IN THE FIFTH DISTRICT COURT OF APPEALS
DELAWARE COUNTY, OHIO

JOHN DOE 1, et al.,	)	CASE NO: 23 CAE 04 0028
	)	
Plaintiffs-Appellees,	)	
	)	On Appeal from the Delaware
vs.	)	County Court of Common Pleas
	)	CASE NO: 23-cv-H-02-0089
CITY OF COLUMBUS, et al.,	)	
	)	
Defendants-Appellants.	)	ORAL ARGUMENTS
	)	REQUESTED

BRIEF OF APPELLEES

Richard N. Coglianese (0066830)
Matthew D. Sturtz (0095536)
Aaron D. Epstein (0063286)
Assistant City Attorneys
City of Columbus
Department of Law
77 N. Front Street, 4th Floor
Columbus, Ohio 43215
rncoglianese@columbus.gov
mdsturtz@columbus.gov
adepstein@columbus.gov
(614) 645-7385 Phone
(614) 645-6949 Fax

Attorneys for Defendants-Appellants

David C. Tryon (0028954)
Robert D. Alt (0091753)
Jay R. Carson (0068526)
Alex M. Certo (0102790)
The Buckeye Institute
88 East Broad Street, Suite 1300
Columbus, Ohio 43215
(614) 224-4422
d.tryon@buckeyeinstitute.org

Attorneys for Plaintiffs-Appellees

37 Pgs

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

City Codes

Constitutional Provisions

Rules

Other Authorities

STATEMENT OF ASSIGNMENTS OF ERROR

1. Did the trial court err when it granted Plaintiffs leave to proceed under pseudonyms to protect Plaintiffs from prosecution by the government entity whose unconstitutional ordinances they challenge, as permitted by the Ohio Supreme Court?
2. Did the trial court err when it determined that the jurisdictional-priority rule does not deprive the court of subject matter jurisdiction where Plaintiffs are not parties to the Defendants' previous cases and are individuals not substantially the same as the State in those cases?
3. Did the trial court err when it determined that Plaintiffs have standing to challenge unlawful ordinances that would deprive them of the right to bear arms and their personally possessed firearm magazines?
4. Did the trial court err when it interpreted the Ohio Constitution in light of the Second Amendment as required by the Ohio Supreme Court for individual rights that have been incorporated to the states by the U.S. Supreme Court?
5. Did the trial court err when it determined that Plaintiffs were entitled to a preliminary injunction based on signed and notarized affidavits—as allowed by the Ohio Supreme Court, the rules of civil procedure, and the Revised Code—and other evidence placed in the record at the preliminary injunction hearing?

STATEMENT OF ISSUES FOR REVIEW

This appeal presents the following issues for review:

1. Whether pseudonymous plaintiffs can invoke the subject matter jurisdiction of a state common pleas court where the General Assembly has not limited the common pleas courts' jurisdiction?
2. Whether a trial court can hear a case involving individual plaintiffs when a court of concurrent jurisdiction in a different county is already hearing a similar case in which the individual plaintiffs are not involved, and the only parties involved are government entities?
3. Whether a trial court can issue a preliminary injunction where the plaintiffs claim that the defendants' ordinances unconstitutionally and in violation of state law deprive them of their individual rights to keep and bear arms?
4. Whether a trial court can interpret the Ohio Constitution in light of the Federal Constitution where the Ohio Supreme Court has demanded such interpretation once a federal constitutional right has been incorporated to the states?
5. Whether a trial court can issue a preliminary injunction based on signed and notarized affidavits—as allowed by the Ohio Supreme Court, the rules of civil procedure, and the Revised Code—and other evidence placed in the record at the preliminary injunction hearing?

ARGUMENT

I. Standard of Review

"A trial court's decision to grant or deny a preliminary injunction is reviewed for abuse of discretion." *Avery Dennison Corp. v. TransAct Techs., Inc.*, 11th Dist. Lake No. 2012-L-132, 2013-Ohio-4551, ¶ 13. The decision as to whether or not a statute is constitutional presents a question of law and is reviewed under a de novo standard. *Wilson v. AC&S, Inc.*, 169 Ohio App.3d 720, 2006-Ohio-6704, 864 N.E.2d 682, ¶ 61 (12th Dist.). Legislative enactments must be overturned when "there is a clear conflict between the legislation * * * and some particular provision or provisions of the Constitution." *Id.*, quoting *City of Xenia v. Schmidt*, 101 Ohio St. 437, 130 N.E. 24 (1920).

II. The trial court had subject matter jurisdiction.

A. Plaintiffs' anonymous complaint does not divest the court of subject matter jurisdiction.

1. The Ohio Supreme Court has sanctioned the use of pseudonyms by plaintiffs.

The men who went by Publius, Brutus, and Federal Farmer—the names synonymous with the founding of our Country—were not "fictitious" individuals,[1] but instead, Alexander Hamilton, James Madison, John Jay, Robert Yates, and Richard Henry Lee using pseudonyms to protect their identities. Likewise, here, and contrary to Defendants' assertions, Plaintiffs are very much real individuals who brought this action using pseudonyms to protect their identities from the government entities that threatened to prosecute Plaintiffs for their admitted violations of Defendants' unlawful ordinances.

"The practice of proceeding under a pseudonym is well established in Ohio * * *." *Doe v.*

[1] Defendants repeatedly refer to Plaintiffs as fictitious rather than as anonymous. Defendants either do not know the difference or they are simply being disingenuous. Plaintiffs are real as the undersigned counsel, as officers of the court, have represented and as six different notaries public have attested.

Bruner, 12th Dist. Clinton No. CA2011–07–013, 2012-Ohio-761, ¶ 4, citing *Doe v. Shaffer*, 90 Ohio St.3d 388, 738 N.E.2d 1243 (2000) (noting the plaintiff's name has been changed); *Doe v. George*, 12th Dist. Warren No. CA2011–03–022, 2011-Ohio-6795 (allowing but not commenting on use of pseudonyms for plaintiffs). Just last year, the Ohio Supreme Court again recognized that a court may excuse a plaintiff from identifying him or herself in certain situations. *State ex rel. Cincinnati Enquirer v. Shanahan*, 166 Ohio St.3d 382, 2022-Ohio-448, 185 N.E.3d 1089, ¶ 36. When a plaintiff's "privacy interests substantially outweigh the presumption of open judicial proceedings," the court may allow the plaintiff to proceed under a pseudonym. *Id.*, quoting *Doe v. Porter*, 370 F.3d 558, 560 (6th Cir.2004). *Shanahan* looked to two factors: (1) the threat of retaliation and (2) public disclosure. *Id.* at ¶ 36. Both of those factors support proceeding pseudonymously here.

