IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

Ohioans for Concealed Carry, *et al.*,	:	
	:	Case No.: 18CV-005216
Plaintiffs,	:	
	:	
v.	:	Judge David E. Cain
	:	
City of Columbus, *et al.*,	:	
	:	
Defendants.	:	

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

I. INTRODUCTION

One hundred forty-three people were murdered in the City of Columbus in 2017. Eighty-three percent of them were shot to death. One hundred eleven of the murder victims were African-American. Three police officers from neighboring jurisdictions: shot and killed by domestic violence abusers who were prohibited from having guns under federal law. Innumerable domestic violence victims: shot by their abusers. Fifty-eight people killed and four hundred eighty-nine wounded by a gunman using a bump stock in Las Vegas.

The City of Columbus has acted to stem the tide of gun violence by passing a series of common sense gun safety ordinances. Although Ohio law restricts what a municipality can do as it relates to firearms, local ordinances such as those at issue here are either consistent with or outside the scope of the state's preemption law and are a valid exercise of the City's home rule authority.

R.C. 9.68 allows a person to "own, possess, purchase, sell, transfer, transport, store, or keep any firearm, part of a firearm, its components, and its ammunition," unless the action is prohibited "by the United States Constitution, Ohio Constitution, state law, or federal law."

Federal law prohibits individuals who have been convicted of a misdemeanor crime of domestic violence, certain underlying felony convictions, or who are the subject of a protection order from possessing a firearm. The Columbus Weapons Under Disability Ordinance, Columbus City Code 2323.13, likewise prohibits these individuals from possessing a firearm. Because the Columbus Ordinance prohibits behaviors that are prohibited by federal law, the City has acted in conformity with R.C. 9.68.

In addition, Ohio law only prohibits the regulation of firearms, their components, and their ammunition. The City passed an ordinance, codified in Columbus City Code 2323.171, prohibiting the possession of a bump stock—the accessory used in Las Vegas to murder fifty-eight and injure four hundred eighty-nine people. A bump stock, as will be demonstrated, is not a firearm, a component, or ammunition. Rather, it is an accessory. Because it is an accessory—and because one of the principal requirements of statutory interpretation is that the words selected by the General Assembly must be given their ordinary meaning—it does not conflict with the prohibitions of R.C. 9.68 and the City acted within its authority in passing that ordinance.

This Court should reject the Plaintiff's motion for a preliminary injunction for several reasons. First, the Plaintiffs lack standing to bring any of their claims before this Court. No plaintiff alleges ownership (or its members' ownership) of a bump stock or that the bump stock ordinance would impact them or their members in any way; nor does any plaintiff allege they or their members are illegally in possession of a firearm such that they might be subject to or prosecuted under the new weapons under disability ordinance. Second, the City used its authority under the Ohio Constitution to pass narrowly tailored ordinances that target gun accessories and criminals who possess guns which were completely within the City's right to

do—even under the current requirements of State law. Finally, the public interest in protecting the police and victims of domestic violence greatly outweighs the non-existent harm that either these Plaintiffs or any individual might suffer if these ordinances were allowed to take effect. As a result, this Court should reject the Plaintiffs' motion for a preliminary injunction.

II. LAW AND ARGUMENT

A. Standard of Review

"The standards by which a trial court must judge a motion for preliminary injunction are well-established." *Schaller v. Rogers*, 10th Dist. Franklin No. 08AP-591, 2008-Ohio-4464, ¶30. "In deciding whether to grant a preliminary injunction, a court must look at: (1) whether there is a substantial likelihood that plaintiff will prevail on the merits; (2) whether plaintiff will suffer irreparable injury if the injunction is not granted; (3) whether third parties will be unjustifiably harmed if the injunction is granted; and (4) whether the public interest will be served by the injunction." *Vanguard Transp. Sys., Inc. v. Edwards Transfer & Storage Co., Gen. Commodities Div.*, 109 Ohio App.3d 786, 790, 673 N.E.2d 182 (10th Dist. 1996), citing *Valco Cincinnati, Inc. v. N & D Machining Serv., Inc.*, 24 Ohio St.3d 41, 492 N.E.2d 814 (1986). A party seeking a preliminary injunction has the burden of establishing a right to the preliminary injunction by demonstrating clear and convincing evidence of each of these factors. *Hydrofarm, Inc., v. Orendorff*, 180 Ohio App.3d 339, 2008-Ohio-6819, ¶ 18 (10th Dist.), citing *Vanguard Transp. Sys., Inc*. at 790. As will be demonstrated below, Plaintiffs cannot meet any of these standards, much less each of them. Because Plaintiffs cannot succeed on the merits of their claims, this Court should reject their request for a preliminary injunction.

B. Plaintiffs do not have a Substantial Likelihood of Success on the Merits Because They Lack Standing to Bring Their Claims.

Plaintiffs cannot prevail on the merits of their claims. They have brought claims against both the City's weapons under disability ordinance and its bump stock ordinance. However, even a superficial review of the law shows that the Plaintiffs cannot succeed on either of these claims. First, the Plaintiffs lack standing to bring these challenges. Second, the City's weapons under disability ordinance appropriately mirrors prohibitions that exist in federal law. Third, a bump stock is an accessory and Ohio law allows the City to regulate accessories. Therefore, this Court should reject the Plaintiff's motion for a preliminary injunction.

i. The Ohio Constitution requires that any party that brings a case in common pleas court must have standing to sue.

The Ohio Constitution places limits on a common pleas court's ability to hear cases. Specifically, "'[t]he Ohio Constitution expressly requires standing for cases filed in common pleas courts.'" *Preterm-Cleveland, Inc. v. Kasich,* 2018-Ohio-441, ¶ 20. The Ohio Supreme Court recognized that "Article IV, Section 4(B) provides that the courts of common pleas 'shall have such original jurisdiction over all justiciable matters.' A matter is justiciable only if the complaining party has standing to sue." *Id.* Thus, "[i]n order to have standing to attack the constitutionality of a legislative enactment, the private litigant must generally show that he or she has suffered or is threatened with direct and concrete injury in a manner or degree different from that suffered by the public in general, that the law in question has caused the injury, and that the relief requested will redress the injury." *Id* at ¶ 21. At its most basic level, standing is a "party's right to make a legal claim or seek judicial enforcement of a duty or right." *Bank of Am. v. Stevens,* 4th Dist. Hocking No. 16CA24, 2017-Ohio-9040, ¶ 24.

