IN THE COURT OF COMMON PLEAS
DELAWARE COUNTY, OHIO

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| 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' MEMORANDUM CONTRA OF DEFENDANTS' MOTION FOR STAY PENDING APPEAL, MOTION TO EXPEDITE THE BRIEFING, AND ALTERNATIVELY, MOTION FOR CLARIFICATION FILED APRIL 28, 2023.**

## I. Introduction

Defendants Motion for Stay Pending Appeal seeks to eviscerate the protection that the preliminary injunction provided to the Plaintiffs. The proposed stay is inequitable and unwarranted. The Court found that the City of Columbus' challenged ordinances likely violate R.C. 9.68 and the Ohio Constitution, yet Defendants want this Court to allow them to arrest and prosecute any city resident violating those ordinances. The whole point of a preliminary injunction—especially in the context of preventing the enforcement of an invalid criminal ordinance—is to protect individuals from arrest and prosecution while the validity of the ordinances is finally resolved in a final judgment and after appeals are concluded. The City of Columbus elsewhere argues that the very type of stay it now seeks is "[c]ontrary to common sense and well established law * * * ." Memo Contra Def.'s Mot. for Civ.R. 62 Stay and Vacate Stay, *City of Columbus* v. *State*, Franklin C.P. 2019-cv-2281 at 1 (Nov. 10, 2022). Plaintiffs agree—Defendants' motion for stay of a preliminary injunction pursuant to Civ.R. 62 is "contrary to common sense and the law." Moreover, Defendants' urging this Court to "issue the stay without awaiting a response from Plaintiffs," is unseemly and improper. Defs.' Mot. for Stay Pending

Appeal, Mot. to Expedite the Briefing, & Alternatively, Mot. for Clarification. There is no cause for such prejudicial action given that Defendants have represented that they will not be enforcing the magazine ban until July 1.

## II. Law and Argument

### A. Defendants elsewhere correctly argue that governments subject to a preliminary injunction are *not* entitled to a stay under Rule 62; here they incorrectly argue the exact opposite.

Defendants are "abusing the judicial process through cynical gamesmanship" by arguing the opposite position from the one they are taking in another case. *Greer-Burger* v. *Temesi*, 116 Ohio St. 3d 324, 2007-Ohio-6442, 879 N.E.2d 174, ¶ 25, quoting *Griffith* v. *Wal–Mart Stores, Inc.*, 135 F.3d 376, 380 (6th Cir.1998). In the Franklin County case, the City of Columbus asserted that Rule 62 is inapplicable to preliminary injunctions. Memo Contra Def.'s Mot. for Civ. R. 62 Stay and Vacate Stay, *City of Columbus* v. *State*, Franklin C.P. 2019-cv-2281 (Nov. 10, 2022) (Ex. 1 at 4–12). On March 6, 2023, the City of Columbus made the same argument to the court of appeals—denying that "Civ. R. 62 * * * gives a governmental entity the automatic right to a full stay of any injunction enjoining any law preliminarily deemed unconstitutional." Merit Brief of Appellee City of Columbus, *City of Columbus* v. *State*, 10th Dist. Franklin No. 22 AP 676, at 49 (Mar. 6, 2023) (relevant excerpts attached at Ex. 2).

While Defendants may not be formally judicially estopped from asserting the opposite position in this case, the principles underlying judicial estoppel apply. "'The doctrine of judicial estoppel forbids a party from taking a position inconsistent with one successfully and unequivocally asserted by the same party in a prior proceeding.'" *Greer-Burger* at ¶ 25, quoting *Griffith* at 380 (quotation marks omitted). The purpose is "'to preserve[ ] the integrity of the courts by preventing a party from abusing the judicial process through cynical gamesmanship * * * .'"

*Id.*, quoting *Griffith* at 380.

