

IN THE COURT OF COMMON PLEAS  
DELAWARE COUNTY, OHIO

JOHN DOE 1, et al.,	)	CASE NO: 23 CV H 02 0089
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	JUDGE DAVID M. GORMLEY
CITY OF COLUMBUS, et al.,	)	
	)	
Defendants.	)	
	)	

**PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND  
PRELIMINARY INJUNCTION**

Pursuant to R.C. 2721.03 and Ohio Rules of Civil Procedure Rule 65, Plaintiffs respectfully move for a temporary restraining order and a preliminary injunction to preclude the implementation and enforcement of the City of Columbus ordinance 3176-2022 (the “Ordinance”), which, among other things, ostensibly bans certain firearm-loading devices—magazines—which the Ordinance defines as “large-capacity magazines.” As explained in the attached Memorandum in Support, the Ordinance violates the State’s firearms regulation preemption law, is unconstitutionally vague, and violates Ohio’s constitutional provision governing the fundamental right to keep and bear arms for defense and security. Accordingly, Plaintiffs are entitled to the requested orders.

Respectfully submitted,  
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**PLAINTIFF’S MEMORANDUM IN SUPPORT OF MOTION FOR TEMPORARY  
RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

**I. INTRODUCTION**

For over 100 years, the State of Ohio has regulated firearms. As part of this regulation, the State enacted R.C. 9.68 providing for uniformity of firearms laws throughout the State of Ohio and precluding localities from passing more restrictive gun laws than the State. Despite this uniformity law (twice upheld by the Ohio Supreme Court), on December 7, 2022 the City of Columbus enacted ordinance 3176-2022 (the “Ordinance”), which created a new crime for those in possession of certain firearms-loading devices, i.e. detachable magazines. Detachable magazines have been in civilian usage for over 100 years. Dave Campbell, *A Look Back at the Winchester Model 1907 Rifle*, <https://www.americanrifleman.org/content/a-look-back-at-the-winchester-model-1907-rifle/> (accessed Feb. 1, 2023). The Ordinance ostensibly bans such magazines if they can hold 30 rounds of ammunition—which magazines have been in civilian usage for at least 60 years. David B. Kopel, *The History of Firearm Magazines and Magazine*

*Prohibitions*, 88 Albany L.Rev. 849, 859 (2015). Ohio law, which preempts municipal law, does not prohibit the possession of such magazines. As such, R.C. 9.68 invalidates the Ordinance.

The Ordinance defines the prohibited magazines as follows:

“Large Capacity Magazine” means any magazine, belt, drum, feed strip, clip or other similar device that has the capacity of, or can be readily restored or converted to accept, *thirty (30) or more rounds of ammunition* for use in a firearm. A “large capacity magazine” *does not include* any of the following: (1) *A feeding device [e.g. a magazine] that has been permanently altered so that it cannot accommodate more than thirty rounds of ammunition*

\* \* \*

(Emphasis added.) Columbus City Code 2323.11(N), Compl. Ex. A at 4.

The Ordinance makes illegal, under punishment of a mandatory six-month incarceration and a \$1,500 fine, the possession of a large-capacity magazine. Columbus City Code 2323.32, Compl. Ex. A. at 5–6. However, while the first clause of 2323.11(N) makes a magazine holding 30 rounds *or more* illegal, the second clause exempts magazines that can hold 30 rounds or less. Compl. Ex. A at 4. So, a 30-round magazine is both legal and illegal. This is beyond vague—it is contradictory and neither the City Prosecutor nor the residents of the City of Columbus can know if a person possessing a 30-round magazine is violating the law. Accordingly, the large-capacity magazine prohibition is void for vagueness under the Ohio Constitution Article I, Section 1.

Finally, Article I, Section 4 of the Ohio Constitution gives every Ohioan a fundamental right to “bear arms for their defense and security.” *Arnold v. Cleveland*, 67 Ohio St.3d 35, 43, 616 N.E.2d 163 (1993). Ohio has recognized that the Ohio Constitution’s right to bear arms grants greater protection than that provide in the Second Amendment to the U.S. Constitution. *Stolz v. J & B Steel Erectors, Inc.*, 155 Ohio St.3d 567, 2018-Ohio-5088, 122 N.E.3d 1228, ¶ 30. And the

standard for protection under the Ohio Constitution “may not deny individuals or groups the minimum level of protections mandated by the federal Constitution.” *Arnold* at 168; *New York State Rifle & Pistol Assn., Inc. v. Bruen*, 142 S.Ct. 2111, 2190–130 (2022). But whether judged under the historical evaluation standard required by *Bruen* at 2190–130, or the pre-*Bruen* reasonableness standard in *Arnold*, the Ordinance fails and must be struck down.

## **II. Facts**

For purposes of brevity, Plaintiffs incorporate by reference the recitation of facts set forth in the Complaint but restate some key facts here and provide additional relevant background.

