

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

CHUCK KLEIN, et al.	:	APPEAL NOS.	C-020012
			C-020013
Plaintiffs-Appellees,	:		C-020015
			C-020021
v.	:	TRIAL NOS.	A-0107121
			A-0004304
SIMON L. LEIS, SHERIFF, et al.	:		
Defendants-Appellants.	:		

BRIEF OF CITY OF CINCINNATI DEFENDANTS-APPELLANTS

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I. INTRODUCTION

Since the 1800s, the Ohio General Assembly has limited the public carrying of concealed weapons by civilians to those with a legitimate defense need. Ohio courts have consistently upheld these laws. Virtually every state in the nation has long recognized the grave risks posed by allowing deadly hidden weapons in public places. All states like Ohio with significant metropolitan areas ban the concealed carrying of firearms by untrained, unlicensed civilians.

The plaintiffs, fronted by an organization from the State of Washington called The Second Amendment Foundation,¹ sought to jettison these historic policies and precedents, and a biased trial court agreed. Ridiculing the position of defendants (the State of Ohio, the City of Cincinnati, Hamilton County, and a host of chiefs of police) as "baying from gun opponents,"² the trial court simply substituted its personal views about whether people should be able to carry concealed weapons in public places for the judgment of the Ohio General Assembly. This was reversible error.

The legal issue at the heart of this case was laid to rest early on when counsel for the plaintiffs conceded: "We have not alleged that there is a fundamental constitutional right to carry a concealed weapon."³ There were no genuine issues of material fact. The constitutionality of carrying concealed weapons laws has been long established. There are reasonable public safety grounds for the challenged statutes and no evidence suggested otherwise. The plaintiff's witness admitted that reasonable people can differ about carrying concealed weapons policies. No matter. The trial court's overwhelming preexisting views trumped the evidence and the law. Before hearing any evidence the trial court stated that it "always had a problem with this statute." In the end, the

¹ Klein deposition testimony, T.d. 175, pp. 57-68.

² Findings of Fact and Conclusions of Law, T.d. 231, p. 33

³ Supplemental Record, Transcript, Hearing dated September 7, 2000, p.13.

trial court declared that because it believed that there are Apeople in our society who refuse to follow any rules and who can never be reasoned with or rehabilitated,@ who Ahave no conscience and no qualms about doing harm to innocent persons,@ and who Aunderstand[] only one thingB brute force,@ A[a]s a consequence, every law-abiding citizen of this state has the right to protect him or herself with a concealed firearm.@⁴

Constitutional rights cannot be created by a trial court based on what it personally believes is necessary to respond to a sometimes brutal world. A trial court cannot substitute its judgment for the legislature. A trial court cannot simply disregard evidence that does not comport with its preexisting views. A trial court cannot apply erroneous standards of judicial review. Plaintiffs cannot seek advisory opinions. But all that (and more) happened in the case at bar. The Ohio General Assembly is entitled to protect public safety by regulating the public carrying of concealed weapons for private purposes, the laws at issue have already been declared constitutional, the plaintiffs did not have standing, and they did not approach satisfying their burden of proof. The trial court=s improper legislative act should be reversed.

II. STATEMENT OF THE CASE

1. PROCEDURAL POSTURE

⁴ Findings of Fact and Conclusions of Law, T.d. 231, p. 33.

This action (Court of Common Pleas Case No. A 0004340) challenging the State of Ohio=s carrying concealed weapons statutes⁵ was commenced by a complaint filed on July 17, 2000, along with a motion for a temporary restraining order.⁶ The complaint and motion were filed at a time when Judge Robert Ruehlman was designated equity judge. The related, now consolidated, complaint and motion for temporary restraining order were later filed by other plaintiffs on October 16, 2001, also at a time when Judge Robert Ruehlman again was designated equity judge (Case No. A 0107121).⁷

The morning after the original complaint was filed, after declining to take testimony from Ltc. Richard Janke of the Cincinnati Police Division,⁸ the trial court granted the plaintiffs= motion for a temporary restraining order, thereby enjoining the City from enforcing the State=s carrying concealed weapons statutes. Upon petition of the City of Cincinnati and Hamilton County, this court issued a stay against enforcement of the trial court=s temporary restraining order.⁹

The City filed a motion to dismiss on August 8, 2000.¹⁰ On September 14, 2000, the trial court summarily denied the City=s motion to dismiss.¹¹ On September 22, 2000, the trial court summarily denied the City=s uncontested motion for admission of out of state counsel *pro hac*

⁵ R.C. 2923.12, R.C. 2923.16, R.C. 4749.06, and R.C. 4749.10.

⁶ T.d. 2, 4, 5, Case No. A 0004340.

⁷ T.d. 2, 3, Case No. A 0107121.

⁸ Transcript, p. 7.

⁹ Case No.C-000548, Entry Granting Stay entered July 28, 2000.

¹⁰ T.d. 26, Case No. A0004340.

¹¹ T.d. 119, Case No. A 0004340.

*vice.*¹² The City filed a motion for summary judgment in Case No. A 0004340 on November 7, 2000.¹³ The City filed a motion to dismiss the complaint in Case No. A 0107121 on November 14, 2001.¹⁴ The trial court summarily denied the motion for summary judgment and the motion to dismiss on November 29, 2001.¹⁵

¹² T.d. 126, Case No. A 0004340. The City's out of state counsel was eventually admitted by the trial court after the City successfully appealed this court's dismissal of the City's appeal to the Supreme Court of Ohio.

¹³ T.d. 165, Case No. A 0004340.

¹⁴ T.d. 145, Case No. A 0107121.

¹⁵ T.d. 213, Case No. A 0004340.

The two consolidated complaints were tried to the court commencing November 29, 2001. The City filed a motion seeking the trial court=s recusal on December 4, 2001,¹⁶ and renewed the motion on December 31, 2001.¹⁷ The trial court denied the City=s motion¹⁸ and denied the renewed motion.¹⁹ The City made a motion for judgment at the close of the plaintiffs= case and the trial court

¹⁶ T.d. 215, Case No. A 0004340.

¹⁷ T.d. 222, Case No. A 0004340.

¹⁸ Transcript, pp.194-195; the trial court=s reference to counsel not following @the rules@ concerning the uncontested motion for admission of out of state counsel *pro hac vice* is the trial court=s retrospective effort to impose a requirement that uncontested motions for admission *pro hac vice* be set for hearing before the trial court even though the Ohio Rules of Civil Procedure and the Rules of the Hamilton County Court of Common Pleas do not require that motions be set for hearing and even though no court, as a matter of practice, requires that uncontested motions for admission *pro hac vice* be set for hearing. The trial court retrospectively asserted that its decision was supported by a @Judicial Profile@ in the back of the Cincinnati Bar Telephone Directory; even though the @Judicial Profile@ does not expressly require that uncontested motions be set for hearing by counsel, the trial court asserted that it could be interpreted to override the Ohio Rules of Civil Procedure and the Rules of the Hamilton County Court of Common Pleas. This assertion by the trial court was first made after the City had appealed the court=s summary denial of the uncontested motion.

¹⁹ T.d. 228, Case No. A 0004340.

took the motion under advisement.²⁰ The trial court entered Findings of Fact and Conclusions of Law and Final Judgment in favor of all the plaintiffs, and the public at large, on January 10, 2002.²¹ The City timely appealed.²²

The City also incorporates by reference the procedural posture presented by the State of Ohio and by Hamilton County.

2. STATEMENT OF FACTS

²⁰ Transcript, pp. 508-513.

²¹ T.d. 231, 232 Case No. A 0004340; T.d. 166 Case No. A 0107121.

²² Notice of Appeal, T.d. 234.

Only three plaintiffs appeared to testify in these consolidated cases: Chuck Klein, James H. Cohen, and Patrick Feely. The other plaintiffs did not appear and prosecute their cases at trial. Plaintiffs Klein, Cohen, and Feely each carry a concealed weapon and each believes he has an affirmative defense to a potential charge of carrying a concealed weapon.²³ The plaintiffs did not, however, establish what specific weapon each carries. Klein, Cohen, and Feely did not establish that they have ever been charged, or are likely to be charged, by the City of Cincinnati with the offense of carrying a concealed weapon. Cohen and Feely do not even live in the City of Cincinnati. Klein, Cohen, and Feely did not establish that there are pending carrying concealed weapons charges against them by the City of Cincinnati or by any other political jurisdiction. Klein, Cohen, and Feely did not establish any likelihood that they would be charged by the City of Cincinnati with the offense of carrying concealed weapons.

