.68 are not general laws.

80. Am. Sub. H.B. 228 and R.C. 9.68 unconstitutionally interfere with the constitutionally guaranteed Home Rule Authority of the City of Columbus

Fourth Cause of Action
(Violation of Home Rule Authority)

81. The Plaintiff restates and reincorporates by reference each and every allegation contained in Paragraphs 1 thought 80 of the Complaint.

82. In *Dayton v. State*, 151 Ohio St.3d 168, 2017-Ohio-6909, the Ohio Supreme Court found three separate provisions of the Ohio Revised Code to unconstitutionally interfere with the rights of municipalities to use traffic cameras because they were not general laws.

83. The plurality opinion reinforced the need to examine each challenged statute individually and not as part of a complete regulatory scheme.

84. This decision has served as implicitly overruling the Supreme Court's opinion in *Cleveland v. State*, 128 Ohio St.3d 135, 2010-Ohio-6318, finding R.C. 9.68 to be constitutional.

85. R.C. 9.68 as originally enacted is not a general law under the holdings of *Dayton*.

86. R.C. 9.68 unconstitutionally interferes with the constitutionally guaranteed Home Rule Authority of the City of Columbus.

Fifth Cause of Action
(Violation of Home Rule Authority)

87. The Plaintiff restates and reincorporates by reference each and every allegation contained in Paragraphs 1 through 86 of the Complaint.

99. Am. Sub. H.B. 228 and R.C. 9.68 violate the Home Rule Authority of the City of Columbus.

Sixth Cause of Action
(Violation of Home Rule Authority)

100. The Plaintiff restates and reincorporates by reference each and every allegation contained in Paragraphs 1 through 99 of the Complaint.

101. Am. Sub. H.B. 228 and R.C. 9.68 violate the constitutionally protected Home Rule Authority of the City of Columbus.

Seventh Cause of Action
(Void for Vagueness)

102. The Plaintiff restates and reincorporates by reference each and every allegation contained in Paragraphs 1 through 101of the Complaint.

103. Am. Sub. H.B. 228 and R.C. 9.68 fail to provide sufficient notice of their prescriptions to facilitate compliance by persons of ordinary intelligence and are not specific enough to prevent official arbitrariness or discrimination in its enforcement.

104. Furthermore, through their prohibitions, Am. Sub. H.B. 228 and R.C. 9.68 are directed at a constitutionally protected right, namely the right of a municipality to engage in home rule.

105. Am. Sub. H.B. 228 and R.C. 9.68 are void for vagueness.

106. WHEREFORE, the Plaintiff respectfully requests that this Court issue the following relief:

a. A declaration under R.C. Chapter 2721 that Am. Sub. H.B. 228 and R.C. 9.68, both in its original and amended forms, violate Article XVIII, Sections 3 and 7 of the Ohio Constitution;

b. A declaration under R.C. Chapter 2721 that Am. Sub. H.B. 228 and R.C. 9.68 are unconstitutional because they violate the Separation of Powers doctrine;

c. A declaration under R.C. Chapter 2721 that Am. Sub. H.B. 228 and R.C. 9.68 violate Article II, Section 32 of the Ohio Constitution;

d. A declaration under R.C. Chapter 2721 that Am. Sub. H.B. 228 and R.C. 9.68 are unconstitutional under the Ohio Constitution because they are void for vagueness;

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CITY OF COLUMBUS,	:	
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Plaintiff,	:	
	:	**Judge** _____
v.	:	
	:	
STATE OF OHIO,	:	
	:	
Defendant.	:	
	:	

PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

Now comes Plaintiff, City of Columbus, pursuant to Ohio Civ.R. 65, moves this Court to issue a preliminary injunction against Am. Sub. H.B. 228 and R.C. 9.68. A memorandum in support is attached.

Respectfully,

CITY OF COLUMBUS, DEPARTMENT OF LAW
ZACH KLEIN

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Other Authorities

enforcement and subjects local governments to ruinous expenses if they attempt to exercise their constitutionally protected rights.