Americans have long considered the right to bear arms an individual right, even before it was ensconced in the Second Amendment to the U.S. Constitution. *United States v. Cruikshank*, 92 U.S. 542, 542, 23 L.Ed. 588 (1875), paragraph six of the syllabus (“The right to bear arms is *not granted* by the Constitution; *neither* is it in any manner *dependent* upon that instrument for its existence.” (Emphasis added)); *D.C. v. Heller*, 554 U.S. 570, 592, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008) (the Second Amendment “codified a pre-existing right”). And this right is a fundamental right under the Ohio Constitution. *Arnold*, 67 Ohio St.3d at 43–46, 616 N.E.2d 163.

Because the right to bear arms is a “constitutionally protected right in every part of Ohio, the general assembly [found] the need to provide uniform laws throughout the state regulating \* \* \* firearms [and] their components \* \* \*.” R.C. 9.68. In passing R.C. 9.68, the General Assembly guaranteed every citizen in Ohio would be subject to the same firearms laws no matter where in the state they were. The Ohio Supreme Court has twice upheld R.C. 9.68 as a general law that preempts conflicting local ordinances regulating firearms and does not unconstitutionally infringe on political subdivisions' home-rule authority. *Ohioans for Concealed Carry, Inc. v. City of Clyde*,

120 Ohio St.3d 96, 2008-Ohio-4605, 896 N.E.2d 967; *City of Cleveland v. State*, 128 Ohio St.3d 135, 2010-Ohio-6318, 942 N.E.2d 370.

Despite these clear rulings, in 2019 the City of Columbus challenged the law once again. *City of Columbus v. State*, Franklin C.P. 2019-cv-2281. On November 2, 2022, the court granted the City of Columbus a preliminary injunction. Decision & Entry on Pl.’s Mot. for a Prelim. Inj., *City of Columbus v. State*, Franklin C.P. 2019-cv-2281 at 10 (Nov. 2, 2022). The court determined in its preliminary order that “paragraph (B) of 9.68” is an “unconstitutional infringement on municipal home rule,” because it provides to parties adversely affected by a conflicting city ordinance a statutory cause of action to challenge such ordinance. *Id.* The court also asserted that the law’s zoning carveout was not broad enough. *Id.* It did not address any other aspect of R.C. 9.68 as it affects the Ordinance challenged in this case. On November 10, 2022, the court stayed the case. Decision & Entry on Def. State of Ohio’s Mot. to Stay Pending Appeal, *City of Columbus v. State*, Franklin C.P. 2019-cv-2281 (Nov. 10, 2022).

Almost immediately—and despite the stay—on December 7, 2022, the City of Columbus passed an ordinance that sought to regulate firearms and their components to a greater extent than that provided for by state law and in violation of R.C. 9.68 and the Ohio Constitution. In passing the Ordinance, the City of Columbus became an outlier in firearms regulation. Conduct that is legal everywhere else in the State immediately became criminalized in Columbus. The Ordinance banned the knowing possession, purchase, keeping for sale, offering or exposing for sale, transferring, distribution, or importation of large-capacity magazines. Compl. Ex. A at 5–6.

The Ordinance ostensibly bans magazines which hold 30 or more rounds of ammunition. Compl. Ex. A at 4–6. Such 30-round magazines have been in civilian usage since at least the 1960s—about 60 years. They have been used for many civilian firearms, including .22 caliber

rifles, .30 caliber rifles, and the very common AR-15<sup>1</sup> (usually .223 caliber), none of which are fully automatic.<sup>2</sup> Plaintiff Jane Doe chose an AR-15 rifle with a 30-round magazine for home defense, specifically because it is lightweight, has low recoil and is easy for women to use. Notably, “AR-15-platform rifles are among the most popular firearms being sold. They are today’s modern sporting rifle.” National Shooting Sports Foundation, *Modern Sporting Rifle: The Facts*, <https://www.nssf.org/msr/> (accessed Feb. 9, 2023). It has been estimated that there are about 80 million 30-round magazines in civilian usage. National Shooting Sports Foundation, *Another Ban on “High-Capacity” Magazines?*, [www.nssf.org/wp-content/uploads/2021/03/NSSF-factsheet-High-Capacity-Magazines.pdf](http://www.nssf.org/wp-content/uploads/2021/03/NSSF-factsheet-High-Capacity-Magazines.pdf) (accessed Feb. 1, 2023). Only an infinitesimal fraction of these have ever been used in the commission of a crime.

On December 14, 2022, the Franklin County court clarified its November 10 stay order to make clear that it had stayed the preliminary injunction issued on November 2 pending the resolution of the State’s subsequent appeal of the preliminary injunction. Order Regarding Stay Order Issued on Nov. 10, 2022, *City of Columbus v. State*, Franklin C.P. 2019-cv-2281 (Dec. 14, 2022).