None of these three plaintiffs established that there is a sufficient likelihood of substantial and immediate irreparable injury to them by the City of Cincinnati defendants to warrant enjoining the City from enforcing State of Ohio criminal laws. The City of Cincinnati has not taken a definitive position that adversely affects plaintiffs Klein, Cohen, or Feely. The record does not reflect that the City of Cincinnati intends to charge Klein, Cohen, or Feely with the offense of carrying a concealed weapon. Rather, the record reflects that officers in the Cincinnati Police Division are trained to consider the totality of circumstances, including the existence of an affirmative defense, when determining whether there is probable cause for an arrest. The record further reflects that Cincinnati Police Division officers consider the existence of an affirmative

²³ Trial transcript 236, 237; 252, 259-260; 279-281.

defense when determining whether probable cause exists for the charge of carrying a concealed weapon.²⁴

²⁴ Trial transcript, Ltc. Richard Janke testimony, beginning p. 429, *passim*.

Cincinnati Police Division law enforcement officers are instructed in the enforcement of all state codes including the elements of the offense, the availability of affirmative defenses, and the need for probable cause to exist for an arrest.²⁵ The Cincinnati Police Division officers are trained to consider affirmative defenses.²⁶ Cincinnati Police Division officers are responsible for conducting an investigation to establish probable cause for an arrest for a violation of the State=s carrying concealed weapons statutes.²⁷ The Cincinnati Police Division considers it inappropriate to charge an individual with carrying a concealed weapon if the individual has an affirmative defense.²⁸

Plaintiffs Klein, Cohen, and Feely have not been charged by the City of Cincinnati with unlawfully carrying concealed weapons. They are not likely to be charged with the offense if they have an affirmative defense. The State=s carrying concealed weapons statutes regulate behavior of a specific type and serve as a tool for law enforcement. The statutes allow an officer to intervene prior to the commission of some other type of crime by a person who has not yet committed any crime, but may be unlawfully carrying a concealed weapon.²⁹ In those instances where Cincinnati Police

²⁵ *Id.*, pp. 434-436.

²⁶ *Id.*, pp.435-436, 456-458.

²⁷ *Id.*, pp. 435-436.

²⁸ *Id.*, pp. 435-436, 441.

²⁹ *Id.*, pp. 437-440.

Division officers have a question concerning the existence of probable cause for arrest or the availability of affirmative defenses they consult with their supervisors and prosecutors.³⁰

³⁰ *Id.*, pp. 436, 444.

In general, concealed weapons present a risk to all citizens, including police officers.³¹ There is no way to know that an individual who has been law-abiding one moment will be law-abiding the next.³² The Ohio State Highway Patrol enforces the carrying concealed weapons statutes in a manner similar to the City of Cincinnati and has similar concerns.³³ The Hamilton County Sheriff=s Department also enforces the carrying concealed weapons statutes in a manner similar to the City of Cincinnati and has similar concerns.³⁴

Professor Franklin E. Zimring offered expert testimony on behalf of the City of Cincinnati defendants. Professor Zimring has authored, in whole or in part, at least 21 books and monographs on issues relating to crime, many of which relate to gun policy, including concealed carry of weapons, as well as 100 scholarly articles, over 100 additional articles, and at least seven reports to governmental agencies. His writings include an analysis and critique of studies regarding the effects of concealed carrying of firearms, and a book on the lethal effects of gun violence. Professor Zimring=s curriculum vitae sets forth his qualifications and expertise. Plaintiffs stipulated to its admissibility and accuracy.³⁵

³¹ *Id.*, p. 484.

³² *Id.*, p. 485.

³³ Major J.P. Allen, trial testimony, *passim*.

³⁴ Colonel Raymon Hoffbauer, trial testimony, *passim*; Sergeant Luke, trial testimony, *passim*.

³⁵ Court exhibit (Transcript, p. 500), T.d. 207, Zimring trial testimony at 8:17 B 9:10; City of Cincinnati

Defendants= Exhibit A.

Professor Zimring's expert testimony supports the conclusion that the Ohio legislature's statutory scheme regarding the concealed carrying of weapons is reasonable. Professor Zimring was familiar with studies and analyses of laws governing the carrying of concealed weapons and their effects on public safety,³⁶ and has reviewed the 10 B 12 statistical studies on that issue.³⁶ Professor Zimring concluded that, for a variety of reasons, the carrying of concealed, loaded handguns is a public danger.³⁷ Concealed carrying of loaded handguns increases both the rate of robberies that can occur and the lethality of robberies for their victims, and whether or not it increases the rate of assaults in public places, it does increase dramatically the death rate from assault when guns are available and used.³⁸

Professor Zimring provided three objectives of a public safety policy like that reflected in the challenged State of Ohio statutes. A[T]here are three objectives of any law that attempts to sharply restrict the number of concealed, loaded guns in public places. The first is to reduce the deadliness of all attacks in public places by reducing the availability of guns used in those attacks. The second use of having that kind of restriction is that it provides police with a basis for intervening when they reasonably believe that people are carrying concealed deadly weapons, and without waiting for an attempt at a substantive crime other than carrying concealed weapons to occur, they can intervene and disarm an individual and arrest an individual who they think is up to no good because the regulation forbidding the carrying of the concealed deadly weapon allows the police an earlier intervention in a dangerous scenario. The third objective, which is linked to that second early

³⁶ Zimring trial testimony at 11:9-18.

³⁷ *Id.* at 11:19 B 12:2.

³⁸ *Id.* at 12:2 B 12:7.

intervention scenario, is that prohibiting and sharply restricting the carrying of concealed weapons is an attempt to make the public area policeman's lot a safer one.³⁹

³⁹ *Id.* at 12:17 B 13:13; 78:2 B 80:1.

Professor Zimring explained further the beneficial effects on police officers= safety of restricting concealed carrying of firearms on civilians. AIt turns out that firearms are almost the exclusive method that are available to kill police officers in the United States. In excess of 90 percent of all killings of police are killings that are accomplished with firearms, and in excess of 90 percent of those, the weapon is a handgun, a concealable firearm. So, police safety is a third reason why states and municipalities may seek to drastically limit the number of concealed guns that are carried on public premises.⁴⁰

By eliminating current restrictions on carrying concealed weapons, police will be deprived of a basis for a reasonable belief that a suspicious person is illegally carrying a concealed weapon; thus, police will be deprived of a legal basis to intervene early when faced with a likely dangerous person carrying a concealed weapon.⁴¹

Professor Zimring also testified regarding the dangerous effects of striking down Ohio=s existing concealed carry laws, stating: Alf one assumes that the absence of legal regulation means that more people are going to carry loaded guns, and since there's no attempt to discriminate between the types of people who are allowed this, when you strike down the statute, to the extent that there's going to be much more carriage of concealed loaded guns, then I'm afraid that whatever proportion of violent assaults do occur in Cincinnati, that will occur with guns being used, will go up. And one function of that is that assault, all other things being equal, will be more deadly. To the extent that there is an increase in citizens carrying weapons, and that increase is widely distributed across

⁴⁰ *Id.* at 13:14 B 24.

⁴¹ *Id.* at 61:16 B 62:3; 64:15 B 65:8.

aspects of the population, as by law it could be under the circumstances that you are hypothesizing, I would also believe that there would be some increase in danger to police, as well as other citizens.⁴²

The City also incorporates by reference the statement of facts presented by the State of Ohio and by Hamilton County.

III. ARGUMENT

1. CITY OF CINCINNATI'S FIRST ASSIGNMENT OF ERROR

The Trial Court Violated the Code of Judicial Conduct

2. First Issue Presented for Review and Argument

The trial court was prejudicially biased

⁴² *Id.* at 19:15 B 20:8.