The City of Columbus respectfully requests that this Court restore the constitutional balance that has been intruded upon by the General Assembly and give back to the City its constitutional right to manage its own affairs without interference or command.

II. STATEMENT OF FACTS

On December 27, 2018, the Ohio General Assembly overrode Governor John Kasich's veto of Am. Sub. H.B. 228. (Attached as Exh. A). That bill, in part, makes significant changes to R.C. 9.68 and most of those changes become effective on March 28, 2019. Current R.C. 9.68, entitled "Right to bear arms – challenge to law," generally states that a person's right to bear arms shall not be further restricted except as provided by state and federal law. R.C. 9.68(A). It also awards costs and attorney fees to anyone who "prevails in a challenge to an ordinance, rule, or regulation as being in conflict with this section." R.C. 9.68(B). Am. Sub. H.B. 228 amends R.C. 9.68 in significant ways. First, it expands the ways in which a municipality cannot regulate firearms, including through limitations on manufacturing and taxation. Amended R.C. 9.68(A). Second, Am. Sub. H.B. 228 "declares null and void any such further license, permission, restriction, delay, or process" related to firearms. *Id.* As well, the legislation expands who can bring an action to challenge an "ordinance, rule, regulation, resolution, practice, or other action" of a political subdivision that might conflict with R.C. 9.68 and increases the penalties if a political subdivision loses such an action. Amended R.C. 9.68(B) and (C)(3).

The City of Columbus has in the past regulated firearms inside its municipal boundaries. The City has been sued in the past for exercising its Home Rule Authority and is currently litigating two ordinances it has passed relating to firearms and their accessories. It currently

injunction. As a result, this Court should issue a preliminary injunction against Am. Sub. H.B. 228 and R.C. 9.68.

B. The City Has a Substantial Likelihood of Success on the Merits of its Claim that R.C. 9.68 and Am. Sub. H.B. 228 Violate the Home Rule Provisions of the Ohio Constitution.

The City of Columbus has a constitutionally protected right to home rule. Article XVIII, Section 3 of the Ohio Constitution provides that "[m]unicipalities shall have the authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws." In addition, a chartered municipality such as Columbus may exercise all other powers of local self-government. Ohio Constitution, Article XVIII, Section 7. A municipality exceeds its powers under the Home Rule Amendment and a state statute takes precedence over a local ordinance if "(1) the ordinance is an exercise of the police power, rather than of local self-government, (2) the statute is a general law, and (3) the ordinance is in conflict with the statute." *Mendenhall v. Akron*, 117 Ohio St. 3d 33, 2008-Ohio-270, ¶ 17. To qualify as a "general law" for the purposes of the 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." *Canton v. State*, 95 Ohio St.3d 149, 2002-Ohio-2005, syllabus. If a statute is not a general law, then it is "an unconstitutional attempt to limit the legislative home-rule powers" of municipalities. *Id* at ¶ 10. R.C. 9.68, both in its original form and as amended by Am. Sub. H.B. 228, violates Columbus' constitutional right to Home Rule because it is not a general law.

The Court noted that "[p]rior to the enactment of Sections 3 and 7 of Article XVIII of the Ohio Constitution in 1912, above code section [G.C. 3628] was allpowerful and supreme in its regulation of municipal law making. The amendments of 1912 necessarily operated as a repeal of any statutes then existing, in conflict therewith." *Id.* at 345. The Court was very clear that the Home Rule amendments of 1912 greatly redefined the relationship between the State and municipal corporations.

As an example of how that relationship had been redefined, the Court simply asked whether the General Assembly could pass a law providing "for a complete prohibition upon municipal legislation. Manifestly such a law would not be effective to take away the power conferred upon municipalities by the plain provisions of the Constitution." *Id.* at 346. The Court went on to ask whether the General Assembly could pass a law mandating that "municipalities should not impose any fine in excess of one dollar for violation of any police or sanitary ordinance, and that it prohibited punishment by imprisonment altogether. No one would contend that such an indirect effort would be in any wise different in effect from a plain prohibition." *Id.* The Supreme Court again emphasized that under the Home Rule Amendment, the General Assembly did not have the authority to prohibit municipal legislation in the exercise of the municipality's police powers. Such a lack of authority by the General Assembly was true whether the state law directly barred municipal legislation or if it put an indirect limit on what a municipality could do.