Before a plaintiff brings an action in an Ohio Common Pleas Court, that individual must show standing—the *sine qua non* of litigation. "The Supreme Court of the United States has stated standing 'is not dispensed in gross.'" *Preterm-Cleveland*, 2018-Ohio-441, ¶ 30 quoting *Davis v. F.E.C.*, 554 U.S. 724, 734 (2008). When parties attempt to bring multiple claims, "'a plaintiff must demonstrate standing for each claim he seeks to press' and '*for each form of relief*' that is sought.'" *Id.* (emphasis original). The plaintiffs in this case lack standing to pursue any of the claims that they have raised. Because they cannot properly invoke this Court's jurisdiction, they cannot succeed on the merits of their claims and the Court should deny their request for a preliminary injunction.

ii. None of the Plaintiffs have standing to bring a taxpayer action against the City of Columbus and cannot succeed on the merits of their first claim on this basis.

In order to bring a taxpayer action, Ohio law mandates that certain prerequisites be met. Those prerequisites are codified by R.C. 733.59. Among the prerequisites are a written demand by a taxpayer, made to the City's law director, to seek an "injunction to restrain the misapplication of funds of the municipal corporation, the abuse of its corporate powers, or the execution or performance of any contract made in behalf of the municipal corporation." R.C. 733.56. The Ohio Supreme Court has recognized, however, that "a taxpayer cannot bring an action to prevent the carrying out of a public contract or expenditure of public funds unless he has some special interest therein by reason of which his own property rights are put in jeopardy." *State ex rel. Masterson v. Ohio State Racing Comm'n*, 162 Ohio St. 366, 368, 123 N.E.2d 1 (1954). Thus, a plaintiff's interest in a taxpayer standing matter must be based on more than just their taxpayer status. *McBee v. Toledo*, 6th Dist. Lucas No. L-13-1101, 2014-Ohio-1555, ¶ 12. A Plaintiff must be individually impacted by the law in question. *Id.*

As an initial matter, both Ohioans for Concealed Carry ("OFCC") and Buckeye Firearms Foundation ("BFF") allege that they are not-for-profit corporations. Complaint at ¶¶ 3-4. They are, therefore, not taxpayers and cannot bring a taxpayer case in their own right. As the Eighth District Court of Appeals noted, "OFCC is not an individual taxpayer or citizen." *Ohioans for Concealed Carry, Inc. v. Cleveland*, 2017-Ohio-1560, 90 N.E.3d 80, ¶ 44. Since neither of these organizations can bring a claim on their own behalf, they cannot succeed on the merits of their taxpayer action claims.

Likewise, Gary Witt lacks standing to bring a taxpayer action case in this Court. He alleges that he is "a member of OFCC and a resident and taxpayer of the City of Columbus pursuant to R.C. § 733.59." Complaint at ¶ 5. He does not allege that he owns a bump stock or that he intends to purchase one. He does not allege that he owns a firearm or that he is in any way impacted by the City's weapons under disability ordinance (which would only impact him if he is illegally in possession of a weapon under federal law). Therefore, he has not alleged that he is in any way impacted by the ordinances at issue in this case and lacks standing to bring the taxpayer action claim.

Finally, none of the Plaintiffs can claim standing based upon attempting to enforce a public right. The Ohio Supreme Court has stated that for a taxpayer to maintain a cause of action under R.C. 733.59 in which he has no special right, "the 'aim must be to enforce a public right.'" *State ex rel. Fisher v. Cleveland*, 109 Ohio St.3d 33, 2006-Ohio-1827, ¶ 12 quoting *State ex rel. Caspar v. Dayton*, 53 Ohio St.3d 16, 20, 558 N.E.2d 49 (1990). "[O]nly 'when the issues sought to be litigated are of great importance and interest to the public [may they] be resolved in a form of action that involves no rights or obligations peculiar to the named parties." *State ex rel. Teamsters Local Union No. 436 v. Bd. of Cty. Comm'rs*, 132 Ohio St.3d 47, 2012-Ohio-1861, ¶

12 quoting *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 471, 715 N.E.2d 1062 (1999).

Further, Ohio has specifically held that the public rights doctrine only applies to "original actions in mandamus and/or prohibition." *State ex rel. ProgressOhio.org, Inc. v. JobsOhio*, 139 Ohio St.3d 520, 2014-Ohio-2382, ¶10. And the Court made it clear that it is skeptical that the public rights doctrine can even apply in a common pleas court. *Id.* at ¶¶ 11-12. However, even if the public rights doctrine would apply in general, it cannot apply in this case because none of the Plaintiffs have brought this case as a mandamus case or a prohibition action. Since the Plaintiffs cannot proceed on a public rights claim as taxpayers, they lack standing to assert any claims here and cannot prevail on the merits. As a result, this Court should deny their motion for a preliminary injunction.

iii. Plaintiffs lack standing to bring a declaratory judgment action against the City of Columbus and cannot succeed on the merits of their second claim on this basis.

In their second cause of action, the Plaintiffs have attempted to bring a declaratory judgment action against two of Columbus' common sense gun ordinances under R.C. 2721.03. In order to bring that claim, a plaintiff must plead "three prerequisites to declaratory relief: (1) a real controversy between the parties, (2) justiciability, and (3) the necessity of speedy relief to preserve the parties' rights." *Hamilton v. Ohio Dep't of Health*, 2015-Ohio-4041, 42 N.E.3d 1261, ¶ 23 (10th Dist.). Furthermore, R.C. 2721.03 is not an independent grant of standing; it is simply a legal basis for obtaining a declaratory judgment by a person who already has standing. *Autumn Care Ctr. Inc. v. Todd*, 2014-Ohio-5235, 22 N.E.3d 1105, ¶ 17 (5th Dist.) (citation omitted). Because the Plaintiffs have failed to plead the requisite requirements for a declaratory judgment action and have failed to show that they possess standing to challenge the City

ordinances, Plaintiffs cannot prevail on the merits and this Court should reject their motion for a preliminary injunction.

