

<b>Buckeye Firearms Foundation, Inc.</b> <b>Et al</b>  <b>Plaintiffs</b>	:  :  :  :	<b>IN THE COURT OF COMMON        PLEAS OF CUYAHOGA        COUNTY, OHIO</b>  <b>CASE _____</b>  <b>JUDGE _____</b>
<b>vs</b>  <b>City of Cleveland, Ohio</b> <b>Et al</b>  <b>Defendants</b>	:  :  :  :	<b>PLAINTIFFS' MOTION FOR A        TEMPORARY RESTRAINING        ORDER AND FOR A  <u>PRELIMINARY INJUNCTION</u></b>

Now come Plaintiffs, by and through undersigned counsel, pursuant to Ohio Civil Rule 65 and R.C. Section 2727.02 et seq., and request this Court enter a Temporary Restraining Order and Preliminary Injunction against Defendants, restraining said Defendants from attempting to enforce Codified Ordinances 674.02, 674.03, 674.04, 674.05, 674.07, 674.09, 674.10, 627A.02, 627A.03, 628.03, 628.04, 627.02, 627.04, 627.06, 627.08, 627.09, 627.10, 627.11, 627.16 and 549.01 against any person who possesses, purchases, sells, transfers, transports, stores, or keeps any firearm, part of a firearm, its components, and its ammunition in manners authorized and/or not prohibited by state or federal law. Plaintiffs request this same relief for any person also holding a Concealed Handgun License (“CHL”) under Revised Code Section 2923.125, holding a Temporary Emergency License (“TEL”) under Revised Code Section 2923.1213, or holding a license to carry a concealed handgun from a state which has entered into a written reciprocity agreement with the Ohio Attorney General (“Foreign CHL.”)

Affidavits in support of this motion are attached hereto and incorporated by reference.

For cause, Plaintiffs state that they are likely to prevail on the merits of their case; that all attempts to discuss the matter with Defendants have been rebuffed by said Defendants; in cases where courts have ruled against Defendants on these issues, Defendants have manifested an intent to disregard these rulings with regard to the above ordinances; that the owners of firearms and the holders of a CHL, TEL or Foreign CHL are suffering irreparable harm in the form of threatened criminal arrest of their person and continued violation of their statutory and constitutional rights; this harm will continue if Defendants are not restrained from enforcing said Ordinance; the issuance of the injunction will preserve the legal status quo; the City will suffer no damages from the issuance of the injunction; and Plaintiffs have no other remedy at law. Plaintiffs further request that this Court find that the posting of a bond is not

needed to issue the requested orders, or in the alternative, find that a token bond is sufficient, as Defendants cannot claim any economic damages from the issuance of the requested orders.

Respectfully submitted,

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### **MEMORANDUM IN SUPPORT**

#### **BACKGROUND**

On April 8, 2004, Ohio began issuing CHLs and TELs, pursuant to Ohio Revised Code Sections 2923.125 and 2923.1213, respectively, and began to accept certain Foreign CHLs when that foreign state has entered into a written reciprocity agreement with the Ohio Attorney General. In enacting this and other concealed carry licensing provisions, it was the intent of the General Assembly to create a licensing scheme for the concealed carry of a loaded handgun in Ohio, including the areas where a license holder may and may not carry a loaded handgun. In addition to the general statutory prohibitions set forth in Revised Code Sections 2923.121, 2923.122, and 2923.123, 2923.126(B) was enacted to specifically enumerate the classifications of public and private property where a license holder may not carry a concealed handgun. This licensing scheme was implemented to allow Ohio citizens to obtain a pre-determination of their right to carry a concealed handgun in Ohio.

On March 14, 2007, R.C. Section 9.68 went into effect in response to cities attempting to regulate concealed carry, and in further response to one Appellate decision that attempted to classify Ohio's firearm laws as non-general laws. R.C. Section 9.68 provides for the uniform, affirmative grant of the right to own, possess, use, store, buy, sell, transfer, carry etc. firearms, firearm components and ammunition. It is important to note that R.C. Section 9.68 grants these rights to all citizens without regard to their status as licensed to carry a concealed handgun or not.