**B. Defendants are not automatically entitled to a stay.**

Defendants' "entitlement" argument ignores the plain language of Civ.R. 62. Under Rule 62(A),

> *In its discretion and* on such conditions for the security of the adverse party as are proper, *the court may*, upon motion made any time after judgment, stay *the execution of that judgment or stay any proceedings to enforce the judgment* until the time for moving for a new trial under Civ.R. 59, moving for relief from a judgment or order under Civ.R. 60, moving for judgment notwithstanding the verdict under Civ.R. 50, or filing a notice of appeal * * * ."

(Emphasis added.). Rule 62(A) leaves to the Court—in its discretion—the decision of whether to grant a stay. Rule 62(B) states that a bond is required before a stay that has been issued under paragraph (A) pending appeal is effective. Rule 62(C) follows in logical order and states that a bond is *not* required when a government entity seeks a stay under paragraph (A) pending appeal: "When an appeal is taken by this state or political subdivision, or administrative agency of either, or by any officer thereof acting in his representative capacity *and the operation or enforcement of the judgment is stayed*, no bond, obligation or other security shall be required from the appellant." (Emphasis added.) Civ.R. 62(C).

Rule 62(C) does not operate independently to require a stay if the government asks for one. As Defendants currently assert elsewhere, "Rule 62(C) simply operates to exempt the state or any political subdivision, from going through the process of posting a bond before the stay becomes effective." Memo Contra Def.'s Mot. for Civ.R. 62 Stay and Vacate Stay, *City of Columbus* v. *State*, Franklin C.P. 2019-cv-2281 at 2 (Nov. 10, 2022); Merit Brief of Appellee City of Columbus, *City of Columbus* v. *State*, 10th Dist. Franklin No. 22 AP 676, at 49 (Mar. 6, 2023). The rule's

requirement that no bond be required is predicated on the operation or enforcement of the judgment being stayed—in the court's discretion. It does not, as Defendants suggest before this Court, preclude the Court from exercising its discretion on whether to issue a stay in the first instance.

But even assuming that the government is entitled to a stay of execution of a judgment or a stay of proceedings to enforce a judgment, Rule 62 does not apply here.

**1. The Court's preliminary injunction order is not a final judgment subject to Rule 62.**

Rule 62 is inapplicable to the Court's *order* that Defendants are appealing. Rule 62—by its title and substance—only applies to "Stay[s] of Proceedings to Enforce a *Judgment*." (Emphasis added.) Civ.R. 62.

Judgments and temporary—or preliminary—orders are not the same thing. "A judgment is final, effective, and imbued with permanent character when properly filed pursuant to Civ.R. 58. The judgment remains effective unless stayed pursuant to Rule 62, reversed or vacated on appeal, App.R. 12, or superseded by another judgment." *Blood* v. *Nofzinger*, 162 Ohio App.3d 545, 2005-Ohio-3859, 834 N.E.2d 358, ¶ 21 (6th Dist.), quoting *State* v. *Suchy*, 6th Dist. Huron No. L–02–1243, 2003-Ohio-3457, ¶ 27. "Generally speaking, there are two types of judgments for which execution or enforcement proceedings may arise, viz., judgments for payment of money and judgments directing the performance of a specific act." *WBCMT 2007-C33 Office 7870, LLC* v. *Bar J Ranch-Kemper Pointe LLC*, 108 N.E.3d 772, 778 (C.P.2018), citing Civ.R. 69 & 70. Neither type of judgments is applicable here. Plaintiffs have not been awarded money damages, and the Court has not directed the performance of a specific act. Instead, the Court only preliminarily enjoined the Defendants from performing unconstitutional acts.

**2. There are no execution or enforcement proceedings before the Court to be stayed subject to Rule 62.**

Rule 62 addresses stays of "the execution" of a judgment and "proceedings to enforce" a

judgment. The terms "execution" and "enforcement proceedings" have specific meanings in the Ohio Rules of Civil Procedure and the Ohio Revised Code. In fact, there is no execution of a judgment or enforcement proceeding before the Court for the Court to stay. And that is because the subject order is a preliminary injunction.

