IN THE SUPREME COURT OF OHIO

OHIOANS FOR CONCEALED CARRY, ET AL	)	**SUPREME COURT CASE NO. _____**
Appellants,	)	**On Appeal from Franklin County Court of Appeals Tenth Appellate District**
V.	)	**Court of Appeals Case No. 18 AP 00605**
THE CITY OF COLUMBUS, OHIO, ET AL.,	)	
Appellees	)	

BRIEF OF APPELLANTS GARY WITT, OHIOANS FOR CONCEALED CARRY, INC. AND BUCKEYE FIREARMS FOUNDATION, INC.

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EXPLANATION OF WHY THIS CASE IS OF PUBLIC AND GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

Firearms rights are fundamental liberties protected by the Ohio Constitution (O.Const.Art.I Sec. 4) and by statute (R.C. §9.68). In 2006, the General Assembly addressed the problem created by the patchwork of local firearms restrictions and made an effort to bring statewide uniformity to Ohio gun law by enacting R.C. §9.68, which prohibited local restrictions on the right to keep and bear arms. *City of Cleveland v. State of* Ohio, 128 Ohio St.3d 135, 140, 2010-Ohio-6318 ¶24. With that statute, the General Assembly forbade nearly all local restrictions on the right to keep and bear arms. This Court has twice upheld R.C. §9.68 as a valid restriction on the home rule powers of cities. *Ohioans for Concealed Carry v. Clyde*, 120 Ohio St.3d 96 (2008); *City of Cleveland v. State of Ohio*, 128 Ohio St.3d (2010).

In defiance of the law, the City of Columbus ("City") passed two Columbus Codified Ordinances, §2323.171 and §2323.13 (collectively, the "Ordinances"), mandating a six-month period of confinement for either of two offenses. City Codified Ordinance §2323.13 created a firearms disability on certain categories of citizens and taxpayers. City Codified Ordinance §2323.171 banned the possession of certain firearms components. The City Ordinances expose every person residing in (or travelling through) the City to the very patchwork of criminal law the General Assembly forbade. City Codified Ordinance §2323.171 regulates "parts and components of firearms" plainly within the embrace of R.C. §9.68. The City concedes that no other city in Ohio

has such an ordinance with the exception of Cincinnati, which adopted an ordinance similar to that of the City of Columbus that was (similarly) stricken as unconstitutional. See, Entry Granting Plaintiff's Motion for Summary Judgment (2/11/2019), *Buckeye Firearms Foundation v. City of Cincinnati*, Hamilton County Common Pleas Case No. A1803098 (J. Ruehlmann) (attached as Appendix D).

Appellants Ohioans for Concealed Carry, Inc. ("OFCC") and Buckeye Firearms Foundation, Inc. ("BFF") and an individual Columbus taxpayer notified the City of the constitutional deficiencies of its ordinance and demanded that the City Attorney seek to enjoin the ordinances. BFF and OFCC are grassroots, non-profit firearms advocacy organization composed of firearm owners across the state of Ohio, including members who are taxpayers of the City of Columbus.

When the City was notified by Appellants that the ordinance was an improper exercise of the City's police power, it did nothing. In response to the filing of this action, the City challenged the standing of OFCC and BFF to contest the ordinance. Until this case, neither this Court nor any other trial or intermediate appellate court had held that OFCC or BFF – or indeed any other associational group protecting firearms rights – lacked standing to challenge unconstitutional ordinances that burden the fundamental civil liberty to keep and bear arms. In its August 1, 2019 Decision, however, the Tenth District Court of Appeals determined that declaratory relief was unavailable, generally, and that OFCC and BFF lacked standing to pursue any relief at all.