Within days of R.C. Section 9.68 taking effect, the City of Cleveland sued the State of

Ohio in an attempt to have R.C. Section 9.68 deemed unconstitutional. This action was filed in Cuyahoga County Common Pleas Court case #CV-07-618492.

On September 18, 2008, the Ohio Supreme Court issued their opinion in Ohioans for Concealed Carry, Inc. et al v. Clyde, et al (2008) 120 Ohio St.3d 96. This opinion upheld R.C. Section 9.68 and Ohio's concealed carry licensing laws as general laws of the state and constitutional with respect to home rule powers of municipalities, striking down a local ordinance regulating licensed carry of firearms in parks in the process.

On January 2, 2009, Judge McGinty denied the City of Cleveland's request, ruling that R.C. Section 9.68 is a valid, general law of the state, is constitutional and does not impermissibly interfere with Cleveland's home rule authority. Judge McGinty further found that R.C. Section 9.68, as enacted by H.B. 347, did not violate the single-subject rule and was not an abuse of legislative power by the Ohio General Assembly.

### **LIKELIHOOD OF SUCCESS ON THE MERITS**

Any examination of the constitutionality of the questioned ordinances must proceed under a conflicts of law analysis. O Const. XVIII Sec. 3 provides that a municipality may adopt local police regulations "as are not in conflict with the general laws." The above ordinances are clearly in conflict with the general laws of Ohio and are, therefore, unconstitutional.

A conflicts-of-law analysis is a three part test that begins with an examination of whether the municipal ordinance is an exercise of inherent local self-government power, or an exercise of a local police power. Canton v. State, 95 Ohio St.3d 149 (2002). The regulation of firearms is the exercise of police power, and not the exercise of local self-government. The municipalities argued this extensively in their merit brief and amici briefs in the Clyde case. They lost. The regulation of firearms is the exercise of police powers as a matter of law and no further inquiry is needed.

The next step in a conflicts-of-law analysis is whether the state law in question is a general law or not. Canton. The municipalities argued extensively in their merit brief and amici briefs in the Clyde case that R.C. Section 9.68 and Ohio's concealed carry licensing scheme were not general laws of the state. They lost. R.C. Section 9.68 and R.C. Section 2923.125 et seq. are general laws of the state as a matter of law and no further inquiry is needed.

The final step in a conflicts-of-law analysis is whether the municipal exercise of police power conflicts with the state general law. Canton. As is demonstrated in detail in Plaintiff's Complaint, which is incorporated by reference, including the exhibits thereto, as if fully rewritten herein, the ordinances set forth above all purport to limit how a person may own, possess, purchase, sell, transfer, transport, store, or keep any firearm, part of a firearm, its components, and its ammunition. Further, the above ordinances do so in a manner that is not provided for in state or federal law.

The test for whether an ordinance conflicts with a statute is relatively simple. “The final step in a home-rule analysis is the conflict test, which asks whether the ordinance prohibits that which the statute permits, or vice versa.” Clyde at paragraph 53, citing to Struthers v. Sokol (1923), 108 Ohio St. 263.

Turning this test to Ohio’s law and the above ordinances, the analysis is simple. The law in Ohio is that unless prohibited by state or federal law, a person is affirmatively granted the right to own, 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. This is the vague, unambiguous law of Ohio as upheld by the Ohio Supreme Court.

The settled law of Ohio is that the state permits the full enjoyment of the constitutional and statutory right to own and carry firearms unless otherwise prohibited by state or federal law.

Each of the above ordinances attempts to place further license, permission, restriction, delay, or process on the ownership, possession, purchase, sale, transfer, transport, storage, or keeping of any firearm, part of a firearm, its components, and its ammunition. (Plaintiffs’ Complaint analyzes each and every ordinance in detail and the manner in which the ordinance attempts to impact firearms, and this analysis is incorporated by reference as if fully rewritten herein.) Each of these ordinances attempts to limit, license and prohibit that which state law allows citizens to do firearms, and that is no longer legally permissible under Ohio law.

### **LIKELIHOOD OF IRREPARABLE DAMAGE AND BOND WAIVER**

Having established that Plaintiffs are likely to prevail on the merits of the underlying declaratory action, examination of Plaintiffs’ instant motion should next proceed to examination of the relative harms that the parties stand to suffer. Plaintiffs represent that they stand to suffer irreparable harm if the temporary restraining order and preliminary injunction are not granted. Plaintiffs further represent that Defendants are not likely to suffer any harm by the granting of the orders requested.