For the same reasons that Gary Witt lacks standing to bring a taxpayer action, he lacks standing to bring a declaratory judgment action. He has failed to allege that he owns or plans to purchase a bump stock, or that he owns a firearm and is presently under a federal disability from possessing a firearm. "To show standing, a private litigant: '[M]ust generally show that he or she has suffered or is threatened with direct and concrete injury in a manner or degree different from that suffered by the public in general, that the law in question has caused the injury, and that the relief requested will redress the injury.'" *State ex rel. Food & Water Watch v. State*, 10th Dist. Franklin No. 14AP-958, 2016-Ohio-3135 (10th Dist), ¶¶ 59-60 quoting *Bowers v. Ohio State Dental Bd.*, 142 Ohio App.3d 376, 380, 755 N.E.2d 948 (10th Dist. 2001), quoting *Sheward*, 86 Ohio St.3d at 469-70.

Likewise, the two organizational plaintiffs cannot bring this declaratory judgment action. These organizations do not claim to have suffered any direct injury to themselves as a result of the two common sense gun ordinances they seek to challenge. As a result, they have suffered no direct injury and cannot bring an action on their own.

Under certain circumstances, a trade organization "that has not suffered any injury nonetheless has standing on behalf of its members if (a) its members would otherwise have standing to sue in their own right; (b) the interests the association seeks to protect are germane to the association's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Thompson v. Hayes*, 10th Dist. Franklin No. 05AP-476, 2006-Ohio-6000, ¶ 56, citing *Hunt v. Washington State Apple Advertising Comm.*, 432 U.S. 333, 343 (1977). "However, to have standing, the association must establish that its

members have suffered actual injury." *Id.* citing *Ohio Contractors Ass'n v. Bicking*, 71 Ohio St.3d 318, 320 643 N.E.2d 1088 (1994). Therefore, "'the association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit.'" *Id.* quoting *Warth v. Seldin*, 422 U.S. 490, 511 (1975). Relying on this standard, the Tenth District found that a trade association representing bar owners had standing to challenge Ohio's smoking ban because the trade association had alleged that its members were suffering an economic injury. *Ohio Licensed Bev. Ass'n v. Ohio Dep't of Health*, 10th Dist. Franklin No. 07AP-490, 2007-Ohio-7147, ¶ 21.

In this case, however, neither organization alleges that its members have suffered any injury whatsoever or are in any way impacted by the Ordinances. Instead, OFCC alleges that it is "a not-for-profit Ohio corporation formed in 1999 and composed of firearm owners across the state of Ohio, including members who are taxpayers of the City of Columbus pursuant to R.C. § 733.59." Complaint at ¶ 3. BFF states that it is "a not-for-profit Ohio corporation formed in 2013 and composed of firearm owners across the state of Ohio, including members who are taxpayers of the City of Columbus pursuant to R.C. § 733.59." Complaint at ¶ 4. They do not allege that any of their members own bump stocks that either reside in Columbus or would transport that item through Columbus. They do not allege that any of their members are federally prohibited from possessing a firearm but that they still possess such a weapon in violation of federal law.

A challenge to the standing of a gun rights organization to bring such an action is not a radical or new idea. Numerous courts across the country have found that gun organizations and other plaintiffs lack standing to challenge gun ordinances or statutes on behalf of their members

or themselves when there is no allegation of actual impact.[1] None of the Plaintiffs can succeed on the merits of their claims on this basis and the Court should deny their motion for a preliminary injunction.

Even if this Court were to exam the merits of the Plaintiffs' claims—and it should not since the Plaintiff lacks standing to raise them—the Court will see that the Plaintiffs are not likely to succeed on the merits.

C. Plaintiffs do not have a Substantial Likelihood of Success on the Merits Because the City Ordinances do not Conflict with State Law.

Section 3, Article XVIII of the Ohio Constitution grants municipalities the "authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary, and other similar regulations, as are not in conflict with general laws." The Ohio Supreme Court has clearly stated that a municipality only exceeds its authority under the Home Rule Amendment of the Ohio Constitution when "(1) the ordinance is in *conflict* with the statute, (2) the ordinance is an exercise of the police power, rather than of local self-government,

[1] *See, e.g., Firearms Import/Export Roundtable Trade Group v. Jones*, 854 F.Supp.2d 1 (D.D.C. 2012) (holding that plaintiffs lack standing to challenge the Gun Control Act as unconstitutionally vague because they have not been subject of any enforcement action); *Voneida v. Pennsylvania*, 2012 WL 6685521 (3rd Cir. 2012) (plaintiff lacked standing to challenge background check laws because he could allege no more than a generalized grievance shared by the public and suffered no required particularized injury-in-fact); *Klayman v. President of the United States*, 689 Fed.Appx. 921 (11th Cir. 2017) (holding that a public advocate lacked Article III standing to challenge guidance from the ATF and SSA because he alleged that he might engage in future unlawful conduct and never indicated any concrete plans to do so); *Robinson v. Sessions*, 721 Fed.Appx. 20 (2nd Cir. 2018) (holding that plaintiffs do not have standing to challenge DOJ actions pursuant to the GCA and Brady Act because they failed to show a direct injury from the conduct since they were not unable to buy a gun, were not delayed in buying a gun, and did not have their information compromised due to background checks); *Clark v. City of Shawnee, Kansas*, 184 F.Supp.3d 1020 (D.Kan. 2016) (holding that plaintiff did not have standing to challenge a firearm statute because he faced no credible threat of prosecution); *Colorado Outfitters Assoc. v. Hickenlooper*, 823 F.3d 537 (10th Cir. 2016) (holding that a youth outdoor activities organization lacked Article III standing to challenge statute expanding mandatory background checks, that an advocacy organization lacked associational standing, and that sheriffs lacked Article III standing); *Montgomery v. Cuomo*, 291 F.Supp.3d 303 (W.D.N.Y. 2018) (holding that gun owners whose firearm licenses were suspended or revoked on basis other than a particular mental hygiene law lacked standing to challenge the law).

