

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

CITY OF CINCINNATI, et al.,	)	APPEAL NO: C-230492
	)	
Plaintiffs-Appellees,	)	TRIAL NO: A-2300389
	)	
vs.	)	
	)	
STATE OF OHIO,	)	
	)	
Defendant-Appellant.	)	
	)	

**BRIEF AMICUS CURIAE OF THE BUCKEYE INSTITUTE IN
SUPPORT OF APPELLANT**

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INTEREST OF *AMICUS CURIAE*¹

Amicus curiae, The Buckeye Institute, was founded in 1989 as an independent research and educational institution—a think tank—to formulate and promote free-market policy in the states. The Buckeye Institute accomplishes the organization’s mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policies, and marketing those public policy solutions for implementation in Ohio and replication across the country. The Buckeye Institute assists executive and legislative branch policymakers by providing ideas, research, and data to enable lawmakers’ effectiveness in advocating free-market public policy solutions. The Buckeye Institute is a non-partisan, nonprofit, tax-exempt organization, as defined by I.R.C. § 501(c)(3).

Through its Legal Center, The Buckeye Institute works to restrain governmental overreach at all levels of government. In fulfillment of that purpose, The Buckeye Institute files lawsuits and submits amicus briefs. As it relates to this case, *amicus*’ attorneys represent six individuals in Columbus who have challenged ordinances similar to those enacted by Cincinnati.² The outcome of this case before this Court will be informative in *amicus*’ representation of its clients.

¹ All parties have consented to the filing of this amicus brief.

² *Doe v. Columbus*, Delaware C.P. No. 23-CVH-02 0089.

SUMMARY OF ARGUMENT

Below, the Hamilton County Court of Common Pleas improperly ignored binding Ohio Supreme Court precedent to conclude that R.C. 9.68 is unconstitutional. The court's opinion concludes with a confusing holding that does not appear to grant Cincinnati a remedy. Nonetheless, its reasoning and holding was incorrect.

Despite recognizing that the Ohio Supreme Court has upheld the statute at issue against the same challenge brought by Cincinnati, the court below failed to articulate how amendments to R.C. 9.68—which did not change the operative language of the statute—abrogated the Ohio Supreme Court's opinions. Because those amendments in fact did not abrogate such opinions, Cincinnati has apparently considered factual assertions that are incorrect and irrelevant to its complaints about crime. The decision below is an outlier, and the courts have consistently recognized that the Ohio Supreme Court's opinions upholding R.C. 9.68 continue to be binding precedent.

Because R.C. 9.68 continues to pass the home rule analysis—and only the Ohio Supreme Court can alter or abandon its prior decisions holding such—the opinion below must be reversed.

LAW AND ARGUMENT

I. The Hamilton County Court of Common Pleas' decision below accomplishes no practical remedy.

The court below issued a decision which leaves readers somewhat confused as to the court's view of R.C. 9.68. The decision portends to enjoin the State of Ohio from enforcing R.C. 9.68 as amended in 2018 and 2021. But the decision only does so "to the extent—and only to the extent—that [those amendments] amended Original 9.68 * * * ." Entry Granting Prelim. Inj. in Part & Ordering the State to be Enjoined at 34 (Prelim. Inj. Entry). Apparently, the State may continue to enforce the original 9.68 enacted in 2007, the key operative provision of which reads:

The individual right to keep and bear arms, being a fundamental individual right that predates the United States Constitution and Ohio Constitution, and being a constitutionally protected right in every part of Ohio, the general assembly finds the need to provide uniform laws throughout the state regulating the ownership, possession, purchase, other acquisition, transport, storage, carrying, sale, or other transfer of firearms, their components, and their ammunition. 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, may own, possess, purchase, sell, transfer, transport, store, or keep any firearm, part of a firearm, its

components, and its ammunition.

R.C. 9.68 (2007). It is unclear what practical remedy the court accomplished by only enjoining the 2018 and 2021 amendments, which made relatively minor changes to the code. Nonetheless, the court's findings and holdings are inconsistent with Ohio law and must be reversed.

II. The constitutionality of R.C. 9.68 requires a legal analysis not a policy review.

The court below spent the first six pages of its decision discussing violent crime in Cincinnati. While violent crime is certainly a problem, it is not relevant to the determination of whether R.C. 9.68 is constitutional. Neither this Court nor the trial court should take outside factors, like violent crime statistics, into account when determining the constitutionality of R.C. 9.68.

As members of the judiciary, [the court is] tasked with applying the law as written. The city may not enact ordinances that conflict with Ohio's firearm ownership and possession laws, which are intended to provide uniformity throughout the state. If individuals on either side of the divide are unhappy with the law as written, the remedy lies with the Ohio legislature.

Ohioans for Concealed Carry, Inc. v. City of Cleveland, 2017-Ohio-1560, 90 N.E.3d 80, ¶ 11 (8th Dist.).

The court below recognized that the Ohio Supreme Court has previously

upheld R.C. 9.68 against an identical challenge. *See* Prelim. Inj. Entry at 2, citing *City of Cleveland v. State*, 128 Ohio St.3d 135, 2010-Ohio-6318, 942 N.E.2d 370, ¶ 15–29. However, at the insistence of Cincinnati, the court found that in the years since *Cleveland*, the General Assembly’s amendments, which “broadened R.C. 9.68, * * * have had the effect of unconstitutionally infringing on the City of Cincinnati’s constitutionally protected right to Home Rule * * * .” *Id.* However, a legal analysis of R.C. 9.68 shows that those amendments do not affect the Ohio Supreme Court’s cases upholding R.C. 9.68.