The timing of the filing of each of the complaints in the case at bar guaranteed that Judge Robert Ruhlman would be assigned the cases. Each case, filed more than one year apart, requested temporary restraining orders enjoining enforcement of statutory carrying concealed weapons laws that have been in effect throughout the nation since the 1800s. There were no newly existing exigent circumstances involving the plaintiffs that warranted seeking temporary restraining orders at those particular times. The complaints were filed during months when Judge Ruhlman was the designated equity judge and it was certain he would be assigned the cases. The morning after the first case was filed Judge Ruhlman stated for the record: "I've always had a problem with this statute."⁴³ Later, while the cases were pending for decision, the Cleveland Plain Dealer featured a report on Judge Ruhlman's spouse ("Gun-case Jurist's Wife Once Held By Gunmen," 12/26/01) and stated that "she said she is firmly in the camp of those who think Ohioans ought to be able to arm themselves against crooks." Judge Ruhlman's wife was quoted: "I've thought about this a million times. . . Personally, I feel a law-abiding citizen should be able to get a registered handgun for their own personal protection."⁴⁴

The Code of Judicial Conduct (Canon 3.E) states that a "judge shall disqualify himself. . . in a proceeding in which the judge's impartiality might reasonably be questioned, including. . . instances where. . . [t]he judge knows that he. . . or the judge's spouse. . . has any other more than a *de minimis* interest that could be substantially affected by the proceeding. . . ." The Code also provides that a "judge shall not allow family. . . relationships to influence the judge's judicial

⁴³ Transcript, pp. 36-37.

⁴⁴ T.d.222, City of Cincinnati Defendants' Renewed Motion Seeking Recusal and Memorandum in Support, attached Cleveland Plain Dealer article.

conduct or judgment. The trial court violated the Code of Judicial Conduct because it was prejudicially biased in the case at bar with a personal interest in the outcome.

The trial court's bias manifested itself, for instance, when it summarily denied the City's uncontested motion to admit out of state counsel *pro hac vice*,⁴⁵ when it summarily denied the City's motion to dismiss and motion for summary judgment,⁴⁶ when it repeatedly referred to its own impressions of unrelated criminal prosecutions,⁴⁷ when it injected his misapprehension of the benefit of the challenged State statutes to law enforcement officials when they make Terry stops,⁴⁸ when it terminated the City's cross-examination of the plaintiffs' proffered expert witness,⁴⁹ when it at first admitted the testimony of the City's preeminent expert witness at trial but then without notice later

⁴⁵ T.d.126.

⁴⁶ T.d.119, 213.

⁴⁷ Transcript, pp.36-37, 359-363, 421, 439-450.

⁴⁸ *Id.*, pp.142-144, 332-333; compare with testimony of City witness Ltc. Janke, pp. 437-439.

⁴⁹ *Id.*, p 173.

stated its Findings of Fact and Conclusions of Law that the expert=s testimony should be struck,⁵⁰ and by its generally confrontational remarks.⁵¹

⁵⁰ *Id.*, pp.189, 500; Findings of Fact and Conclusions of Law, T.d.231, p.13.

⁵¹ *Id.*, *passim*.

The trial court's Findings of Fact and Conclusions of Law was written by counsel for the plaintiffs; other than a few paragraphs at the start of the Conclusion, the rest merely replicates *verbatim* the plaintiffs' Proposed Findings of Fact and Conclusions of Law.⁵² The trial court's few original paragraphs reveal the court's faulty reasoning and failed to establish that there is no reasonable ground for the General Assembly's conclusion that concealed weapons should generally be in the hands of law enforcement and state officers, rather than in the hands of untrained, unlicensed citizens.

The trial court's bias colored its judgment of the case. The trial court preliminarily expressed its unsubstantiated views on the effect that striking down the laws at issue would have on law enforcement before a single law enforcement officer testified at trial. The judge interrupted the City's cross-examination of the first witness -- plaintiff's proffered expert, Mr. Mustard B to state that any suggestion that striking down the laws restricting concealed carry of weapons (that now provide a basis for many *Terry* frisk-searches) was *dead wrong*, a *completely false statement* based on false premises.⁵³ In fact, law enforcement witnesses for the City, State, and County subsequently testified that striking down Ohio's concealed carry laws would have a detrimental effect on their ability to protect citizens. Although this testimony was never contradicted the trial court retained its preexisting views and ignored the evidence.

Were the trial court a prospective juror on a case in which it held such strong views, it would be improper to let the court sit B even as one on a panel. As the sole adjudicator of this case, it was

⁵² Compare T.d. 220, Plaintiffs' Proposed Findings of Fact and Conclusions of Law with T.d. 231, the trial court's Findings of Fact and Conclusions of Law.

⁵³ Transcript, p. 72:1-3; see generally pp.70:14:14 B 72:18.

even more improper and prejudicially erroneous.

B. CITY OF CINCINNATI'S SECOND ASSIGNMENT OF ERROR

**The Trial Court Erred by Denying the City's Motions to Dismiss,
Motion for Summary Judgment, and Rule 41(B) Motion**

1. First Issue Presented for Review and Argument

The plaintiffs do not have standing

a) No injury in fact

The plaintiffs do not have standing to bring either an as applied or a facial challenge to the City's speculative and hypothetical enforcement against them of the State's carrying concealed weapons statutes. Neither the allegations in the complaints nor the summary judgment record established that any plaintiff had a justiciable injury in fact caused by the City of Cincinnati.

These consolidated cases allege jurisdiction under Ohio Revised Code Chapter 2721, Ohio's declaratory judgment statute, seeking to facially enjoin enforcement of several State of Ohio criminal statutes. Fourth Amended Complaint, *Klein, et al. v. Leis, et al.*, T.d. 145, Case No. A 0004340; Complaint, *Second Amendment Foundation, et al. v. Leis, et al.*, T.d. 2, Case No. A 0107121. Each plaintiff had the burden throughout the case to establish his standing, the Court's jurisdiction, and the merits of his own claim.

A declaratory action under R.C. Chapter 2721 requires: 1) a real controversy between the parties, 2) a controversy which is justiciable in character, and 3) a situation where speedy relief is necessary to preserve the rights of the parties. *Perrico Property Systems v. City of Independence, et al.*, 96 Ohio App.3d 134, 139, 644 N.E.2d 714 (Eighth District 1994).

A prerequisite to a determination that an actual controversy exists in a declaratory judgment action is a final decision concerning the application of an allegedly invalid law. *Id.* A defendant must have taken a definitive position that finally and adversely affects a plaintiff's rights in order for the plaintiff to have standing to bring a declaratory judgment action. *Id.* at 140. None of the three

plaintiffs who appeared at trial to prosecute their claims established that there is a sufficient likelihood of substantial and immediate irreparable injury to them caused by the City of Cincinnati to warrant enjoining the City from enforcing State of Ohio criminal laws against them, specifically, or against the public, generally. In order for the trial court to have lawfully asserted jurisdiction, there had to be a real concrete controversy between the parties which is justiciable in character, such as the actual announcement of impending employee layoffs in *Gannon, et al. v. Perk, et al.*, 46 Ohio St.2d 301, 348 N.E.2d 342 (1976). There is no such real concrete controversy between the plaintiffs and the City of Cincinnati.

The trial court's erroneous finding that the plaintiffs had standing to pursue as applied and facial challenges against the City of Cincinnati is demonstrated by reference to the inapposite Ohio cases cited by the trial court: *Peltz v. South Euclid*, 11 Ohio St.2d 128, 228 N.E.2d 320 (1967) and *Palazzi v. Estate of Gardner*, 32 Ohio St.3d 169, 512 N.E.2d 971 (1997).⁵⁴ *Peltz*, contrary to the case at bar, was a free speech case banning all political signs in the municipality, the plaintiff was a resident of the municipality, the court found that the challenged ordinance would have been applied adversely against the plaintiff, the plaintiff had declined to use his right to free speech, and, unlike carrying concealed weapons, the free speech behavior did not create a risk of bodily harm to others.

Palazzi held that the plaintiff in that case did not have standing, in part because he did not establish that the alleged unconstitutional act of the government in fact injured him. 32 Ohio St.3d at 174. In contrast to the misapprehension expressed by the trial court in the case at bar, the Supreme Court of Ohio held in *Palazzi* that the constitutionality of a state statute may not be brought into

⁵⁴ Findings of Fact and Conclusions of Law, T.d. 231, pp. 20-21.

question by one who is not within the class against whom the operation of the statute is alleged to have been unconstitutionally applied and who has not been injured by its alleged unconstitutional provision@ (emphasis added). *Id.*, p. 175. The City of Cincinnati has not unconstitutionally applied the challenged state statutes to the plaintiffs, they have not been injured by the City=s speculative application of the statutes, and the plaintiffs do not have standing to sue the City.