"Execution" is governed by Ohio Rules of Civil Procedure Rule 69, which provides that the "Process to enforce a judgment for the payment of money shall be a writ of execution * * * ." The Court's preliminary injunction does not provide for a money judgment upon which the Plaintiffs can "execute[]" judgment.

"Proceedings to execute" a judgment are governed by R.C. 1925.13, which allows "a judgment creditor [to] commence any proceedings to obtain satisfaction of the judgment, including execution and garnishment proceedings, that are permitted to obtain satisfaction of a judgment rendered in an ordinary civil action." See also R.C. 2333 Proceedings in Aid of Execution (providing for garnishment and debtor's exams).

Rule 62 only provides for staying the execution of a judgment or a proceeding to enforce the judgment—not staying a preliminary injunction.

Indeed, the language of Appellate Rule 7 anticipates that the trial court cannot issue a stay of an injunction. Rule 7(A)'s title itself states that a "Stay must ordinarily be sought in the first instance in trial court * * * ." The rule then requires the applicant to have first sought a stay in the trial court "except in cases of injunction pending appeal * * * ." App.R. 7. The only way that makes sense is if a stay of an injunction is not typically available in the first instance in the trial court.

**3. Defendants' cited cases do not apply here.**

None of Defendants' cited cases support Defendants' claim that they are entitled to a stay of a preliminary injunction as a matter of law—or at all. They are inapposite because they deal

with extraordinary writs or they have two key features absent from the case at bar.

First, all of Defendants' cited cases involve final judgments on the merits of the case, whereas here, Plaintiffs have only obtained preliminary relief. Second, they all involve enforcement proceedings. Plaintiffs have not sought to enforce any judgement against Defendants, and no post-appeal proceedings have been requested. There is simply nothing for this Court to stay under Civ.R. 62.

*State ex rel. Elec. Classroom of Tomorrow* illustrates the purpose of Civ.R. 62—to stay execution of the collection of monetary judgements. "Supportive Solutions sued for money damages against [Electronic Classroom of Tomorrow (ECOT)] and others in the Cuyahoga County Court of Common Pleas." *State ex rel. Elec. Classroom of Tomorrow* v. *Cuyahoga Cty. Ct. of Common Pleas*, Ohio St. 3d 30, 2011-Ohio-626, 950 N.E.2d 149, ¶ 4. The court "entered a [final] judgment" against the defendants for over $1,000,000. *Id.* at ¶ 7. ECOT then sought, and obtained, "a writ of prohibition to prevent respondents * * * *from enforcing the judgment* * * * [and] a writ of mandamus to vacate the allegedly invalid portions of the judgment in the case and to compel the common pleas court judges to issue *a stay of execution of the remaining judgment* * * * ." (Emphasis added.) *Id.* at ¶ 1. That relief was consistent with Rule 62.

*Milligan* also involved a monetary judgment. The common pleas court granted a writ of mandamus (which is a final judgment) to compel a local board to appropriate—or pay—money requested by the respondent. *State ex rel. Geauga Cty. Bd. of Commrs.* v. *Milligan*, 100 Ohio St. 3d 366, 2003-Ohio-6608, 800 N.E.2d 361, ¶ 2. The court granted a stay of its mandamus that ordered a judgment for monies to be paid. Once an appeal was taken, the common pleas judge lifted the stay—which would effectuate the enforcement of the ordered payment of funds. The court initiated judicial "proceedings to enforce" the monetary judgment by issuing an order to

show cause why the local board should not be held in contempt for failure to pay. Relators filed an "action for a writ of prohibition *to prevent [the judge] from conducting the August 14, 2003 contempt hearing* or *taking any other action to enforce* the November 14, 2002 [final] judgment pending appeal." (Emphasis added.) *Id.* at ¶ 12. Again, that fit Rule 62's language as to staying "proceedings to enforce" a judgment.