The Court of Appeals recognized there is a split of authority on whether declaratory relief is available in a taxpayer action under R.C. §733.59. *Decision* at ¶17, citing, *inter alia*, *Cincinnati ex rel. Smitherman v. Cincinnati*, 1st Dist. No. C-090502, 188 Ohio App.3d 171, 2010-Ohio-2768, 934 N.E.2d 985, at ¶¶19-20. However, legal precedent clearly permits the standing of both

individuals and groups to seek declarations and injunctions striking unconstitutional laws on Second Amendment grounds. *Peoples Rights Org., Inc. v. City of Columbus*, 152 F.3d 522 (6th Cir. 1998); *Ezell v. City of Chicago*, 651 F.3d 684 (7th Cir. 2011). The Court of Appeals failed to properly apply this Court's decisions on standing in the context harm or potential harm to fundamental rights. The Court of Appeals failed to recognize that the members of BFF and OFCC are "persons" and include Columbus taxpayers, as specifically alleged in the Complaint. That allegation alone is sufficient to create standing in an action seeking to prevent the enforcement or protection of a public right, even if OFCC and BFF did not allege or show ***any*** individualized interest or harm. *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 1999-Ohio-123, 715 N.E.2d 1062 (1999); see also, Entry Denying Defendant's Motion for Summary Judgment (2/11/2019), *Buckeye Firearms Foundation v. City of Cincinnati*, Hamilton County Common Pleas Case No. A1803098 (J. Ruehlmann). *Sheward* involved multiple associational plaintiffs seeking a declaration that several provisions of Ohio's "tort-reform bill" were unconstitutional. Those organizations consisted of discreet-interest groups: trial lawyers and union members. In contrast, the organization plaintiffs herein represent the interests of all Ohioans as well as those who are passing through Columbus regardless of residency and domicile. It is difficult to conceive of a more compelling public right deserving of associational representation.

The question of when (if ever) a "challenger" under R.C. §9.68 lacks standing has not been specifically determined (or even addressed) before this case, although Appellants assert this Court implicitly recognized organizational standing in its decisions in *Ohioans for Concealed Carry v. Clyde*, 120 Ohio St.3d 96 (2008) and *City of Cleveland v. State of Ohio*, 128 Ohio St.3d (2010).

This case raises a question of public or great general interest because Ohio's general firearms policy remains unchanged under R.C. §9.68, there is a split of district authority whether

(and when) declaratory relief is available, and the ongoing viability of standing under the "public right doctrine" applied by this Court two decades ago in *Sheward.* This Court should address the standing issues to determine: 1) when and if the public right doctrine may be applied after *Sheward*; 2) whether organizations like BFF and OFCC have standing to challenge local laws that violate R.C. §9.68, as the General Assembly clearly envisioned; and, 3) whether declaratory relief is to be afforded in a challenge to an ordinance that violates R.C. §9.68.

This case also involves the consolidation of an injunction hearing with a trial on the merits. The trial court exercised its discretion to consolidate the preliminary injunction hearing with the trial on the merits, however, the Court of Appeals reversed, holding that the trial court erred in so doing. Notably, the Court of Appeals did not find that the trial court abused its discretion, merely that the City claimed to be prejudiced by the consolidation. Any prejudiced suffered by the City was of its own doing. It failed to conduct discovery and declined an opportunity to continue the preliminary injunction hearing. Finally, the Court of Appeals held that the Plaintiffs requested consolidation, which is incorrect.

This case presents multiple issues of great, public and general interest in the context of clarifying and applying precedents on standing, including associational standing, in the particular context of violation of fundamental civil liberties.

STATEMENT OF THE FACTS AND THE CASE

Gary Witt, a Columbus taxpayer, OFCC and BFF filed this action in the Franklin County Common Pleas Court on June 21, 2018 seeking, *inter alia*, to declare unconstitutional and enjoin the Ordinances, including City Ordinance §2323.171, which made unlawful the possession of a "rate-of-fire acceleration" device, parts, or combination of parts, components, or devices.[1] The

[1] This enactment will be called "the Rate-of-Fire Ordinance" or "ROF Ordinance," and states:

organizations and Witt sought declaratory and injunctive relief. Witt stated a claim under the "taxpayer statute," R.C. §733.59, as well. R.C. §9.68 states, in pertinent part:

> (A) *** 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.
>
> (B) *In addition to any other relief provided*, the court shall award costs and reasonable attorney fees to *any person, group, or entity that prevails in a challenge to an ordinance, rule, or regulation as being in conflict with this section.* (Emphasis added).