Throughout the Twentieth Century, the Ohio Supreme Court continued protecting municipalities from attempts by the General Assembly to infringe on their constitutionally protected rights to adopt and enforce local regulations. For example, the General Assembly passed Ohio Revised Code Sections 715.63 and 715.64 regulating municipal licensing of

granted power is not a 'general law.'" *Id.* at 55. The Court determined that the law at issue was simply a limit on the legislative powers. "It is a statute that says, in effect, certain cities may not enforce local regulations; precisely the type of statute *West Jefferson* denounced. Moreover, this enactment does not prescribe a rule of conduct upon citizens generally as required by this court." *Id.* As a result, the Court found that the statute was unconstitutional under the Home Rule Amendment. Thus, for decades the Court consistently and systematically rejected State laws attempting to grant or limit the legislative powers of municipalities.

2. In analyzing the Home Rule Amendment, the Ohio Supreme Court has also historically required an actual conflict to exist between a municipal ordinance and a State law on a particular matter.

Very early on, the Ohio Supreme Court took a dim view of the argument that the General Assembly could simply pass what it hoped to be a "general law" in order to nullify the power of municipalities to legislate in an area. Turning back to the *Youngstown* case, the Court pointed out that the law at issue prohibiting a municipality from passing an ordinance that provided greater penalties than provided in the state law was being defended as purely a general law. "It is insisted, however, that Section 3628 is a general law, and that the Constitution framers left with the Legislature the power to nullify the constitutional provisions." *Youngstown*, 121 Ohio St. at 346. The Court summarily rejected such an argument. "Necessarily, the conflict which limits the municipal local self-government must relate to a conflict with state legislation on the same subject matter. Any conflict with general legislative policies, or any conflicts between matters of local concern, and therefore pertaining to local self-government, such as misdemeanors, on the one hand, and matters of general concern, and therefore pertaining to the peace and dignity of the entire state, such as felonies, on the other hand, could not have been in the minds of the Constitution framers." *Id.* at 346-47. Thus, as early as 1929, the Supreme

of them, and that, on the other hand, the ordinances penalize certain acts which are not declared to be illegal under the state laws." *Id.*

The Court went on to determine that no conflict existed between the State law and the ordinances even though the ordinances made illegal and unlawful an action that was not made illegal under state law. As a result, the Supreme Court determined that even though an action would be permitted under the State statutes, it was well within the constitutional home rule authority of the municipality to ban such action and doing so would not be a real conflict. *Id.* at 268.

Therefore, the earliest Courts to take up the interpretation of the Home Rule Amendment understood that for a State statute to not infringe upon the constitutional rights of a municipality there must be several things. First, the State cannot pass generalized laws which broadly attempt to remove a municipality's ability to legislate in an area. The conflict must arise from the co-regulation of a particular subject matter area and not be a simple attempt by the State to curb municipal power. Second, there must be an actual conflict. That is, State law must expressly authorize that which municipal law prohibits.

3. In *Dayton*, the Ohio Supreme Court has recently revisited the manner in which it will examine Home Rule challenges, particularly with respect to whether a State law is a "general law."

In 2017, the City of Dayton successfully challenged three statutes obligating municipalities that operated red light cameras to: (1) have a law enforcement officer present at the location of a traffic camera; (2) prohibit a municipality from issuing a citation to a driver who was caught speeding by a traffic camera unless that driver exceeded the posted speed limit by at least 6 m.p.h. in certain areas and 10 m.p.h. in others; and (3) require a municipality to perform a safety study and information campaign prior to using a traffic camera. *Dayton v. State*, 151 Ohio

require traffic cameras to be placed in certain spots as a result of the safety study. *Id.* at ¶ 25. "Thus, the statute does not serve the purpose of directing that the devices be placed in spots where authorities have safety concerns." *Id.* The Court also noted that the newspaper publication and 30-day warning period served no purpose. "The public travelling through municipalities includes motorists who are not members of the local community targeted by the public-information campaign and local-publication requirement. Thus, the statute's requirements do not serve the purpose of ensuring that the public traveling in the area has notice." *Id.* at ¶ 27.