Shanahan considered the following to address the protection against a threat of retaliation: "(1) the severity of the threatened harm, (2) the reasonableness of the anonymous party's fears, and (3) the anonymous party's vulnerability to such retaliation." *Id.* at ¶ 38, quoting *Does I thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1068 (9th Cir.2000) (internal quotation marks omitted).

Here, Plaintiffs satisfy these considerations. The threatened harm is severe—it is a mandatory six-month incarceration and a $1,500 fine. Columbus City Code 2323.32, Compl. Ex. A at 5–6.

As to the second and third considerations, because Plaintiffs have attested to their possession of banned magazines within the city of Columbus, the city would have probable cause to arrest Plaintiffs pursuant to an unlawful ordinance if they were identified. This threat is not speculative. Defendants submitted evidence below of the city's indictment of an individual for

violating the ordinance, Prelim. Inj. Hr'g Defs.' Ex. 3, thus demonstrating Defendants' intent to enforce the challenged ordinances.[2] Further, Defendant City Attorney Zach Klein threatened to "enforce [the magazine ban] by seeing it on site." Ferenchik and Lagatta, *Columbus gun owners wary of city's new ammunition restriction*, 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 also satisfy factor two of the *Shanahan* test: there has been no public disclosure of Plaintiffs' identities to anyone outside of Plaintiffs' counsel, and the notaries who attested to Plaintiffs' existence and names.

Thus, the *Shanahan* test authorizes Plaintiffs to proceed pseudonymously.

Despite clear Ohio law permitting anonymous plaintiffs, Defendants insist on presenting federal case law. But even federal courts allow plaintiffs to sue pseudonymously.[3]

In *Sealed Plaintiff v. Sealed Defendant*, 537 F.3d 185 (2nd Cir.2008), cited by the Ohio Supreme Court, the court looked to the following:

> (1) "whether identification presents other harms and the likely severity of those harms, including whether 'the injury litigated against would be incurred as a result of the disclosure of the plaintiff's identity'";
>
> (2) "whether the suit is challenging the actions of the government or that of private parties";
>
> (3) "whether the plaintiff's identity has thus far been kept confidential";
>
> (4) "whether the public's interest in the litigation is furthered by requiring the plaintiff to

[2] Further, forcing Plaintiffs to reveal their names and addresses would make them choose between their fundamental right against self-incrimination and their fundamental right to access the courts.

[3] Perhaps most famously, see *Roe v. Wade*, 410 U.S. 113 (1973). There, the trial court found jurisdiction and explained that "Plaintiffs Roe and Doe have adopted pseudonyms for purposes of anonymity." *Roe v. Wade*, 314 F. Supp. 1217, 1219 (N.D. Tex. 1970), *aff'd in part, rev'd in part*, 410 U.S. 113 (1973).

disclose his identity" or "'whether, because of the purely legal nature of the issues presented or otherwise, there is an atypically weak public interest in knowing the litigants' identities'";

(5) "whether the defendant is prejudiced by allowing the plaintiff to press his claims anonymously * * *"; and

(6) "whether there are any alternative mechanisms for protecting the confidentiality of the plaintiff."

Sealed Plaintiff at 190 (internal citations omitted). Every one of these factors militates in favor of Plaintiffs' proceeding pseudonymously.

As discussed above, Plaintiffs satisfy the first *Sealed Plaintiff* factor.

Second, the suit challenges the actions of the government defendants. The government does not need Plaintiffs' identities to defend itself. The only relevant facts are that Plaintiffs are residents of Columbus and are impacted by the ordinances—facts established by sworn affidavits.

Third, there has been no public disclosure of the Plaintiffs' identities. Further, unlike *Allison Publications, LLC v. Doe*, 654 S.W.3d 210 (Tex.App.2022), cited by Defendants, where the plaintiff's counsel did not know the identity of his client, counsel for Plaintiffs here are aware of Plaintiffs' identities and their legitimacy.

Fourth, the public has no need to know the identities of the affected individuals. Rather, the public has a strong interest in seeing unlawful and unconstitutional criminal laws challenged without forcing Plaintiffs to subject themselves to criminal prosecution first. *See Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 163 (2014). Indeed, the public benefits from Plaintiffs' establishing whether others will need to divest themselves of supposedly illegal items without anyone being arrested or prosecuted. Plaintiffs' affidavits establish their possession of the banned magazines and

their firearms storage methods, which are the only essential facts in this case. Whether (1) the ordinances violate R.C. 9.68, and (2) the ordinances violate Article I, Section 4 of the Ohio Constitution are purely legal determinations that will not change based on the identity of Plaintiffs.

Fifth, there will be no prejudice to Defendants. The affidavits, permitted for a preliminary injunction, establish the relevant facts.

Finally, there are no reasonable alternative mechanisms for the court to protect Plaintiffs' identities. Any disclosure of Plaintiffs' names would not only destroy their privacy but would also give their names to the very entities that seek to prosecute them, contrary to the directive of the Ohio Supreme Court. *Shanahan*, 166 Ohio St.3d 382, 2022-Ohio-448, 185 N.E.3d 1089, at ¶ 41–42.

Defendants' falsely claim that Plaintiffs have refused to disclose their names to the trial court under seal. The trial court was satisfied that Plaintiffs are legitimate based on the six signed and notarized[4] affidavits and the pleadings signed by four Ohio attorneys subject to Rule 11.[5] Defendants have ignored Ohio law allowing this practice and have failed to show non-compliance with the federal factors.

2. Leave to proceed pseudonymously is not required before filing a complaint.

Defendants' argument that a court must grant permission to file pseudonymously to have subject matter jurisdiction is illogical. As Defendants previously admitted, the trial court has "general jurisdiction of the subject matter of this dispute." Defs.' Mot. Dismiss Compl. at 8. "The

[4] A notary violating the oath of office may lose his or her commission and become ineligible for recommission, R.C. 147.032, and may "be fined not more than one hundred dollars or imprisoned not more than thirty days, or both," R.C. 147.99.