With notice to and participation by the City and the State of Ohio, the trial court issued a temporary restraining order on June 22, 2018 precluding the City from enforcing the ROF Ordinance. The City, which neither served nor requested any discovery, demanded an evidentiary hearing upon Appellants' subsequent application for a Preliminary Injunction, which was heard on July 9, 2018. After the Preliminary Injunction hearing, the Court issued an order *permanently* enjoining the City from enforcing the ROF Ordinance on July 12, 2018 (hereinafter, "the

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(A) No person shall knowingly acquire, have, carry, or use an illegal rate-of-fire acceleration firearm accessory.

(B) Whoever violates this section is guilty of unlawful possession of a firearm accessory, a misdemeanor punishable by up to one year in jail with a mandatory minimum jail term of at least one hundred eighty (180) consecutive days during which mandatory jail term the defendant shall not be eligible for work release and up to a $1500 fine.

(C) For the purposes of this section:

> (1) "Illegal rate-of-fire acceleration firearm accessory" means any trigger crank, a bump-fire device, or any part, combination of parts, component, device, attachment, or accessory, that is designed or functions to accelerate the rate of fire of a semi-automatic firearm but not convert the semi-automatic firearm into an automatic firearm. These include, but are not limited to, firearm accessories described or marketed as bump stocks, bump-fire stocks, slide fires, and accelerators.

Injunction Decision")(attached as Appendix A). The City and Appellants timely appealed from various aspects of the Injunction Decision. In pertinent part, the City asserted that all parties challenging the ROF Ordinance lacked standing to sue, and that the trial court erred in issuing a permanent injunction after the preliminary injunction hearing.

On August 1, 2019, the Tenth District Court of Appeals issued its Decision and Judgment Entry (attached hereto as Appendix B and C). Without citing any authority from this Court interpreting and applying R.C. §9.68, the Court of Appeals sustained the City's arguments in part and held: 1) Witt had standing under R.C. §733.59 to challenge the ROF Ordinance, but BFF and OFCC did not have any standing to do so either as taxpayers or under R.C. §9.68; 2) declaratory relief was unavailable to Witt and Appellants; and 3) the trial court improperly applied Civ. R. 65 by prematurely consolidating the hearing on the preliminary injunction with a trial on the merits without adequate notice to the City, and to the City's prejudice. With respect to the last of these determinations, the Court of Appeals asserted Appellants requested consolidation. *Decision* at ¶51 ("After counsel for firearm plaintiffs suggested combining the decision on the preliminary injunction with the decision on the merits, counsel for the City objected."). Appellants' counsel did no such thing. Accordingly, Appellants BFF and OFCC challenge not only this aspect of the Court of Appeals' Decision, but also assert that the Court of Appeals erred in holding that Appellants (and each of them) lacked standing and that declaratory relief was unavailable.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: A non-profit firearms-rights association has standing to challenge as unconstitutional municipal ordinances that violate R.C. §9.68 by maintaining an action for declaratory and injunctive relief under R.C. §9.68, R.C. §733.59, and/or Ohio Revised Code Chapter 2721.

Appellants OFCC and BFF have associational standing to sue on behalf of their members, even without express statutory authorization when: (1) its members would otherwise have standing

to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Warth v. Seldin,* 422 U.S. 490 (1975); *Hunt v. Washington State Apple Advertising Comm.,* 432 U.S. 333 (1977); *Ohio Academy of Nursing Homes, Inc. v. Barry* (10th Dist. 1987), 37 Ohio App.3d 46, 47; *State, ex rel. Connors, v. Ohio Dept. of Transp.* (10 Dist. 1982), 8 Ohio App.3d 44, 47; *Fraternal Order of Police v. Columbus* (10th Dist 1983), 10 Ohio App.3d 1.

The interests sought to be protected in this lawsuit by OFCC and BFF are germane to each organization's purpose. For instance, their members cannot lawfully possess in Columbus a gun or firearm component that violates the ROF Ordinance, which is contrary to the organizations' purpose of promoting and preserving gun rights. *Ohioans for Concealed Carry, Inc. v. Oberlin* (9th Dist. 2017), No. 15CA010781, 2017-Ohio-36, ¶2, *appeal not allowed*, 151 Ohio St.3d 1425, 2017-Ohio-8371, ¶2 (2017) ("Ohioans for Concealed Carry, Inc., is a not-for-profit corporation that advocates for and protects the right of the people to keep and bear arms."). Likewise, BFF is an organization devoted to the preservation of firearms rights across Ohio. The City does not challenge that this case is germane to the purpose of both organizations. The claims asserted and the relief requested do not require the participation of individual members of OFCC and BFF (though Witt is a member of OFCC).