The Court stated that when a state statute's alleged purpose is not served by the requirements it creates, that statute does not serve an overriding state interest. *Id.* at ¶ 27. When that happens, the state statute is not a police, sanitary, or similar regulation. It is only a limit on the municipality's legislative power, not a general law, and the state statute is unconstitutional under the Home Rule Amendment. *Id.*

In our case, R.C. 9.68 and Am. Sub. H.B. 228 are not general laws under either the third or fourth prongs of the *Canton* general-law test. As such, the City is entitled to a preliminary injunction.

4. Am. Sub. H.B. 228 and R.C. 9.68 unconstitutionally infringe upon the City of Columbus' right to exercise its zoning powers to prohibit a firearms manufacturing plant from locating in a residential neighborhood.

The City of Columbus has enacted a comprehensive zoning code. That code specifies that it "is enacted to preserve and promote the public health, safety and welfare by means of regulations and restrictions enacted pursuant to a comprehensive plan designed to, among other purposes, encourage the orderly growth and development of the city; to provide for adequate light, air, open space and convenience of access; protect against fire and natural hazards; and

municipalities can only have 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" or that "specifies the hours of operation or the geographic area where the commercial sale of firearms, firearm components, or ammunition for firearms may occur." R.C. 9.68(D) (original and amended versions). Thus, while the General Assembly has declared that municipalities may be allowed to zone for purposes of firearm sales, it has also prohibited municipalities from zoning to prohibit a firearm manufacturer to locate *anywhere* in the city.

As a result, there is clearly a conflict between the City's zoning ordinance which prohibits firearm manufacturing from occurring in, for example, a residential neighborhood and Am. Sub. H.B. 228 and R.C. 9.68, both in its original and amended forms, which purport to only allow municipal zoning regulations to touch upon firearm sales. Since the City's zoning code is an exercise of police power, this court must determine whether the State law is a general law. Based upon the Supreme Court's most recent precedent, it is clear that the answer to that question is that R.C. 9.68 is *not* a general law.

5. Am. Sub. H.B. 228 and R.C. 9.68 are not general laws under the *Canton* test because they only limit the legislative power of a municipality and they do not prescribe a rule of conduct upon citizens generally.

As noted above, from the time of the adoption of the Home Rule Amendment, the Supreme Court has determined that the General Assembly cannot pass a law that prohibits a municipality from regulating a topic. *Fremont*, 96 Ohio St. at 470. In passing Am. Sub. H.B. 228 and R.C. 9.68, the General Assembly ignored the clear command that it received in *Fremont* more than a century ago. Amended R.C. 9.68 operates to directly prohibit a municipality from attempting to pass any "ordinance, rule, regulation, resolution, practice or other action" concerning firearms. This language directly contradicts the holding in *Fremont* as the General

actual conflict between the City's zoning ordinances and R.C. 9.68 as it applies to manufacturing because the State does not have any specific zoning ordinances beyond the generalized pronouncement of R.C. 9.68. Because R.C. 9.68 and Am. Sub. H.B. 228 do not advance any statewide interest, they are an unconstitutional limitation on the City's Home Rule Authority.

