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' POST-HEARING MEMORANDUM IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

In response to the February 21, 2023, hearing relative to Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction ("Motion"), Plaintiffs submit this Memorandum to supplement their Memorandum in Support filed on February 16, 2023 ("Pls.' Memo.").

I. Plaintiffs are substantially likely to succeed on the merits.

a. The City of Columbus' Ordinance is invalid because it is preempted by State law.

Under Ohio's constitutional system of limited home rule, municipalities may exercise police power within their limits to the extent that such regulations do not conflict with general laws. Ohio Const., Sec. 3, Art. XVIII; *Cleveland v. State*, 128 Ohio St. 3d 135, 2010-Ohio-6318, 942 N.E. 370, ¶ 10. Here, the City's Ordinance directly conflicts with R.C. 9.68—a statute that the Ohio Supreme Court has determined is a general law—which provides:

> "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.) R.C. 9.68.

During the hearing, Defendants' witness, John Gripshover, provided examples of firearms laws of the City of Columbus. Some pass muster under R.C. 9.68 and some do not. First, Mr. Gripshover provided an example of a city ordinance that *would* pass muster under R.C. 9.68. Ohio has no domestic violence disability law precluding firearms possession, but federal law does. He testified that "the City passed a statute [sic] a number of years ago that mirrors basically the federal government's disability. It picks up the gaps between what the State has for creating a disability and what the federal government has for creating a disability." Tr. at 50. Those ordinances are not preempted by R.C. 9.68 because that law preempts only municipal restrictions that are greater than those "specifically provided [for] by the United States Constitution, Ohio Constitution, state law, or federal law * * *." R.C. 9.68(A). Since that "statute" "mirrors basically the federal government's disability," Tr. at 50, R.C. 9.68 does not preempt that "statute."

Conversely, the Ordinance's large-capacity magazine ban does not fit into any of R.C. 9.68's exemptions and, in fact, imposes restrictions that the General Assembly has expressly rejected. Mr. Gripshover confirmed that although the State at one time regulated "large capacity

magazines" (most recently magazines holding 31 or more rounds), "it no longer does." Tr. at 41. Because the General Assembly made a policy decision to remove any such restrictions, the City of Columbus cannot ban what the State "no longer does."[1] R.C. 9.68. Mr. Gripshover's testimony simply confirms that R.C. 9.68 preempts the Ordinance.

b. The Ordinance is void for vagueness under the Ohio Due Process Clause.

The Ordinance, as written at the time the Complaint was filed, was unquestionably ambiguous—even contradictory—as to whether a 30-round magazine is prohibited or permitted. Defendants' counsel could not articulate how a person of normal intelligence could look at a 30-round magazine and tell if it was a prohibited 30-round magazine or a 30-round magazine that had been modified so that it could not accept more than 30 rounds and, therefore, legal. He did claim a 60-round magazine that had been modified to accept only 30 rounds would be legal, even though a standard 30-round magazine would be illegal. Tr. at 58–59. Of course, that admission demonstrates that the 30-round limit is totally arbitrary. And when pressed, he conceded that the wording of the Ordinance was confusing and, if re-worded, there would be no confusion. Tr. at 59.

This became so obvious that on February 27, 2023, the Defendant City of Columbus repealed that portion of the Ordinance and replaced it with new language so that it now does prohibit 30-round magazines, whether in their original or modified format. City of Columbus Ordinance 0680-2023. But that does not moot the Plaintiffs' void for vagueness claim. Part of Plaintiffs' claim is for attorneys' fees, and, pursuant to R.C. 9.68(B), Plaintiffs are entitled to attorneys' fees if the City of Columbus repeals or rescinds the challenged ordinance after the filing of a complaint challenging the Ordinance. *Kellard* v. *Cincinnati*, 2021-Ohio-1420, 171 N.E.3d 868, ¶ 13 (1st Dist.) (finding R.C. 9.68 attorneys' fees claim justiciable after repeal of municipal

[1] The State regulated, but never banned, any firearms magazines. See *infra* at 6.

ordinance); *accord Ohioans for Concealed Carry, Inc.* v. *Oberlin*, 2017-Ohio-36, 72 N.E.3d 676, ¶ 33 (9th Dist.).