Under the Home Rule Amendment, a municipal ordinance must yield when it conflicts with a general state law that establishes police powers rather than *only* limiting the legislative power of a municipal corporation. Where a state statute both establishes police power regulations and limits municipal legislative power, the state statute will still take precedence if it serves an overriding state interest. *Dayton v. State*, 151 Ohio St.3d 168, 2017-Ohio-6909, 87 N.E.3d 176, ¶ 20 (lead opinion). This Court has noted that “[a] general law exists when ‘a matter has become of such general interest that it is necessary to make it subject to statewide control as to require uniform statewide regulation, [and] the municipality can no longer legislate in the field so as to conflict with the state.’” *Buckeye Firearms Found. Inc. v. Cincinnati*, 2020-Ohio-5422, 163 N.E.3d 68, ¶ 24 (1st Dist.), quoting *Mendenhall v.*

Akron, 117 Ohio St.3d 33, 2008-Ohio-270, 881 N.E.2d 255, ¶ 12.

At the time the Ohio Supreme Court upheld R.C. 9.68, the statute established police regulations by granting to all Ohioans the right to “possess, purchase, sell, transfer, transport, store, or keep any firearm, part of a firearm, its components, and its ammunition,” “without further license, permission, restriction, delay, or process * * * .” R.C. 9.68(A) (2007). “[T]he General Assembly, by enacting R.C. 9.68(A), gave persons in Ohio the right to carry a handgun unless federal or state law prohibits them from doing so. A municipal ordinance cannot infringe on that broad statutory right.” *Ohioans for Concealed Carry, Inc. v. Clyde*, 120 Ohio St.3d 96, 2008-Ohio-4605, 896 N.E.2d 967, ¶ 20. The statute continues to do so today. Further, it does so for the overriding state interests of protecting the constitutional right to keep and bear arms, to provide uniformity throughout the state, and to protect citizens from fear of prosecution or civil action for acting in defense of themselves or others.

A. The operative language of R.C. 9.68(A) has not materially changed.

The operative language of R.C. 9.68, originally enacted in 2007, which grants citizens a protected right and prohibits municipalities from regulating firearms, has not materially changed since the Ohio Supreme Court upheld R.C. 9.68. In 2018, the General Assembly amended R.C. 9.68(A) as follows:

The individual right to keep and bear arms, being a fundamental individual right that predates the United States Constitution and Ohio

Constitution, and being a constitutionally protected right in every part of Ohio, the general assembly finds the need to provide uniform laws throughout the state regulating the ownership, possession, purchase, other acquisition, transport, storage, carrying, sale, ~~or~~ other transfer, manufacture, taxation, keeping, and reporting of loss or theft of firearms, their components, and their ammunition. The general assembly also finds and declares that it is proper for law-abiding people to protect themselves, their families, and others from intruders and attackers without fear of prosecution or civil action for acting in defense of themselves or others. 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, ~~sell, transfer~~ acquire, transport, store, carry, sell, transfer, manufacture, or keep any firearm, part of a firearm, its components, and its ammunition. Any such further license, permission, restriction, delay, or process interferes with the fundamental individual right described in this division and unduly inhibits law-abiding people from protecting themselves, their families,

and others from intruders and attackers and from other legitimate uses of constitutionally protected firearms, including hunting and sporting activities, and the state by this section preempts, supersedes, and declares null and void any such further license, permission, restriction, delay, or process.

2018 Am.Sub.H.B. No. 228 at 1.

The Hamilton County court in *West* noted an important factor that was ignored by the court below: “In *Cleveland v. State*, the Ohio Supreme Court considered [whether R.C. 9.68 was constitutional]. (Albeit under a previous version of R.C. 9.68, *which in the language relevant here is the same.*)” (Emphasis added.) Decision & Entry, *West v. Cincinnati*, Hamilton C.P. No. A2303087, at 4 (Sept. 7, 2023). The common pleas court below incorrectly asserted that the amendments to R.C. 9.68 permitted it to ignore binding precedent. However, the court failed to articulate how the same operative language from the version upheld by the Ohio Supreme Court was somehow invalid under the amended statute. Under both versions of the statute, 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, may own, possess, purchase, sell, transfer, transport, store, or keep any firearm, part of a firearm, its components, and its ammunition. *See* 2018 Am.Sub.H.B. No. 228 at 1. The vast majority of the operative language that prevents

Cincinnati from enacting firearm ordinances is the same as that upheld by the Ohio Supreme Court.

B. Amended R.C. 9.68(A) continues to serve an overriding state interest.

Under the Ohio Supreme Court’s precedent, “so long as a statute serves an overriding state interest with respect to police, sanitary, or similar regulations, then the third prong of the *Canton* general-law test is satisfied, even if the statute limits the legislative authority of municipalities.” *Dayton*, 151 Ohio St.3d 168, 2017-Ohio-6909, 87 N.E.3d 176, at ¶ 20 (plurality). R.C. 9.68 sets forth two distinct state interests.

