

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' RENEWED 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 regulations set forth in Columbus City Code 2323.32, 2323.11(N), 2323.321, 2303.05, 2303.14, 2323.11(O), and 2323.191 as enacted by the City of Columbus ordinance 3176-2022 (the "Ordinance") and as amended by City of Columbus ordinance 0680-2023 (the "New Ordinance"). As explained in the attached Memorandum in Support, the specified city code sections violate the State's firearm regulation preemption law and violate 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.

On February 16, 2023, Plaintiffs filed a Motion for Temporary Restraining Order and Preliminary Injunction. On February 21, 2023, the Court held a hearing on the motion. The parties then submitted post-hearing briefs. On February 28, 2023, apparently in response to issues raised by the Plaintiff's Complaint and Motion, the City of Columbus repealed certain code provisions in the Ordinance and replaced them with new code provisions via the New Ordinance. Consequently, on March 10, 2023, the Plaintiffs filed an Amended Complaint to address the new

code provisions. Accordingly, Plaintiffs are renewing their prior Motion for Temporary Restraining Order and Preliminary Injunction. Plaintiffs' attached memorandum in support is similar to that submitted on February 16 but has been modified to address the issues raised in the Amended Complaint.

Respectfully submitted,

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**PLAINTIFFS’ MEMORANDUM IN SUPPORT OF PLAINTIFFS’ RENEWED 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 6, 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.americanriflesman.org/content/a-look-back-at-the-winchester-model-1907-rifle/> (accessed Feb. 1, 2023). The Ordinance 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). On February 27, 2023, the Columbus City Council enacted ordinance 0680-2023 (the “New Ordinance”). Am. Compl. Ex. H. Ordinance 0680-2023 explicitly repealed

the definitions of a large-capacity magazine, and then re-enacted those provisions to be internally consistent. *Id.* Ohio law, which preempts municipal law, does not prohibit the possession of 30-round magazines. As such, R.C. 9.68 invalidates the code provisions enacted by the Ordinance and the New Ordinance.

Amended Columbus City Code 2323.11(N) defines the prohibited magazines as “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.” Amended Columbus City Code 2323.321 provides an alternative definition, substituting thirty (30) or more rounds of ammunition with one hundred (100) or more rounds of ammunition. Am. Compl. Ex. H. The Ordinance makes illegal, under punishment of a mandatory six-month incarceration and a \$1,500 fine, the possession of a large-capacity magazine—under the originally enacted and amended definitions. Columbus City Code 2323.32, Compl. Ex. A. at 5–6.

This prohibition cannot be squared with Ohio law. Besides R.C. 9.68’s express preemption of the New Ordinance, 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). The Ohio Supreme Court has held 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 Bruen’s analogous historical regulation test at 2190–130, or *Arnold*’s pre-*Bruen* reasonableness standard, the New 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 Amended Complaint. But the New Ordinance warrants the restatement of a few key facts as well as 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. 553, 542, 23 L.Ed. 588 (1875) (The right to bear arms “is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence.”); *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 R.C. 9.68 once again. *City of Columbus v. State*, Franklin C.P. 2019-cv-2281. On November 2, 2022, that 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. The State of Ohio appealed the decision and moved to stay the 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 New Ordinance 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 with many civilian firearms, including .22 caliber rifles, .30 caliber

rifles, and the very common AR-15¹ (usually .223 caliber), none of which are fully automatic.² 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 (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

¹ 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.

² 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.

declaratory judgment, a temporary restraining order, and preliminary and permanent injunctive 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>. On March 8, 2023, Defendant Klein again emphasized that "[w]e'll enforce [the magazine ban] by seeing it on site [sic]." Mark Ferrenchik and Eric Lagatta, *Columbus gun owners wary of city's new ammunition restriction*, *The Columbus Dispatch* (Mar. 8, 2023), <https://www.dispatch.com/story/news/local/2023/03/08/columbus-gun-owners-wary-of-citys-new-ammunition-restriction/69958312007/>. Plaintiffs, with good reason, fear arrest and prosecution for simple possession of the banned firearms magazines.

Plaintiffs are diverse in multiple ways, but they all have one thing in common. Plaintiffs possess (or, in one case, previously possessed until removing them outside city limits) firearms magazines that the City has banned. See Affidavits of Plaintiffs, Am. Compl. Ex. B-G. 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 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 New 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)³ 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

In addition to the law and argument set forth below, Plaintiffs incorporate by reference the law and arguments set forth in the Plaintiffs’ Post-hearing Memorandum in Support of Motion for Temporary Restraining Order and Preliminary Injunction filed on March 7, 2023.

³ “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, injunctive relief, or a combination of those remedies.” R.C. 9.68(B).

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 clearer. In the past, the City of Columbus recognized that clarity. In 2007 the State of Ohio enacted the original version of R.C. 9.68. Immediately thereafter, a Columbus resident sued the City to invalidate two sections of the Columbus City Code which banned certain firearms magazines and certain firearms. In response the City filed an affidavit stating that, in response to the enactment of 9.68, it “had directed members of the Columbus Division of Police to no longer enforce [those] two sections.” *Smolak v. Columbus*, 10th Dist. Franklin No. 07AP-373, 2007-Ohio-4671, ¶ 3. The court of appeals affirmed the dismissal of the case because “[t]he fact that the City of Columbus has accepted the preemptions of the regulation of assault weapons and [large-capacity magazines] by state

government as a result of the enactment of R.C. 9.68 is not open to serious dispute.” *Id.* at ¶ 14. But 16 years later, the Defendants now try to defy state law and ban the possession of components of firearms—i.e., so-called large-capacity magazines—and have repeatedly expressed their intent to enforce the law. The Ordinance—as well as the amended version of 2323.321—recognize that “Ohio Revised Code Section 9.68 [] governs the regulation of firearms by a political subdivision * * *.” Compl. Ex. A at 6; Am. Compl. Ex. H. Despite this recognition, the New Ordinance enacts a firearms regulation that expressly violates of R.C. 9.68. Further, the New Ordinance 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 ban⁴—magazines which could hold “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. This was confirmed by the Defendants’ witness at the preliminary injunction hearing. Tr. at 41. 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 Columbus City Code* 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.