Unlike the foregoing cases, in this case there is no monetary judgment and no efforts to enforce such a judgment.

In *Ocasek*, the common pleas court rendered a *final* judgment—not a preliminary injunction—"that certain statutes concerning the distribution of 'basic state aid' to public schools were unconstitutional and therefore void." *State ex rel. Ocasek* v. *Riley*, 54 Ohio St. 2d 488, 488, 377 N.E.2d 792 (1978). The relators requested "writs to prevent respondent from *holding an evidentiary hearing* on defendants-appellants' application for stay pending termination of appellate litigation in *Board v. Walter* and further *to prevent respondent from permitting any proceedings*, including depositions of relators, which are ancillary thereto." (Emphasis added.) *Id.*

In *Curl*, the common pleas court granted a writ of mandamus to compel the State Fire Marshal to issue a fireworks license within seven days. *State ex rel. State Fire Marshal* v. *Curl*, 87 Ohio St. 3d 568, 722 N.E.2d 73 (2000). Again, a writ of mandamus is a final order, triggering the judgment element of Rule 62. When the State Fire Marshal disobeyed the mandamus order, "Judge Curl subsequently advised the State Fire Marshal that if he failed to issue the fireworks license * * *, the judge would issue a warrant for his arrest." *Id.* at 569. This is a "proceeding to enforce" the judgment, triggering the enforcement element of Rule 62. The State Fire Marshal filed an "action for a writ of prohibition to prevent Judge Curl from *holding a contempt hearing* * * * and to prevent Judge Curl from [enforcing the mandamus judgment by] ordering the State Fire Marshal

to issue a fireworks license to Green River pending appeal." *Id.* Again, neither of those enforcement elements is present here.

Moreover, *Curl* relied heavily on Federal Rule 62. "Our interpretation of Civ.R. 62(B) and (C) in *Ocasek* comports with the interpretation of the similarly worded Fed.R.Civ.P. 62(d) and (e)[,] by the leading treatises[,] and a majority of federal courts." *Id.* at 571 (citing 11 Wright, Miller, and Kane, *Fed. Prac. & Proc. Civ.* (2d Ed.1995) 520, Section 2905). Significantly, Federal Rule 62 requires an automatic thirty-day stay pending appeal, Fed.R.Civ.P. 62(a), excludes "injunction[s]" from that automatic stay, Fed.R.Civ.P. 62(c)(1), and only allows a stay of an injunction if the court "secures the opposing party's rights," Fed R.Civ.P. 62(d). "*There is no automatic stay in actions for injunctions.*" (Emphasis added.) 11 Wright, Miller, and Kane, *Fed. Prac. & Proc. Civ.*, Section 2904 (3d Ed.). In federal court, as in Ohio courts, stays of injunctions pending appeal "necessarily goes to the discretion of the court." *Id.*; Civ.R. 62(A) ("In [the court's] discretion * * *.").

In any event, Defendants have presented no cases supporting the notion that Rule 62 requires the Court to issue a stay of a preliminary injunction. Such a rule would be antithetical to the entire purpose of a court granting a preliminary injunction to begin with.[1]

If perchance the Court finds that *Ocasek*, 54 Ohio St. 2d 488, 377 N.E.2d 792, and its progeny require the Court to issue a stay under these circumstances, Plaintiffs respectfully reserve

[1] As a general rule, preliminary injunctions do not constitute an appealable order. "[W]hile the preliminary injunction cannot now be appealed, * * * review may be had in the event that it becomes permanent." (Internal citation omitted.) *State ex rel. Tilford* v. *Crush*, 39 Ohio St. 3d 174, 177, 529 N.E.2d 1245 (1988); *McHenry v. McHenry*, 5th Dist. Stark No. 2013CA00001, 2013-Ohio-3693, ¶ 13–20 (dismissal of appeal of preliminary injunction "for lack of a final appealable order"); c.f. R.C. 2505.02(B)(4). If the court were to stay its own preliminary injunction pending a final order, it would render the whole idea of a preliminary injunction meaningless.

their right to challenge the holdings of those cases on appeal.

