

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

FRANK WEST,)	APPEAL NO: C-2300469
)	
Plaintiff-Appellee,)	TRIAL NO: A-2303087
)	
vs.)	
)	
CITY OF CINCINNATI, et al.,)	
)	
Defendants-Appellants.)	
)	

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

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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 will be informative in *amicus*’ representation of its clients.

¹ All parties have consented in writing to the filing of this amicus brief. See exhibits A and B.

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

SUMMARY OF ARGUMENT

Below, the Hamilton County Court of Common Pleas properly followed binding Ohio Supreme Court precedent to conclude that R.C. 9.68 is constitutional. The decision below is consistent with other courts' decisions that have consistently recognized that the Ohio Supreme Court's opinions upholding R.C. 9.68 continue to be binding precedent.

Among other things, Cincinnati's ordinance improperly changes the mens rea requirement for a criminal offense of improper firearms storage from recklessness under state law to negligence. It also regulates firearms in ways that state law does not. R.C. 9.68 does not permit that.

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 affirmed.

LAW AND ARGUMENT

There is no question that proper firearm handling and storage is important. There are legitimate debates about policies requiring certain firearm handling and storage techniques. Cincinnati would have the Court believe that these policies are the point of this case. But the *Court's* legal obligation is to properly interpret and apply the Ohio Constitution and the statutes enacted by the General Assembly. Policy decisions are for the General Assembly. The General Assembly has made

numerous judgment calls as it enacted laws governing firearm possession, handling, and storage.

Likewise, this case is not about the actions of Appellee West. Nor does the amicus curiae opine as to the propriety of Mr. West's storage protocols. The amicus curiae addresses only the constitutional and statutory issues presented.

I. R.C. 9.68 invalidates Cincinnati's firearm storage law.

Cincinnati's firearm storage law exceeds its constitutional authority as it conflicts with a general state law—R.C. 9.68. Unless specifically provided by the United States Constitution, Ohio Constitution, state law, or federal law, R.C. 9.68 invalidates all municipal ordinances and threats of prosecution that restrict an individual's ability to possess, *store*, or keep any firearm. R.C. 9.68(A). Cincinnati's safe storage law attempts to regulate the storage of firearms in a way that is not provided by the U.S. or Ohio Constitutions, or state or federal law. The ordinance is thus invalid.

Cincinnati claims that its firearm storage law “does not conflict with Ohio law; it follows Ohio law,” and that it “provides a defense that does not exist in R.C. 2919.22(A), thereby affording West more rights than he would possess if he were prosecuted under state law.” Br. of Defs.'-Appellants at 15. This assertion is simply not true.

Cincinnati is correct that Cincinnati Municipal Code (CMC) 915-3 and R.C.

2919.22 both prohibit a “parent, guardian, custodian, person having custody or control, or person in loco parentis of a child under eighteen years of age” from “creat[ing] a substantial risk to the health or safety of the child, by violating a duty of care, protection, or support.” And, some courts have found that—in fact specific scenarios—leaving a firearm unattended can rise to a violation of R.C. 2919.22. However, that is the extent of the laws’ similarities. Where CMC 915-3 and R.C. 2919.22 diverge is extremely important for the home rule analysis.

R.C. 2919.22 does not define the requisite mens rea. But, as Cincinnati’s cited authority admits, “[t]he culpable mental state of ‘recklessness’ applies to” R.C. 2919.22.” *State v. Leak*, 2nd Dist. Montgomery No. 16424, 1998 WL 184646, *5, citing *State v. Adams*, 62 Ohio St.2d 151, 404 N.E.2d 144 (1980). And the Ohio Revised Code defines “recklessness” as follows:

A person acts recklessly when, *with heedless indifference* to the consequences, he *perversely disregards a known risk* that his conduct is *likely to cause* a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist.

(Emphasis added.) R.C. 2901.22(C).

CMC 915-3(a) sets forth the same restriction on conduct as R.C. 2919.22.

Like the state statute, it does not—by itself—define a requisite mental state. However, CMC 915-3(b) does set forth a requisite mental state for firearms crimes. As it relates to this case and R.C. 9.68, CMC 915-3(b) diverges from R.C. 2919.22 by making it “a substantial risk to the health or safety of a child for a person [defined in CMC 915-3(a)] * * * to *negligently* store or leave a firearm in a manner or location in the person’s residence or vehicle where the person knows or reasonably should know a child is able to gain access to the firearm.” (Emphasis added.) CMC 915-3(b). Thus, Cincinnati’s ordinance reduces the required mental state from recklessness under state law to negligence under municipal law.

Under Cincinnati Municipal Code,

“Negligent” or “negligently” means when, because of a substantial lapse from due care, a person *fails to perceive a risk* that the person’s conduct *may cause* a certain result or may be of a certain nature or fails to avoid a risk that the person’s conduct may cause a certain result or may be of a certain nature. A person is negligent with respect to circumstances when, because of a substantial lapse from due care, the person fails to perceive or avoid a risk that such circumstances may exist.