Plaintiffs anticipate that Defendants may challenge Plaintiffs' right to attorneys' fees pursuant to R.C. 9.68. But both times that the Ohio Supreme Court affirmed the constitutionality of R.C. 9.68, the statute already included an attorneys' fees clause. In *Cleveland* v. *State*, the Ohio Supreme Court explicitly upheld the attorneys' fees clause because "the General Assembly is clearly within its legislative authority to authorize the award of attorney fees and costs in R.C. 9.68(B)." 128 Ohio St.3d 135, 2010-Ohio-6318, 942 N.E.2d 370, at ¶ 34. As such, the constitutionality of R.C. 9.68's attorneys' fees is settled law. Further, R.C. 9.68(B)(2) explicitly grants Plaintiffs' attorneys fees now as the City repealed (and replaced) a portion of the Ordinance after Plaintiffs filed their Complaint.

c. *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.

The Defendants' presentation at the Preliminary Injunction hearing further demonstrates that the Ordinance's magazine ban does not pass constitutional muster.

Since the 1993 *Arnold* test, constitutional law has developed significantly in ways that affect this case. As already briefed, since then the law has developed through *Heller*, *McDonald*, and *Bruen*. *D.C.* v. *Heller*, 554 U.S. 570, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008); *McDonald* v. *Chicago*, 561 U.S. 742, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010); *New York State Rifle & Pistol Assn., Inc.* v. *Bruen*, 142 S.Ct. 2111 (2022). At the hearing, Defendants insisted that *Arnold* only requires a reasonableness threshold for a gun regulation to meet constitutional muster. Tr. at 63. But the Ohio Supreme Court has effectively abrogated the *Arnold* standard of review for laws impinging on Ohio's right to bear arms.

There can be no doubt that Article I, Section 4 guarantees a fundamental right. *Arnold* v. *Cleveland*, 67 Ohio St. 3d 35, 46, 616 N.E.2d 163 (1993). In a series of post-*Arnold* cases, the Ohio Supreme Court has recognized that "[w]hen legislation infringes upon a f*undamental constitutional right* or the rights of a suspect class, *strict scrutiny applies*." (Emphasis added.) *State* v. *O'Malley*, 2022-Ohio-3207, ¶22, citing *Arbino* v. *Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, ¶ 64. Only when "neither a fundamental right nor a suspect class is implicated, [does the court] apply a rational-basis test." *Id.*

While these cases do not explicitly overrule *Arnold*, they certainly abrogate Arnold's *reasonableness* test in favor of a strict scrutiny test. And while *O'Malley* was an equal protection claim, it applied strict scrutiny to "legislation infring[ing] upon a fundamental constitutional right." *Id. Arnold* itself recognized that once the U.S. Supreme Court has integrated a right to the States, 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 42.

That federally mandated protection is explained in *Bruen,* which is based on an analysis of the history of firearms regulation. The Ordinance does not come close to meeting the *Bruen* test. See Pls.' Memo. at 14–17. Even before *Bruen*, the Ohio Supreme Court, guided by *Heller*, was moving in that same direction:

> A city, for example, might decide to pass legislation banning handguns. In support, it might proffer a wealth of statistics and sociological studies to show that the city's handgun ban is absolutely necessary to prevent gun violence. Confronting such a claim, a court need not sift through this evidence and ask whether more narrowly tailored ways would achieve the compelling governmental interest of reducing gun

violence. Such an inquiry is unnecessary because the Second Amendment has taken the question off the table.

State v. *Weber*, 163 Ohio St. 3d 125, 2020-Ohio-6832, 168 N.E.3d 468, 473, ¶ 69 (DeWine, J., concurring in the judgment).

The *Bruen* Court created a burden shifting test, holding that "[w]hen 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." (Emphasis added.) *Bruen*, 142 S.Ct. at 2190–130. There is little doubt that a firearms magazine is an essential part of a firearm and therefore covered by the Second Amendment. Plaintiffs' February 16, 2023, Memorandum presents the historical information that 30-round magazines have been in civilian usage for about 60 years. Pls.' Memo. at 5. The Defendants' witness affirmed that 30-round magazines have been in civilian usage for a "long time," Tr. at 30, and that "there are very valid reasons why someone might want to have a high capacity magazine," Tr. at 25. While he recognized that large capacity magazines—meaning 31 rounds or more, Tr. at 46—were previously regulated by Ohio, he was mistaken in saying that Ohio had banned them. Tr. at 23–24, 61. Rather, Ohio law restricted "dangerous ordinance," which included certain firearms capable of accepting magazines which held a specified number of rounds. R.C. 2923.11(E) (2013). But the law did not ban either those magazines or firearms; it simply required a license or permit to possess the firearm. R.C. 2923.17(C)(7) (2011). See also Pls.' Memo. at 16–17.