First, “The individual right to keep and bear arms, being a fundamental individual right that predates the United States Constitution and Ohio Constitution, and being a constitutionally protected right in every part of Ohio, the general assembly finds the need to provide uniform laws throughout the state * * *.” R.C. 9.68(A). The Ohio Supreme Court recognized the validity of the State’s interest in uniform firearm laws when it cited this provision in explaining that R.C. 9.68 did not violate the Home Rule Amendment. This overriding state interest of uniformity was the only interest the statute recited when the Ohio Supreme Court upheld R.C. 9.68. *See Cleveland*, 128 Ohio St.3d 135, 2010-Ohio-6318, 942 N.E.2d 370, at ¶ 24. Because the statute granted rights to citizens to be protected from a patchwork of laws, the Ohio Supreme Court “conclude[d] that R.C. 9.68 establishes police

regulations rather than limiting municipal legislative power.” *Id.* at ¶ 28. Oddly, the court below ignored the Ohio Supreme Court’s holding in *Cleveland* and determined that uniformity cannot be an overriding state interest because the Home Rule Amendment is designed to make laws nonuniform. Prelim. Inj. Entry at 21. The court was mistaken in this determination.

The 2018 amendments to R.C. 9.68 added a second overriding state interest: “The general assembly also finds and declares that it is proper for law-abiding people to protect themselves, their families, and others from intruders and attackers without fear of prosecution or civil action for acting in defense of themselves or others.” R.C. 9.68(A). By regulating the field of firearm possession, R.C. 9.68(A) achieves this overriding state interest. The General Assembly explained as much when, in 2018, it added the fourth sentence to R.C. 9.68(A) to say,

Any such further license, permission, restriction, delay, or process interferes with the fundamental individual right described in this division and unduly inhibits law-abiding people from protecting themselves, their families, and others from intruders and attackers and from other legitimate uses of constitutionally protected firearms, including hunting and sporting activities * * *.

R.C. 9.68 “represents both an exercise of the state’s police power and an attempt to limit legislative power of a municipal corporation to set forth police,

sanitary, or similar regulations,” *Clyde*, 120 Ohio St.3d 96, 2008-Ohio-4605, 896 N.E.2d 967, at ¶ 50. As such, R.C. 9.68 continues to serve an overriding state interest and is constitutional.

Nothing in the 2018 and 2021 amendments affect the reasoning or holding in *Cleveland* and the lower court’s disregard of *Cleveland* merits reversal.

C. Cincinnati attempts to invoke the sympathies of the courts with irrelevant speculation about crime prevention.

Cincinnati speculated below that “[t]he State’s preemption—purely and simply—costs lives.” Mot. for Prelim Inj. at 9. However, such speculation, with no factual support whatsoever, is irrelevant to the legal issue presented. Existing laws already extensively regulate firearms. And if more state-wide laws are needed, Cincinnati should work with the State to enact them. Enforcing existing laws is more effective than passing more laws that criminals will ignore, just as they do unenforced current laws.

Cincinnati complains that R.C. 9.68 has prevented it from “provid[ing] badly-needed protection against gun violence to vulnerable City residents” by prohibiting it from enacting firearm possession restrictions on those who have committed domestic violence. Mot. for Prelim. Inj. at 41. However, the city dooms its own arguments by noting that the restriction it wishes to enact “mirrors federal law that already prohibits individuals convicted of a domestic violence offense from possessing firearms.” *Id.* Simply put, this “badly-needed protection” is already

enforceable, and R.C. 9.68 does not prohibit the city from enacting any law that mirrors federal law. R.C. 9.68(A) (“Except as specifically provided by the United States Constitution, Ohio Constitution, state law, or federal law * * *”). Cincinnati’s claimed causal link between domestic firearms violence and R.C. 9.68 is incorrect.

Cincinnati’s crime statistics are not relevant to the legal issue at hand, but since they raise them, Cincinnati’s misuse and misrepresentation of statistics is worth noting.³ Cincinnati complains that “the onset of the pandemic brought with it a surge of gun violence.” Am. Compl. at ¶ 67. Of course, the pandemic brought on numerous societal problems—none of which can be attributed to R.C. 9.68. And while Cincinnati uses 2019 as a baseline, the city had more shootings per year in 2005–2017 than in 2019. Institute of Crime Science, *Cincinnati 2014 Violent Crime Summary*, University of Cincinnati School of Criminal Justice (Feb. 2, 2015)⁴; Sarah Brookbank, *2017: What trends do Cincinnati crime statistics show?*, Cincinnati Enquirer (Jan. 1, 2018)⁵. Cincinnati further misleads the court by conflating total

³ “There are three types of lies: lies, damn lies and statistics.” Often attributed to Benjamin Disraeli, Prime Minister of Great Britain from 1874 to 1880. See 1 Twain, *Autobiography of Mark Twain* 228 (2010).

⁴ <https://www.cincinnati-oh.gov/sites/cityofcincinnati/assets/File/CY2015%20Year%20End%20Report%20Final%20Draft.pdf>.

⁵ <https://www.cincinnati.com/story/news/2018/01/01/2017-what-trends-do-cincinnati-crime-statistics-show/923184001/>.

shootings with homicides. However, homicides only make up a small percentage of total shootings. *See id.* And accidental shootings make up an even smaller percentage. Jessie Balmert, *Gun deaths in Ohio, explained in 4 charts*, Cincinnati Enquirer (Aug. 9, 2019)⁶; Institute of Crime Science, *supra*.

To the extent that any firearms-related crime statistics might be of interest, the correct statistical comparison is the number of pre-9.68 enactment (2007) vs post 9.68 enactment firearms related crimes. Those statistics undermine Cincinnati's frightening speculations that R.C. 9.68 costs lives. In fact, there is no apparent statistical difference in Cincinnati's homicide numbers before and after R.C. 9.68 was enacted. Cincinnati had 73 homicides in 2019, 94 in 2020 and 2021, and 78 in 2022. Felicia Jordan, *Despite rough start, 2022 saw first drop in Cincinnati homicides since pandemic*, WCPO (Feb. 6, 2023).⁷ This is compared to 80 homicides in 2005, 89 in 2006, and 68, 75, 60, and 72 over the next four years respectively. Institute of Crime Science, *supra*. In these earlier years, and at least through 2014, more than half of these homicides were gang related. *Id.* Cincinnati's violent crime

⁶ <https://www.cincinnati.com/story/news/politics/2019/08/09/ohio-gun-death-statistics-homicide-suicide-accidental/1953560001/>.