and (3) the statute is a general law." *Canton v. State*, 95 Ohio St.3d 149, 2002-Ohio-2005, ¶ 9 (emphasis added). "Where the statute fails to meet all of these conditions, it is not a general law, and, as such, it must yield to the municipal ordinance in question." *Cleveland v. State*, 2013-Ohio-1186, 989 N.E.2d 1072, ¶ 12 (8th Dist.) citing *Cleveland v. Ohio*, 2012-Ohio-3572, 974 N.E.2d 123, ¶ 19 (8th Dist.) citing *Canton*, 95 Ohio St.3d 149, 2002-Ohio-2005 at ¶ 9. The Columbus ordinances at issue do not conflict with R.C. 9.68 and, as such, the local ordinance must prevail.

i. Plaintiffs have not demonstrated a substantial likelihood of success on their claim that the City's Weapons Under Disability Ordinance violates state law.

In a rather unusual claim, the Plaintiffs ask this Court to enjoin a Columbus ordinance from prohibiting that which a federal law already forbids. The City's Weapons Under Disability Ordinance prohibits misdemeanor domestic violence abusers, individuals who have committed certain underlying felony offenses, or subjects of a protection order from possessing a firearm. Based upon the filings in this case, and his contemporaneous failure to weigh in on this provision, should the Court assume that Ohio Attorney General Mike DeWine agrees that this City ordinance does not violate R.C. 9.68? Attorney General DeWine's silence on the City's misdemeanor weapons under disability ordinance, while choosing to weigh in on the bump stock ban, is a legal curiosity. Nonetheless, the City certainly welcomes DeWine's support of this ordinance to protect Ohio's families by keeping firearms out of the hands of dangerous perpetrators who have injured or killed far too many Ohioans. Since 2016 alone, Columbus has identified at least ten individuals who were disabled under federal law from possessing a firearm by virtue of having committed the offense of domestic violence who subsequently used a firearm

in the commission of another crime. Further, three police officers from neighboring jurisdictions were tragically killed by people who were already disabled from possessing firearms.

The federal prohibition against possessing a firearm while under a disability is found at 18 U.S.C. 922(g) (attached as Ex. A). Federal law makes it unlawful for nine distinct classifications of individuals to possess a firearm.[2] On a statewide basis, Ohio has chosen not to separately criminalize all nine classifications. Rather, Ohio law criminalizes only a small subset of the federal law. In other words, Ohio has failed to provide separate state law penalties for numerous classifications of individuals who are disqualified under federal law from possessing a firearm.

By enacting the City's weapons under disability ordinance, Columbus City Code 2323.13, Columbus has recognized the importance of the United State Constitution's Supremacy Clause and closed the gap between federal law and the unduly lax state law. Thus, Columbus has provided local criminal penalties for those who choose to possess a firearm in the City of Columbus despite having been federally disqualified from doing so. In so doing, the City exercises its constitutionally protected home rule powers to confer upon its law enforcement officers the ability to remove these unlawfully possessed firearms from the streets of Columbus and to hold violators accountable.

The City's carefully crafted, common sense gun safety ordinance follows the dictates of R.C. 9.68 as there is no conflict between the City's ordinance and the general laws of the State of Ohio. In pertinent part, R.C. 9.68 provides that *"[e]xcept as specifically provided by* the United States Constitution, the Ohio Constitution, state law, or *federal law*, a person . . . may own, possess, purchase, sell, transfer, transport, store, or keep any firearm, part of a firearm, its

[2] An individual who is under federal disability but in possession of a firearm has committed a federal felony and that person is subject to a maximum of ten years in prison. 18 U.S.C. 924(A)(2).

components, and its ammunition." (emphasis added). Therefore, that which is banned under federal law can be banned by local ordinance so long as it does not conflict with state law.

The State of Ohio and its Attorney General claim that they seek uniform application of firearms laws throughout the State of Ohio. Ironically, in this case, it is the State that fails to provide uniform application of the laws. For example, federal law prohibits individuals who have been convicted of misdemeanor crimes of domestic violence, or individuals who are the subject of a protection order, from possessing firearms, but state law does not. In his brief, Attorney General Mike DeWine does not address this gigantic gap in the State's argument for uniformity. Taking it a step further, it would be hard to believe that the Plaintiffs and the Ohio Attorney General—in an effort to promote uniformity—are actually defending the domestic violence abuser's "right" to safely carry a gun across municipalities without a confusing patchwork of laws.

Despite Plaintiffs' arguments to the contrary, the City is not turning state felonies into misdemeanors. Motion for Preliminary Injunction at 9. As an initial matter, the Plaintiffs have articulated this argument but they have not pointed to one example of where the City has done this. The federal disability applies to any individual who has been convicted of a felony offense. 18 U.S.C. 922(g)(1). Ohio, however, only penalizes possession of a firearm by those who have been previously convicted of a "felony offenses of violence" R.C. 2923.13(A)(2) and/or a variety of felony drug offenses. R.C. 2923.13(A)(3). Ohio defines an "offense of violence" by providing a specific laundry list of code sections. R.C. 2901.01(A)(9). Ohio's weapons under disability felony offenses of violence provision applies only to those offenses listed in R.C. 2901.01(A)(9) that are felonies. R.C. 2923.13 (attached as Ex. B).