Coincidentally, earlier on that same day, December 14, 2022, the State of Ohio filed a complaint in Fairfield County against the City of Columbus regarding the Ordinance seeking a declaratory judgment, a temporary restraining order, and preliminary and permanent injunctive

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<sup>1</sup> Contrary to media portrayals, the “AR” in “AR-15” does not mean assault rifle—nor could it because an assault rifle is a military rifle which is fully automatic; the AR-15 will not fire fully automatic. Rather, “AR” is an abbreviation for the original patent holder for that firearm as developed in the 1950s—ArmaLite. See U.S. Patent No. 2,951,424 (filed Aug. 14, 1956). “Assault rifles are short, compact, selective-fire weapons that fire a cartridge intermediate in power between submachinegun and rifle cartridges. Assault rifles \* \* \* are capable of delivering effective full-automatic fire\* \* \*” U.S. Army, Foreign Science and Technology Center, ST-HB-07-03-74, *Small Arms Identification and Operation Guide—Eurasian Communist Countries* 105 (1974), available at [https://www.collezionareexordinanza.it/uploads/downloads/2017-07-02\\_dia-small%20arms%20identification%20communist%20countries.pdf](https://www.collezionareexordinanza.it/uploads/downloads/2017-07-02_dia-small%20arms%20identification%20communist%20countries.pdf).

<sup>2</sup> While it is possible for a gunsmith to convert an AR-15 to be fully automatic, that would be illegal. See R.C. 2923.11(E), (K); R.C. 2923.17.

relief. Compl., *State v. City of Columbus*, Fairfield C.P. No. 2022-cv-00657 (Dec. 14, 2022). The court entered a temporary restraining order against the enforcement of the Ordinance. Decision & Entry Granting the State of Ohio's Appl. for TRO, *State v. City of Columbus*, Fairfield C.P. No. 2022-cv-00657 (Dec. 15, 2022). Subsequently, due to the previously pending case between the City and State in Franklin County over the validity of R.C. 9.68, the Fairfield County court dismissed the State's claim that the Ordinance violates R.C. 9.68. Op. & Entry Regarding Mot. for Prelim. Inj., *State v. City of Columbus*, Fairfield C.P. No. 2022-cv-00657 (Jan. 20, 2023). The temporary restraining order was dissolved on January 20, 2023. *Id.*

Despite the Franklin County Court's November 10, 2022, stay, as clarified on December 14, Defendant City Attorney Zach Klein on January 20, 2023, announced that the Ordinance "can be enforced beginning Saturday morning," January 21, 2023. Mark Feuerborn, *Columbus gun laws dodge block on enforcement, going into effect soon*, <https://tinyurl.com/KleinStatement>. Plaintiffs, with good reason, now fear arrest and prosecution for simple possession of the ostensibly banned firearms magazines.

Plaintiffs are diverse in multiple ways, but they all have one thing in common. Plaintiffs possess (or previously possessed until removing them outside city limits) firearms magazines that the City has banned. See Affidavits of Plaintiffs, Compl. Ex. B-F. Plaintiffs are firearms owners who live in the City of Columbus. *Id.* Other persons living in communities surrounded by Columbus, such as Whitehall, Ohio, are also subject to arrest and prosecution. To get to a firearms range or anywhere else where they can legally discharge their firearms, they must travel through the City of Columbus. Plaintiffs brought this action to protect themselves (and others) from the immediate infringement of their fundamental rights and the risk of arrest and prosecution. *Id.*

Plaintiffs were not parties to either the Fairfield or Franklin action between the City and the State and they now challenge the validity of the Ordinance, which did not exist at the time the Franklin County Court issued its *preliminary* injunction. Indeed, it is unlikely that when the Franklin County court determined that “no third parties would be harmed by granting the injunction” that it envisioned that the City would immediately ban a whole class of firearms components—which *does* harm an unknown number of third parties who, until the passage of the Ordinance, legally possessed such components. Decision & Entry on Pl.’s Mot. for a Prelim. Inj., *City of Columbus v. State*, Franklin C.P. 2019-cv-2281 at 11 (Nov. 2, 2022).

Plaintiffs are entitled to bring this action pursuant to R.C. 9.68(B) and, separately, because they are in danger of arrest and prosecution. *Ohioans for Concealed Carry, Inc.*, 164 Ohio St.3d 291, 2020-Ohio-6724, 172 N.E.3d 935, at ¶ 33–34.

### **III. Law and Argument**

#### **A. Standard of Review**

Temporary restraining orders and preliminary injunctions “preserve the status quo of the parties pending a final adjudication of the case on the merits.” *Ak Steel Corp. v. ArcelorMittal USA, LLC*, 2016-Ohio-3258, 55 N.E.2d 1152, ¶ 9 (12th Dist.); *accord Grogan v. T.W. Grogan Co.*, 143 Ohio App.3d 548, 556, 758 N.E.2d 702 (8th Dist.2001), *as amended nunc pro tunc* (June 7, 2001).

In deciding whether to grant a preliminary injunction, a court must look at (1) whether there is a substantial likelihood that plaintiff will prevail on the merits, (2) whether plaintiff will suffer irreparable injury if the injunction is not granted, (3) whether third parties will be unjustifiably harmed if the injunction is granted, and (4) whether the public interest will be served by the injunction.