[5] Defendants' repeated claims that "the Plaintiffs in Delaware are fictitious" and may not "even exist[]" are disrespectful to opposing counsel and unjustifiably question the trial court's legitimacy. Defendants' continuing attacks on the Plaintiffs' anonymity for the apparent purpose of intimidating Plaintiffs to drop this case is prejudicial to the administration of justice.

General Assembly has given the common pleas courts subject-matter jurisdiction over all civil cases that it has not expressly excluded from their jurisdiction." *Pivonka v. Corcoran*, 162 Ohio St.3d 326, 2020-Ohio-3476, 165 N.E.3d 1098, ¶ 21, citing *Bank of Am., N.A. v. Kuchta*, 141 Ohio St.3d 75, 2014-Ohio-4275, 21 N.E.2d 1040, ¶ 20. The General Assembly never disallowed pseudonymous filings and the Ohio Supreme Court permits them. Thus, pleading pseudonymously does not divest the court of subject matter jurisdiction.

Additionally, none of Defendants' cited cases supports the proposition that filing a pseudonymous complaint before seeking leave from the court deprives the court of subject matter jurisdiction. In fact, it is hard to fathom how that could happen given that without a filed complaint, a party cannot file a motion seeking leave to do anything, let alone file a motion to file a complaint pseudonymously. Even *Marsh*, previously cited by Defendants, does not require a plaintiff to seek leave from the court before filing a complaint pseudonymously. In *Marsh*, the Sixth Circuit only noted that "[*o*]*rdinarily*, a plaintiff wishing to proceed anonymously files a protective order that allows him or her to proceed under a pseudonym." (Emphasis added.) *Citizens for a Strong Ohio v. Marsh*, 123 Fed.Appx. 630, 636 (6th Cir.2005), citing *Porter*, 370 F.3d at 560. In *Marsh*, the court upheld the dismissal of a plaintiff who had initially filed as John Doe only because he had "not alleged sufficient facts to be permitted to proceed with his claim." *Id.* Further, in *Porter*—cited by *Marsh*—the Sixth Circuit affirmed the district court's decision to allow the Doe plaintiff to proceed pseudonymously.

Defendants also misstate the holding of *Yocom*. That court recognized that parties *can* proceed pseudonymously with the court's permission. The court found a lack of jurisdiction in that case only because the nunc pro tunc order allowing the plaintiffs to proceed pseudonymously had been "filed [and granted] after the start of this appeal," which appeal divested the district court of

jurisdiction. *W.N.J. v. Yocom*, 257 F.3d 1171, 1172 (10th Cir.2001).

Aside from the logistical and procedural challenges to first seek leave, the Ohio Supreme Court refuted Defendants argument in *Shanahan*, explaining that "Judge Shanahan has the authority to *excuse* M.R. from identifying himself in his complaint * * *." *Shanahan,* 166 Ohio St.3d 382, 2022-Ohio-448, 185 N.E.3d 1089, at ¶ 42. *See also Bruner*, 12th Dist. Clinton No. CA2011-07-013, 2012-Ohio-761, at ¶ 2. In *Shanahan*, the court determined that there was no need to excuse M.R. from continuing pseudonymously because—unlike here—M.R. had already disclosed his name publicly. In any event, it is clear that pseudonymous pleadings are permitted without first seeking leave.

3. Pseudonymous filing is not a subject matter jurisdiction question.

Defendants' motion to dismiss the Amended Complaint only raises lack of subject matter jurisdiction, Civ. R. 12(B)(1), but not lack of personal jurisdiction, Civ. R. 12(B)(2). Defs.' Mot. Dismiss Am. Compl. at 1 ("This Court lacks subject-matter jurisdiction to hear this case because (1) Plaintiffs have failed to meet the requirements to proceed pseudonymously * * * ."); *id.* at 6 Heading II, A ("This Court lacks subject matter jurisdiction * * * ."). *See also* Br. of Appellants at 5 Heading II (claiming the trial court "lacked subject matter jurisdiction"). A claim that the court lacks jurisdiction over the parties is based on personal jurisdiction, not a lack of subject matter jurisdiction.[6] The trial court, of course, has personal jurisdiction over Plaintiffs because they "submitted to the court's jurisdiction by filing the complaint." *Moore v. Mt. Carmel Health Sys.*, 162 Ohio St.3d 106, 2020-Ohio-4113, 164 N.E.3d 376, ¶ 34. And Defendants waived the defense of personal jurisdiction because they did not raise it in their motion to dismiss below. Civ.R. 12(H).

[6] Even *Yocom*, Defendants' lead case, explained regarded the issue as one of personal jurisdiction—but only where permission to proceed has not been granted. "Where no permission is granted, 'the federal courts lack jurisdiction over the unnamed parties [i.e., personal jurisdiction], as a case has not been commenced with respect to them.'" *Yocom*, 257 F.3d at 1172 (citation omitted).

Further, Defendants did not raise that defense in their Answer to the Amended Complaint.

Thus, the trial court has jurisdiction.[7]

B. The jurisdictional-priority rule does not divest the trial court of jurisdiction to hear Plaintiffs' claims.

The jurisdictional-priority rule does not preclude the trial court's jurisdiction in this case. Under the jurisdictional-priority rule, "[a]s between courts of concurrent jurisdiction, the tribunal whose power is first invoked by the institution of proper proceedings acquires jurisdiction, to the exclusion of all other tribunals, to adjudicate upon *the whole issue* and to settle the rights of *the* parties." (Emphasis added.) *State, ex rel. Phillips v. Polcar,* 50 Ohio St.2d 279, 279, 364 N.E.2d 33 (1977). There are two important and distinct requirements for the jurisdictional-priority rule to apply.

> "To be sure, it is a condition of the jurisdictional-priority rule that the claims and parties be the same in both cases, so '[i]f the second case is not for the same cause of action, nor between the same parties, the former suit will not prevent the latter.'" *See State ex rel. Judson v. Spahr,* 33 Ohio St.3d 111, 113, 515 N.E.2d 911 (1987).

Gilcrest v. Gilcrest, 5th Dist. Delaware No. 22 CAE 03 0019, 2022-Ohio-3640, ¶ 34–35, quoting *State ex rel. Dunlap v. Sarko*, 135 Ohio St.3d 171, 2013-Ohio-67, 985 N.E.2d 450, ¶ 10–11.

It is a two-step analysis:

> "*First*, there must be cases pending in two different courts of concurrent jurisdiction *involving substantially the same parties*; and second, the ruling of the court subsequently acquiring jurisdiction may affect or interfere with the resolution of the issues before the court where suit was originally commenced."