The traditional confines of standing under the declaratory judgment act (Ohio Revised Code Chapter 2721) yield when a law creating a constitutional deprivation is involved. Irreparable harm is presumed entitling Appellants to declaratory and injunctive relief. *Elrod v. Burns,* 427 U.S. 347, 373 (1976); *Bonnell v. Lorenzo,* 241 F.3d 800, 809 (6th Cir. 2001); *Magda v. Ohio Elections Comm.,* No. 14AP–929, 2016-Ohio-5043, ¶38 (10th Dist. 2016); *Babbitt v. United Farm*

Workers Nat. Union, 442 U.S. 289, 298, 99 S.Ct. 2301, 2308, 60 L.Ed.2d 895 (1979)(quoting *Steffel v. Thompson*, 415 U.S. 452, 459, 94 S.Ct. 1209, 1216, 39 L.Ed.2d 505 (1974)). Three reasons support this conclusion.

First, an injunction is an appropriate pre-enforcement remedy for an unconstitutional or void law, including criminal statutes infringing upon constitutional rights. *See, Troy Amusement Co. v. Attenweiler*, 187 Ohio St. 460, 465-466 (1940); *VFW v. Sweeny*, 64 Ohio Law Abs. 277, 111 N.E.2d 699 (C.P.1952); *Garono v. State*, 37 Ohio St.3d 171, 173, (1988); *Olds v. Klotz*, 131 Ohio St. 447, 452 (1936); *Brown v. Anderson*, 13 Ohio St.2d 53 (1968), paragraph two of the syllabus. Necessarily, for an injunction to issue against such a law, a declaration must be obtained that the law is unconstitutional, which is precisely what Appellants sought.

Second, litigants need not subject themselves to criminal prosecution before their challenges to an unconstitutional criminal statute may be heard. Requiring such creates incentives that are perverse from the perspective of law enforcement, unfair to the litigants, and totally unrelated to the constitutional or prudential concerns underlying the doctrine of justiciability. *Navegar, Inc. v. United States*, 103 F.3d 994, 1000-1001, 332 U.S. App. D.C. 288, (D.C. Cir. 1997),; *Mobil Oil Co. v. Atty Gen'l of Va*., 940 F.2d 73, 75 (4th Cir. 1991); *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (quoting *Doe v. Bolton*, 410 U.S. 179, 188 (1973)). Lastly, one need not face self-incrimination, arrest, or criminal prosecution to challenge a facially-unconstitutional law directly bearing on a fundamental constitutional freedom. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158-159, 134 S.Ct. 2334, 2342, 189 L.Ed.2d 246 (2014); *Babbitt*, 442 U.S. at 298; *Steffel v. Thompson*, 415 U.S. 452, 459 (1974); *Doe v. Bolton*, 410 U.S. 179, 188 (1973); *Mobil Oil Co.*, 940 F.2d at 75); *Navegar, Inc.*, 103 F.3d at 1000-1001. Since there is no

question that this lawsuit is a facial challenge to the constitutionality of the ROF Ordinance, the standing requirements are different from a traditional case.

The lower court's analysis of standing should have followed Sixth and Seventh Circuit precedents given the fundamental constitutional issues involved. In *Peoples Rights Org., Inc. v. City of Columbus*, 152 F.3d 522 (6th Cir. 1998), individual gun owners and a firearms-rights association ("P.R.O.") brought a pre-enforcement action challenging the constitutionality of another City of Columbus ordinance – one banning the sale, transfer, acquisition, or possession of assault weapons. The Sixth Circuit Court of Appeals: 1) held that P.R.O. had standing to bring a pre-enforcement action; 2) held that the case was justiciable despite fact that the owners had not been criminally charged under statute; and, 3) rejected the city's argument that the matter was not justiciable because the plaintiffs did not allege that they have been charged with a criminal violation of the ordinance, explaining such a requirement to be contrary to well-settled law and utterly inconsistent with the policies underlying the Declaratory Judgment Act:

> As the Supreme Court explained in *Abbott Laboratories v. Gardner,* 387 U.S. 136, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967):
>
> > To require them [the petitioners] to challenge these regulations only as a defense to an action brought by the Government might harm them severely and unnecessarily. Where the legal issue presented is fit for judicial resolution, and where a regulation requires an immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties attached to noncompliance, access to the courts under the Administrative Procedure Act and the Declaratory Judgment Act must be permitted, absent a statutory bar or some other unusual circumstance, neither of which appears here.