*Vanguard Transp. Sys., Inc. v. Edwards Transfer & Storage Co., Gen. Commodities Div.*, 109 Ohio App.3d 786, 790, 673 N.E.2d 182 (10th Dist.1996). However, no single factor is dispositive, and “if there is a strong likelihood of success on the merits, an injunction may be granted even though there is little evidence of irreparable harm and vice versa.” *AK Steel Corp.* at ¶ 10 (internal citations omitted). Here, all the factors weigh in favor of Plaintiffs and granting a temporary restraining order and preliminary injunction.

**B. Plaintiffs are substantially likely to succeed on the merits.**

**1. The City of Columbus’ Ordinance is invalid because it is preempted by State law. R.C. 9.68.**

R.C. 9.68 explains that “[t]he individual right to keep and bear arms” is “a fundamental individual right” that is “a constitutionally protected right \* \* \* .” R.C. 9.68(A). The Ohio General Assembly then declared “the need to provide uniform laws throughout the state regulating the ownership, possession, purchase, other acquisition, transport, [or] storage \* \* \* of firearms, [and] *their components* \* \* \* .” (Emphasis added.) *Id.*

The operative part of the law states:

“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, acquire, transport, store \* \* \* or keep any firearm, part of a firearm, [and] *its components* \* \* \* . Any such further license, permission, restriction, delay, or process interferes with the fundamental individual right described in this division \* \* \* and the state by this section preempts,

supersedes, and declares null and void any such further license, permission, restriction, delay, or process.

(Emphasis added.) *Id.*

The State’s preemption of local laws could not be much clearer. Despite that, the Ordinance explicitly bans the possession of components of firearms, i.e., so-called large-capacity magazines. The Ordinance recognizes that “Ohio Revised Code Section 9.68 [] governs the regulation of firearms by a political subdivision \* \* \* .” Compl. Ex. A at 6. Despite this recognition, the Ordinance enacts a firearms regulation that conflicts with state law. Further, it declares that if the courts uphold R.C. 9.68 and invalidate the 30-round magazine limit, the Ordinance will then impose a 100-round limitation; but that is also preempted by R.C. 9.68 and would also be invalid. *See* Compl. Ex. A. at 6.

The Ohio Supreme Court has twice upheld R.C. 9.68 as a general law that preempts conflicting local ordinances regulating firearms and does not unconstitutionally infringe on political subdivisions’ home-rule authority. *Ohioans for Concealed Carry, Inc.*, 120 Ohio St.3d 96, 2008-Ohio-4605, 896 N.E.2d 967; *City of Cleveland*, 128 Ohio St.3d 135, 2010-Ohio-6318, 942 N.E.2d 370. In reaching that conclusion, the Court asked (1) whether the ordinance is an exercise of the police power, rather than of local self-government, (2) whether the State statute is a general law, and (3) whether the ordinance is in conflict with the state statute. *Ohioans for Concealed Carry, Inc.* at ¶ 10.

The Ohio Supreme Court has already determined that (1) firearms regulations are an exercise of police power, *id.* at ¶ 28, and (2) R.C. 9.68 is a general law “that displaces municipal firearm ordinances \* \* \* ,” *City of Cleveland* at ¶ 35. That leaves only the final question: Is the Ordinance in conflict with the state statute? The answer is “Yes.”

When determining if the ordinance conflicts with any state statute, the court “asks whether the ordinance prohibits that which the statute permits, or vice versa.” *Ohioans for Concealed Carry, Inc.*, at ¶ 53. R.C. 9.68’s prohibits all firearms regulations that are not uniform. Only the General Assembly can provide for uniform laws. The Ordinance implements regulations that are not uniform throughout the state, and it bans certain firearm magazines that state law permits.

Significantly, from 1986 until 2014, state law regulated—but did not ban<sup>3</sup>—magazines which could hold no “more than thirty-one (31) cartridges.” 1986 Am.H.B. 51. Then, in 2014, the General Assembly eliminated the limitation all together, 2014 Am.Sub.H.B. 234, so that the current uniform law of the State of Ohio has no limit on the number of rounds a firearm magazine may legally hold. Plainly, the Ordinance prohibits that which state law permits. *See City of Columbus v. State*, 10th Dist., Franklin No. 22-AP-676, 2023 WL 371787, ¶ 17 (Jan. 24, 2023).

The Ordinance also regulates the storage of firearms inside one’s residence. *See Ordinance Sections 2303.05, 2303.14, 2323.11(O), and 2323.191, Compl. Ex. A at 1–5.* These provisions are also preempted by R.C. 9.68. Ohio law does not mandate any storage requirements within one’s own residence. Finally, the Ordinance does not contain a severability provision.

The Ordinance conflicts with R.C. 9.68, and Plaintiffs are substantially likely to succeed on the merits of this claim.