R.A.S. Entertainment, Inc. v. City of Cleveland, et al., 130 Ohio App.3d 125, 719 N.E.2d 641 (Eighth District 1998), reaffirms that unless a plaintiff establishes standing the judiciary is unlawfully issuing advisory opinions. The court emphasized that A[f]or a >controversy= to exist there must be a >genuine dispute between parties having adverse legal interests of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.=@ 130 Ohio App.3d at 644. Plaintiffs Klein, Cohen, and Feely do not have a Acontroversy@ with the City of Cincinnati within the meaning of standing law.

Federal standing law similarly establishes that the plaintiffs would not have had standing to bring a federal claim. Plaintiffs Klein, Cohen, and Feely only have standing under federal law to seek equitable relief against the City of Cincinnati if each separately established a sufficient likelihood of substantial and immediate irreparable injury caused by the City of Cincinnati. *Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983). The plaintiffs did not establish a sufficient likelihood of substantial and immediate irreparable injury caused by the City. In fact, it is unknown when, if at all, the challenged statutes will be adversely enforced by the City of Cincinnati against these plaintiffs.

In *National Rifle Ass=n v. Magaw*, 132 F.3d 272, 293-294 (6th Cir. 1997), the United States Court of Appeals for the Sixth Circuit ruled that the mere existence of a statute which may never be applied to plaintiffs and plaintiffs= allegations of fear of prosecution are circumstances too preliminary and generalized to justify the assertion of jurisdiction and accompanying judicial review.

The City of Cincinnati does not intend to arrest plaintiffs Klein, Cohen, and Feely for carrying a concealed weapon if, at the time a hypothetical stop occurs, the plaintiffs have an affirmative defense to the charge. That is the general policy of the City of Cincinnati with respect to enforcing the carrying concealed weapons statutes.⁵⁵ Plaintiffs Klein, Cohen, and Feely are not suffering immediate and irreparable harm at the hands of the City of Cincinnati defendants. They do not have standing to sue the City.

b) Most plaintiffs did not appear and prosecute their claims at trial

At the close of the plaintiffs' case, the City of Cincinnati moved the Court under Rule 41(B), O.R.Civ.P., to dismiss the plaintiffs named in the case at bar who did not appear and prosecute their claims.⁵⁶ At the request of the plaintiffs' counsel, the trial court took the City's motion to dismiss under advisement. The trial court erred by later ruling that it was unnecessary to determine the standing of plaintiffs who did not appear and prosecute their claims at trial and by granting those plaintiffs judgment in their favor.⁵⁷ The plaintiffs who did not appear and prosecute their claims should have been dismissed with prejudice. Rule 41 (B)(1) and (B)(3), Ohio Rules Civil Procedure; *Allstate Ins. Co. v. Rule*, 64 Ohio St.2d 67, 413 N.E.2d 796 (1980). The Second Amendment Foundation and its members are further barred from relitigating the same issues they already litigated

⁵⁵ Transcript, pp.434-435.

⁵⁶ *Id.*, pp.509-512.

⁵⁷ T.d. 231, Findings of Fact and Conclusions of Law, pp. 5, 33; T.d. 232, Final Judgment Entry Granting

and lost or could have litigated in *Michael S. Powers, Second Amendment Foundation, and Dawn Merryman v. John G. Overly, Sheriff, et al., Union County*, Case No. 01-CV-0206.⁵⁸

c) The plaintiffs do not have standing to facially challenge the state statutes

Subject to very narrowly defined exceptions that are irrelevant to the case at bar, a plaintiff must assert his own legal rights and interests and cannot rest his claim to relief on the legal rights or interests of third parties. A plaintiff must have an injury in fact that is concrete, particularized, and actual or imminent. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). Plaintiffs Klein, Cohen, and Feely do not have the requisite injury in fact to even bring an as-applied challenge to the City=s speculative enforcement against them of the State=s carrying concealed weapons statutes. Moreover, facial challenges to statutes are disfavored and are employed only as a last resort when freedom of expression issues are involved. *National Endowment for the Arts, et al. v. Finley*, 524 U.S. 569 (1998). The case at bar does not justify bestowing standing on plaintiffs Klein, Cohen, or Feely to facially challenge the State of Ohio carrying concealed weapons statutes. The trial court committed reversible error by facially enjoining the City=s enforcement of the State statutes.

2. Second Issue Presented For Review and Argument

The plaintiffs= claims are not ripe

A court of equity will not enjoin the enforcement of criminal statutes A[s]o long as the defense which may be made in impending criminal prosecution is adequate to protect the rights of the accused.@ *Troy Amusement Company v. Allenweiler*, 137 Ohio St. 460, 465, 30 N.E. 799 (1940).

Declaratory Judgment and Permanent Injunction.

⁵⁸ Plaintiffs Klein and Feely are members of the Second Amendment Foundation. Transcript, pp. 233, 283.

The City of Cincinnati has not taken a definitive position that adversely affects plaintiffs Klein, Cohen, or Feely. The City has not announced that it intends to charge Klein, Cohen, or Feely with the offense of carrying a concealed weapon. Rather, the record reflects that officers in the Cincinnati Police Division are trained to consider the totality of circumstances, including the existence of an affirmative defense, when determining whether there is probable cause for an arrest.⁵⁹

The plaintiffs' failure to establish the requisite likelihood of future injury similarly renders their claim for declaratory relief unripe. Ripeness doctrine protects against premature adjudication of suits in which declaratory relief is sought. *Abbot Laboratories v. Gardner*, 387 U.S. 136, 148 (1967), overruled on other grounds by *Califano v. Sanders*, 430 U.S. 99 (1977). A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all. *Texas v. United States*, 523 U.S. 296, 300 (1998). The odds of plaintiffs Klein, Cohen, or Feely ever being stopped by a City of Cincinnati police officer and then being charged with the offense of carrying a concealed weapon is too speculative to warrant equitable judicial remedy, including declaratory relief, that would require that the Cincinnati Police Division change its law enforcement practices. Plaintiffs Cohen and Feely do not even reside in the City of Cincinnati,⁶⁰ all the plaintiffs carry deadly concealed weapons and have not modified their behavior as a result of the City's hypothetical enforcement of the challenged statutes against them,⁶¹ the City has not determined to enforce the statutes against them, and the record reflects the City would not enforce the statutes against these plaintiffs if they had an affirmative defense.⁶²

⁵⁹ Transcript, pp.434-435.

⁶⁰ Complaints identifying plaintiffs' addresses, T.d. 2, Case No. A 0004340; T.d.2, Case No. A 0107121.

⁶¹ Transcript, pp.236-237; 252, 258-259; 278-280.

⁶² Transcript, pp.434-435.

The plaintiffs= claims are not ripe. The trial court committed reversible error by finding that the plaintiffs= claims against the City were ripe.

4. Third Issue Presented for Review and Argument

The trial court spited stare decisis

- a) The Supreme Court of Ohio already affirmed the General Assembly=s limitation on carrying concealed weapons

In 1920, the Supreme Court of Ohio unambiguously rejected the argument that an individual in Ohio has the constitutional right to publicly carry concealed weapons for private purposes. The Supreme Court reviewed Ohio=s carrying concealed weapons statute and held:

The statute is plain and unambiguous in its terms. . .Neither is the statute unconstitutional, as in conflict with section 4, article 1, of the Constitution of Ohio, when so construed. The statute does not operate as a prohibition against carrying weapons, but as a regulation of the manner of carrying them. The Constitution contains no prohibition against the Legislature making such police regulations as may be necessary for the welfare of the public at large as to the manner in which arms shall be borne. The intent of section 4, article 1, of the Constitution of Ohio is revealed by the language of that section itself. . . And its meaning becomes more apparent when considered in the light of the limitation imposed by the people upon the powers of the federal government by the Second Amendment to the Constitution of the United States. . . It may be that the accused was justified in carrying a weapon under the conditions and circumstances existing, and under which he was working, at the steel plant at the time of his arrest, but those were matters to be availed of as a defense under . . .[the] General Code. . .@

State v. Nieto, 101 Ohio St. 409, 412-13, 416, 130 N.E. 663 (1920) (emphasis added). In *State v. Nieto, supra*, the rest of the Supreme Court of Ohio disregarded the dissent of Justice Wanamaker who articulately made the same argument now presented by plaintiffs Klein, Cohen, and Feely, and erroneously adopted by the trial court. 101 Ohio St. at 417-436.