⁷ <https://www.wcpo.com/news/local-news/hamilton-county/cincinnati/despite-rough-start-2022-saw-first-drop-in-cincinnati-homicides-since-pandemic>.

problems existed before, not because of, R.C. 9.68.

The court below, like Cincinnati, considered facts that are inapplicable to the city's complaint of crime. The court noted, "Recently, Cincinnati has seen an increase in firearm modification that turn a handgun into a machine gun." Prelim. Inj. Entry at 3. According to the court, this "simple modification to a handgun can turn it into a machine gun capable of shooting 1,200 rounds a minute." *Id.* at 1. This modification is illegal under both federal and Ohio law, as both prohibit owning a machine gun unless properly licensed. *See* 26 U.S.C. § 5845(b) and § 5861; R.C. 2923.11 and 2923.17. The court below even admits that "[t]hese glock switches can be *illegally* manufactured by an ordinary citizen * * * ." (Emphasis added.) Prelim. Inj. Entry at 4, citing (TR. 116:8-117:1). R.C. 9.68 does not prevent Cincinnati from enacting regulations that prohibit these already illegal glock switches, but adding a municipal prohibition will not stop criminals from making this modification any more than the state and federal prohibitions have. And R.C. 9.68 does not prevent Cincinnati from arresting and prosecuting those with illegal glock switches. If the city wishes to address the "glock switch" problem, it can.

The court below also noted that according to Cincinnati's witness, "[m]ore than two-thousand guns were stolen, to the Cincinnati Police Department's knowledge, from 2018 to 2023; almost one-thousand of those thefts were from vehicles." Prelim. Inj. Entry at 3, citing (Tr. 106:4-107:1). Cincinnati has two options

for resolving this problem. One, enforce current laws by finding and prosecuting the firearms thieves or enact laws that punish the theft victims if they become victims and scare others into not taking the risk of owning a firearm. Cincinnati's briefing does not inform the court on any efforts it is taking to accomplish the former but demands the right to do the latter in violation of R.C. 9.68. Meanwhile, as far as the public knows, Cincinnati has done little to find and prosecute those who have stolen "[m]ore than two-thousand guns."

The court's legal analysis should not be swayed by Cincinnati's rhetoric and speculation.

III. Ohio has not abandoned its comprehensive firearms regulatory scheme.

Contrary to Cincinnati's claim, the State still has a comprehensive firearms regulatory scheme.

A. The State regulates firearms through numerous statutes and regulations.

The State has dozens of statutes and regulations regarding firearms. R.C. 2923.111 and 2923.12 generally regulate concealed carrying of firearms. R.C. 2923.121 regulates the possession of firearms in licensed establishments "in which any person is consuming beer or intoxicating liquor." R.C. 2923.122 and 2923.123 make it illegal to convey or possess deadly weapon or dangerous ordnance in school safety zones or courthouses. R.C. 2923.13 and 2923.131 regulate who is prohibited from possessing a firearm in substantially the same way as federal law does, with

R.C. 2923.14 setting forth how one can be relieved of such disability. R.C. 2923.15 prohibits using a weapon while intoxicated. R.C. 2923.16 regulates how an individual can transport a firearm in a motor vehicle. R.C. 2923.161 and 2923.162 regulate where firearms may not be discharged, including at or into a habitation, in a school safety zone, a school building, a school function, a park, pleasure ground, orchard, or other ground appurtenant to a schoolhouse, church, or inhabited dwelling, the property of another, or a charitable institution. R.C. 2923.17 prohibits the possession of “dangerous ordnances,” including machine guns, suppressors, sawed off shotguns and rifles, zip-guns, and incendiary devices. R.C. 2923.18 allows certain individuals to apply to the sheriff of the county or safety director or police chief of the municipality where the applicant resides for a license to possess these restricted weapons. Under R.C. 2923.19, if a person responsible for such weapons negligently fails to take proper precautions to secure the dangerous ordnance against theft, or against its acquisition or use by any unauthorized or incompetent person or to insure the safety of persons and property, that person can be criminally charged. R.C. 2923.20 generally regulates the unlawful transaction of firearms. R.C. 2923.211 sets the age limit for purchasing firearms and handguns. Under R.C. 2923.20, it is unlawful to furnish or sell a firearm to a minor. And, R.C. 2923.201(A)(1) makes it unlawful to modify a firearm to “[c]hange, alter, remove, or obliterate the name of the manufacturer, model, manufacturer’s serial number, or other mark of

identification on a firearm.” R.C. 2923.201(A)(2) makes it illegal to knowingly possess a firearm so modified.

The State also regulates proper firearms handling and usage. R.C. 2923.125–129, 1211, and 1213 regulate the concealed handgun licensing process, including making it a criminal offense to falsify a concealed handgun license. And R.C. 2923.132, as well as other criminal statutes, increase the penalty for using a firearm in the commission of a crime or violation of conditional supervision.