## **2. The Ordinance is void for vagueness under the Ohio Due Process Clause.**

Ohio’s Due Process Clause, Article I, Section I of the Ohio Constitution, protects Ohio citizens from overly vague ordinances. *Akron v. Rowland*, 67 Ohio St.3d 374, 381, 618 N.E.2d 138 (1993).

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<sup>3</sup> Anyone with a permit could obtain a firearm that exceeded the cartridge limitation. *See R.C. 2923.17(C)(7)* (2011).

In considering a challenge to an ordinance or statute as void for vagueness, a court is required to determine whether the enactment “(1) provides sufficient notice of its proscriptions to facilitate compliance by persons of ordinary intelligence and (2) is specific enough to prevent official arbitrariness or discrimination in its enforcement.”

*City of All. v. Carbone*, 181 Ohio App.3d 500, 2009-Ohio-1197, 909 N.E.2d 688, ¶ 15 (5th Dist.), quoting *Norwood v. Horney*, 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, ¶ 84. Further, a “law is also impermissibly vague when it delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.” *Id.* at ¶ 47 (internal quotation marks and citations omitted). The “critical question in all cases 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.” *Norwood* at ¶ 86.

While Plaintiffs are not asserting a claim under the Federal Due Process Clause, Fourteenth Amendment to the U.S. Constitution, federal due process law is instructive. A statute violates the Federal Due Process Clause if it deprives a person of “life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement.” *Johnson v. United States*, 576 U.S. 591, 595, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015). “It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined,” *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972), and “men of common intelligence must necessarily guess at its meaning and differ as to its application \* \* \*,” *Connally v. General Construction Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322 (1926).

And just as with Ohio's Due Process Clause, to overcome a federal due process void for vagueness challenge, the legislature must "establish minimal guidelines to govern law enforcement." *Kolender v. Lawson*, 461 U.S. 352, 358, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983), quoting *Smith v. Goguen*, 415 U.S. 566, 574, 94 S.Ct. 1242, 39 L.Ed.2d 605 (1974). "Where the legislature fails to provide such minimal guidelines, a criminal statute may permit a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." *Id.* (internal quotation marks and citation omitted).

The Ordinance is internally contradictory. It defines a large-capacity magazine as one that holds "thirty (30) or more" rounds of ammunition *but then excludes* magazines that "cannot accommodate more than thirty rounds of ammunition \* \* \* ." Columbus City Code 2323.11(N), Compl. Ex. A at 4. Accordingly, a 30-round magazine is both prohibited and exempted. It is not possible for a person of "ordinary" or "common" intelligence to know whether a 30-round magazine is prohibited or exempted under the Ordinance. *See Norwood* at ¶ 86; *Connally* at 391. And because of this simultaneous prohibition and exemption, the Ordinance "gives police and courts unfettered discretion to determine whether a person's conduct constitutes criminal" possession. *City of All.* at ¶ 47; see also *Kolender* at 358. The Ordinance's 100-round alternative definition similarly suffers the same internal contradictions. Ordinance Section 2323.321, Compl. Ex. A at 6.

Thus, as enacted by the Ordinance, Columbus City Codes 2323.32, 2323.11(N), and 2323.321 violate Article I, Section I of the Ohio Constitution as void for vagueness. And while the Plaintiffs are not asserting a claim under the Fourteenth Amendment, the Ordinance also violates the Federal Due Process Clause, which is instructive in evaluating the Ohio Constitution.

**3. Article I, Section 4 of the Ohio Constitution protects the fundamental individual right to bear arms, including the components of those arms. The Ordinance infringes on that right by banning components of firearms.**

Article I, Section 4 of the Ohio Constitution provides that: “The people have the right to bear arms for their defense and security \* \* \* .” “[W]hen adopting Article I, Section 4 of the Ohio Constitution, the people of Ohio ‘chose to go even further’ than the Second Amendment to the United States Constitution regarding the right of an individual to possess firearms.” *Stolz*, 155 Ohio St.3d 567, 2018-Ohio-5088, 122 N.E.3d 1228, at ¶ 30 (citation omitted). Before the U.S. Supreme Court’s decision in *Heller*, 554 U.S. 570, the Ohio Supreme Court applied this principle to determine that Article I, Section 4 provided an individual right that “was obviously implemented to allow a person to possess certain firearms for defense of self and property.” *Arnold*, 67 Ohio St.3d at 43, 616 N.E.2d 163. The Ordinance infringes on this right by banning the possession of arms protected by Article I, Section 4.

**a. *Arnold’s* recognition that the right to bear arms in Ohio is a fundamental right entitles it to at least as much protection as that right has under the Second Amendment.**

“[T]he Ohio Constitution is a document of independent force,” and the Ohio Supreme Court has “held that the state courts may recognize protections under the Ohio Constitution that are greater than those provided by the United States Constitution.” *Stolz* at ¶ 30.

In the areas of individual rights and civil liberties, the United States Constitution, where applicable to the states, *provides a floor below which state court decisions may not fall*. As long as state courts provide at least as much protection as the United States Supreme Court has provided in its interpretation of the federal Bill of Rights, state courts are unrestricted in according greater civil liberties and protections to individuals and groups.