In addition to failing the third prong of the *Canton* test, R.C. 9.68 and Am. Sub. H.B. 228 also fail the fourth prong as well. That prong mandates that the statute at issue must prescribe a rule of conduct upon citizens generally to qualify as a general law. In her concurrence in *Dayton*, Justice French noted that the issue in *Canton* was a state statute "forbidding political subdivisions from prohibiting or restricting the location of permanently sited manufactured homes in any zone or district in which a single-family home was permitted—[and that statute] did not satisfy the requirement because it 'applie[d] to municipal legislative bodies, not to citizens generally.'" *Dayton* at ¶ 41 quoting *Canton* at ¶ 2, 36 (French, J., concurring). The traffic camera laws at issue in *Dayton* "were phrased in terms of what a local authority shall or shall not do. They apply not to citizens but to municipalities." *Id.* at ¶ 44. This was similar to the reasoning outlined by the *Linndale* Court which rejected the State law at issue there because it did not prescribe a rule of conduct on citizens generally. 85 Ohio St.3d at 55. And this is unlike cases such as *Mendenhall* in which the challenged statute directed its application to persons of the state generally. 117 Ohio St.3d 33, 2008-Ohio-270 at ¶ 25. Further, as in *Dayton*, the fact that other firearm regulations in other code sections describe substantive offenses does not mean amended R.C. 9.68 satisfies the fourth prong of *Canton*. *Dayton* at ¶ 44.

Am. Sub. H.B. 228 and R.C. 9.68 are unconstitutional because they only exist to limit the legislative power of municipalities. This is true of both the original and amended versions of

legislative power." *Id.* at ¶ 21; "R.C. 4511.0912 dictates how municipalities must enforce speed limits within their territories, thus limiting their legislative power." *Id.* at ¶ 23; "R.C. 4511.095 does not set forth state police, sanitary, or similar regulations but instead merely limits a municipalities legislative power to set forth those regulations." *Id.* at ¶ 27). Thus, contrary to the holding in *Cleveland*, in considering the third and fourth prongs of the *Canton* test the courts should not consider whether it is part of a comprehensive collection of state laws. *Cleveland*, 128 Ohio St.3d at 141.

In fact, the dissent pointed out in *Dayton* that the analysis used would mean that *Cleveland* was implicitly overruled. "If the provisions at issue today do not apply to citizens generally because they are directed at municipal governments, then the same must be said for the gun law in *Cleveland* and the predatory-lending provision in *Am. Servs. Assn.*" *Dayton* at ¶ 81 (DeWine, J., dissenting). The City agrees with the conclusion the dissent reached in *Dayton* as to the effect of that decision on the continued viability of the *Cleveland* analysis. When examining solely the statutory provision at issue, it is clear that Am. Sub. H.B. 228 and R.C. 9.68 are unconstitutional because they violate the City's Home Rule rights.

The jurisprudential approach to the general law test of *Canton* used in *Dayton* is also more consistent with the foundational principles of constitutional interpretation found in the Court's rulings in *Fremont*, *Youngstown*, *West Jefferson*, and *Linndale*. The decision in *Cleveland* represents an outlier in what had previously been consistent protection by the Court of municipal constitutional rights. The logical extension of the *Cleveland* ruling would be to make Article XVIII toothless in protecting what was put in place by the Ohio Constitutional Convention of 1912. As one delegate to that Convention noted, "If any act of the city can be

In the First Amendment context, the Ohio Supreme Court has noted that "[a]lthough prior restrains are not unconstitutional per se, there is a heavy presumption against their constitutional validity." *State ex rel. Toledo Blade Co. v. Henry Cty. Court of Common Pleas*, 125 Ohio St.3d 149, 2010-Ohio-1533, ¶ 21. Now, for Columbus to exercise its constitutional rights in the area of home rule as it relates to firearms, it must risk not only paying attorneys fees and costs to anyone who challenges its ordinances, but it also faces potentially paying economic damages to any challenger. Because of these threats, the City of Columbus cannot, for example, pass an ordinance that bans high-capacity magazines, even though Ohio law does not have a statute regulating ammunition clips. Thus, it is not possible for the City to show actual conflicts with State law because State law acts in such way as to punish a municipality for even attempting to exercise its constitutional rights. By engaging in prior restraint of municipal legislation, the General Assembly—in both current and amended R.C. 9.68—has violated the City's Home Rule Authority.

C. The City Has a Strong Likelihood of Success on the Merits of its Claims that Am. Sub. H.B. 228 and R.C. 9.68 Violate the Separation of Powers Doctrine and Article II, Section 32 of the Ohio Constitution.