Peoples Rights Org., Inc., 152 F.3d at 529, citing *Abbott Labs.,* 387 U.S. 136, 153.

Similarly, in *Ezell v. City of Chicago*, 651 F.3d 684 (7th Cir. 2011), the Seventh Circuit Court of Appeals reversed a denial of a preliminary injunction in an action brought by residents, a firing-

range business, and nonprofit Second-Amendment-advocacy associations challenging the constitutionality of a city ordinance that mandated firing-range training as a prerequisite to lawful gun ownership, yet prohibited all firing ranges in the city. In part, the Seventh Circuit Court of Appeals reasoned that the city's "confused approach to this case led the district court to make legal errors on several fronts: (1) the organizational plaintiffs' standing; (2) the nature of the plaintiffs' harm; (3) the scope of the Second Amendment right as recognized in D.C. v. Heller, 554 U.S. 570, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008) and applied to the States in *McDonald v. Chicago*, 561 U.S. 742, 780, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010); and (4) the structure and standards for judicial review of laws alleged to infringe Second Amendment rights. *Ezell*, 651 F.3d at 694.

Ezell noted it is "well-established" that pre-enforcement challenges are within Article III jurisdiction. *Id*. at 695, and that the plaintiffs need not violate the ordinance and risk prosecution in order to challenge it. *Id*. citing *Schirmer v. Nagode,* 621 F.3d 581, 586 (7th Cir. 2010)("A person need not risk arrest before bringing a pre-enforcement challenge...."). The very "existence of a statute implies a threat to prosecute, so pre-enforcement challenges are proper, because a probability of future injury counts as 'injury' for the purpose of standing." *Id*. at 695-696, citing *Bauer v. Shepard*, 620 F.3d 704, 708 (7th Cir. 2010). As to the organizational plaintiffs, *Ezell*, at 696–97, reasoned:

> The Second Amendment Foundation and the Illinois Rifle Association have many members who reside in Chicago and easily meet the requirements for associational standing: (1) their members would otherwise have standing to sue in their own right; (2) the interests the associations seek to protect are germane to their organizational purposes; and (3) neither the claim asserted nor the relief requested requires the participation of individual association members in the lawsuit. *See United Food & Commercial Workers Union Local 751 v. Brown Group,* 517 U.S. 544, 553, 116 S.Ct. 1529, 134 L.Ed.2d 758 (1996); *Hunt v. Wash. State Apple Adver. Comm'n,* 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977); *Disability Rights Wis. v. Walworth Cnty. Bd. of Supervisors,* 522 F.3d 796, 801–02 (7th Cir.2008).

> The district court held in the alternative that the organizational plaintiffs "failed to present sufficient evidence to support their position that their constituency has been unable to comply with the statute." More specifically, the court held that the plaintiffs failed to produce "evidence of any one resident [of Chicago] who has been unable to travel to ... a range [or] has been unable to obtain [the] range training" required for a Permit. It's not clear whether these observations were directed at standing or the merits of the motion for a preliminary injunction; this discussion appears in the court's evaluation of irreparable harm. Either way, the point is irrelevant. Nothing depends on this kind of evidence. The availability of range training outside the city neither defeats the organizational plaintiffs' standing nor has anything to do with merits of the claim. The question is not whether or how easily Chicago residents can comply with the range-training requirement by traveling outside the city; the plaintiffs are not seeking an injunction against the range-training requirement. The pertinent question is whether the Second Amendment prevents the City Council from banning firing ranges everywhere in the city; that ranges are present in neighboring jurisdictions has no bearing on this question.