(Emphasis added.) *Centerburg RE, LLC v. Centerburg Pointe, Inc.*, 2014-Ohio-4846, 22 N.E.3d 296, ¶ 45 (5th Dist.) (citation omitted).

[7] Defendants claim for the first time on appeal and without support that the court cannot proceed without knowing the Plaintiffs' identities because the court cannot tell if it has an ethical conflict. But an ethical conflict would result from knowingly favoring one party based on a personal relationship, which knowledge would not exist here. *Shanahan* imposed no such requirement.

First, on July 31, 2023, this Court granted the State's voluntary dismissal of its appeal of the Fairfield County court's order dismissing the State's R.C. 9.68 claim. J.E. Dismissing Appeal, *State v. Columbus*, No. 23CA00005 (5th Dist. Jul. 31, 2023). As such, the Fairfield County Common Pleas Court no longer had jurisdiction over the State's R.C. 9.68. Additionally, on July 28, 2023, the State moved to dismiss its amended complaint, including its challenge to Defendants' ordinances under the Ohio Constitution. Notice Voluntary Dismissal, *State v. Columbus*, Fairfield C.P. No. 22CV657 (Jul. 28, 2023). Thus, the Fairfield County Common Pleas Court no longer has jurisdiction "to the exclusion of other tribunals," *Phillips* at 279, over a challenge to Defendants' ordinances as violations of R.C. 9.68 and the Ohio Constitution. Because there are not "cases pending in two different courts of concurrent jurisdiction * * *," *Centerburg RE, LLC* at ¶ 45, this alone dooms Defendants' jurisdictional-priority rule argument.

Second, Plaintiffs are not parties to either the Franklin or the (now dismissed) Fairfield County cases between Defendants and the State.[8] Defendants oddly suggest that John and Jane Doe Plaintiffs are somehow substantially the same as the State of Ohio. They take the curious position that "private citizens[] do not exist 'separate and apart' from the rest of Ohio * * * ." Defs.' Mot. Dismiss Am. Compl. at 14. This argument is wrong. Obviously the City of Columbus and the State of Ohio are separate entities from the residents of Columbus and the State. The ramifications of Defendants' argument that they are one and the same as the State are varied and ludicrous—individual citizens and residents, such as the Doe Plaintiffs, would be entitled to

[8] Defendants' speculation that Plaintiffs "are employees of the Ohio Attorney General's Office or have specifically coordinated this litigation with that office" is wrong and irrelevant. First, Defendants did not raise this defense below and so have waived it. Second, they have no evidence to support their supposition. Defendants' cite to an e-mail chain between the Ohio Attorney General's Office and outside individuals—none of whom is a party herein or counsel herein. And, Plaintiffs' counsel are not even referenced in the email chain as other attorneys are. Third, Plaintiffs' counsel attests that no Plaintiff is an employee of the Ohio Attorney General's Office. Finally, even if Plaintiffs were employed by the Attorney General's Office, state employees enjoy the same fundamental rights outside of their employment as any other Ohio citizen.

sovereign immunity because they would be the same as the State. Defendants provide no legal support for their illogical assertions and, in fact, argued contrary to this point in other cases. See Pls.' Mem. Contra Mot. Dismiss Am. Compl. at 9–11.

Defendants cite two inapplicable cases for their "substantially the same parties" argument. In *Davis*, Cowan Systems sued Pamela Miranda in Portage County regarding a car accident. *Davis v. Cowan Sys.*, 8th Dist. Cuyahoga No 83155, 2004-Ohio 515, ¶ 5. Subsequently, Davis sued Cowan Systems, Pamela Miranda and Leland Crocker in Cuyahoga County. *Id.* The parties were substantially similar because "[i]t is clear that of the four parties in the Cuyahoga County case, two are also principal parties in the Portage County litigation," Davis "would have undoubtedly been called as a witness in the Portage County action," and "it may have been improper to proceed with the Portage County action without adding [Davis] to the action." *Id.*

Here, Defendants are suing the State of Ohio in Franklin County, but Plaintiffs are not in that case, and there is no reason for them to be. And, Plaintiffs are unquestionably not indispensable parties to that action. Thus, *Davis* is inapplicable.

In *Racing Guild*, the relator sued Northfield Park Associates and others in Cuyahoga County, seeking injunctive relief to prevent interference with picketing at Northfield. *State ex rel. Racing Guild, Local 304 v. Morgan*, 17 Ohio St.3d 54, 55, 476 N.E.2d 1060 (1985). The following day, Northfield sued relator and its members and officers in Summit County, "seeking injunctive relief to restrict or prohibit picketing at the track." *Id.* Relator and Northfield Park Associates were the principal parties to both cases, just on opposite sides of the coin. Again, Plaintiffs are not parties to the other case brought by Defendants.

Defendants also misrepresent *John Weenick & Sons Co.* and the court's citation to it in *Racing Guild*. According to Defendants, the court "noted that it had previously affirmed a writ of

prohibition brought by the City of Cleveland when it sought to prevent a second court from exercising jurisdiction even though the parties in the two cases were not the same." Br. of Appellants at 11. However, in *Racing Guild*, the court noted that

> In *Weenink & Sons*, [ ] relators filed suit in municipal court against the city of Cleveland for money judgments stemming from a rodeo held in Cleveland. The city then filed suit in the court of common pleas against relators and others, seeking declaratory relief with regard to a fund which the city had collected as a result of holding the rodeo.

Racing Guild at 56, citing *John Weenink & Sons Co. v. Court of Common Pleas of Cuyahoga Cnty.*, 150 Ohio St. 349, 82 N.E.2d 730 (1948). Not only are Defendants incorrect in stating that the city of Cleveland brought the writ of prohibition action, but they are also incorrect in stating that the cases involved different parties. In *John Weenick & Sons Co.*, the relators and others named by Cleveland in its case were creditors of the Diamond D Corporation. *John Weenick & Sons Co.* at 349–353. These creditors had previously filed actions against Diamond D naming Cleveland as garnishee or filed actions directly against Cleveland for money owed to them. *Id.* Contrary to Defendants' claims, nowhere in *Racing Guild* does the court state that the parties in *John Weenick & Sons Co.* were different parties, and the facts of the case do not support such an assertion.

There is no legal support for the conclusion that Plaintiffs are substantially the same as the parties in Defendants other case.