(Emphasis added.) *Arnold* at 169. When *Arnold* was decided in 1993, the U.S. Supreme Court had not yet recognized the right to bear arms under the Second Amendment as a fundamental individual right. Most federal courts considered it a collective right under the Second Amendment and any law impinging on it was analyzed with using a reasonableness test. *See Heller*, 554 U.S. at 622. But *Arnold* recognized that the Ohio Constitution protected this right for individuals and that “Section 4, Article I of the Ohio Constitution confers upon the people of Ohio the fundamental right to bear arms.” *Arnold* at 171. Despite this, the court looked to other jurisdictions to determine if a law violated this fundamental right, explaining the concept that the right to bear arms “is subject to reasonable regulation is an accepted principle among other jurisdictions.” *Arnold* at 172. Based on that, the Court concluded that “the test [of a questioned ordinance] is one of reasonableness.” *Id.*

Subsequently, the U.S. Supreme Court ruled in *Heller* and *McDonald v. Chicago*, 561 U.S. 742, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010), that the Second Amendment protects an individual right. In 2018 the Ohio Supreme Court again recognized that Ohio’s constitutional right to bear arms grants greater protection than the Second Amendment. *Stolz*, 155 Ohio St.3d 567, 2018-Ohio-5088, 122 N.E.3d 1228, at ¶ 30. Next in *Bruen*, 142 S.Ct. at 2190–130, the U.S. Supreme Court held that laws infringing on this right are subject to a much stronger protection than the lax “reasonableness” test. The Court explained:

[T]he standard for applying the Second Amendment[’s] [protection of the right to keep and bear arms] is as follows: When the Second Amendment’s plain text covers an individual’s conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation’s historical tradition of firearm regulation.

*Id.*

Article I, Section 4’s protection of the right to bear arms—including possession of firearms-magazines—“may not deny individuals or groups the minimum level of protections mandated by the federal Constitution.” *Arnold*, 67 Ohio St.3d at 168, 616 N.E.2d 163. And courts have considered the right to bear arms to cover magazines. *See, e.g., Heller v. District of Columbia (“Heller II”)*, 670 F.3d 1244, 1264 (D.C. Cir.2011) (“We are not aware of evidence that prohibitions on \* \* \* large-capacity magazines are longstanding and thereby deserving of a presumption of validity”); *Ass’n of New Jersey Rifle & Pistol Clubs, Inc. v. Att’y Gen. New Jersey*, 910 F.3d 106, 116–17 (3d Cir.2018), *abrogated by Bruen*, 142 S.Ct. at 2126–127 (noting that according to the record, magazines are typically owned by law abiding citizens and that “there is no longstanding history of [large capacity magazine] regulation”). The plain text of Article I, Section 4, goes even further than the Second Amendment though by explicitly protecting those arms for one’s defense and security. Because magazines are essential for the use in a firearm, they must be considered arms under Article I, Section 4.

Ohio’s early history of firearms regulations is consistent with protecting feeding devices holding multiple rounds of ammunition. The Ohio legislature has never banned them. From the enactment of Article I, Section 4 in 1851, until 1933, the State did not regulate cartridge limits in feeding devices. Firearms feeding devices—whether tubular or fixed magazines—existed beginning as early as 1848. Seth Isaacson, *The Volcanic Pistol: The First Smith & Wesson Handgun*, <https://www.rockislandauction.com/riac-blog/the-volcanic-pistol> (accessed Jan. 30, 2023). And while the State once restricted firearm cartridge limits, it has since repealed those restrictions. If the State still had such restrictions, even those might be invalid under *Heller* and *Bruen*. Moreover, Ohio’s prior laws regulating firearm cartridge size did not ban the magazines,



they simply required a permit to possess a firearm which was adapted to fire more than the limit without reloading. *See* R.C. 2923.17(C)(7) (2011).

Under *Heller*, *McDonald*, and *Bruen*, the subject magazines are protected and cannot be banned.

**b. The Ordinance is invalid even under the reasonableness test.**

The Ordinance fails the *Heller/McDonald/Bruen* tests, but even if the Court were to look only at the outdated—and effectively supplanted—*Arnold* reasonableness test, the Ordinance is not a reasonable restriction on the right to bear arms. An ordinance’s reasonableness is not determined in a vacuum. “[O]rdinances must be reasonable considering the existing circumstances \* \* \* .” *Loesch Allotment Co. v. Vill. of Newburgh Heights*, 69 Ohio Law Abs. 310, 313, 100 N.E.2d 543 (C.P. 1950). “[A] municipality may enact ordinances to promote the health, safety and general welfare of the public if the means adopted bear a real and substantial relationship to their purpose.” *City of Cincinnati v. Kelley*, 47 Ohio St. 2d 94, 97, 351 N.E.2d 85 (1976). The ordinance “must relate, in a reasonable manner, to the evil the ordinance is intended to combat \* \* \* .” *Id.* The Ordinance does not do that.