The organizational/associational standing analysis does not fail, as the Court of Appeals supposed, simply because a declaration or injunction was sought (rather than the functional equivalent remedy of mandamus). In *Cincinnati ex rel. Smitherman v. Cincinnati,* 1st Dist. No. C-090502, 188 Ohio App.3d 171, 2010-Ohio-2768, 934 N.E.2d 985, the Hamilton County Court of Appeals affirmed an award of attorney's fees in a taxpayer lawsuit challenging as unconstitutional a Cincinnati city ordinance requiring the consent of the city council for any appointment by the city manager to the board of the local metropolitan housing authority. In part, the city appealed claiming an injunction was improper, a contention the court rejected. ("Next, the city argues that an injunction was not warranted, because a declaratory judgment alone provided an adequate remedy at law. However, a prohibitory injunction and a declaratory judgment are not mutually exclusive remedies. A party may institute an action for a declaratory judgment *and* a prohibitory injunction to challenge legislation." *Id*. at ¶26, citing *State ex rel. Satow v. Gausse–Milliken,* 98 Ohio St.3d 479, 2003-Ohio-2074, 786 N.E.2d 1289, ¶22 (2003). The court upheld an award of fees as proper because the suit "sought more than declaratory relief.. Pursuant to R.C. 733.59, [plaintiff]

also sought an injunction to restrain the city from applying the provisions of [the contested ordinance]," and "R.C. 733.61 explicitly authorizes a court to award attorney fees to the taxpayer in a successful R.C. 733.59 suit." *Cincinnati ex rel. Smitherman,* at ¶ 29. Similarly, the Court of Appeals was faced with a challenge to an unconstitutional ordinance. Necessarily, there must be some declaration that the ordinance is unconstitutional to obtain relief. *See, Porter v. City of Oberlin*, 1 Ohio St. 2d 143, 162–63, 205 N.E.2d 363, 376 (1965) (concurring opinion of Justice Schneider: "I am not unmindful that the prayer of the petition also seeks a declaratory judgment. I do not dispute that a solicitor may obtain the benefit of Chapter 2721, Revised Code, in a *proper* case under Section 733.56. It follows that a taxpayer may likewise seek a declaratory judgment in a *proper* case under Section 733.59.");, *State ex rel. Satow*, 98 Ohio St.3d 479, 2003-Ohio-2074, at ¶22 (adequate remedies to challenge new legislation as unconstitutional by an action for declaratory judgment and prohibitory injunction).

It makes no sense to dismiss a taxpayer action to declare a law as unconstitutional when that is the gist of the taxpayer's claim. In a proper case, whether the action sounds in mandamus or declaratory relief should be of no consequence, as a citizen and Ohio resident should have standing independent of the taxpayer statute to ensure that public funds are not spent enforcing an unconstitutional a law that infringes on a fundamental constitutional right. *State ex rel. Ohio Academy of Trial Lawyers v. Sheward,* 86 Ohio St.3d 451, 1999-Ohio-123, 715 N.E.2d 1062 (1999). Here, the Complaint plainly stated the relief requested was to declare and enjoin the Ordinances as unconstitutional. BFF and OFCC are comprised of taxpayers, and the plain language of R.C. §9.68(B) clearly provides a vehicle for *any person, group, or entity … (to) challenge to an ordinance, rule, or regulation as being in conflict with"* R.C. §9.68. The Court of Appeals committed substantive and prejudicial error by interpreting R.C. §9.68 to provide no cause of

action and to confer no standing upon Appellants. The interpretation given by the Court of Appeals reads an entire section (§9.68(B)) out of existence by providing no relief and no claim for a violation of R.C. §9.68(A).

Proposition of Law No. II: A non-profit firearms-rights association has standing under the "Public-Right Doctrine" to challenge as unconstitutional municipal ordinances that violate R.C. §9.68 by maintaining an action for declaratory and injunctive relief.

OFCC and BFF have standing under the public-right doctrine, an exception to the "personal-stake requirement" of traditional standing: "[W]hen the issues sought to be litigated are of great importance and interest to the public, they may be resolved in a form of action that involves no rights or obligations peculiar to named parties." *Sheward,* 86 Ohio St.3d at 471. To qualify for standing under this public-right doctrine, "a litigant must allege 'rare and extraordinary' issues that threaten serious public injury * * *. Not all allegedly illegal or unconstitutional government actions rise to this level of importance." *Id.* at 504; *State ex rel. Ullmann v. Husted* (2016), 148 Ohio St.3d 255, 2016-Ohio-5584, ¶9, *reconsideration denied*, 147 Ohio St.3d 1439, 2016-Ohio-7677, ¶9 (2016).