In 1929, the Supreme Court of Ohio found no error in the charge that the defendant had the burden of proof to demonstrate the statutory affirmative defense that facts existed to justify his carrying a concealed weapon. *Porello v. State*, 121 Ohio St. 280, 290, 168 N.E. 135 (1929). The Court stated: A[W]hen the defendant seeks to justify himself for the unlawful carrying of a concealed weapon on or about his person, under [the carrying concealed weapons statute], he raises an

affirmative defense which places upon him the burden of establishing the facts set forth to justify his carrying the weapon. @ *Id.* (emphasis added). In rejecting the claim that the carrying concealed weapons statute violated the Ohio Constitution, the same argument made by the plaintiffs in the case at bar, the Supreme Court emphasized that the statutory scheme regulating the carrying of concealed weapons and the imposition on a defendant of proving an affirmative defense Amakes ample provision for the necessities of genuine self defense@ (emphasis added). *Id.*

It is not surprising that the Supreme Court ruled that an individual does not have a constitutionally protected interest in publicly carrying a concealed weapon for private purposes. Article I, Section 4 of the Ohio Constitution does not limit the authority of the General Assembly to establish public safety policy insofar as the manner of carrying concealed weapons is concerned:

Section 4 Bearing arms; standing armies; subordination of military power. The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall not be kept up; and the military shall be in strict subordination to the civil power.

As recently as 1993, in *Arnold, et al. v. City of Cleveland*, 67 Ohio St.3d 35, 616 N.E.2d 163 (1993), the Supreme Court of Ohio ruled that a motion to dismiss a lawsuit challenging a gun control ordinance should have been granted in the first instance. @ 67 Ohio St.3d at 49, ft.13. Like the case at bar, the plaintiffs in *Arnold* argued that the right to bear arms@ can override the legislative police power. The Supreme Court of Ohio rejected the plaintiffs= challenge.⁶³

By reference to the common law right of self defense, the Court stated that Athe mere possession of a firearm in the home offers a sense of security.@ *Id.*, pp. 43-44 (emphasis added). However, this recognition of possession of a weapon in one=s home does not extend to all manner of

⁶³The Supreme Court extended the military related language of Article I, Section 4, referring to Athe people@ and a right to Abear arms@ for Atheir defense and security,@ into a limited individual right.

possession in public places. The Court emphasized: A[T]he people. . . cannot have unfettered discretion to do as we please at all times.@ *Id.*, p. 49. Contrary to the trial court=s ruling in the case at bar, the Supreme Court emphasized that the Ohio Constitution does not Aimplicitly or explicitly, guarantee[] unlimited rights.@ *Id.* The Court further emphasized that Afreedom, if made absolute, might result in the creation of public safety problems. Hence, we must be able to draw a line when certain rights have foreseeable consequences of causing harm to others.@ *Id.*, pp. 45-46.

The Supreme Court of Ohio reiterated its well-established standard that Aa court must follow in review of an enactment under the police power.@ *Id.*, p. 46. That standard is a reasonableness standard that balances competing interests. *Id.*, pp. 46-48.⁶⁴ The Supreme Court further held that Afirearm controls are within the ambit of the police power.@ *Id.*, p. 47. The Court announced the principles that guide a court in reviewing the reasonableness of an ordinance: 1) it is not a court=s function to pass judgment on the wisdom of legislation; and 2) a court will not substitute its judgment for the legislature absent Aa clear and palpable abuse of power.@ *Id.*, p. 48. These binding jurisprudential principles were scorned by the trial court in the case at bar as the court imposed its personal views on the citizenry of the City of Cincinnati and the rest of Hamilton County.

The trial court erroneously treated the State=s regulation of the manner of carrying firearms in public as if it posed the same problems under the Ohio Constitution as a total ban on ownership and possession. In the process, the trial court laid waste to *stare decisis* and the rule of law.

As described in more detail below, Abearing arms@ in the Ohio Constitution, words with an historical significance, does not mean the same thing as the Aconcealed carrying@ of anything

⁶⁴ As discussed in this Brief, the trial court ignored the clear teaching of *Arnold, et al. v. City of Cleveland* and instead erroneously held that Astrict scrutiny is the test.@ Findings of Fact and Conclusions of Law, T.d. 231, p. 27.

constituting a weapon in the year 2002.

The trial court erroneously disregarded and ignored the binding precedents of the Supreme Court of Ohio.

b) The United States Supreme Court held that carrying concealed weapons is not a fundamental individual right

In 1897, the Supreme Court of the United States stated in reference to the federal Bill of Rights that the right of the people to keep and bear arms (article 2) is not infringed by laws prohibiting the carrying of concealed weapons. . . . *Robertson, et al. v. Baldwin*, 165 U.S. 275, 281-282 (1897).

c) The highest courts of other states have long held that carrying concealed weapons is not a fundamental individual right

The United States Court of Appeals for the Third Circuit has explained:

Weapon bearing was never treated as anything like an absolute right by the common law. It was regulated by statute as to time and place as far back as the Statute of Northampton in 1328 and on many occasions since. The decisions under the State Constitutions show the upholding of regulations prohibiting the carrying of concealed weapons, prohibiting persons from going armed in certain public places and other restrictions. . . .

United States v. Tot, 131 F.2d 261, 266 (3rd Cir. 1942) (emphasis added).

As far back as 1840, the Supreme Court of Tennessee affirmed a carrying concealed weapon conviction, ruling that the right to bear arms did not encompass the carrying of concealed weapons for private purposes. *Aymette v. The State*, 1840 WL 1554, 21 Tenn. 154 (1840). Reviewing the history of bearing arms in England and the United States, the court concluded that A[t]he words >bear arms=. . . have reference to their military use, and were not employed to mean wearing them about the person as part of the dress They need not . . . the use of those weapons which are usually employed in private broils, and which are efficient only in the hands of the robber

and the assassin. These weapons would be useless in war. They could not be employed advantageously in the common defense of the citizens. The right to keep and bear them is not, therefore, secured by the constitution.® The Supreme Court of Tennessee emphasized:

To hold that the Legislature could pass no law upon this subject by which to preserve the public peace, and protect our citizens from the terror which a wanton and unusual exhibition of arms might produce, or their lives from being endangered by desperadoes with concealed arms, would be to pervert a great political right to the worst of purposes, and to make it a social evil of infinitely greater extent to society than would result from abandoning the right itself.

* * * * *

And, as the manner in which they are worn and circumstances under which they are carried indicate to every man the purpose of the wearer, the Legislature may prohibit such manner of wearing as would never be resorted to by persons engaged in the common defense.

* * * * *

Here we know that the phrase [bear arms] has a military sense, and no other . . . A man in the pursuit of deer, elk, and buffaloes might carry his rifle every day for forty years, and yet it would never be said of him that he had borne arms; much less could it be said that a private citizen bears arms because he has a dirk or pistol concealed under his clothes, or a spear in a cane.

In 1842, the Supreme Court of Arkansas held that an Arkansas statute that made wearing concealed weapons a penal offense was constitutional under the Arkansas Constitution. *The State v. Buzzard*, 1842 WL 331, 4 Ark. 18 (1842). The court expressed the concern that Aif the right to keep and bear arms be subject to no legal control or regulation whatever, it might, and in time to come doubtless will, be so exercised as to produce in the community disorder and anarchy.® The court answered the question: AIs [the right to bear arms] to enable each member of the community to protect and defend by individual force his private rights against every illegal invasion, or to obtain redress in like manner for injuries thereto committed by persons acting contrary to law?® The answer provided by the court was: ACertainly not® The court further derided the idea that the right to keep and bear arms was adopted for the purpose of enabling individuals to defend, by their own arms, threatened injuries to their personal rights:

The dangers to be apprehended from the existence and exercise of such right, not only to social order, domestic tranquility and the upright and independent administration of the government, but also to the established institutions of the country, appears so obvious as to induce the belief that they are present to every intelligent mind, and to render their statement here unnecessary.