Separately, and very simply, this case challenges Columbus new regulations enacted by the ordinances. The Franklin County case does not—nor could it since the challenged regulations were enacted in 2022, long after the Franklin case was filed in 2019.

Accordingly, the jurisdictional-priority rule does not preclude jurisdiction.

III. The trial court did not err when it granted a preliminary injunction to Plaintiffs.

A. Plaintiffs have standing to bring their claims.

In order to have standing to attack the constitutionality of a legislative enactment,

> the private litigant must generally show that he or she has suffered or is threatened with direct and concrete injury in a manner or degree different from that suffered by the public in general, that the law in question has caused the injury, and that the relief requested will redress the injury.
>
> *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 469–70, 715 N.E.2d 1062 (1999).

In this case, there is little question that Plaintiffs have standing to challenge the large capacity magazine (LCM) ban. Plaintiffs have all alleged—and attested—that they possess an LCM in the city or own LCMs but removed them from the city on fear of prosecution but seek to return them to their city property. This satisfies the standing requirement on this issue. Further, below, Defendants objected to standing only as to the safe storage regulation as to John Does 1–4 and Jane Doe. They specifically stated that the court should dismiss the claims of those Plaintiffs as to the firearms storage regulations "and maintain them only for John Doe 5." Defs.' Mem. Contra Pls.' Renewed Mot. for TRO and Prelim. Inj. at 8–9. But once standing is established for one plaintiff, "the standing of other plaintiffs is immaterial." *Natl. Wildlife Fedn. v. Agricultural Stabilization & Conservation Serv.*, 955 F.2d 1199, 1203 (8th Cir.1992), citing *Bowen v. Kendrick*, 487 U.S. 589, 620 n. 15 (1988). John Doe 5 has pled adequate facts to satisfy the traditional standing requirements for both the safe storage provision and the LCM ban.

Defendants otherwise misstate Plaintiffs claims. See Br. of Appellants at 14–16. While Plaintiffs' Amended Complaint references Defendants' ordinances, Plaintiffs' claims for relief are directed at specific Columbus City Codes enacted by those ordinances, namely "Columbus City Codes 2323.32, 2323.11(N) and (O), 2323.321, and 2323.191 * * * ." Am. Compl. at 21–22. Plaintiffs sought (and obtained) a "preliminary injunction barring Defendant's from enforcing the challenged code provisions." *Id.* Defendants are correct that Plaintiffs have not asserted that they are barred from purchasing a weapon or intend to sell or furnish a weapon to an individual who is

so barred, because Plaintiffs have not challenged the Columbus City Code provision for negligent sale of a firearm. Thus, no standing inquiry into this code provision is necessary.

B. Municipalities do not have due process rights, and, regardless, Defendants had notice and an opportunity to be heard on John Doe 5's addition to the preliminary injunction.

Defendants next invoke due process. Defendants' claim that they did not have notice and an opportunity to be heard on the application of the preliminary injunction after John Doe 5's addition is specious. First, due process rights "do not apply to municipal corporations or other political subdivisions." *Hamilton v. Fairfield Twp.*, 112 Ohio App. 3d 255, 275, 678 N.E.2d 599 (12th Dist.1996).

Plaintiffs gave Defendants notice of John Doe 5's addition to the case via the Amended Complaint and to the Preliminary Injunction motion via the renewed motion for preliminary injunction, filed on March 10 and 17, respectively. Defendants then moved to dismiss the Amended Complaint on March 24 and filed a memorandum contra Plaintiffs' renewed preliminary injunction request on March 31. Defendants thus had any possibly required notice and opportunity to be heard a month before the trial court ruled on the motions on April 25. *See RDSOR v. Knox Cty. Bd. of Revision*, 5th Dist. Knox No. 07-CA-12, 2008-Ohio-897, ¶ 26.

Finally, Defendants do not—and cannot—challenge the fact that Plaintiffs' affidavits provide that they have a personal controversy over the 30-round magazine ban. As Defendants acknowledge, all Plaintiffs attested to their possession of 30-round magazines within the City of Columbus, except one who removed it from the jurisdiction pending an outcome in this case out of fear that Defendants would arrest him. All Plaintiffs attested that they do or intend to possess magazines prohibited by Defendants' ordinances and thus have standing to challenge their unconstitutional and unlawful banning. And, affidavits alone "may be used to obtain a provisional remedy such as a temporary injunction." *Natl. City Bank of Cleveland v. Natl. City Window*

Cleaning Co., 174 Ohio St. 510, 190 N.E.2d 437, 440 (1963), citing R.C. 2319.03 ("An affidavit may be used to * * * obtain a provisional remedy * * * .").

Thus, Plaintiffs have standing to challenge the code provisions enacted by the ordinances.

C. Plaintiffs are likely to prevail on their constitutional claim because Article I, Section 4 must be interpreted in light of the Second Amendment.

1. The Second Amendment is the floor for Article I, Section 4.

"[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 v. J & B Steel Erectors, Inc.*, 155 Ohio St.3d 567, 2018-Ohio-5088, 122 N.E.3d 1228, ¶ 30. Contrary to Defendants' claims, the trial court did not "reject" the Ohio Supreme Court's *Arnold* analysis. Instead, the trial court applied *Arnold*'s command that

> [i]n 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 v. Cleveland*, 67 Ohio St. 3d 35, 42, 616 N.E.2d 163 (1993).

When *Arnold* was decided in 1993, many federal courts considered the Second Amendment to provide a collective right and analyzed any law impinging on it using a reasonableness test. *See District of Columbia v. Heller*, 554 U.S. 570, 622 (2008). 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 46. 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.* at 47.

Subsequently, the U.S. Supreme Court ruled in *Heller* that the Second Amendment protects an individual right to bear arms. And in *McDonald v. Chicago*, 561 U.S. 742 (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." *Arnold* at 42. 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. In *New York State Rifle & Pistol Assn., Inc. v. Bruen*, 142 S.Ct. 2111, 2129–130 (2022), the U.S. Supreme Court held that state 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. 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).

Under the *Bruen* test, to regulate conduct covered by the Second Amendment's text, "[t]he

government[9] must [] 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. While the Court expressed its preference for interpreting the Second Amendment following its adoption in 1791, the Court also noted that, consistent with its prior interpretations, colonial laws considering firearms to be "'dangerous and unusual weapons' in the 1690s, [] provide no justification for laws restricting the [possession] of weapons that are unquestionably in common use today." *Bruen* at 2143. Thus, where modern laws and practice have rejected historical restrictions, the modern common usage controls.