The City's Weapons Under Disability Ordinance does not include any of the offenses already criminalized under Ohio law. C.C.C. 2323.13(A)(1)(a)-(g) (attached as Ex. C). Instead, every underlying offense listed in the City's ordinance falls within the area of conduct prohibited by the federal statute but not addressed by State law. Thus, the City—by prohibiting that which is already prohibited under Federal law—is acting within its authority under R.C. 9.68.

Similarly, Columbus has not attempted to turn federal felonies into misdemeanors. Although Plaintiffs make this meritless claim in their memorandum in support of a preliminary injunction, they fail to cite any law to support such an argument and they fail to further develop that argument. Motion for Preliminary Injunction at 4. The City fully admits that any violation of its weapons under disability ordinance is a misdemeanor offense. The City, however, only has the legal authority to pass misdemeanor criminal offenses. While it is true that federal law makes possession of a firearm by these affected individuals a felony subject to ten years in prison, the City has done its best to criminalize what it can by making the same behavior subject to a year in jail with six months mandatory jail time. The City's approach of making these offenses misdemeanors is not unusual. Numerous States, including our neighbors in Indiana and West Virginia, have passed misdemeanor prohibitions similar to the ordinance at issue in this case.[3] Ideally, Ohio would mirror federal law and make possession of a firearm by an individual

[3] *See* Code of Ala. §13A-11-72(b) (Alabama—firearm possession by an addict or habitual alcoholic); A.C.A. §5-73-103 (Arkansas—firearm possession by one with prior felony, or adjudicated mentally ill, or committed to an institution without aggravating circumstances); Cal. Pen. Code §§29825 and 29805 (California—firearm possession by one subject to a temporary restraining order or one convicted of a felony firearm offense); Fla. Stat. §790.233 (Florida—firearm possession by one subject to DV restraining order); HRS §134-7 (Hawaii—firearm possession by and addict, one with mental illness, those under 25 with felony convictions, the subject of a restraining order); Burns Ind. Code Ann. §35-47-4-6 (Indiana—firearm possession by one convicted of DV); La. R.S. §46:2136.3 (Louisiana—firearm possession by the subject of a protective order for DV); Minn. Stat. §624.713 (Minnesota—firearm possession by most federal disqualifiers, without aggravating circumstances); N.D. Cent. Code §62.1-02-01 (North Dakota—firearm possession by mentally ill); ORS §166.250 (Oregon—firearm possession by prior felony conviction, mentally ill); S.C. Code Ann. §16-25-30 (South Carolina—firearm possession by subject of a protection order); Tenn. Code Ann. §39-17-1307 (Tennessee—firearm possession by prior DV conviction, subject of a protection order, all other WUDs); Tex. Penal Code §46.04 (Texas—firearm possession by prior DV conviction,

who has a misdemeanor domestic violence conviction or is the subject of a protection order a felony, but the State has made the policy choice to not criminalize this behavior. We would hope that the State joins in the City's common sense approach to firearms and to the protection of Ohio's families and police forces.

Just as the City is free to make these federal disability provisions a misdemeanor under the City's code, it is also not compelled to include an "interstate commerce" element to do so. The Plaintiffs are simply mistaken in their argument that the City must establish that a firearm has been moved in or otherwise affected interstate commerce in order to include it in the City's weapons under disability ordinance. Inexplicably, the Plaintiffs have used double jeopardy law in trying to make this argument. Again, interestingly, the Ohio Attorney General has offered no opinion about whether an "interstate commerce" requirement exists.

The Plaintiffs' argument fails for two reasons. First, United States Supreme Court precedent unequivocally holds that the necessity of proving movement in interstate commerce is merely a jurisdictional element necessary to a successful federal prosecution. *Torres v. Lynch*, 136 S.Ct. 1619, 1631-32 (2016). It is not an element of the offense itself. Second, in determining whether the City's ordinance is in alignment with federal law, double jeopardy jurisprudence is irrelevant. The Court is, instead, to look at the long list of federal cases that determine whether state crimes correspond to federal offenses.

In *Torres*, the United States Supreme Court addressed the question of whether a New York arson offense qualified as an aggravated felony under the Immigration and Nationality Act. In order to qualify as an aggravated felony under federal law, the state law violation must mirror an existing federal offense. The New York statute contained all the elements of the federal

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subject of a protection order); Va. Code Ann. §18.2-308.1:4 (Virginia—firearm possession by subject of protection order); and W. Va. Code §61-7-7 (West Virginia—firearm possession by most federal disqualifiers).

offense—save one: the New York statute did not contain the element of interstate commerce as the federal offense did. *Id.* at 1634. The Supreme Court recognized that the interstate commerce provision of the federal statute was purely jurisdictional, not substantive, and found the State law and federal law to be in alignment.

The Supreme Court's analysis is equally persuasive when the determination must be made by a state court judge. For instance, in determining whether a municipal ordinance is substantially similar to a state law so as to constitute a prior offense, state trial court judges must compare the elements of the offenses. Every successful prosecution of a municipal ordinance must include proof that the violation occurred within the municipality's corporate boundaries (in order to establish both the jurisdiction of the court and applicability of the ordinance), but the existence of this additional jurisdictional element does not create a lack of correspondence with a parallel state law offense. Thus, the City's Weapons Under Disability Ordinance, C.C.C. 2323.13, is not in conflict with R.C. 9.68. As a result, the Plaintiffs cannot prevail on this claim and have failed to demonstrate any chance of success on the merits. For this reason, this Court should reject their motion for a preliminary injunction.

ii. Plaintiffs have not demonstrated a substantial likelihood of success on their claim that the City's bump stock prohibition violates state law.

As previously mentioned, in response to the tragedy that occurred in Las Vegas in which fifty-eight people died and another four hundred eighty-nine people were wounded by a person using a bump stock, the City of Columbus properly exercised its corporate powers to prohibit possession of a bump stock within city limits. The Ohio Attorney General weighs into this case in order to claim that "binding precedent of the Ohio Supreme Court make[s] clear that city ordinances must give way to the general laws of the State." Amicus Brief at 1. However, that is only half the story. As the Ohio Supreme Court has made clear, a city's ordinance must only

give way to the general laws of the State of Ohio when the ordinance and state law are in conflict. *Canton*, 95 Ohio St.3d 149, 2002-Ohio-2005 at ¶ 9.