CMC 915-1-N. This change is no small matter.

“It came to be the general feeling of the judges when defining common law

crimes (not always so strongly shared later by the legislatures when defining statutory crimes) that something more was required for criminal liability than the ordinary negligence * * *.” 1 LaFave, Subst. Crim. L., Section 5.4 (3d Ed. 2023). “[W]hen the problem is one of whether to impose criminal punishment on the one who caused [an] injury, then something extra—beyond ordinary negligence—should be required.” *Id.* Thus, to violate R.C. 2919.22, the State requires a person—with heedless indifference—to perversely disregard a known risk that his conduct is likely to cause a certain result. On the other hand, negligence under the CMC only requires a substantial lapse from due care. A person is not required under CMC 915-3 to know the likely consequences of his conduct but only must fail to perceive the risk that may occur. As such, Cincinnati is no longer regulating the same conduct in the same way that state law does.

Therefore, CMC 915-3(b) conflicts with R.C. 9.68 by restricting an individual’s ability to store a firearm in a way that state and federal law do not.

A. Cincinnati’s prosecution of West illustrates that state law addresses safe storage concerns.

Cincinnati has availed itself of state law to prosecute West, showing that it does not need to resort to a lower standard of proof. As Cincinnati noted, West was charged with multiple counts of CMC 915-3 and R.C. 2919.22 in Hamilton County M.C. Case No. 23/CRB/8377. Br. of Defs.’-Appellants at 6. Cincinnati’s use of the state statute evidences that such statute is available and effective in prosecuting the

crimes Cincinnati wishes to prosecute. Cincinnati’s attempt to lower the proof required for such charge is simply an attempt to make it easier for it to prosecute an individual for conduct it already had the authority to prosecute.

Similarly, Columbus recently prosecuted a man for violating *both* the state statute and its local firearm storage ordinance.³ In *State v. Rivas*, Franklin M.C. No. 2023 CR B2299, the State and Columbus charged Matthew Rivas with violations of R.C. 2919.22 and Columbus City Code 2323.191. Despite Rivas’ loaded firearm being left in a couch cushion and accessed by his child—placing him within R.C. 2919.22—Columbus negotiated a plea whereby the R.C. 2919.22 charges would be dropped against Rivas and he would plead guilty to the Columbus ordinance charges. Jordan Laird, *Father pleads guilty after young child fires gun in first test of Columbus storage law*, Columbus Dispatch (Apr. 11, 2023).⁴

Both cases demonstrate that the relevant state law is an effective and proper tool in addressing improper storage of firearms.

II. 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

³ The Delaware common pleas court has now enjoined the enforcement of that ordinance in *Doe v. Columbus*. J. Entry *inter alia* Granting Pls.’ Mot. for Prelim. Inj., *Doe v. Columbus*, Delaware C.P. No. 23-CVH-02 0089 (Apr. 25, 2023).

⁴ <https://www.dispatch.com/story/news/courts/2023/04/11/columbus-dad-convicted-under-new-law-after-child-finds-gun-for-leaving-gun-for-child-to-find-and-fire/70100947007/>.

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 below noted an important factor that was ignored by the court common pleas court in *Cincinnati v. State*, Hamilton C.P. No. A-2300389: “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 at 4, citing *Cleveland v. State*, 128 Ohio St.3d 135, 2010-Ohio-6318, 942 N.E.2d 370. The common pleas court in *Cincinnati v. State* 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. The court below did not make this same mistake. 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.

III. 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 common pleas court in *Cincinnati v. State* 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. Entry Granting Prelim. Inj. in Part, *Cincinnati v. State*, Hamilton C.P. No. A-2300389, at 21 (Sept. 14, 2023). That 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,” *Ohioans for Concealed Carry, Inc. v. Clyde*, 120 Ohio St.3d 96, 2008-Ohio-4605, 896 N.E.2d 967, ¶ 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*. As the court below properly recognized, *Cleveland* continues to be controlling.

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

The State continues to have a comprehensive regulatory scheme governing firearms.

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.

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,⁵ 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 the person 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

⁵ 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.

“Permitless carry” has not completely changed the State’s regulation of firearms. 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.

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* 18⁶; Ohio Attorney General, *2nd*

⁶ <https://www.ohioattorneygeneral.gov/Files/Reports/Concealed-Carry-Statistics/1st-Quarter-2023-CCW-Report>.

Quarter 2023 CCW Statistics 18⁷. 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.

V. The decision below is consistent with most courts addressing the constitutionality of R.C. 9.68.

Since its original iteration, the Ohio Supreme Court has consistently upheld R.C. 9.68. Following the court’s first 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 correctly rejected this attempt to challenge the constitutionality of R.C. 9.68.