Thus, *Bruen* is the "minimal level of protection" under Article I, Section 4's protection of the right to bear arms. *Arnold*, 67 Ohio St.3d at 168, 616 N.E.2d 163. The provisions enacted by Defendants' ordinances do not come close to meeting the *Bruen* test. See Pls.' Renewed Mot. for TRO & Prelim. Inj. at 15–17 (Pls.' Renewed Mot.). Federal 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 same is true for Ohio's history.

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

[9] The government, not Plaintiffs, has the burden to show that its laws do not violate the *Bruen* standard.

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 Pls.' Renewed Mot. at 16–17.

As time moved on, Ohio has rejected the restriction of magazine capacities. The state continuously raised the number of rounds that a licensed firearm may carry, until the state eliminated that number all together. Similarly, only 13 states currently prohibit 30-round magazines, and those laws have been subject to numerous lawsuits. *See* Wisevoter, *States With Magazine Restrictions,* Https://wisevoter.com/state-rankings/states-with-magazine-restrictions/#:~:text=The%20states%20with%20magazine%20restrictions,hold%20at%20any%20given%20time. It is estimated that at least 80 million 30-round magazines are owned in the U.S. National Shooting Sports Foundation, *Another Ban on "High-Capacity" Magazines?* (2020), https://www.nssf.org/wp-content/uploads/2021/03/NSSF-factsheet-High-Capacity-Magazines.pdf. While it is unknown exactly how many of these magazines are possessed in Ohio, Columbus retailers regularly sell these magazines by themselves and—as packaged from the factory—along with their most popular rifles. *See, e.g.,* Vance Outdoors, *Rifles*, https://www.vanceoutdoors.com/category.cfm/outdoors/rifles/CurrentPage/1. Similarly, when a federal judge threw out the state's ban on 10-round magazines, "[m]ore than a million high-capacity ammunition magazines flooded into California during a one-week window * * *." Thomspon, *Gun groups: Million-plus extended magazines flood California* (Apr. 14, 2019), https://www.vcstar.com/story/news/2019/04/15/gun-groups-million-plus-extended-magazines-flood-california/3443072002/.

Ohio and other states' modern reduction in restrictions along with the numerous amounts of large capacity magazines owned by citizens, show that large capacity magazines are "unquestionably in common use today," *Bruen* at 2143. Thus, the modern common usage of large capacity magazines prevents restrictions on the right to keep and bear arms. Defendants have not satisfied their burden of meeting the *Bruen* test.

Contrary to Defendants' assertions, the trial courts reliance on the *Duncan* cases supports this argument. First, in *Duncan* v. *Bacerra*, 970 F.3d 1133, 1149 (9th Cir. 2020), the Ninth Circuit looked to the history of regulations of large capacity magazines, the test that *Bruen* would later require. The trial court then cites the dissent in *Duncan v. Bonta* 19 F.4th 1087, 1159 (9th Cir.2021) (Bumatay, J., dissenting), the en banc opinion reversing *Bacerra*. The fact that the en banc majority opinion in that case was vacated in light of *Bruen* emphasizes why Judge Bumatay correctly dissented and why the Ninth Circuit got the decision correct in *Bacerra*.

Defendants' citations to post-*Bruen* cases challenging large capacity magazine regulations or bans are unavailing because they are non-controlling federal cases, and they are based on a record not before this court. Moreover, some courts have granted injunctions against the enforcement of such laws.

In *Oregon Firearms Fedn. v. Kotek*, D.Or. No. 2:22-cv-01815-IM, 2023 WL 3380663 (May 11, 2023),[10] the district court did *not* find a 30-round magazine ban to be unconstitutional. Instead, the court granted a motion for partial judgment on the pleadings and dismissed claims against defendants in their individual capacities but allowed the case to go forward otherwise. In *Oregon Firearms Fedn., Inc. v. Brown*, D.Or. No. 2:22-cv-01815-IM, 2022 WL 17454829, *12 (Dec. 6, 2022), the lead case consolidated in *Kotek* and cited by Defendants, the trial court "reiterate[d] that

[10] Beyond it being inapplicable, Defendants' claim that the trial court ignored this case is incorrect considering it was decided after the trial court ruled on the preliminary injunction.

the record at the TRO stage is a limited one, and [its] finding is made on this limited record alone."

In *Hanson v. D.C.*, No. 22-2256, 2023 WL 3019777, *8 (Apr. 20, 2023), the district court recognized that several circuits pre-*Bruen* found magazines to be arms covered by the Second Amendment. However, the court diverged from *Bruen*'s requirement to decide whether "the Second Amendment's plain text covers an individual's conduct," and imposed a self-defense requirement on the Second Amendment. While the Court has noted that self-defense is at the core of the Second Amendment, neither the amendment's text, history, or the Court's interpretation of such imposes a self-defense requirement.

In *Delaware State Sportsmen's Ass'n, Inc. v. Delaware Dep't of Safety & Homeland Sec.*, D.Del. No. CV 22-951-RGA, 2023 WL 2655150, *8 (Mar. 27, 2023), the district court found "that LCMs are 'in common use' for self-defense." However, the court wrongly relied on historical regulations of melee weapons, 20th century machine gun regulations, and *Brown*'s limited evidentiary analysis to determine that the bans could be upheld.

In *Ocean State Tactical, LLC v. Rhode Island*, D.R.I. No. 22-CV-246, 2022 WL 17721175, *16 (Dec. 14, 2022), contrary to circuit courts finding otherwise, the district court found that "LCMS are neither 'Arms' within the meaning of the Second Amendment's text, nor weapons of 'self-defense * * *." Because of the court's improper implementation of a self-defense requirement into the Second Amendment, the court did "not investigate whether the LCM Ban's restrictions are consistent with the regulations of history * * *." *Id.*

In *Herrera v. Raoul*, N.D. Ill. No. 23 CV 532, 2023 WL 3074799 (Apr. 25, 2023), and *Bevis v. City of Naperville, Illinois*, N.D. Ill. No. 22 C 4775, 2023 WL 2077392 (Feb. 17, 2023), the plaintiffs challenged the Illinois' Protect Illinois Communities Act ("PICA"), which bans the sale and possession of so-called "assault weapons" and so-called "large capacity magazines." That

district court denied the requested preliminary injunction. However, the Southern District of Illinois disagreed and granted a preliminary injunction prohibiting the State of Illinois from enforcing PICA. In *Barnett v. Raoul*, S.D. Ill. No. 3:23-CV-00141, 2023 WL 3160285 (Apr. 28, 2023), the court explained that for the government to justify the law, it "must: (1) demonstrate that the 'arms' PICA bans are not in 'common use;' *and* (2) 'identify a well-established and representative historical analogue' to PICA." (Emphasis added.) *Id.* at *9, quoting *Bruen*, 142 S.Ct. at 2128, 2133. It then found that both the so-called assault rifles and so-called LCMs (as defined in PICA) "are 'in common use' and protected by the Second Amendment." *Id.* at *10.