Further, the Ordinance does not come close to satisfying the strict scrutiny test that the Ohio Supreme Court now applies to laws impinging on fundamental constitutional rights. "Under strict scrutiny, the statute is constitutional if it furthers a compelling governmental interest and the

[government's] chosen means are narrowly tailored to advance that interest." *Weber*, 163 Ohio St. 3d 125, 2020-Ohio-6832, 168 N.E.3d 468, 473, at ¶ 17. Even if the City's purported interest in reducing gun violence is compelling, Defendants have not provided any evidence to show how preventing law-abiding firearms owners from possessing 30-round magazines is narrowly tailored to that end. Nor could they. The justification contained in the Ordinance, the amended ordinance, and the Defendants' witness' testimony all fail to explain how taking 30-round magazines from lawful firearms owners would reduce crime in the City of Columbus.

Under any current constitutional test that the Ohio Supreme Court would apply to this case, the Ordinance fails.

d. The Ordinance is invalid even under the *Arnold* reasonableness test.

Arnold originally invoked the following test:

> Laws or ordinances passed by virtue of the police power which limit or abrogate constitutionally guaranteed rights must not be arbitrary, discriminatory, capricious or unreasonable and must bear a real and substantial relation to the object sought to be obtained, namely, the health, safety, morals or general welfare of the public.

Arnold, 67 Ohio St.3d at 46, 616 N.E.2d 163.

This is different from the typical "rational relationship" test used in equal protection cases. But even in those cases, "[R]ational-basis review [] under Ohio constitutional principles * * * does not mean toothless scrutiny." *State* v. *Mole*, 149 Ohio St.3d 215, 2016-Ohio-5124, 74 N.E.3d 368, ¶ 28, citing *Mathews* v. *Lucas,* 427 U.S. 495, 510, 96 S.Ct. 2755, 49 L.Ed.2d 651 (1976). "And the rational-basis test requires that the classification must bear a rational relationship to a legitimate government interest or that reasonable grounds must exist for drawing the distinction." *Id.*, citing *Holeton* v. *Crouse Cartage Co.,* 92 Ohio St.3d 115, 131, 748 N.E.2d 1111

(2001). The Ohio Supreme Court has insisted that the legislature's "classifications must have a reasonable basis and may not 'subject individuals to an arbitrary exercise of power.'" *Id.*, quoting *Conley* v. *Shearer,* 64 Ohio St.3d 284, 288, 595 N.E.2d 862 (1992).

At the hearing, Defendants tried to present evidence that the ban of 30-round magazines is not "arbitrary, discriminatory, capricious or unreasonable" and that it "bear[s] a real and substantial relation to the object sought to be obtained, namely, the health, safety, morals or general welfare of the public." *See Arnold* at 46. The object sought in this case is the reduction in crime within the City of Columbus. Instead, the evidence—notably Mr. Gripshover's testimony—showed that the 30-round cutoff is arbitrary and has no rational relationship to the objective of reducing crime or gun violence. *See* Tr. at 15–17. Notably, City Council had no such evidence before it at the time of the enactment and the witness did not consult with City Council before or during the drafting or enactment phase. Tr. at 34–35.

Mr. Gripshover provided his observations of "large capacity magazines" being used in crime, but then testified that when he was referring to "large capacity magazines," he meant magazines holding *31 or more* rounds of ammunition. Tr. at 46. By contrast, the Ordinance refers to 30-round magazines. Neither the preamble to the Ordinance nor evidence presented at the hearing provided any rationale or reasonable basis for choosing 30 rounds as the dangerous number. And the witness confirmed that 30-round magazines have been in civilian usage for a "long time," Tr. at 30, and that "there are very valid reasons why someone might want to have a high-capacity magazine." Tr. at 25. Moreover, Defendants failed to articulate any cogent reason why 29 rounds is OK, but 30 is not. Thirty is simply an arbitrary number, untethered to any evidence.[2]

[2] Reportedly, on or about March 2, 2023, Defendant Klein stated that the City chose the number 30 because "we felt comfortable with the number 30." Lacey Crisp, *Columbus gun owners have until July 1 to get rid of high-capacity*

Defendants' witness raised the issue of "Glock Switches" which some people use to convert Glocks (a brand of handguns) into fully automatic firearms and surmised that those who do so might want a large-capacity magazine. Tr. at 25. But he admitted that the firearm converted into a fully automatic firearm—with a Glock Switch or otherwise—would be illegal and anyone performing such a conversion would be committing a felony, regardless of the size of the magazine. Tr. at 36. So, attempts to reach conduct that is already a felony cannot be a rational basis for such an expansive ban of magazines that the City's own witness concedes have been in common usage for a long time and that Columbus residents possess for very valid reasons.