In *Buzzard*, the Supreme Court of Arkansas cited an earlier case decided by the Supreme Court of Alabama⁶⁵ upholding Alabama's limitation on carrying concealed weapons notwithstanding that the Alabama Constitution provided that every citizen has the right to bear arms in defense of himself and the State. The Supreme Court of Arkansas also cited a case decided by the Supreme Court of Indiana to the same effect.⁶⁶

In 1874, the Supreme Court of Georgia discussed the meaning of the right to bear arms. In *Hill v. State of Georgia*, 1874 WL 3112, 53 Ga. 472 (1874). The court expressed that the right to bear arms did not extend to an individual carrying pistols:

It is in my judgment a perversion of the meaning of the word arms, as used in the phrase the right to keep and bear arms, to treat it as including weapons of this character. . . The very words, bear arms, had then and now have, a technical meaning. The arms bearing part of a people, were its men fit for service on the field of battle. . . I greatly doubt if in any good author of those days, a use of the word arms when applied to a people, can be found, which includes pocket-pistols. . . or inventions of modern savagery of like character.

A later Georgia court concluded that the possession of a pistol or a revolver about the person, either by a minor or an adult, concealed or open, is a menace to individual safety and to law and order and the court concurred strongly in the view of those able jurists who construe the constitutional provision above quoted as not applicable to the modern pistol or revolver. In *Glenn v. State*, 72 S.E. 927, 929 (1911). The court added:

The pistol is, in the opinion of the writer, the most offensive weapon ever devised by

⁶⁵ *The State v. Reid*, Ala. Rep., 1 vol., new series, p. 612.

⁶⁶ *The State v. Mitchell*, 3 Blackf. Rep. 229.

the ingenuity of man for the destruction of life and the peace of society. The people in their sovereign capacity have the right to prohibit absolutely this evil, and the individual member of society cannot claim it as one of the inalienable constitutional privileges of personal liberty.

Id.

In 1911, the Supreme Court of Georgia again surveyed the decisions of the various states dealing with the carrying of concealed weapons and emphasized that the decisions are practically unanimous that legislative acts to prevent the carrying of concealed weapons are constitutional. *Strickland v. State*, 72 S.E. 260, 261 (1911). The challenged State of Ohio statutes, in the case at bar, do not even prevent the carrying of concealed weapons. They merely restrict the carrying of concealed weapons to those who can establish a justifiable defense for the behavior.

In 1905, in *City of Salina v. Blaksley*, 83 P. 619 (1905), the Supreme Court of Kansas construed language of the Kansas Constitution that was identical to Article I, Section 4, of the Ohio Constitution, and concluded that an individual did not have a constitutional right to carry a pistol for private purposes, concealed or otherwise.

In 1908, the Supreme Court of Oklahoma affirmed the constitutionality of that state's carrying concealed weapons statutes. *Ex parte Thomas*, 97 P. 260 (1908). The court stated:

Practically all of the states under constitutional provisions similar to ours have held that acts of the Legislatures against the carrying of weapons concealed did not conflict with such constitutional provision denying infringement of the right to bear arms, but were a valid exercise of the police power of the state.

97 P. at 262. The court held:

The question now arises: Is a pistol the character of arms in contemplation of the constitutional convention and of the people of the state when they declared that the right of a citizen to carry and bear arms, etc., shall never be prohibited. We hold that it is not, and most of the states where it has been passed upon support us in this conclusion.

Id.

In 1921, in *State v. Kerner*, 107 S.E. 222, 225 (1921), notwithstanding that the Supreme

Court of North Carolina ruled that a pistol came within the meaning of "arms," it concluded that it was a reasonable regulation to require that pistols be of a certain length so that they cannot be "easily and ordinarily carried concealed."

There are many more state authorities referenced in the preceding cases, each decided under a state constitution similar to the Ohio Constitution, affirming the legislative authority to limit the carrying of concealed weapons.

d) Ohio courts have long upheld proscriptions on carrying concealed weapons and other gun regulations

In 1885, the Supreme Court of Ohio acknowledged that a criminal defendant had unlawfully concealed a pistol because he had not established that his circumstances were such as would justify a prudent man in carrying a pistol for the defense of his person, property, or family. *Ballard v. State*, 43 Ohio St. 340, 1 N.E. 76 (1885).

In 1889, the Hamilton County Circuit Court relied upon the carrying concealed weapons statute to justify imposing the duty on a criminal defendant to prove a statutory affirmative defense and to deny the defendant's claim that it was unconstitutional to do so. *Weil v. State of Ohio*, 1889 WL 292. The Court stated: "The legislature has seen proper to enact a law for the correction of an evil which undoubtedly existed. Whether all of its provisions are the wisest that could have been made, is not for the courts to say. It had the power to pass such law, unless it is in violation of some constitutional provision. This we hold is not the case. . . ."

In 1885, a Hamilton County court tried and convicted a criminal defendant on the charge of carrying a concealed weapon. *Ex Parte John Jordan*, Probate Court of Hamilton County, 1885 WL 3795. In 1896, a Hamilton County court concluded that the prohibition on carrying concealed weapons applied even to a pistol that could not have been discharged. *Lamb v. State of Ohio*, Court of Common Pleas of Hamilton County, 1896 WL 748.

In 1905, the Cuyahoga County Court of Common Pleas ruled that the right to keep and bear arms is to be enjoyed subject to such reasonable regulations and limitations as may be imposed by the law of the land. The right to keep and bear arms does not prevent the legislature from passing laws regulating the manner in which arms shall be used. . . Moreover, the state legislatures of the states have provided many limitations. For example, it has been provided that no one shall carry weapons either concealed or unconcealed, into a court of justice, or into a church, or into a voting place or within a mile thereof, and all these have been held to be valid restrictions upon the manner in which arms may be used. @ *Walter v. State of Ohio*, Court of Common Pleas of Ohio, Cuyahoga County, 1905 WL 789.

In 1905, the Circuit Court of Ohio affirmed *Walter v. State of Ohio, supra*, and ruled that A[t]he huntsman=s avocation is not within the purview of Sec. 4 of the [State=s] bill of rights. @ The Court stated that the right to bear arms Ais not infringed by reasonable police regulations designed to promote the peace and well-being of society, such for example as those that prohibit carrying fire arms into churches, courthouses, theaters and polling places. @ The Court also ruled that A[t]he right of acquiring, possessing and protecting property guaranteed by Sec. 1 of the [State=s] bill of rights is not an absolute right maintainable by every means and under all circumstances. @ The Court emphasized that A[i]f the law here in question shall in practice be found to be oppressive, the remedy is a resort to the authority by which it was enacted. @ 1905 WL 723.

In 1976, the Supreme Court of Ohio upheld a gun identification card ordinance and reiterated that neither federal nor state law elevates the right of an individual to bear arms over the authority of the government under the police power to reasonably regulate the purchase of arms. *Mosher v. City of Dayton*, 48 Ohio St.2d 243, 247, 358 N.E.2d 540 (1976).

In 1988, the Court of Appeals, Sixth District, rejected the appellant=s claim and ruled that

R.C. 2923.13 has withstood previous constitutional challenges. @ *Muldrow v. State of Ohio*, 1988 WL 121285 (Sixth District 1988). In 1988, the Court of Appeals, Eighth District, emphasized that A[t]he notion that there is a personal right to carry concealed weapons that is a fundamental right under the United States and Ohio Constitutions has been repeatedly and emphatically rejected. @ *State of Ohio v. Pauley*, 8 Ohio App.3d 354, 357, 457 N.E.2d 864 (Eighth District 1982). In 1993, the Court of Appeals, Eighth District, dismissed the argument that an individual has the right to be armed constantly. @ *State of Ohio v. Martin*, 1993 WL 389737 (Eighth District 1993).

In 1993, the Supreme Court of Ohio ruled that the right to bear arms in Ohio is not an unlimited right and is subject to reasonable regulation. . . . [T]he test is one of reasonableness. @ *Arnold, et al. v. City of Cleveland*, 67 Ohio St.3d 35, 47, 616 N.E.2d 163 (1993).