1. The doctrine of Separation of Powers is a fundamental principle of the Ohio and Unites States Constitutions.

"The first, and defining, principle of a free constitutional government is the separation of powers." *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424, ¶ 39 citing *Evans v. State*, 872 A.2d 539, 543 (Del. 2005). As the United States Supreme Court long ago declared, "the functions appropriate to each of these branches of government shall be vested in a separate body of public servants, and . . . the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined." *Kilbourn v. Thompson*, 103 U.S. 168, 190 (1880). It is essential that those wielding the power in any one of these branches not

Court has acknowledged the overarching danger to a democratic system of government whenever one branch of government overtakes the responsibilities of any other. "[W]e protect the borders separating the three branches in order to ensure the security and harmony of the government and to voice the evils that would flow from legislative encroachment on our independence." *Id.* at ¶ 47 (internal citations omitted). As a result, Ohio's courts must "'jealously guard the judicial power against encroachment from the other two branches of government and . . . conscientiously perform our constitutional duties and continue our most precious legacy." *Id.* at ¶ 46 quoting *Sheward* at 467.

On the federal level, the United States Supreme Court has likewise recognized the importance of maintaining a separation of powers between the three branches of government. As the Court has maintained since 1803, "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). That Court has "not hesitated to strike down provisions of law that either accrete to a single Branch powers more appropriately diffused among separate Branches or that undermine the authority and independence of one or another coordinate Branch." *Mistretta v. United States*, 488 U.S. 361, 382, (1989).

2. Ohio courts have repeatedly rebuffed attempts by the General Assembly to mandate or pre-determine judicial outcomes in an attempt to limit judicial power.

Since the adoption of the 1851 constitution, the Ohio Supreme Court has held that "all the judicial power of the State is vested in the courts designated in the constitution." *Ex parte Logan Branch*, 1 Ohio St. 432, 434 (1853). Thus, when the General Assembly has passed a law interfering with the rights of the courts of this state to exercise their judicial powers, the courts have not hesitated to find such actions unconstitutional.

is beyond the constitutional power of the General Assembly to prescribe particular factors that a trial judge must consider when finding a fact." *Id.* at 32.

Finally, the Ohio Supreme Court, in *State v. Thompson*, 92 Ohio St.3d 584, 752 N.E.2d 276 (2001), found no constitutional deficiency in a statute that directed a trial court to consider all relevant factors including but not limited to a statutorily prescribed list. As the Supreme Court noted, "the factors listed in R.C. 2950.09(B)(2) are guidelines that serve an important function by providing a framework to assist judges in determining whether a defendant, who committed a sexually oriented offense, is a sexual predator. These guidelines provide consistency in the reasoning process." *Id.* at 587.

The Court went further and explained that the statutory guidelines "do not control a judge's discretion." *Id.* Instead, they merely provide a non-exhaustive list of factors that a judge can consider without prescribing any particular weight to give to any factor. Because the trial judge ultimately retained the ability to consider what weight, if any, to provide to each guideline and because the judge was not prohibited from considering any other factors, the Court determined these provisions were constitutional.

3. Amended R.C. 9.68 violates the Separation of Powers doctrine and as such the City is likely to succeed on the merits of its claim.

In our case, the General Assembly has specifically usurped the constitutional role of the courts in amended R.C. 9.68. The General Assembly has granted itself the authority to declare ordinances, rules, regulations, practice, or other actions of a municipal corporation to be null and void. Amended R.C. 9.68(A). The power to declare duly enacted legislation null and void is the domain of the judicial branch of government. *Bodyke* at ¶ 46. The General Assembly however has taken it upon itself to exercise that power. This action is no different than the General

discrimination in its enforcement." *Id.* at ¶ 84 citing *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). Thus, a "determination of whether a statute is impermissibly imprecise, indefinite, or incomprehensible must be made in light of the facts presented in the given case and the nature of the enactment challenged." *Id.* citing *Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982) (internal citations omitted).