The Ohio Administrative Code has dozens and dozens of additional provisions regulating firearms. See, *e.g.*, Ohio Adm.Code 109:2-1-01 et seq.; 109:2-2-01 et seq.; 109:2-3-01 et seq.; 109:2-5-01 et seq.; 128-4-02(G)(9); 173-14-14; 901:12-1-04; 1501:3-6-02; 1501:17-3-05; 1501:20-7-05; 1501:31-9-03; 1501:31-13-01 et seq.; 1501:31-29-3; 1501:31-31-01 et seq.; 3304-2-59; 3335-23-04; 3337-55-30; 3341-2-15; 3341-2-28; 3341-6-6-17 et seq.; 3352-7-18; 3354:1-50-4; 3356-4-08; 3356-7-03; and 3358:17-7-02. And there are many more.

Though Cincinnati would like to impose even more restrictions on Ohio citizens, it is hard to dispute that the State does have a comprehensive firearms regulatory scheme.

The court below did recognize that for a state law to be part of a comprehensive enactment for home rule purposes, the law need not cover every conceivable issue or regulate in a particularly invasive fashion. Prelim. Inj. Entry at

17. But Cincinnati argued that “the landscape of Ohio gun regulation ha[s] shifted substantially since 2010,” Mot. for Prelim. Inj. at 21. It has not.

Most of the laws cited by the Ohio Supreme Court in *Cleveland* have not had significant changes. See *Cleveland*, 128 Ohio St.3d 135, 2010-Ohio-6318, 942 N.E.2d 370, at ¶ 17–19. Only one law cited by the court has been repealed,⁸ and its validity while in force was questionable. *Id.* at ¶ 18, citing R.C. 2923.22 (allowing interstate sale of firearms to citizens of certain states). In some instances, the General Assembly has increased restrictions on firearms ownership, including expanding the applicability of the laws cited by the *Cleveland* court. See 2014 Am.Sub.S.B. No. 43 (amending R.C. 2923.13 to remove requirement that a mentally ill person be subject to hospitalization before a court order can cause them to be considered under disability); 2014 Am.Sub.H.B. No. 234 (amending R.C. 2923.125 to ensure “that Ohio concealed handgun license law [is] compliant with the national instant criminal background check system, * * * and that no person shall be eligible to receive a concealed handgun license permit * * * unless the person is eligible lawfully to receive or possess a firearm in the United States”); 2018 Am.Sub.H.B. No. 228 (amending R.C. 2923.20 to make it a crime to provide false information to a licensed firearms dealer and to solicit, persuade, encourage, or entice a person to violate

⁸ Additionally, the court cites to R.C. 1541.19. This section was renumbered as R.C. 1546.19 without significant changes. 2016 Sub.S.B. No. 293.

firearm laws).

The State's dozens of firearms and weapons statutes—including those unchanged since the Ohio Supreme Court upheld R.C. 9.68—constitute a comprehensive enactment of state laws.

B. The general laws of the state choose not only what to regulate but also what to not regulate.

The crux of the Cincinnati's claims is that the 2022 enactment of "permitless carry" completely changed the State's regulation of firearms. Mot. Prelim. Inj. at 21, citing R.C. 2923.111. However, the State is free to make its regulations less restrictive without that decision unraveling its comprehensive enactment. The State's decision to modify its concealed carry law reflects a policy decision regarding allowing citizens to carry concealed to protect themselves while recognizing that criminals will carry concealed regardless of any laws prohibiting it. It also reflects societal experience that law-abiding citizens seldom abuse the right to carry concealed and that there are already laws criminalizing improper usage of firearms. And Cincinnati's representations of the modifications are inaccurate.

R.C. 2923.111 did not eliminate the concealed handgun permit scheme. In fact, many Ohioans have continued to obtain and renew their concealed handgun permits since the enactment of permitless carry. In the first two quarters of 2023, 8,707 Ohioans applied for new permits, and 41,708 renewed their permits. *See Ohio*

Attorney General, *1st Quarter 2023 CCW Statistics* 18⁹; Ohio Attorney General, *2nd Quarter 2023 CCW Statistics* 18¹⁰. Because the Ohio Attorney General is empowered to enter into reciprocity agreements with other states, R.C. 109.69(A), many Ohioans have, and will continue to, obtain concealed carry licenses.

Much like R.C. 9.68, the state firearm laws reviewed by the Ohio Supreme Court have not changed since *Cleveland v. State*, and Ohio continues to have comprehensive firearms regulations.

IV. The decision below is an outlier.

Since its original iteration, the Ohio Supreme Court has not questioned—and in fact has upheld—R.C. 9.68. Following the court’s determination that R.C. 9.68 does not unconstitutionally infringe on municipalities home rule authority, the courts of appeals abided by this determination and rejected challenges to R.C. 9.68. However, following amendments to the statute in 2018, several municipalities have attempted again to challenge the constitutionality of R.C. 9.68. The decision below is the only remaining challenge that has found R.C. 9.68 invalid and is an outlier in R.C. 9.68 jurisprudence.

⁹ <https://www.ohioattorneygeneral.gov/Files/Reports/Concealed-Carry-Statistics/1st-Quarter-2023-CCW-Report>.

¹⁰ <https://www.ohioattorneygeneral.gov/Files/Reports/Concealed-Carry-Statistics/2nd-Quarter-2023-CCW-Report>.