The Ordinance’s preamble references the City of Columbus’ gun violence as a problem and references the mayor’s declaration of gun violence as a public health crisis. Compl. Ex. A at 1–2. The preamble did not cite the number of firearms used in crimes and did not cite even one criminal usage of a firearm equipped with a 30-round magazine in the City of Columbus—or anywhere else for that matter. Compl. Ex. A at 1–2. The preamble does mention the use of a 100 round magazine used in one isolated crime—three years ago and 70 miles away in Dayton, Ohio. Compl. Ex. A at 1. But that is a far cry from criminal usage of a 30-round magazine in Columbus in recent times. In any event, while it is impossible to know, it is likely that Columbus residents

who legally possess firearms also collectively possess thousands of 30-round magazines and never once used them in a crime. And while a municipality may not need to wait for a threat to appear within the municipality to address it, there must at least be evidence that banning a commonly owned firearm-component would likely reduce gun violence in Columbus. There is none. Moreover, there is no logical or fact-based reasoning justifying a ban on 30-round magazines as opposed to some other number. Nothing in the Ordinance shows how it is anything other than an arbitrary and capricious number.

Moreover, nothing in the Ordinance’s preamble or the City’s public statements in the cited articles state what types of firearms were used in these crimes. Detachable 30-round magazines are almost always used in rifles. But rifles are only used in about 2.5% of homicides. Indeed, hands, fists, feet, etc. are more often used to commit homicides, i.e., in 4.8% of the homicides in Ohio. Joslyn Law Firm, *Which Weapons Are Most Commonly Used for Homicides?* <https://www.criminalattorneycolumbus.com/which-weapons-are-most-commonly-used-for-homicides/> (accessed on Feb. 1, 2023).

The Columbus City Council says “[g]un control simply cannot wait.” Compl. Ex. A at 1. But any firearms regulation must be *reasonably related to the problem to be resolved*. “[C]ommon sense gun reform” to “creat[e] a safer Columbus” must actually be common sense to be reasonable. Compl. Ex. A at 2 “Common sense” is more than a shibboleth that the City can invoke to justify its actions. “Common sense” is “sound and prudent judgment based on a simple perception of the situation or facts.” *Common Sense*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/common%20sense> (accessed on Jan. 31, 2023). Banning a magazine without any facts or evidence that the ban has reduced gun violence elsewhere or that gun violence in the jurisdiction is fairly traceable to the firearms components that the governmental entity is

seeking to regulate, and that the regulation is therefore likely to reduce gun violence here is neither common sense nor is it reasonable. It simply does not pass the very basic reasonableness test.

Because the Ordinance is not a reasonable restriction on Ohioans' fundamental constitutional right to bear arms, it violates Article I, Section 4 of the Ohio Constitution. Thus, Plaintiffs are substantially likely to succeed on the merits of this claim.

**C. Plaintiffs will suffer irreparable harm without an injunction.**

An injunction is necessary to prevent irreparable harm to Plaintiffs. “An irreparable injury is one for the redress of which, after its occurrence, there could be no plain, adequate and complete remedy at law, and for which restitution in specie (money) would be impossible, difficult or incomplete.” *Cleveland v. Cleveland Elec. Illum. Co.*, 115 Ohio App.3d 1, 12, 684 N.E.2d 343 (8th Dist.1996) (internal quotation marks and citation omitted). Irreparable harm is presumed from the nature of a constitutional deprivation. *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976); *Magda v. Ohio Elections Comm.*, 2016-Ohio-5043, 58 N.E.3d 1188, ¶ 38 (10th Dist.).

Plaintiffs' harm is already accruing and will continue to accrue until the Ordinance is struck down or repealed. Because the Ordinance immediately criminalized mere possession of so-called large-capacity magazines, Plaintiffs risk arrest and prosecution for violating an unlawful ordinance. Residents of Columbus, non-residents whose homes are enclosed by the city, and any other person traveling through the city, also risk arrest and prosecution for an action otherwise allowed within the state. Further, their ability to exercise their fundamental right to bear arms has been, and continues to be, infringed. The possibility of enforcement against the Plaintiffs is an irreparable harm. *See Ohioans for Concealed Carry, Inc.*, 164 Ohio St.3d 291, 2020-Ohio-6724, 172 N.E.3d 935, at ¶ 33–34.

Further, beyond the infringement of rights and the threat of prosecution, the Plaintiffs are losing their ability to protect themselves in their own homes. This is well illustrated by John Doe 3, who—as a disabled man confined to a wheelchair—relies upon his firearm, which uses the 30-round magazine he possesses, to protect himself against home invasions, which have occurred in Columbus as recently as Monday, February 6, 2023.<sup>4</sup> And “individuals with disabilities were at least twice as likely to be victims of violent victimization as people without disabilities.”<sup>5</sup>

John Doe 4, as a Muslim, faces similar exacerbated threats which many minorities encounter. *See, e.g.,* Dalia Hatuqa, *The Ohio Muslim groups standing up for their embattled community*, Middle East Eye, <https://www.middleeasteye.net/news/ohio-muslim-groups-standing-their-embattled-community> (accessed Feb. 9, 2023). (“[A]nti-Muslim discrimination incidents and hate crimes are up 83 and 21 percent respectively, compared with the first quarter of [2018].”).