Finally, in an effort to claim that the Ohio Supreme Court had already approved magazine bans, Defendants' counsel argued that *Arnold* v. *Cleveland* banned magazines. It did not; it banned firearms that accepted certain magazines.[3] *Arnold*, 67 Ohio St. 3d at 36 n.1, 616 N.E.2d 163, paragraph four of the syllabus. In any event, as the law has developed post-*Arnold*, that Cleveland gun ban—if it still existed—could not withstand constitutional scrutiny.

Ultimately, the Defendants presented no evidence or cogent arguments showing that a ban on 30-round magazines is reasonable or that it "bear[s] a real and substantial relation to the reduction of crime."

II. Plaintiffs will suffer irreparable harm without an injunction.

The Defendants have made their intent to enforce the Ordinance now and in the future clear. The Defendants submitted Exhibit 3 at the hearing, which shows that "some of the city codes at issue here are not only currently being enforced but are actually resulting in charges brought."

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magazines, 10WBNS (March 2, 2023), https://www.10tv.com/article/news/local/columbus-gun-owners-have-until-july-1-get-rid-of-high-capacity-magazines/530-51c6811f-60a5-4c1d-b567-f3e553da77fb. But feelings are not evidence; they are not data supporting an ordinance impinging on a fundamental constitutional right. This further confirms that "30" is nothing more than an arbitrary number.

[3] That law no longer exists.

Tr. at 54–55. The amended ordinance makes clear that starting on July 1, 2023, the Defendants will again begin enforcing the magazine ban. Columbus residents are required to turn in, destroy or remove from city limits their 30-round magazines prior to that date. City of Columbus Ordinance 0680-2023[4]. Hence the need for a preliminary injunction remains. Plaintiffs and other city residents are entitled to know in advance if they will be subject to arrest and prosecution before taking the drastic actions of submitting to government seizure of their magazines—which are still legal under state law—or destroying or selling them to a licensed firearms dealer (but not any other person) outside Columbus.

Further, the amended ordinance did not delay the Defendants' current enforcement of the other portions of the law which violate R.C. 9.68, such as the storage provisions discussed above and in the Complaint. As the Defendants' evidence and statements admit, Plaintiffs will suffer irreparable harm without a preliminary injunction.

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

While the Defendants submitted Exhibit 3 to show that they are enforcing the Ordinance, Defendants' Exhibit 3 also showed that the Defendants charged the suspect for violations of Ohio law. This shows that state laws provide Defendants with legal recourse against lawbreakers.

[4] City of Columbus Ordinance 0680-2023, Section 2323 (E) provides: "No person who lawfully acquired or possessed a large capacity magazine prior to December 5, 2022 shall be prosecuted for lawfully possessing a large capacity magazine in violation of section 2323.32 prior to July 1, 2023. Any person who may not lawfully possess a large-capacity magazine as of December 5, 2022, shall, prior to July 1, 2023: (1) Remove the large-capacity magazine from the City limits; or (2) Prior to July 1, 2023, sell the large-capacity magazine to a licensed firearms dealer located outside of the City limits; or (3) Surrender the large capacity magazine for destruction by reporting the possession of the large capacity magazine to the Columbus Division of Police, describing the large capacity magazine in the person's possession and where the person may be found, and voluntarily surrendering the large capacity magazine to the Division of Police." Oddly, it seems to limit the legal sales of the prohibited items to only licensed dealers outside the City of Columbus, not private individuals outside of the City of Columbus.

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

As the General Assembly found in passing R.C. 9.68, there is a strong public policy interest in uniform firearm laws. Defendants' original and amended ordinances have caused great confusion to firearms owners in Ohio. When the Ordinance was originally passed, firearms owners did not know if or when they would be subject to Columbus' restrictions.

V. Conclusion

Based on the forgoing, Plaintiffs are entitled to their Temporary Restraining Order and Preliminary Injunction. Further, Plaintiffs are entitled to reasonable costs, including but not limited to, attorneys' fees.

Respectfully submitted,

/s/ David C. Tryon

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CERTIFICATE OF SERVICE

This will certify that a true and accurate copy of the foregoing Plaintiffs' Post-Hearing Memorandum in Support of Motion for Temporary Restraining Order And Preliminary Injunction has been served by operation of this Court's electronic filing system this 7th day of March 2023.

/s/ David C. Tryon
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