A. The Ohio Supreme Court upheld the original iteration of R.C. 9.68.

Enacted in 2006, R.C. 9.68 “emphasize[s] the ‘fundamental individual right’ to ‘keep and bear arms’ and expresse[s] the legislature’s further desire ‘to provide uniform laws throughout the state regulating the ownership [and] possession * * * of firearms.’” *Clyde*, 120 Ohio St.3d 96, 2008-Ohio-4605, 896 N.E.2d 967, at ¶ 20, quoting R.C. 9.68(A). Immediately after its enactment, the Sixth District used R.C. 9.68 to distinguish its precedent in *Ohioans for Concealed Carry, Inc. v. Clyde*. *Id.* at ¶ 21. The court held that Ohio’s concealed handgun law, when read in conjunction with R.C. 9.68’s express purpose, constituted a general law that preempted the city of Clyde’s ordinance restricting where licensees could carry a handgun. *Id.* at ¶ 20–21. On appeal, the Ohio Supreme Court agreed that Ohio’s concealed handgun law was a general law and the city’s ordinance was invalid because it conflicted with the general law. Like the Sixth District, the Ohio Supreme Court noted the importance of R.C. 9.68 in the general law analysis of a home rule challenge. The court recognized that “the General Assembly, by enacting R.C. 9.68(A), gave persons in Ohio the right to carry a handgun unless federal or state law prohibits them from doing so. A municipal ordinance cannot infringe on that broad statutory right.” *Id.* at ¶ 20. While the court’s opinion was primarily focused on the concealed handgun statute, as R.C. 9.68 was enacted while the case was on appeal, the court pointed to

R.C. 9.68 as strengthening the general law analysis.

Following *Clyde*, the Ohio Supreme Court had the opportunity to directly address a home rule challenge to R.C. 9.68. In *Cleveland v. State*, the Ohio Supreme Court “reaffirm[ed] the holding [in *Clyde*] that R.C. 9.68 is part of a statewide comprehensive legislative enactment.” 128 Ohio St.3d 135, 2010-Ohio-6318, 942 N.E.2d 370, at ¶ 25. The court unequivocally held that “R.C. 9.68 is a general law that displaces municipal firearm ordinances and does not unconstitutionally infringe on municipal home rule authority.” *Id.* at ¶ 35. The court so held because “R.C. 9.68 addresses the General Assembly’s concern that absent a uniform law throughout the state, law abiding gun owners would face a confusing patchwork of licensing requirements, possession restrictions, and *criminal penalties* as they travel from one jurisdiction to another.” (Emphasis added.) *Id.* The court repeatedly found that the lower court erred “in analyzing R.C. 9.68 in a vacuum.” *Id.* at ¶ 17; see also *id.* at ¶ 22–23, and 29.

B. Court of Appeals Cases Post *Cleveland v. State*

In *Ohioans for Concealed Carry, Inc. v. Oberlin*, the Ninth District recognized that the “Supreme Court of Ohio has already determined that R.C. 9.68 ‘is a general law that displaces municipal firearm ordinances and does not unconstitutionally infringe on municipal home rule authority.’” 2017-Ohio-36, 72 N.E.3d 676, ¶ 15 (9th Dist.), quoting *Cleveland*, 2010-Ohio-6318, 128 Ohio St.3d 135, 942 N.E.2d 370, at

syllabus. The Ninth District concluded that an Oberlin ordinance—as amended post-filing—that “prohibits only the ‘unlawful’ possession, use, or discharge of firearms in a city park or recreation area,” did not conflict with R.C. 9.68 because the amended ordinance added the word “unlawful” to the ordinance, thus accommodating R.C. 9.68(A)’s allowance for local laws consistent with state or federal law. *Id.* at ¶ 20. The court then enforced R.C. 9.68(B)’s attorney’s fees provision and awarded the plaintiff attorneys’ fees because the city had amended the city’s ordinance during the course of the litigation to bring it into compliance with state law.

In *Ohioans for Concealed Carry, Inc. v. City of Cleveland*, 2017-Ohio-1560, 90 N.E.3d 80, ¶ 51 (8th Dist.), the Eighth District determined that Cleveland ordinances that “mirror[ed] state law” were not violations of R.C. 9.68. However, the court also determined that various Cleveland ordinances that differed from state law or used unlawful definitions unconstitutionally exceeded the city’s home rule authority because the statutes conflicted with R.C. 9.68. One of the ordinances struck down by the court “regulate[d] the storing and keeping of a firearm,” which “conflicts with [] state statutes.” *Id.* at ¶ 25.

In *Buckeye Firearms Found. Inc. v. Cincinnati*, 2020-Ohio-5422, 163 N.E.3d 68, at ¶ 28, this Court found noted that “R.C. 9.68 makes clear that Ohio citizens have the right to possess and transfer ‘any firearm, part of a firearm, its components,

and its ammunition.”” As such, the court found that Cincinnati’s “ban[] [on] trigger activators, which [the State did not prohibit],” was in conflict with R.C. 9.68. *Id.* at ¶ 33. “Therefore, the city exceeded its home-rule authority * * * in enacting [the] [o]rdinance.” *Id.* The court then followed up on its prior decision and determined that “[u]nder former (and current) R.C. 9.68,” local regulations that conflict with state statutes are void, *Kellard v. Cincinnati*, 2021-Ohio-1420, 171 N.E.3d 868, ¶ 3 (1st Dist.), and one who brings a challenge against an offending local regulation that is later repealed, is entitled to attorneys’ fees, *id.* at ¶ 24–25.

C. Cases Post 2018 Amendments

In 2018, the General Assembly amended R.C. 9.68 to make explicit what the courts had already inferred. *See* 2018 Am.Sub.H.B. No. 228. Then, in 2021, the General Assembly again amended the statute to include protections for knives. *See* 2021 Am.Sub.S.B. No. 156. Since 2010, legislators, courts, and the public have consistently relied on the Ohio Supreme Court’s settled jurisprudence upholding R.C. 9.68 as a valid constitutional prohibition on municipal firearms laws. Recently several cases have been filed either challenging the Ohio Supreme Court’s upholding of R.C. 9.68 or challenging municipal ordinances that conflict with R.C. 9.68. The Hamilton County Court of Common Pleas’ decision below finding R.C. 9.68 invalid is an outlier.