Plaintiff Jane Doe, a woman of color, obtained an AR-15 specifically because the Columbus police refused to help her when she was assaulted. And she selected that rifle and accompanying magazine because it is light, has a light recoil and is easy for a woman to use.

The Plaintiffs all illustrate legitimate rationales for owning and possessing these firearms and their accompanying 30-round magazines and the legal risk they have by continuing to possess these firearms and the magazines absent an injunction. Thus, an injunction is necessary to prevent irreparable harm to Plaintiffs.

**D. No third parties will be harmed by the granting of an injunction.**

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<sup>4</sup> Adam Conn & Anna Hoffman, *Columbus police searching for two home invasion suspects, family traumatized from incident*, NBC 4, <https://www.nbc4i.com/news/local-news/columbus-police-searching-for-two-home-invasion-robbery-suspects/> (accessed Feb. 9, 2023)

<sup>5</sup> Office for Victims of Crime, U.S. Dept. of Justice, *Crimes Against People with Disabilities*, [https://ovc.ojp.gov/sites/g/files/xyckuh226/files/ncvrw2018/info\\_flyers/fact\\_sheets/2018NCVRW\\_VictimsWithDisabilities\\_508\\_QC.pdf](https://ovc.ojp.gov/sites/g/files/xyckuh226/files/ncvrw2018/info_flyers/fact_sheets/2018NCVRW_VictimsWithDisabilities_508_QC.pdf) (accessed Feb. 14, 2023)

There is no indication that any third party will be harmed if an injunction is granted. The Columbus City Council attempts to justify its enactment of the Ordinance by citing a four-year old, out-of-city, incident that did not involve a 30-round magazine and Columbus' general crime level. Defendants have not provided any evidence that possession of 30-round magazines by lawful gun owners will cause any harm to third parties or that banning such possession will prevent harm to third parties. Of course, the City of Columbus is free to arrest and prosecute anyone who illegally possesses a firearm or uses a firearm in the commission of a crime, whether or not that person also possesses a 30-round magazine. R.C. 2923.13.

The purpose of an injunction is to preserve the parties' status quo pending a final determination on the merits. *Ak Steel Corp.*, 2016-Ohio-3258, 55 N.E.2d 1152, at ¶ 9. Prior to the enactment of the Ordinance, the status quo was uniform firearms regulations throughout the state, as required by R.C. 9.68. The Ordinance changed the status quo. If an injunction is granted, firearms regulations will be returned to uniformity across the state. An injunction would return Plaintiffs and all other large-capacity magazine owners to the place they were before the Ordinance. This would benefit Plaintiffs and others who possess the banned magazines by preventing confusion, uncertainty, and variation in the law.

**E. The public has an interest in state-wide uniform firearms laws and enjoining laws that upend firearms uniformity and violate the constitution.**

In passing R.C. 9.68, the General Assembly determined that there is a public interest in uniform firearms laws throughout the State of Ohio. The Ordinance upends that uniformity. While claiming to represent the interest of the citizens of Columbus, the City Council ignored the interest of its residents and other citizens of Ohio by criminalizing actions that are lawful under state law. It also ignored the toll on non-owners of large-capacity magazines. Those who do not own large-

capacity magazines have an interest in not seeing their friends and family prosecuted with their tax dollars by a city enforcing an unlawful ordinance.

Until the merits of the claims raised in this lawsuit can be determined, the interest in uniformity must be upheld. Further, “the Government does not have an interest in the enforcement of an unconstitutional law.” *N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 488 (2d Cir.2013) (internal citation omitted). All citizens, both residents and non-residents of Columbus, have an interest in having the Ordinance enjoined until the merits of this case can be determined.

#### **IV. Request for Waiver of Bond**

In the appropriate circumstances, the Court may waive a bond when issuing a temporary restraining order or a preliminary injunction. *See Vanguard Transp. Sys., Inc.*, 109 Ohio App. 3d 786, 673 N.E.2d 182 (1996). In this case, the issuance of an injunction preventing the enactment and enforcement of the Ordinance will not cause Defendants to suffer any damages. An injunction will return Ohio’s firearms regulations to the status quo that existed prior to the passage of the Ordinance. Because Defendants will not suffer any injury, and thus cannot be compensated, Plaintiffs request a waiver of the security typically required for the issuance of a temporary restraining order and/or preliminary injunction.

## **V. Conclusion**

Based on the foregoing, Plaintiffs request a temporary restraining order and a preliminary injunction barring the implementation or enforcement of the Ordinance. A proposed order is attached as Exhibit A.

Respectfully submitted,

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