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

2. 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

⁴ Anyone with a permit could obtain a firearm that exceeded the cartridge limitation. *See* R.C. 2923.17(C)(7) (2011).

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. Nor had the Court incorporated that right to the states. Most federal courts considered it a collective right under the Second Amendment and any law impinging on it was analyzed 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. Without a definitive test to evaluate this fundamental right, the *Arnold* Court concluded that “the test [of a questioned ordinance] is one of reasonableness.” *Id.*

Subsequently, the U.S. Supreme Court ruled in *Heller* that the Second Amendment protects an individual right. And in *McDonald v. Chicago*, 561 U.S. 742, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010), the Court incorporated the right to the states. *McDonald*’s incorporation of the Second Amendment triggered *Arnold*’s command that “the United States Constitution, where applicable to the states, provides a floor below which state court decisions may not fall.” Through this statement, the *Arnold* court commanded that Article I, Section 4 could not be interpreted to provide less protection than the Second Amendment once it was incorporated. *See also Stolz*, 155 Ohio St.3d 567, 2018-Ohio-5088, 122 N.E.3d 1228, at ¶ 30 (Ohio’s constitutional right to bear arms grants greater protection than the Second Amendment). Through incorporation in *McDonald* and 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 use of 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 capacity 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 capacity, 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 magazine capacity did not ban the

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

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

Further, *Heller* made clear that the City cannot “render any lawful firearm in the home [in]operable for the purpose of immediate self-defense.” *Heller*, 554 U.S. at 635. By dictating how an individual can store their firearms at home, the City has violated this prohibition. And, because *Arnold* requires Article I, Section 4 to provide as much protection as the Second Amendment after *McDonald*, the City has violated Article I, Section 4.

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.* Neither the Ordinance nor the New Ordinance do that.

The preambles of the Ordinance and the New Ordinance reference the City of Columbus’ gun violence as a problem and reference the mayor’s declaration of gun violence as a public health crisis. Am. Compl. Ex. A and H. Nothing in the preambles cite the number of firearms used in

crimes. Furthermore, the preambles do 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. *Id.* The preambles do mention the use of a 100 round magazine used in one isolated crime—three years ago and 70 miles away in Dayton, Ohio. *Id.* But that is a far cry from evidence of current criminal usage of 30-round magazines in Columbus. 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 New Ordinance shows how it is anything other than an arbitrary and capricious number.

Moreover, nothing in either 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.).

Defendants have claimed that the new “immunity from prosecution” provision removes any threatened harm to Plaintiffs.⁵ This is incorrect on several levels. First, this provision does not stop the immediate enforcement of code section 2323.191 (the safe storage provision) and related

⁵ Defendants’ Memorandum Contra to Plaintiffs’ Motion for Leave to Proceed Pseudonymously Filed February 24, 2023, at 7.

code sections 2303.05 and .14. *See* Columbus City Code 2323.23, Am. Compl. Ex. H. Second, it does not stop the city from enforcing 2323.32 (the magazine ban) right now. *Id.* The Defendants may still arrest and prosecute Plaintiffs or others at any moment. The new part of Columbus City Code 2323.23 precludes prosecution of persons who “acquired or possessed a large capacity magazine prior to December 5, 2022 * * *.” This new provision still allows Defendants to arrest—right now—persons caught with 30-round magazines. The issue in any prosecution would be if the arrestee acquired the magazines prior to December 5, 2022.

Even if the Defendants have delayed enforcement of the magazine ban until July 1, 2023, Plaintiffs are still subject to prosecution in the near future and are entitled to an injunction to stop enforcement of the challenged city code provisions until a final determination of the validity thereof. Residents of Columbus, businesses located in Columbus that sell the prohibited items (such as Cabellas)⁶, and those traveling through the city, also risk arrest and prosecution for an action otherwise allowed within the state. 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.

⁶ Plaintiffs’ Opposition to Defendants’ Motion to Dismiss or, in the Alternative, to Transfer Venue filed on March 7, 2023, at 17.

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 lightweight, has a manageable recoil and is easy for a woman to use.

The Plaintiffs all illustrate legitimate rationales for owning and possessing these firearms and the 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.

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, as well as 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. Nor could they. 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 New 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 New 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 New 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 by a city enforcing an unlawful ordinance. For those living outside of the City, they have no political recourse against Defendants for violating their loved ones rights.

Until the merits of the claims raised in this lawsuit can be determined, the interest in uniformity must be upheld. Before the Ordinance was enacted, there was uniformity, because R.C. 9.68 remained in effect; the Franklin County court's order clarifying its stay confirms this fact. Order Regarding Stay Order Issued on Nov. 10, 2022, *City of Columbus v. State*, Franklin C.P. 2019-cv-2281 (Dec. 14, 2022). 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).

And “it is always in the public interest to prevent the violation of a party’s constitutional rights.”

G & V Lounge, Inc. v. Michigan Liquor Control Comm’n, 23 F.3d 1071, 1079 (6th Cir.1994)

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.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This will certify that a true and accurate copy of the foregoing Plaintiffs' Renewed Motion For Temporary Restraining Order and Preliminary Injunction and Brief in Support has been served by operation of this Court's electronic filing system this 17th day of March 2023.

/s/ David C. Tryon

David C. Tryon