R.C. 9.68 speaks of the need to provide uniform laws in regulating firearms and "their components." It also authorizes a person to possess a "firearm, part of a firearm, its components, and its ammunition" except as specifically provided by state or federal law. *Id.* As the Plaintiffs note, the word "accessories" is not found anywhere in R.C. 9.68. Motion for Preliminary Injunction at 9. It is significant that the word "accessories" does not appear in the statute as that signifies accessories are simply not covered by that statute. Since illegal rate-of-fire acceleration devices such as bump stocks are accessories, the City is free to regulate those items and does not come into conflict with a general law of the State of Ohio.

The ability of the City to regulate bump stocks is clear by simply performing even the most elemental of statutory construction. The State has filed a brief in which it informs the Court that words should be given their "usual, normal, and customary meaning." Amicus Brief at 4. The Attorney General then recites the definition of "component" that appears on Dictionary.com. The Attorney General, however, does not demonstrate anything about why the City of Columbus is prohibited from regulating accessories.

It is true that words in legislative enactments should be given their usual, normal, and customary meaning. But there are several other canons of statutory interpretation that this Court needs to employ before it can reach a decision on whether bump stocks are accessories or components. R.C. 1.42 provides that "[w]ords and phrases shall be read in context and construed according to the rules of grammar and common usage. Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly." As a judicial corollary, the Ohio Supreme Court recognizes that when "a statute is

unambiguous, we apply it as written." *Portage Cty. Bd. of Comm'rs V. Akron*, 109 Ohio St.3d 106, 2006-Ohio-954, ¶ 52. Another judicially recognized rule of statutory construction is "*maxim expression unius est exclusion alterius*" or the express inclusion of one thing implies the exclusion of the other. *See, e.g., State ex rel. Presbyterian Ret. Servs. v. Indus. Comm'n of Ohio*, 151 Ohio St.3d 92, 2017-Ohio-7577, ¶ 28.

The Attorney General does not actually make any substantive argument as to why a bump stock qualifies as a component instead of an accessory. Amicus Brief at 4. And neither the State nor the Plaintiff argues that a bump stock is an essential or constituent element of a firearm. Instead, it is a "device affixed to a gun that changes the way in which a weapon functions." *Id.* This would be akin to arguing that by adding an engine to a bicycle to create a motorbike one has changed a component of the bicycle.

The difference between a part and an accessory is something that is frequently litigated in the tariff or customs context. "In customs classification cases, for an article to be considered a 'part,' rather than an accessory, it must be an integral, constituent, or component part, without which the article to which it is to be joined could not function." *Auto-Ordnance Corp. v. United States*, 822 F.2d 1566, 1570 (Fed. Cir. 1987). Conversely, "an accessory is commonly defined as 'a thing of secondary or subordinate importance . . . . An object or device that is not essential in itself but adds to the beauty, convenience, or effectiveness of something else.'" *Id.* at 1569-70 quoting *Webster's Third New International Dictionary* 11 (1981). A bump stock is a device which is an aftermarket add-on to a weapon. It is not manufactured as a part of the firearm, nor is it essential to the operation of the firearm. It is properly classified as an accessory because it is "an element which is not essential to the operation of an article." *Id.* at 1570. In addition, bump

stocks do not merge with or become an integral part of a firearm. They are, therefore, neither a part nor a component and are properly regulated by the City as an accessory.

Most instructive for this Court may be how the creators and manufacturers of bump stocks describe their own devices. In at least four patent applications located by Defendants, Slide Fire Solutions uses the term "accessory" to describe their bump stocks. U.S. Patent Appl. No. 2012/0117843 A1 (filed May 17, 2012) ("The present invention relates generally to firearms, and more particularly toward a sliding interface for a sliding stock accessory used with semi-automatic firearms to enable sequential firing of ammunition rounds utilizing human muscle power to discharge each round while controlling the aim of the firearm.") (emphasis added); U.S. Patent Appl. No. 2012/0240441 A1 (filed Sep. 27, 2012) ("The present invention relates generally to firearms, and more particularly toward a manually reciprocated bump-stock accessory for semi-automatic firearms.") (emphasis added); U.S. Patent Appl. No. 2012/0291328 A1 (filed Nov. 22, 2012) ("The present invention relates generally to firearms, and more particularly toward a manually reciprocated bump-stock accessory for semi-automatic firearms.") (emphasis added); U.S. Patent Appl. No. 2012/0311907 A1 (filed Dec. 13, 2012) ("The present invention relates generally to firearms, and more particularly toward a manually reciprocated gun stock accessory for enabling rapid fire of a semi-automatic firearm.") (emphasis added). Likewise, Slide Fire's accepted patent also describes their invention as a "bump stock accessory." U.S. Patent No. 8,356,542 B2 (filed Jan. 22, 2013) (emphasis added).

Slide Fire also described itself and the opposing party in a patent infringement lawsuit as companies who market and sell firearm "accessories," including bump stocks. Complaint at 2, 3, *Slide Fire Solutions, LLP v. Bump Fire Systems*, N.D. Tex. No. 3:14-CV-3358, 2016 U.S. Dist. LEXIS 83005 (April 14, 2016). This is similar to how William Akins classified his company in

litigation with the ATF before the United States Court of Appeals for the Eleventh Circuit. In his appellate brief, Akins described the company manufacturing the bump stock as an "accessory manufacturer." Brief of Plaintiff-Appellant, *Akins v. United States*, 312 Fed. App'x 197, 198 (11th Cir. 2009) (per curiam) (emphasis added). Significantly, he further argues that the government should have no interest in regulating the Akins Accelerator, which is the original bump stock, because "the government has no interest in regulating devices that are firearm accessories (and therefore not firearms at all). *Id.* (emphasis added).