Further, "Even if there was a requirement that the 'common use' of an 'arm' be self-defense, AR-15 style rifles would meet such a test considering that 34.6% of owners utilize these rifles for self-defense outside of their home and 61.9% utilize them for self-defense at home." *Id.*

Because magazines are essential for the use of a firearm, they must be considered arms under Article I, Section 4. As Defendants' cited case admits, "No circuit court * * * has considered the issue of large-capacity magazine bans in light of the Supreme Court's decision in" *Bruen*. *Kotek*, 2023 WL 3380663, at *2. Federal courts pre-*Bruen* found no "evidence that prohibitions on * * * large-capacity magazines are longstanding and thereby deserving of a presumption of validity," *Heller II*, 670 F.3d at 1264, and post-*Bruen*, found that large-capacity magazines "are 'in common use' and protected by the Second Amendment," *Barnett* at *10. Contrary to Defendants' assertion that large-capacity magazines are "dangerous and unusual weapons," there is "no justification for laws restricting the [possession] of weapons that are unquestionably in common use today." *Bruen*, 142 S.Ct. at 2143. The trial court correctly followed *Bruen*.

2. The Ohio Supreme Court has abrogated the reasonableness test for fundamental rights.

There can be no doubt that Article I, Section 4 guarantees a fundamental right. *Arnold*, 67

Ohio St. 3d at 46, 616 N.E.2d 163. In a series of post-*Arnold* cases, the Ohio Supreme Court has recognized that "[w]hen legislation infringes upon *a fundamental constitutional right* or the rights of a suspect class, strict scrutiny applies." (Emphasis added.) *State v. O'Malley*, 169 Ohio St.3d 479, 2022-Ohio-3207, 206 N.E.3d 662, ¶ 22, citing *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, ¶ 64. See also *Klein v. Leis*, 99 Ohio St.3d 537, 2003-Ohio-4779, ¶ 20 (O'Connor, J., dissenting) (Rights that affect the fundamental right to bear arms "should be subjected to intermediate scrutiny"). Only when "neither a fundamental right nor a suspect class is implicated, [does the court] apply a rational-basis test." *O'Malley* at ¶ 22. 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.*

The challenged ordinances do 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 ordinances and Defendants' witness' testimony all fail to explain how taking 30-round magazines from lawful firearms owners would reduce crime in Columbus. Further, Defendants presented no evidence to justify the firearms storage regulation.

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

the provisions enacted by the ordinances fail.

3. The ordinances are invalid even under the abrogated *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.

(Emphasis added.) *Arnold*, 67 Ohio St.3d at 46, 616 N.E.2d 163. Even *Klein v. Leis*, previously cited by Defendants, requires that the "goal and the means to obtain it" must be reasonable. *Klein,* 99 Ohio St.3d 537, 2003-Ohio-4779, at ¶ 15.

Importantly, "rational-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 (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).[11]

At the preliminary injunction hearing, Defendants tried to present evidence that the ban of 30-round magazines is not "arbitrary, discriminatory, capricious or unreasonable" and that it

[11] Defendants have cited several cases to try to claim that the Ohio Supreme Court would endorse the subject magazine ban. *See State v. Nieto*, 101 ohio St. 409, 130 N.E. 663 (1920); *Mosher v. Dayton,* 48 Ohio St.2d 243, 358 N.E.2d 540 (1976); and *Klein*, 99 Ohio St.3d 537, 2003-Ohio-4779. But these are all pre-*Bruen* (2022), pre-*O'Malley* (2022), and pre-*Weber* (2020), and they address laws regarding concealed carry of firearms or firearms registration laws. As such, none are relevant here.

"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.

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 ordinances refer to 30-round magazines. Defendants provided no evidence of 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.[12]

Finally, in an effort to claim that the Ohio Supreme Court had already approved magazine bans, Defendants' counsel has repeatedly asserted that *Arnold v. Cleveland* banned magazines. It did not; it banned certain firearms with detachable magazines.[13] *Arnold*, 67 Ohio St. 3d at 36 n.1, 616 N.E.2d 163. In any event, as the law has developed post-*Arnold*, that Cleveland gun ban—if it still existed—could not withstand constitutional scrutiny and would be barred by R.C. 9.68.

Ultimately, Defendants presented no evidence or cogent arguments showing that a ban on

[12] 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 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.

[13] That law no longer exists.

30-round magazines is reasonable or that it "bear[s] a real *and* substantial relation to the reduction of crime." (Emphasis added.) *Arnold* at 46. Similarly, Defendants presented no evidence showing how the firearms storage regulation would reduce crime or firearms misuse. As such, Plaintiffs are substantially likely to prevail on their claims.

D. Plaintiffs are likely to prevail on their claims under R.C. 9.68.

This court must affirm the trial court's decision based on R.C. 9.68 unless the court abused its discretion. *See Avery Dennison Corp*., 11th Dist. Lake No. 2012-L-132, 2013-Ohio-4551, at ¶ 13. Defendants do not argue that he trial court abused its discretion or provide any reasoned argument why Plaintiffs are not likely to succeed on their R.C. 9.68 claim. Instead, Defendants argue that this court should rely on the Franklin County Court of Common Pleas finding R.C. 9.68 unconstitutional rather than the Ohio Supreme Court's two recent decisions confirming the constitutionality of R.C. 9.68. *See Ohioans for Concealed Carry, Inc. v. Clyde,* 120 Ohio St.3d 96, 2008-Ohio-4605, 896 N.E.2d 967; *Cleveland v. State*, 128 Ohio St.3d 135, 2010-Ohio-6318, 942 N.E.2d 370. The Franklin County court's decision to grant a preliminary injunction on R.C. 9.68—which has already been criticized by the Tenth District—was stayed pending appeal at the time Plaintiffs filed their suit. Thus, contrary to Defendants' claims, the law in Franklin County is the same as the entire state of Ohio, R.C. 9.68 prevails.