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 * * *

⁷ <https://www.ohioattorneygeneral.gov/Files/Reports/Concealed-Carry-Statistics/2nd-Quarter-2023-CCW-Report>.

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. The General Assembly enacted R.C. 9.68 while the case was on appeal, and the court pointed to the language of R.C. 9.68 as supporting the court’s 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 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 definitions conflicting with state law unconstitutionally exceeded the city's home rule authority because the statutes violated 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, ¶ 28, this Court found 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, 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 in *Cincinnati v. State* 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 here—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. 968 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.⁸

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 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

⁸ 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>.

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.

Below, the Hamilton County court permanently enjoined CMC 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 at 2. “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 Hamilton County court in *Cincinnati v. State* disagreed with its colleagues ruling and determined that R.C. 9.68 is unconstitutional and enjoined “amended” R.C. 9.68. Entry Granting Prelim. Inj. in Part, *Cincinnati v. State*, Hamilton C.P. No. A-2300389, at 34 (Sept. 14, 2023). Like the Franklin County court’s later vacated preliminary injunction in *Columbus v. State*, the decision in *Cincinnati v. State* 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.

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

The court below was correct to conclude that it must follow binding Ohio Supreme Court precedent upholding 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.

Contrary to the court’s opinion in *Cincinnati v. State*, the plurality opinion in *Dayton v. State* did not abrogate, abandon, or overrule the Ohio Supreme 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 in *Cincinnati v. State* improperly relied on *Dayton*’s plurality opinion for the proposition that it must look to the contested provisions alone. Therefore, the

determination by the *Cincinnati v. State* court 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 in *Cincinnati v. State*, 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. As the court below correctly identified, 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 affirm the Hamilton County Common Pleas Court's injunction on Cincinnati Municipal Code 915 and affirm the constitutionality of R.C. 9.68.

Dated: January 25, 2024

Respectfully submitted,

/s/ David C. Tryon

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CERTIFICATE OF SERVICE

This will certify that a true and accurate copy of the foregoing Brief Amicus Curiae of The Buckeye Institute in Support of Appellee has been served this 25th day of January 2024, by e-mail to:

Scott M. Heenan
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Counsel for Defendant–Appellant

and

Shuva J. Paul
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Counsel for Defendant–Appellant

and

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Counsel for Plaintiff-Appellee.

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

Thursday, January 25, 2024 at 09:21:31 Eastern Standard Time

Subject: RE: [External Email] Re: Cincinnati v. West–No. C 2300469
Date: Thursday, December 14, 2023 at 1:54:59 PM Eastern Standard Time
From: Heenan, Scott
To: Alex M. Certo, Paul, Shuva
CC: carrshiverdecker@yahoo.com
Attachments: image001.jpg

Alex,

I spoke with Merlyn and he said that he would consent to the City getting an amicus support on this matter. In return, you've the City's consent.

Scott Heenan

Senior Assistant City Solicitor
Law Department
City of Cincinnati
(513) 352-3326 (o) | (513) 352-1515 (f)
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From: Alex M. Certo <a.certo@buckeyeinstitute.org>
Sent: Thursday, December 14, 2023 10:04 AM
To: Heenan, Scott <scott.heenan@cincinnati-oh.gov>; Paul, Shuva <shuva.paul@cincinnati-oh.gov>
Cc: carrshiverdecker@yahoo.com
Subject: [External Email] Re: Cincinnati v. West–No. C 2300469

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External Email Communication

Counsel,

Exhibit A

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Thursday, January 25, 2024 at 09:23:23 Eastern Standard Time

Subject: FW: West v. City of Cincinnati; court of appeals case No. C-2300469
Date: Tuesday, January 9, 2024 at 1:42:53 PM Eastern Standard Time
From: David C. Tryon
To: Alex M. Certo

David C. Tryon, *Director of Litigation*
The Buckeye Institute
88 East Broad Street, Suite 1300 | Columbus, Ohio 43215
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From: Carr Shiverdecker <carrshiverdecker@yahoo.com>
Date: Tuesday, January 9, 2024 at 1:38 PM
To: David C. Tryon <d.tryon@buckeyeinstitute.org>
Subject: Re: West v. City of Cincinnati; court of appeals case No. C-2300469

Dave,

Yes you have my permission. (Your email went to Spam)
Thanks,

Merlyn D Shiverdecker, Esq.
817 Main Street, 5th Floor
Cincinnati, Ohio 45202
513 651 5651

On Monday, January 8, 2024 at 04:06:39 PM EST, David C. Tryon <d.tryon@buckeyeinstitute.org> wrote:

Merlyn:

Can you give us written permission to file an amicus brief in support of Plaintiff-Appellee in the captioned case?

Thanks

Dave Tryon

440-503-7877

Exhibit B

Page 1 of 1