In 1994, affirming the constitutionality of a City of Cincinnati ordinance, this Court followed *Arnold, supra*, and held that the right to bear arms is subject to reasonable regulation. *Langan v. City of Cincinnati*, 94 Ohio App.3d 22, 640 N.E.2d 200 (First District 1994). This Court emphasized that it is not a court's function to pass judgment on the wisdom of legislation and that a party challenging the constitutionality of duly-enacted legislation must prove his assertion beyond a reasonable doubt. *Id.*, pp. 30, 31.

In sum, the trial court disregarded consistent and overwhelming precedent that refuted the court's ruling in this case.

4. Fourth Issue Presented for Review and Argument

The trial court erred by holding that an individual has a constitutional right to publicly carry a concealed weapon for private purposes

The trial court, thumbing its nose at the history of the United States and the State of Ohio, and the many courts including the Supreme Court of Ohio and the Supreme Court of the United

States that have considered and rejected the argument, declared for the first time that every law-abiding citizen of this state has the right to protect him or herself with a concealed firearm.⁶⁷ The trial court's determination was unprecedented and constituted reversible error.

5. Fifth Issue Presented for Review and Argument

The trial court erred by not according deference to the legislative enactments

Legislative enactments are accorded a strong presumption of constitutionality. *Arnold v. Cleveland*, 67 Ohio St.3d 35, 38, 616 N.E.2d 163 (1993). *Austintown Township Board of Trustees v. Tracy*, 76 Ohio St.3d 353, 667 N.E.2d 1174 (1996). This Court must apply all presumptions and all rules of construction in a manner so as to uphold the statutes as constitutional. *State v. Dorso*, 4 Ohio St.3d 60, 446 N.E.2d 449 (1983). The party asserting that a legislative enactment is unconstitutional must prove his assertion beyond a reasonable doubt. *City of Cincinnati v. Langan*, 94 Ohio App.3d 22, 30-31, 640 N.E.2d 200 (First District 1994); *Dickman v. Defenbacher*, 164 Ohio St. 142, 128 N.E.2d 59 (1955).

The complaints filed in this case by the plaintiffs are, as the trial court stated recently when granting a motion to dismiss a case brought by the City of Cincinnati seeking to abate dangerous and unnecessary gun risks, an improper attempt to have the Court substitute its judgment for that of the legislature, something which this Court is neither inclined nor empowered to do. Only the legislature has the power to engage in the type of regulation which is being sought. . . .⁶⁷ *City of Cincinnati v. Beretta U.S.A. Corp., et al.*, Case No. A9902369, Order (October 7, 1999), p. 2, Court of Common

⁶⁷ Findings of Fact and Conclusions of Law, T.d. 231, p. 33.

Pleas, Hamilton County (J. Ruehlman).⁶⁸

⁶⁸ The City=s appeal is pending for decision before the Supreme Court of Ohio. Case No. 00-1705.

6. Sixth Issue Presented for Review and Argument

The trial court erred by applying strict judicial scrutiny to the challenged statutes

Even assuming *arguendo* that carrying a concealed firearm for private purposes in public places is within the meaning of the Ohio Constitution's grant of the public right to bear arms,⁶⁹ a statutory limitation on the right to bear arms is only subject to a reasonableness test, not the very different and more stringent strict judicial scrutiny advocated by the plaintiffs and purportedly applied by the trial court.⁶⁹ *Arnold, et al. v. City of Cleveland*, 67 Ohio St.3d 35, 616 N.E.2d 163 (1993).

A reasonableness test, as applied to constitutional rights, is like the Fourth Amendment balancing test for proscriptions against unreasonable searches or seizures, or a form of intermediate scrutiny such as the time, place, and manner test for content-neutral limitations on the right of free speech. The trial court in the case at bar, however, purported to apply strict judicial scrutiny to the challenged ordinance and brazenly and openly defied the Supreme Court of Ohio's holding in *Arnold*.⁷⁰

Not only did the trial court ignore the Supreme Court of Ohio, the trial court's assertion that "[w]here a fundamental constitutional right is impaired, strict scrutiny is the test,"⁷¹ is plainly erroneous as described above. Even constitutional rights such as freedom from unreasonable

⁶⁹ Findings of Fact and Conclusions of Law, T.d. 231, p. 27.

⁷⁰ Findings of Fact and Conclusions of Law, T.d.231, pp. 26-27.

⁷¹ *Id.*, p. 27.

searches and seizures and free speech may be subject to intermediate, not strict, scrutiny.

Furthermore, the record reflects that City witnesses Ltc. Richard Janke and Professor Franklin Zimring identified that the challenged Ohio statutes protect public safety and law enforcement officers by allowing the officers to stop individuals suspected of carrying concealed weapons who may be intending to commit, or have just committed, an unrelated crime. The State of Ohio and Hamilton County provided similar testimony from law enforcement officials. Yet the trial court baldly and erroneously asserted: "Here, there was no compelling state interest offered by the Defendants, nor is there any compelling state interest apparent."⁷² This assertion is doubly erroneous: 1) it is false and 2) a compelling state interest is not required for the government to justify limiting the public carrying of concealed weapons for private purposes.

7. Seventh Issue Presented for Review and Argument

The trial court erred by holding that it is unconstitutional to require a person carrying a concealed weapon to prove an affirmative defense

Affirmative defenses are not an element of the offense charged. A defendant bears the burden of going forward with evidence of an affirmative defense. Due process does not require that the State disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused. *Patterson v. State of New York*, 432 U.S. 197 (1977). A person carrying the [concealed] weapon has in the first instance to decide at his peril. . . whether he is justified in so doing. @ *Weil v. State of Ohio*, 1889 WL 292 (Circuit Court of Ohio 1889).

A law enforcement officer with knowledge of circumstances establishing the legal justification for an individual carrying a concealed firearm does not have probable cause for an

⁷² *Id.*

arrest. In determining whether probable cause to arrest exists for carrying a concealed weapon, a police officer must consider all facts and circumstances within that officer's knowledge, including facts and circumstances conclusively establishing a statutory affirmative defense. *Estate of Dietrich v. Barrows*, 167 F.3d 1007, 1012 (6th Cir. 1999). An officer must consider the totality of the circumstances, recognizing both the inculpatory and exculpatory evidence. *Gardenhire v. Schubert*, 205 F.3d 303, 313 (6th Cir. 2000). A[In assessing probable cause to effect an arrest, [an officer] may not ignore information known to him which proves that the suspect is protected by an affirmative legal justification for his suspected criminal actions. @ *Painter v. Robertson, et al.*, 185 F.3d 557, 571 (6th Cir. 1999).

There is no doctrinal justification to judicially override the legislative determination that an individual desiring to publicly carry a concealed weapon for private purposes may have to establish an affirmative defense for that conduct.

C. CITY OF CINCINNATI'S THIRD ASSIGNMENT OF ERROR

The Trial Court Made Prejudicial Evidentiary Rulings

1. First Issue Presented for Review and Argument

The trial court erred in ignoring and/or striking the testimony of the City's expert witness, Professor Franklin Zimring, who provided unrefuted testimony that there were reasonable grounds for Ohio's concealed carry laws.

a) Introduction

The trial court initially admitted the testimony of the City's expert witness, the nationally renowned firearms policy expert, Professor Franklin Zimring, and denied plaintiffs' motion to strike that testimony.⁷³ Professor Zimring's background was conceded.⁷⁴ Professor Zimring provided

⁷³ Transcript at 189 (AI=m overruling [the motion]@); p. 500 (admitting Zimring trial testimony and exhibits).