Plaintiffs currently are in jeopardy of arrest of their person, criminal booking process, detention in jail, confiscation of their handgun and potential injury while being arrested, all for doing ONLY that which the State of Ohio has already affirmatively allowed them to do. Plaintiffs would also be subject to public scrutiny and humiliation, loss of prestige, self esteem, and community respect from any arrest. Finally, Plaintiffs would suffer emotional distress, economic loss, costs and attorney fees as a result of any arrest.

Defendants, on the other hand, are not in a position where they will suffer any damages. The State of Ohio already has very comprehensive statutes regarding the carrying of firearms, and an order prohibiting Defendants from enforcing their ordinance would in no way endanger

anyone. Additionally, Defendants cannot conceivably claim any harm, as the orders requested simply enforce the status quo: R.C. Section 9.68 is valid and the above ordinances are invalid. Defendants simply are not legally seized of the powers they are exercising, and there is no legally recognized harm from forcing governments to cease illegal acts.

Given that there are already comprehensive state laws available to Defendants with regard to the carrying of deadly weapons, and given that Defendants have had opportunity in multiple judicial forums to argue the merits of their position and lost those arguments, Defendants will not suffer any economic damages if they are ordered to cease enforcement their ordinances, the only real harm being a few bruised egos. The purpose of bond under Civil Rule 65(C) is to secure the enjoined party's economic damages should the court ultimately find the injunction should not have been issued. Bruised egos do not amount to monetary damages and this Court should waive any bond or require only a token bond to issue the orders prayed for.

### **ISSUANCE OF THE ORDERS WILL PRESERVE THE STATUS QUO**

The legal status quo in Ohio as of the filing of this motion is as follows: R.C. Section 9.68 and R.C. Section 2923.125 et seq. are constitutional, general laws of the state of Ohio and any ordinance regulating firearms that conflicts with these provisions is per se unconstitutional. The above ordinances are unenforceable and unconstitutional as of the filing of this motion. The issuance of the orders prayed for will preserve the status quo and preserve the positions of the respective parties until a final adjudication on the merits is held. Finally, issuance of the orders prayed for will avoid the possibility of a multiplicity of actions being filed civilly, and motions being filed in multiple criminal cases, all with the attendant possibility for conflicting/inconsistent results. In areas of law where citizens are being placed in criminal jeopardy, the Court should err on the side of protecting the rights of the citizens as a class, rather than leaving it to each person to fend for themselves.

### **PLAINTIFFS HAVE NO ADEQUATE ALTERNATIVE LEGAL RELIEF**

Plaintiffs are specifically requesting that public officials be ordered NOT TO perform an official act, enforcement of the above ordinances, while the constitutionality of the underlying ordinances is adjudicated. There is no vehicle for accomplishing this but for a temporary restraining order and preliminary injunction. Mandamus would not be appropriate, as Plaintiffs are attempting to restrain the conduct of Defendants, rather than compel the conduct of Defendants. The need for immediate legal relief is great, as is set forth above and is further illustrated by the attached documents indicating that not even Defendants truly agree on what the law is.

If the city can't keep their stories straight, how can citizens be expected to avoid criminal jeopardy at what amounts to the whim of that moment?

Wherefore, Plaintiffs pray that this court issue a temporary restraining order and preliminary injunction ordering Defendants to refrain from any enforcement of Ordinances 674.02, 674.03, 674.04, 674.05, 674.07, 674.09, 674.10, 627A.02, 627A.03, 628.03, 628.04, 627.02, 627.04, 627.06, 627.08, 627.09, 627.10, 627.11, 627.16 and 549.01; find that Plaintiffs are likely to prevail on the merits of the underlying cause; find that Plaintiffs are likely to suffer irreparable harm as outlined above if the orders are not granted; find that Defendants have no grounds for any claim for monetary damages and, therefore, waive bond or approve a token bond from Plaintiffs; and for all other relief deemed necessary to a just and equitable resolution to Plaintiffs' motion.

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