Defendants continue to incorrectly assert that Plaintiffs are only challenging the ordinances as applied to their homes—not activity outside their homes. In fact, Plaintiffs averred that "[t]he regulations enacted by the Ordinance, which ban the so called 'large-capacity magazines,' place a substantial burden on Plaintiffs' ability to defend themselves, not only in their homes located within the city, *but also while in the city for any other lawful purpose.*" (Emphasis added.) Am. Compl. at 4. "Plaintiffs continue to possess the banned magazines within the City of Columbus and intend to continue possessing those magazines within the City of Columbus. [Am. Compl.]

Ex. C–G. All of the Plaintiffs wish to continue owning and possessing the magazines in Columbus." Am. Compl. at 6.

Defendants' failure to address the merits of Plaintiffs R.C. 9.68 claim suggests that they cannot do so and supports Plaintiffs' argument that Plaintiffs are substantially likely to succeed on this claim. Under Ohio's constitutional system of limited home rule, municipalities may exercise police powers within their limits to the extent that such regulations do not conflict with general laws. Ohio Const., Sec. 3, Art. XVIII; *Cleveland* at ¶ 10. Here, the regulations enacted by the ordinances directly conflict with R.C. 9.68[14]—a statute that the Ohio Supreme Court has repeatedly affirmed as constitutional. As Defendants have well noted, common pleas courts "are bound by the doctrine of stare decisis to apply Ohio Supreme Court's precedent." Defs.' Mem. Contra Pls.' Renewed Mot. at 9; Br. of Appellants at 18.

During the preliminary injunction hearing, Defendants' witness, John Gripshover, provided examples of firearm laws of the city of Columbus. Some pass muster under R.C. 9.68 and some do not. The regulations enacted by the ordinances banning large-capacity magazines impose 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. Mr. Gripshover's testimony simply confirms that R.C. 9.68 preempts the magazine ban enacted by Defendants. Further, Defendants' briefing confirms that Defendants believe that the magazine ban goes further than what is allowed by state and federal law. Defs.' Mem. Contra Pls.' Renewed Mot. at 23–25 ("While there was once

[14] "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.

there is no longer a 'standalone charge under state law' for the possession of a large capacity magazine * * *." "Simply put, Columbus's ordinances fill gaps in existing Ohio law." "[I]t is not uncommon for municipalities to have ordinances that differ from state law."). Because the General Assembly made a policy decision in R.C. 9.68 to remove any such restrictions, Defendants cannot ban what the State "no longer does."

The same holds true for Defendants' safe storage ordinance.

Because the Ohio Supreme Court has upheld R.C. 9.68 and Defendants ordinances conflict with the state statute, Plaintiffs are substantially likely to succeed on their R.C. 9.68 claims.

E. Plaintiffs face irreparable harm without an injunction.

"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). Defendants are threatening the Plaintiffs with arrest and prosecution, which—if unlawful—is irreparable. Irreparable harm is presumed from the nature of a constitutional deprivation. *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Magda v. Ohio Elections Comm.*, 2016-Ohio-5043, 58 N.E.3d 1188, ¶ 38 (10th Dist.). Defendants do not deny the fact that they intend to deprive Plaintiffs of their firearm magazines and, if they do not give them up, to arrest Plaintiffs. Plaintiffs are also prohibited by the safe storage provision from having quick access in an emergency to their firearms. This violation of Plaintiffs fundamental rights, including the right to protect themselves, *see* Pls.' Renewed Mot. at 20–21, is irreparable. Furthermore, the violation of Plaintiffs' rights protected by state law cannot be redressed through money damages.

F. Defendants failed to show that an injunction would harm Defendants or third parties.

There was inadequate evidence—if any—below that an injunction would harm Defendants or the public. First, Defendants' "evidence that it has been using its safe storage law to protect minors" does not show what Defendants' claim. Defendants' ability to charge an individual after a crime has been committed says nothing about its deterring effect. This is evident from Defendants own relied upon exhibit, which shows that Defendants initially charged the individual under state law—not the new city firearms storage ordinance. Prelim. Inj. Hr'g Defs.' Ex. 3. This evidence also rebuts Defendants' claim that they are unable to "bring charges in similar situations." Further, Defendants' attempt to submit evidence now is impermissible. Even that is not persuasive—the video shows a situation where the adults were already violating state law, R.C. 2919.22, and there is no evidence that another law prohibiting the same conduct would have changed the adults' behavior.

Second, Defendants undersupplying of their police force says nothing about the magazine ban. First, the magazine ban exempts law enforcement, so the city can supply the magazines to the police. Second, criminals misusing firearms are already committing a crime—regardless of the magazine capacity of the misused firearm. Further, Defendants failure provide LCMs to their officers, does not justify invading city residents' constitutional rights. *See* Welsh-Huggins, *Judge orders Columbus police to alter tactics for protests*, PBS (Apr. 30, 2021), https://tinyurl.com/alter-tactics-for-protests ("[A] newly released report found that Columbus was unprepared for the size and energy of the protests and that most police officers felt abandoned by city leadership during that time.").

CONCLUSION

Accordingly, Plaintiffs request this Court affirm the common pleas court's granting of a preliminary injunction.

Respectfully submitted,

/s/ David C. Tryon
David C. Tryon (0028954)
Robert D. Alt (0091753)
Jay R. Carson (0068526)
Alex M. Certo (0102790)
The Buckeye Institute
88 East Broad Street, Suite 1300
Columbus, Ohio 43215
(614) 224-4422
Email: d.tryon@buckeyeinstitute.org

Attorneys for Plaintiffs-Appellees

CERTIFICATE OF SERVICE

This will certify that a true and accurate copy of the foregoing Appellees' Brief has been sent to the Clerk of Courts by means of UPS for next day filing and served via e-mail on this 4th day of August 2023 upon the following counsel:

Richard N. Coglianese
rncoglianese@columbus.gov
Matthew D. Sturtz
mdsturtz@columbus.gov
Aaron D. Epstein
adepstein@columbus.gov
Assistant City Attorneys
City of Columbus
Department of Law
77 N. Front Street, 4th Floor
Columbus, Ohio 43215
.

/s/ David C. Tryon
David C. Tryon (0028954)