Plaintiffs rely solely on their expert's affidavit regarding how the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") classifies bump stocks and similar items as parts or components of a firearm. Motion for Preliminary Injunction at p. 9. First, the affidavit speaks in terms of legal distinctions between firearms and accessories and not factual statements regarding them. As a result, those comments are not properly admissible evidence and must be struck from the affidavit. Further, the research attached to the affidavit expressly states that the ATF classifies devices "based on the definitions in the Gun Control Act (GCA) and the National Firearms Act (NFS)." Motion for Preliminary Injunction, Exhibit 2. However, there are no definitions of components or accessories given in either of those laws. As well, the affiant cannot and does not address whether a bump stock is properly defined as a component or accessory because the ATF's work on bump stocks is primarily focused on whether they qualify as a machinegun. *See, e.g., Justice Department and ATF Begin Regulatory Process to Determine Whether Bump Stocks Are Prohibited* (Dec. 5, 2017), available at https://www.justice.gov/opa/pr/justice-department-and-atf-begin-regulatory-process-determine-whether-bump-stocks-are. As such, this affidavit is at best not helpful to the Court's determination and at worst it is misleading and inadmissible.

Second, to the extent the affiant purports to speak for the ATF it is completely inappropriate because affiant is a former, not a current, member of the ATF. When properly reviewed, the best that can be said about the ATF's classifications of bump stocks is that it offers a mixed bag with no definitive definition. For instance, there are several places where the ATF refers to bump stocks as an accessory. *See, e.g.*, *ATF Rul. 2006-2* ("ATF has examined several firearms accessory devices that are designed and intended to accelerate the rate of fire for semiautomatic firearms.") (emphasis added); 82 C.F.R. 246 (2017) ("Since 2008, ATF has issued a total of 10 private letters in which it classified various bump stock devices to be unregulated parts or accessories") (emphasis added). In litigation regarding bump stocks and the ATF, at least one court also described bump stocks as an "accessory" and not a component. *Akins*, 312 Fed. App'x at 198.

Finally, the ATF also noted in its recent proposed rule on bump stocks that bump stocks are devices intended to be used to *convert* a semiautomatic firearm to increase the firearm's firing rate to mimic automatic fire. 82 C.F.R. 246 (2017) (emphasis added). That is, a semiautomatic weapon is created and manufactured and then the bump stock is added to that firearm to change its characteristics. This is not a "part of a firearm" or a "component" of one. As Plaintiffs' expert Rick Vasquez put it in an interview, "It's a goofy little doodad . . . It's for those guys who want to look like super ninja when they're out on the range." Aaron C. Davis et al., *The ATF-approved 'goofy little doodad' used by Las Vegas Gunman Stephen Paddock*, WASH. POST, October 4, 2017, https://www.washingtonpost.com/investigations/the-goofy-little-doodad-approved-under-obama-that-was-used-in-las-vegas-carnage/2017/10/04/3a1a2104-a935-11e7-850e-2bdd1236be5d_story.html?noredirect=on&utm_term=.7a000f99d031.

Going back to the rules of statutory construction, it becomes obvious that the City can regulate bump stocks under R.C. 9.68. As the Attorney General points out, words must be given their "usual, normal, and customary meaning." Further the express inclusion of one thing implies the exclusion of the other. *State ex rel. Ohio Presbyterian Ret. Servs*., 151 Ohio St.3d 92, 2017-Ohio-7577 at ¶ 28. The only conclusion that one can reach is that a bump stock, defined as an accessory in the patent applications filed by their manufacturers, is not a component or part covered by R.C. 9.68. The General Assembly chose to include the word component and part in the statute but also chose not to include the word accessories. This distinguishes Ohio's firearms preemption law from the firearms preemption laws of many other states, where the legislatures did include the word and preempt regulation of "accessories," recognizing that "accessories" are different from "components."[4]

"If . . . the General Assembly finds that its original intention was not accomplished in the words that it chose, then it, and it alone, has the constitutional authority to amend the statute to conform to its intention." *State ex rel. Clay v. Cuyahoga Cty. Med. Exam'rs Office*, 152 Ohio St.3d 163, 2017-Ohio-8714, ¶ 40. Since a bump stock is an accessory, the City can regulate a bump stock without conflicting with a general law of the State. As a result, the Plaintiffs are not likely to prevail on this claim and the preliminary injunction must not be granted.

D. The Plaintiffs will suffer no harm in the absence of an injunction because they have failed to show the ordinances will impact them in anyway.

[4] Code of Ala. § 13A-11-61.3(c) (preempting "the entire field of regulation in this state touching in any way upon firearms, ammunition, and firearm accessories"); Ariz. Rev. Stat. § 13-3108(A) (prohibiting a political subdivision from regulating "firearms or ammunition or any firearm or ammunition components or related accessories"); Ind. Code § 35-47-11.1-2 (providing that "a political subdivision may not regulate: [ ] firearms, ammunition, and firearm accessories"); Ky. Rev. Stat. § 65.870(1) (announcing that no locality "may occupy any part of the field of regulation of . . . firearms, ammunition, components of firearms, components of ammunition, firearms accessories, or combination thereof"); Nev. Rev. Stat. § 244.364(1)(b) (providing that regulation of "firearms, firearm accessories and ammunition . . . is within the exclusive domain of the Legislature"); Wyo. Stat. § 6-8-401(c) (except as otherwise authorized, no locality may regulate "firearms, weapons, accessories, components or ammunition").

Plaintiffs have produced absolutely no evidence that they will suffer any injury in the absence of an injunction. Based upon the allegations in the complaint and the arguments raised in their motion, the Plaintiffs are not impacted by the weapons under disability ordinance at issue in this case. As noted above, the individual plaintiff may not even own a firearm. And neither he nor the organizational Plaintiffs can claim any harm due to enforcement of the weapons under disability statute (unless they are claiming they are in illegal possession of firearms under federal law). It seems implausible that the purpose of either of the two organizational Plaintiffs is to aid those convicted of domestic violence, for instance, to be able to carry firearms in contravention of federal law, but if that is the case, then the organizational Plaintiffs must state in their complaint that is their purpose. Likewise, because there is simply no evidence before this Court that any affected Plaintiff or individual has a bump stock, they will not suffer any harm if an injunction is denied. Plaintiffs cannot establish by clear and convincing evidence this factor which is required for a preliminary injunction. *Hydrofarm, Inc.,* 180 Ohio App.3d 339, 2008-Ohio-6819 at ¶ 18.