**4. The Court should not exercise its discretion to issue a stay.**

Defendants have not claimed that they are entitled to a discretionary stay. But if they now do so, the Court should deny any such request. In evaluating whether to issue a discretionary stay under Rule 62, Ohio courts look to federal precedent. *E.g.*, *WBCMT 2007-C33 Office 7870, LLC*, 108 N.E.3d at 779. The test for a discretionary stay has four factors: "'(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.'" *Id.* at 780; *Davis* v. *McGuffey*, 167 Ohio St.3d 1442, 2022-Ohio-2163, 189 N.E.3d 806, ¶ 8 (Kennedy, J., dissenting), quoting *Nken* v. *Holder*, 556 U.S. 418, 434, 129 S.Ct. 1749, 173 L.Ed.2d 550 (2009). These four factors are analogous to the familiar factors governing a preliminary injunction. "When evaluating these factors for an alleged constitutional violation, 'the likelihood of success on the merits often will be the determinative factor.'" *Thompson* v. *Dewine*, 959 F.3d 804, 807–08 (6th Cir.2020), quoting *Obama for Am.* v. *Husted*, 697 F.3d 423, 436 (6th Cir.2012).

This Court has already determined that Plaintiffs are entitled to a preliminary injunction based on the analogous preliminary injunction factors. The factors for determining whether to grant a stay do not sway in the opposite direction.

First, Defendants have made no showing that they are—at all—likely to succeed on the merits of the case. This Court found that it is, in fact, Plaintiffs who are substantially likely to succeed.

Second, Defendants' have not argued that *they* will be irreparably injured absent a stay. Nor could they make such a showing because the preliminary injunction only prevents Defendants from enforcing unconstitutional ordinances. The preliminary injunction does not create irreparable

harm to Defendants.

Third, as this Court found, Plaintiffs will be substantially injured absent the preliminary injunction. If the Court were to grant a stay, it would be opening Plaintiffs up to such irreparable injury that the preliminary injunction is intended to prevent.

Fourth, as this Court recognized, "it is always in the public interest to prevent violation of a party's constitutional rights * * * ." Granting a stay would allow Defendants to infringe on Plaintiffs and other firearms owners' rights. Additionally, both the Ohio Supreme Court and the General Assembly have recognized that uniform firearms laws are in the public's interest.

This Court should deny the Defendants stay as it would be contrary to this Court's determination that Plaintiffs are entitled to a preliminary injunction.

**C. A stay without qualification would endanger Columbus residents.**

If this Court issues a stay pending appeal, the Court should also "issue an appropriate order to preserve the status quo until such time as the appellate court can consider the matter * * * ." *Monarch Constr. Co.* v. *Ohio Sch. Facilities Comm.*, 118 Ohio Misc. 2d 296, 2002-Ohio-2957, 771 N.E.2d 941, ¶ 10 (C.P.) (Brunner, J.). In that case the court had issued a final order because it "consolidated the hearing on the application for preliminary injunction with the trial on the merits." *Monarch Constr. Co.* v. *Ohio School Facilities Comm.*, 150 Ohio App.3d 134, 2002-Ohio-6281, 779 N.E.2d 844, ¶ 9 (10th Dist.).[2] Even in the context of a final order which included an injunction, the court explained that "the effect of a nondiscretionary stay pending appeal pursuant to Civ.R. 62 should not be to undo the trial court's injunction before it can be determined by a higher court whether it was issued wrongfully." *Id.* at ¶ 13.