Beginning with *Columbus v. State*, the city of Columbus attempted to

challenge the State’s ability to enact R.C. 9.68 in the form upheld by the Ohio Supreme Court and in its amended form. *Columbus v. State*, 10th Dist. Franklin No. 22AP-676, 2023-Ohio-2858, ¶ 2. After nearly three and a half years of waiting, the Franklin County Court of Common Pleas determined that R.C. 9.68 was invalid in both forms as an unconstitutional infringement on the home rule authority. *Id.*

After reviewing the history and purpose of R.C. 9.68, and the Ohio Supreme Court’s precedent, the Tenth District reversed the Franklin County court’s preliminary injunction. The Court explained that the court’s decision improperly “displace[d] a longstanding statute, which has the stated purpose of promotion clarity and uniformity of regulations of firearms throughout the state, and replaces it with uncertainty and a patchwork of laws.” *Columbus v. State*, 10th Dist. Franklin No. 22AP-676, 2023-Ohio-195, ¶ 18. Ultimately, the Tenth District reversed the Franklin County court’s decision and vacated the preliminary injunction for procedural errors. *Columbus*, 10th Dist. Franklin No. 22AP-676, 2023-Ohio-2858, at ¶ 62.

Following the Franklin County court’s preliminary injunction on R.C. 9.68, the city of Columbus passed several firearm ordinances—including one similar to the Cincinnati ordinance at issue in *West*—that conflicted with R.C. 9.68. *See Columbus City Ordinance 3176-2022*. In response, the State filed suit against the city of Columbus. Compl., *State v. Columbus*, Fairfield C.P. No. 22-CV-657 (Dec.

14, 2022). The Fairfield County Court of Common Pleas initially issued a temporary restraining order, prohibiting the enforcement of the newly enacted ordinances, because they conflicted with R.C. 9.68. Decision & Entry Granting State of Ohio's App. for TRO, *State v. Columbus*, Fairfield C.P. No 22-CV-657 (Dec. 15, 2022). The court subsequently dismissed the R.C. 9.68 claim based on the jurisdictional priority rule, because the Franklin County case challenging R.C. 9.68 had been filed first. Opinion & Entry Regarding Defs.' Mot. to Dismiss, *State v. Columbus*, Fairfield C.P. No 22-CV-657 (Jan. 5, 2023).

Following the dismissal of the R.C. 9.68 claim in the Fairfield County case, several individuals filed suit challenging the city of Columbus' new ordinances. In *Doe v. Columbus*, the Delaware County Court of Common Pleas preliminarily enjoined the city of Columbus from enforcing its new firearm ordinances. J. Entry *inter alia* Granting Pls.' Mot. for Prelim. Inj., *Doe v. Columbus*, Delaware C.P. No. 23-CVH-02 0089 (Apr. 25, 2023). The court held that "the Columbus ordinance conflicts with R.C. 9.68, which is a state statutory provision that 'declares null and void' any ordinance or other regulation that imposes any firearms-related restrictions beyond those found in state or federal law." *Id.* at 18. In rejecting Columbus' home rule argument, the Delaware County court found that

the Supreme Court of Ohio has undeniably already rejected – in
Cleveland v. State of Ohio, 128 Ohio St.3d 135, 2010-Ohio-6318 – a

home-rule challenge to R.C. 9.68. Also, the parties agree that Ohio law imposes no limitations of the sort that the Columbus ordinance has imposed on * * * the safe storage of firearms. R.C. 9.68 indicates, too, that statewide uniformity in the regulation of the “possession” and “storage” of “firearms, their components, and their ammunition” is now compelled by the State and that any firearms-related regulations “[e]xcept as specifically provided by” state or federal law are “null and void.”

Id. at 19–20. The Delaware County preliminary injunction of Columbus’ ordinances is still in effect.¹¹

Following this declaration, the city of Columbus strangely filed yet another lawsuit against the State in Franklin County, asking the court to declare that its firearms ordinances—which the Delaware Court had enjoined—“are in force and effect, and that R.C. 9.68 is of no legal effect on these ordinances.” Compl., *Columbus v. State*, Franklin C.P. No. 23-CV-003555, at 13 (May 17, 2023). The State has filed a motion to dismiss or, in the alternative, to consolidate the case with the

¹¹ The city of Columbus appealed the grant of the preliminary injunction; however, the Fifth District dismissed the appeal for lack of a final appealable order. J. Entry, *Doe v. Columbus*, 5th Dist. No. 23CAE040028 (Nov. 29, 2023). The city has indicated that it “plans to push this case to the Ohio Supreme Court.” Morgan Trau, *Ohio court shoots down Columbus gun safety regulations*, News 5 Cleveland (Dec. 1, 2023), <https://www.news5cleveland.com/news/local-news/we-follow-through/ohio-court-shoots-down-columbus-gun-safety-regulations>.

one already pending before the Franklin County court. The court denied the motion to consolidate, and a determination on the motion to dismiss is still pending.

Because the Delaware County court has enjoined the city of Columbus from enforcing its firearm ordinances, and the Tenth District has vacated the preliminary injunction on R.C. 9.68, in Columbus, the law has been returned to its proper uniform place. R.C. 9.68 is valid, and the Columbus ordinances are unenforceable. However, the two decisions now pending before the Court are causing confusion for residents of Cincinnati and firearms owners who visit the city.