Although regulations directed at economic matters imposing only civil penalties are subject to a less strict vagueness test, "if the enactment 'threatens to inhibit the exercise of constitutionally protected rights, 'a more stringent vagueness test is to be applied.'" *Id.* at ¶ 85 citing *Hoffman Estates* at 498-499. The test in any void for vagueness challenge is "whether the law affords a reasonable individual of ordinary intelligence fair notice and sufficient definition and guidance to enable him to conform his conduct to the law; those laws that do not are void for vagueness." *Id.* at ¶ 86 citing *Grayned v. Rockford*, 408 U.S. 104, 108-09 (1972).

In *Norwood*, the Ohio Supreme Court determined that a City of Norwood ordinance allowing the city to take property through eminent domain if the property was in a "deteriorating area" was void for vagueness. The Court noted that "we cannot say that the appellants had fair notice of what conditions constitute a deteriorating area, even in light of the evidence adduced against them at trial." *Id.* at ¶ 97. The Court proclaimed that "deteriorating area" was a "standardless standard." *Id.* at ¶ 98. Thus, the ordinance simply recited subjective factors "that invite ad hoc and selective enforcement—a danger made more real by the malleable nature of the public-benefit requirement." *Id.*

In our case, Am. Sub. H.B. 228 and R.C. 9.68 are void for vagueness. The amended statute claims to prohibit any municipal "ordinance, rule, regulation, resolution, practice, or other action or any threat of citation, prosecution, or other legal process" as it relates to firearms. R.C.

CA2005-03-009 and CA2005-03-011, 2006-Ohio-1002, ¶ 24 citing *Crestmont Cadilac Corp. v Gen. Motors Corp.*, 8th Dist. Cuyahoga No. 83000, 2004-Ohio-488, ¶ 36. Actual harm is not required, as "a threat of harm is a sufficient basis on which to grant injunctive relief." *Convergys Corp. v Tackman*, 169 Ohio App.3d 665, 2006-Ohio-6616, ¶ 9 (1st Dist.).

As the Tenth District has noted, "'[i]njunctive relief is warranted when a statute is unconstitutional, enforcement will infringe upon constitutional rights and cause irreparable harm, and there is no adequate remedy at law.'" *Magda v. Ohio Elections Comm'n*, 2016-Ohio-5043, 58 N.E.3d 1188, ¶ 38 quoting *United Auto Workers Local Union 1112 v. Philomena*, 121 Ohio App.3d 760, 781, 700 N.E.2d 936 (10th Dist. 1998). In fact, a "finding that a constitutional right has been threated or impaired mandates a finding of irreparable injury as well." *Id.* citing *Bonnell v. Lorenzo*, 241 F.3d 800, 809 (6th Cir. 2001).

In our case, the Plaintiff has a constitutional right to its home rule authority. The State has sought to interfere with that constitutional right by statutorily prohibiting the City from exercising its rights. Because the City will suffer a loss of its constitutional right it has suffered irreparable harm and is entitled to a preliminary injunction.

F. Third Parties Will not be Unjustifiably Harmed if this Court Were to Issue an Injunction.

There is no harm that any third party would suffer were this Court to issue an injunction against R.C. 9.68 and Am. Sub. H.B. 228. By insuring a proper constitutional balance between the State and its constitutionally protected municipalities, the Court is ensuring that third parties would not be harmed since an injunction would restore the constitutional order.

It appears that the only argument that the State could advance is a claim that individuals might unwittingly violate a yet to be passed municipal ordinance as it relates to firearms. This argument, however, is both speculative and irrelevant. First, this assumes the City would

IV. CONCLUSION

Thus, Plaintiff City of Columbus asks this Court to grant a preliminary injunction against R.C. 9.68, both in its original and amended forms, and Am. Sub. H.B. 228.

Respectfully,

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CERTIFICATE OF SERVICE

This is to certify that the foregoing Plaintiff's Motion for a Preliminary Injunction has been served by operation of this Court's electronic filing system on this 19th day of March 2019.

/s/ Richard N. Coglianese
Richard N. Coglianese