E. Third parties will be greatly harmed as a result of an injunction in this case and Plaintiffs offer no evidence to the contrary.

Plaintiffs have presented even less evidence concerning whether third parties would be harmed by an injunction in this case. Instead, they have simply made the blanket statement that no such future harm exists. They have not met their burden of proof by clear and convincing evidence as it relates to this element. *Id.* Furthermore, it is clear that the public at large will suffer harm if this Court issues a preliminary injunction.

First, as it relates to questions about the weapons under disabilities ordinance, the public will be greatly harmed with an injunction because individuals impacted by that ordinance *are already violating federal law*. They cannot have a firearm in their possession. And as will be

shown through evidence in this case, domestic violence and the use of firearms go hand in hand. Individuals who have had previous domestic violence convictions have used firearms against both their victims and police officers in our community and neighboring communities. The Columbus weapons under disability ordinance gives the City a way to address this issue. If local law enforcement becomes aware of a prohibited person possessing a firearm, they can get a warrant, attempt to arrest the individual, and confiscate the firearm in a safe manner. That is a better and safer scenario than being called out to another domestic violence situation where the abuser has a gun and is threatening to use it on his victim or law enforcement.

In fact, in a case arising in the Fourth District, the Ohio Attorney General successfully defended the State's weapons under disability ordinance from a constitutional attack. *See, State v. Wheatley*, 2018-Ohio-464, 94 N.E.3d 578 (4th Dist.). In that case, the court collected numerous cases that found that keeping firearms out of the hands of criminals or drug addicts serves a substantial state interest. *Id.* at ¶¶ 21-25. As the court noted, "'firearms in the possession of those who are drug dependent, or in danger of becoming such, [creates] a circumstance where substantial harm could result to the public.'" *Id.* at ¶ 24 quoting *State v. White*, 1997 Ohio App. LEXIS 1598 at * 3-4; *see also United States v. Salerno*, 481 U.S. 739, 747 (1987) ("There is no doubt that preventing danger to the community is a legitimate regulatory goal.").

Similarly, the public will be harmed if the bump stock ordinance is enjoined. First, the public has a right to have their properly enacted ordinances enforced. Since the Columbus ordinance has been properly enacted, the government is irreparably harmed if it is enjoined from enforcing a constitutional enactment. *See, e.g., Summit Cty. Democratic Cent. & Exec. Comm. v. Blackwell*, 388 F.3d 547, 551 (6th Cir. 2004). This is truly compelling when the object of the

government regulation is something that just recently was used to murder fifty-eight people and wound an additional four hundred eighty-nine. A blanket statement that the public will not be harmed if an injunction were to issue cannot contradict these real and substantial harms.

F. The public interest weighs heavily in favor of denying an injunction.

In addition, Plaintiffs have presented no evidence showing that the public interest weighs in favor of granting an injunction. Defendants' argument concerning harm to third parties equally shows that the public interest greatly weighs in favor of denying an injunction. The public has a clear and overwhelming interest in taking guns out of the hands of previously convicted domestic abusers. That same interest is true for prohibiting a dangerously lethal accessory—bump stocks.

As another judge of this court has stated, "[i]t is well-established that courts must exercise caution in granting injunctions affecting public work, or which would override decisions of another department of government." *UnitedHeathCare Servs. v. Ohio Dep't of Admin. Servs.*, Franklin C.P. No. 16CV-5023, 2016 Ohio Misc. LEXIS 73, at *7. The Plaintiffs have only told this Court that the public interest rests solely on the back of R.C. 9.68. But as demonstrated above, R.C. 9.68 does not apply to this case. The Columbus Weapons Under Disability ordinance is not impacted by that statute because the City's ordinance follows the requirements of federal law. R.C. 9.68 and the Supremacy Clause of the United States Constitution recognize that the City can follow federal law and that federal law supersedes any state law. Nor does R.C. 9.68 preclude the City's bump stock ban because a bump stock is an accessory—something Ohio law does not address.

Finally, any argument that individuals might inadvertently violate the Columbus ordinances is simply not compelling. As the Attorney General successfully argued in *State v.*

Wheatley, 2018-Ohio-464, 94 N.E.3d 578 (4th Dist.), ignorance of the law is not an excuse to breaking the law. "'[T]he United States Supreme Court has recognized '[t]he general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution is deeply rooted in the American legal system.'" *Id.* at ¶ 36 quoting *Cheek v. United States*, 498 U.S. 192, 199 (1991). Further, the simple fact that someone might violate a duly enacted law cannot seriously be used as a basis for why the public interest weighs in favor of an injunction.[5] If so, this would swing this factor in favor of anyone seeking to enjoin a criminal statute. There must be more substance to it than that and Plaintiffs offer none.

III. CONCLUSION

For the foregoing reasons, the City of Columbus respectfully requests that this Court deny the Plaintiffs' motion for a preliminary injunction.

Respectfully,

CITY OF COLUMBUS, DEPARTMENT OF LAW
ZACH KLEIN

/s/ Lara N. Baker-Morrish
Lara N. Baker-Morrish (0063721)

[5] Notably, Plaintiffs do not and cannot claim that either of the City ordinances violates their constitutional rights. The only constitutional issues they raise involve the Ohio Constitution's Home Rule provisions which, ironically, are designed to protect and empower municipalities.

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CERTIFICATE OF SERVICE

This is to certify that the foregoing Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction has been served by operation of this Court's electronic filing system upon the following on this 29th day of June 2018:

/s/ Lara N. Baker-Morrish
Lara N. Baker-Morrish
City Solicitor General