In *West*, the Hamilton County court permanently enjoined Cincinnati Municipal Code 915 because it conflicts with R.C. 9.68. The court found that “[s]imply reading the text of both the state law and the ordinance together, there is no question that the state law, R.C. 9.68, trumps the city ordinance, CMC 915.” Decision & Entry, *West*, Hamilton C.P. No. A2303087, at 2 (Sept. 7, 2023). “Under R.C. 9.68(A), the ordinance was void on its birthdate * * * .” *Id.* at 3. The court noted that even if it were to conclude otherwise, it “would be bound by established precedent” of the Ohio Supreme Court to strike down any laws in conflict with R.C. 9.68. *Id.* at 4.

Nonetheless, one week later, the court below disagreed with its colleagues ruling and determined that R.C. 9.68 is unconstitutional and enjoined “amended” R.C. 9.68. Like the Franklin County court’s later vacated preliminary injunction in

Columbus v. State, the decision below does “not merely disrupt the status quo in an abstract sense, but it displaces a longstanding statute, which has the stated purpose of promotion clarity and uniformity of regulations of firearms throughout the state, and replaces it with uncertainty and a patchwork of laws.” *Columbus v. State*, 10th Dist. Franklin No. 22AP-676, 2023-Ohio-195, at ¶ 18. Further, the decision directly contravenes the Ohio Supreme Court’s precedent. Despite acknowledging that it relied on a plurality opinion, the court below determined it could abrogate on-point Ohio Supreme Court precedent.

V. Only the Ohio Supreme Court can abrogate, abandon, or overrule *Cleveland and Clyde*.

The trial court was wrong to conclude that it could revisit the Ohio Supreme Court’s holdings and substitute its own views on R.C. 9.68.

Stare decisis is the bedrock of the American judicial system. Well-reasoned opinions become controlling precedent, thus creating stability and predictability in our legal system. It is only with great solemnity and with the assurance that the newly chosen course for the law is a significant improvement over the current course that we should depart from precedent.

Westfield Ins. Co. v. Galatis, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, ¶ 1. “[A] supreme court not only has the right, but is entrusted with the duty to examine its former decisions and, when reconciliation is impossible, to discard its

former errors.” *Id.* at ¶ 43. “As such, it is not within the proper purview of this court, as a lower court, to entertain requests to overturn intact rulings of the Ohio Supreme Court, a court of higher authority to this court.” *State v. Szozda*, 6th Dist. Lucas No. L-21-1026, 2022-Ohio-2294, ¶ 38, appeal not allowed, 168 Ohio St.3d 1420, 2022-Ohio-3752, 196 N.E.3d 857. “In accord with the above, * * * ‘[A]lthough a prior decision of the supreme court may be overruled under limited circumstances, *the authority to examine previous decisions is vested in a ‘supreme court,’ not lower courts.*’” *Id.* at ¶ 39, quoting *Hoeflinger v. AM Mart, LLC*, 2017-Ohio-7530, 96 N.E.3d 1247, ¶ 37 (6th Dist.).

Contrary to the court below, the plurality opinion in *Dayton v. State* did not abrogate, abandon, or overrule the court’s previous decisions upholding R.C. 9.68. Where “four justices declined to join [a] portion of the opinion, * * * [there] is not a holding of th[e] court.” *Fed. Home Loan Mortg. Corp. v. Schwartzwald*, 134 Ohio St. 3d 13, 2012-Ohio-5017, 979 N.E.2d 1214, ¶ 29. The lead opinion in *Dayton*, which garnered only three justices, “focuse[d] exclusively on the third [*Canton*] prong * * * .” *Dayton*, 151 Ohio St.3d 168, 2017-Ohio-6909, 87 N.E.3d 176, at ¶ 40 (French, J., concurring in the judgment only). The plurality determined that “the third *Canton* prong requires consideration of the individual statutory provisions” that are being challenged, rather than examining a bill as a whole. *Id.* at ¶ 20.

Justice French, on the other hand, would have resolved the case under the

fourth *Canton* prong. *Id.* (French, J., concurring in the judgment only). Nothing in Justice French’s concurrence supported the lead opinion’s determination that the contested provisions should be viewed in isolation. *See id.* at ¶ 44–45 (“[v]iewing the contested provisions in relation to the rest of S.B. 342”). Thus, the court below improperly relied on *Dayton*’s plurality opinion for the proposition that it must look to the contested provisions alone. Therefore, the determination by the court below that *Dayton*’s plurality opinion abrogates on point authority— and gave it the right to question established precedent—is wrong.

Contrary to the opinion of the court below, neither the amendments to R.C. 9.68 or Ohio’s firearm laws have altered R.C. 9.68’s constitutionality. The amendments to R.C. 9.68 have not changed the operative language that was upheld by the Ohio Supreme Court, and R.C. 9.68 continues to be part of a comprehensive enactment. The only way for the Ohio Supreme Court decisions upholding R.C. 9.68 to be abrogated, abandoned, or overruled is for the Ohio Supreme Court to do so.

CONCLUSION

Based on the foregoing, the Court should reverse the Hamilton County Common Pleas Court's injunction on R.C. 9.68 and support the uniformity, consistency, and reliability of the law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This will certify that a true and accurate copy of the foregoing Brief Amicus Curiae of The Buckeye Institute in Support of Appellant has been served by operation of this Court's electronic filing system this 18th day of December 2023.

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