The importance of the issues in this case fit easily within the "public-right doctrine" recognized in *Sheward*. The sole basis upon which the Court of Appeals rejected the application of the "public-right doctrine" was the supposed limitation on its application to "original actions." *Decision*, at ¶41, citing *ProgressOhio.org, Inc. v. JobsOhio,* 139 Ohio St.3d 520, 2014-Ohio-2382, 13 N.E.3d 1101 (2014), at ¶10. However, that *Sheward* happened to be a prohibition case was not at all fundamental to its holding. Indeed, since the plaintiffs in *Sheward* were alleging that the General Assembly usurped the power of this and all Ohio courts, there was no apparent adequate remedy at law, and prohibition was a natural (not to mention expedient) vehicle. Nothing in the elements of the "public right doctrine" announced in *Sheward* have any apparent relation to the

form of relief sought. However, as recognized below, this Court has held that the application of *Sheward* is so limited. *ProgressOhio.org* at ¶ 10. Still, *ProgressOhio.org* did not provide an adequate opportunity or incentive for further analysis of why this should be the case since, as this Court recognized, "Even assuming that *Sheward* could apply to common-pleas actions, it would not apply in this case. Appellants make little effort to present a rare and extraordinary public issue. Instead, they assert that citizens should be able to challenge any alleged constitutional violations, regardless of rarity or magnitude". *ProgressOhio.org, Inc.*, 139 Ohio St.3d 520, 2014-Ohio-2382, at ¶12. This case will provide an opportunity for the Court to examine whether public rights standing under *Sheward* is properly limited to original actions.

The magnitude of the issues in this case satisfy the "public-right doctrine" recognized in *Sheward*, and the Ordinances should be subjected to a constitutional review. The Ohio General Assembly has the right of (and has indeed exercised) plenary power when it comes to regulating firearms possession. Municipalities have only very limited powers and they are expressly set forth in R.C. §9.68 (primarily the right to enact zoning ordinances). Against this backdrop and multiple Ohio Supreme Court decisions, the City enacted Ordinances that facially disrupt statewide uniformity by threatening criminal sanctions for otherwise lawful firearms possession throughout the City. The Ordinances created an unconstitutional disruption in the uniformity of statewide regulation of firearms possession, chilled the possession of legal firearms components by those who otherwise are able to lawfully possess firearms, and inflicted an ongoing injury to those who have or wish to possess such components.

<u>Proposition of Law No. III</u>: A trial court does not err by entering a final order after a preliminary injunction hearing which conclusively determines a legal issue when a party opposing injunctive relief chooses not to engage in discovery, call an expert, or otherwise challenge unquestionable factual conclusions.

The Court of Appeals reasoned that the City was prejudiced by the trial court's consolidation of the preliminary injunction hearing with the trial on the merits. *Decision* at ¶¶56-57. The Court of Appeals court correctly noted that Civ. R. 65(B)(2) expressly permits consolidation after the hearing, and that the determination of whether to consolidate depends upon a trial court's discretion to save time and expense for the court and the parties. *Id*. at ¶49.

Here, the trial court's ruling was announced during the evidentiary hearing which the City requested. The City elected to forego discovery, decline the opportunity to continue the preliminary injunction hearing and decline to call any witnesses on the issues concerning the ROF Ordinance. The Court of Appeals ignored that any prejudice suffered by the City was of its own making, and remanded for a new hearing. Additionally, the Court of Appeals failed to say anything at all about the preliminary injunction, *i.e.* whether one presently exists in this case or not.

The basic gist of the Court of Appeals' reasoning is that the City was not afforded an opportunity to call a witness to challenge a fact that was indisputable: the ROF Ordinance regulates components or parts of firearms, for what else could materially alter how a gun functions but a gun part? From that fact, the unavoidable conclusion is that the City's ROF Ordinance cannot stand because R.C. §9.68 precludes the City from enacting or enforcing that Ordinance. The trial court committed no abuse of discretion.

<u>CONCLUSION</u>

The Court should accept this case on appeal and adopt the propositions of law set forth herein.

Respectfully Submitted:

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was sent via email to the following counsel of record for Appellee on September 16, 2019.

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