In its entry, this Court recognized that "[k]eeping that status quo in place while this case is

[2] The effect of such a consolidation is a final judgment, not an order on a preliminary injunction. *See, e.g., Ohio Serv. Grp., Inc.* v. *Integrated & Open Sys., L.L.C.*, 10th Dist. Franklin No. 06AP-433,2006-Ohio-6738, ¶ 10.

heard is an outcome consistent with the equitable nature of preliminary injunctions in general." Similar to the court's decision in *Monarch Constr.*, this Court should not allow Defendants to enforce an unconstitutional ordinance while Plaintiffs wait for the Fifth District to hear Defendants' appeal.

If this court does issue a stay, it should make explicit that such stay is limited to the execution of a judgment or enforcement proceedings—as Rule 62 is limited to—and concurrently issue an appropriate order preventing Defendants from enforcing their unconstitutional ordinances until the Fifth District has made a final determination.

**D. This Court has jurisdiction to issue statewide injunctions.**

This Court's order is clear: "Defendant City of Columbus, as well as its officers, agents, representatives, employees, and the individual defendants, plus all other persons acting in concert with them or with knowledge of this order are enjoined, until further order of the court, from enforcing [the challenged] Columbus City Code[s] * * * ." The Court's order clearly applies as against the Defendants and is enforceable against them. Defendants' claim that the Court's injunction cannot apply outside of Delaware County or to persons other than the Plaintiffs, is not based on logic or law. Defendants cite no cases purporting to limit the Court's equitable powers to only restrain conduct within the county in which it sits.

First, the lawsuit, and the Court's order, are against the Defendants, wherever they are located and wherever they are enforcing the subject ordinances. The Court's jurisdiction and authority stem from the Ohio Constitution. The Ohio Supreme Court has explained that "courts of common pleas [] are created by the Ohio Constitution and have statewide subject-matter jurisdiction, see Section 4(A) and (B), Article IV, Ohio Constitution * * * ." *Cheap Escape Co.* v. *Haddox, LLC*, 120 Ohio St. 3d 493, 2008-Ohio-6323, 900 N.E.2d 601, ¶ 7. Indeed, "Any judge of a court of common pleas or a division thereof may temporarily hold court in any county." Ohio

Constitution, Article IV, Section 4. Further, Defendants' selective quote of R.C. 2727.03 is misleading. The full relevant portion reads: "At the beginning of an action, or any time before judgment, an injunction may be granted by the supreme court or a judge thereof, the court of appeals or a judge thereof in his district, the court of common pleas or a judge thereof in his county * * * ." R.C. 2727.03. Defendants claim that their isolated citation of one clause limits the reach of the judge's decision to only the county where the judge sits. That has never been the law and it would make no sense. By that reading a court could, for example, only enjoin a defendant from violating a non-compete agreement if the violation occurred within the court's county even though the agreement extended further. And a defendant subject to an injunction of any sort could simply evade the order by taking the enjoined action in another county. But that is not what the statute says.

R.C. 2727.03 says that *the* supreme court *or a* supreme court justice may issue an injunction; *the* court of appeals *or a* court of appeals judge of that district can issue an injunction; and *the* court of common pleas *or a* common pleas judge of that county can issue an injunction. The terms "in his district" and "in his county" simply connect the individual judge with the court of appeals or common pleas court in which the judge sits. The additional words clarify that a single judge may issue an injunction—the statute does not require the full supreme court bench, the full court of appeals bench, or the full common pleas court bench to issue the injunction. This Court's authority is statewide, which of course includes all three counties where the City of Columbus has jurisdiction to enforce the enjoined ordinances.

**Conclusion**

Plaintiffs respectfully request that the Court deny the Defendants' motion.

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' Memorandum Contra of Defendants' Motion for Stay Pending Appeal, Motion to Expedite the Briefing, And Alternatively, Motion for Clarification Filed April 28, 2023, has been served by operation of this Court's electronic filing system this 5th day of May, 2023.

/s/ *David C. Tryon*
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