⁷⁴ Zimring trial transcript, pp. 8-9.

persuasive evidence that there are reasonable grounds for Ohio=s concealed carry laws. He testified that restricting civilians from carrying concealed weapons in public protects public safety, decreases the lethality of assaults, and assists law enforcement in searching and apprehending potentially dangerous and armed persons. He also testified that states are virtually uniform in restricting concealed carrying by civilians, and no state with significant urban areas (such as Ohio) allows unrestricted carrying.⁷⁵

Professor Zimring=s testimony was admissible under Ohio law, based on his expertise, facts perceived by him, and evidence at trial. His testimony provided probative evidence that there are reasonable grounds for Ohio=s concealed carry laws. Further, the testimony was undisputed on each of these points. Nonetheless, the trial court simply ignored Professor Zimring=s undisputed testimony. Given Professor Zimring=s testimony, alone, plaintiffs did not carry their burden to prove beyond a reasonable doubt that there were no reasonable grounds for Ohio=s laws. It was reversible error for the trial court to simply disregard and strike Professor Zimring=s undisputed testimony.

b) Professor Zimring Provided Persuasive and Relevant Evidence Identifying Reasonable Grounds For Ohio=s Concealed Carry Laws

Professor Zimring is one of the nation=s preeminent experts on gun policy B including concealed carrying of guns.⁷⁶ Professor Zimring provided testimony identifying the reasonable grounds for the challenged Ohio laws.⁷⁷ By contrast, plaintiffs= witness, David Mustard (a junior economics professor who co-authored one article on gun policy while he was a graduate student, and has since written one other), did not dispute or provide any testimony as to the justifications or bases

⁷⁵ Zimring trial transcript at 16:19-25, 17:2-4.

⁷⁶ Zimring trial testimony, pp. 8-9, City Exhibit A, Curriculum Vitae.

⁷⁷ See, e.g., *id.* at 11:19-12:2.

of Ohio=s laws; at most, he merely opined that a different legislative scheme (not proposed by plaintiffs or the trial judge) might have benefits.

Professor Zimring provided persuasive testimony supporting the conclusion that there are reasonable grounds for the Ohio legislature=s statutory scheme regarding the concealed carrying of weapons. The Ohio General Assembly=s decision to restrict concealed carrying was reasonable because, Professor Zimring concluded, Afor a variety of reasons, the carrying of concealed, loaded handguns is a public danger.@⁷⁸ He provided three objectives of Ohio=s public safety policy:

(1) to reduce the deadliness of all attacks in public places by reducing the availability of guns used in those attacks; (2) to provide police with a basis for intervening when they reasonably believe that people are carrying concealed deadly weapons without waiting for an attempt at a different substantive crime; (3) to protect police by making public areas safer.⁷⁹

Professor Zimring testified specifically regarding the dangerous effects of striking down Ohio=s existing concealed carry laws, including inhibiting the ability of law enforcement to detect and apprehend potentially dangerous persons. ABy eliminating current restrictions on carrying concealed weapons, police will be deprived of a basis for a reasonable belief that a suspicious person is illegally carrying a concealed weapon; and thus, police will often be deprived of a legal basis to intervene early when faced with a likely dangerous person carrying a concealed weapon.@⁸⁰

Professor Zimring explained that the Ohio legislature=s decision to restrict concealed carrying of weapons was far from unique; A special restrictions on carrying of concealed weapons are nearly universal in the United States,@ and there is A no state with significant metropolitan areas in its borders, cities the size of Cleveland and Cincinnati, that fails to have special regulations governing

⁷⁸ *Id.* at pp.11 B 12.

⁷⁹ *Id.* at 12:17 B 13:13; *see also* at 78:2 B 80:1.

⁸⁰ *Id.* at 61:16 B 62:3; 64:15 B 65:8. *See also id.* at 13:14 B 24, and 19:15 B 20.

concealed deadly weapons.⁸¹ These laws are among the earliest state and municipal gun regulations to be found in American history.⁸²

⁸¹ *Id.* at 16:19 B 25

⁸² *Id.* at 17:2 B 4.

Professor Zimring's opinions regarding the reasonable grounds for Ohio's concealed carry laws were based on extensive research that documents the special deadliness of concealed handguns to police officers and to crime victims, as well as the statistical data on the special and indeed unique risk that loaded firearms pose to the lives of police officers.⁸³ The bases for Professor Zimring's opinions included his expertise on gun policy, his review of the Ohio laws at issue, numerous studies he has authored, including 78 articles all of which he was either the primary or sole author, FBI data on crime, and an article that was made a part of the record.⁸⁴

The bases for this testimony were proper under Ohio law. An expert witness may use his expertise in a particular field to consider facts perceived by him (such as in Professor Zimring's own articles and studies) and the record at trial (such as the article he relied on that was admitted as City Exhibit B), and the Ohio statutes. *Pennsylvania Lumbermens Insurance Corp. v. Landmark Electric, Inc.*, (1996), 110 Ohio App.3d 732, 738, 675 N.E.2d 65, 70 (2nd Dist.); Ohio Evid. R. 703. That is precisely what Professor Zimring did.

c) The trial court's decision was against the manifest weight of the evidence

The trial court's decision ignoring the testimony of Professor Zimring and City, State, and County law enforcement officers, was against the manifest weight of the evidence. *See Washkewicz v. Seredick* (1986), 1986 WL 633, *6 (Ohio App. 8 Dist.) (The trial court's complete disregard of the now admissible, unimpeached, un rebutted testimony of Dr. Margrett is against the manifest weight of the evidence and constitutes an abuse of discretion and reversible error); *United States v. Jones* (6th Cir. 1988), 846 F.2d 358, 360, 362 (trial court's finding that ignored un rebutted testimony

⁸³ *Id.* at 18:20 B 19:1.

⁸⁴ *Id.* at 14:1 B 15:22; 69:1-25; Transcript, p. 500, 507.

was clearly erroneous); *City of Springdale v. Burns* (2001), 2001 WL 1386184, *3 (Ohio App. 1 Dist.) (remanding to trial court to incorporate un rebutted evidence into findings); *Coy v. Nieter* (1996), 1996 WL 141706, *1 (Ohio App. 3 Dist.) (affirming new trial on basis that jury ignored evidence); *Crawford v. Board of Review* (1982), 1982 WL 3014, *2 (Ohio App. 5th Dist.) (ignoring unrefuted testimony constitutes denial of fair hearing and is against manifest weight of evidence).

d) The trial court made clearly erroneous findings, abused its discretion, and otherwise erred

The trial court erred in striking Professor Zimring=s undisputed testimony. Although Professor Zimring=s expertise was conceded, and his testimony on the reasonable grounds for Ohio=s laws was undisputed, the trial court disregarded that testimony. In doing so, the trial court made clearly erroneous findings, abused its discretion, and otherwise erred.

A[M]ost instances of abuse of discretion will result in decisions that are simply unreasonable,@ that is, where Athere is no sound reasoning process that would support that decision.@⁸⁵ Here, the only evidence of the trial court=s reasoning why it disregarded the undisputed testimony of a distinguished expert is found in its Findings of Fact and Conclusions of Law. The trial court simply copied, word-for-word, plaintiffs= proposed findings regarding Professor Zimring=s testimony. The plaintiffs= proposed finding was that Professor Zimring=s testimony was Aclearly biased and based on an inadmissible foundation,@ Awas entitled to no weight,@ and Ashould be stricken from the record, based on the motion of the Plaintiffs made before the testimony was offered.@⁸⁶ However, those findings were not supported by the record below; indeed, they were contradicted by the record.

⁸⁵ *AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp.*, (1990) 50 Ohio St.3d 157, 161, 553 N.E.2d 597, 601.

⁸⁶ Findings of Fact and Conclusions of Law, T.d. 231, p.13.

At trial, the trial court denied plaintiffs' motion to exclude Professor Zimring's testimony, and then admitted Professor Zimring's testimony (submitted in a videotaped examination).⁸⁷ The trial court later copied the plaintiffs' proposed findings and, without notice that it was reconsidering its earlier ruling, stated that the testimony should be stricken.

There is no logical reason for allowing David Mustard to offer expert testimony for the plaintiffs based on two articles he authored but no other expertise on firearms issues -- while ruling that Professor Zimring's thirty-plus years of experience studying firearms issues, and numerous books and articles on the subject, provided an insufficient basis.⁸⁸ Professor Zimring's expertise and studies provided more than an adequate basis under Evidence Rule 703, but the trial court simply and totally ignored his testimony. It was the epitome of unreasonableness for the trial court to proceed as if evidence did not exist and to apply wholly different standards for witnesses on opposing sides, particularly given that Mustard's studies and opinions were irrelevant to the issues before the trial court. None of the trial court's rationalizations provides a basis to even question Professor Zimring's testimony. Furthermore, the rationalizations were inaccurate and, at worst, from the

⁸⁷ Transcript at pp. 500, 507, 189-190 (court states it is overruling plaintiffs' objections and motion seeking to strike Zimring's testimony, while recognizing plaintiffs preserved the issue for appeal).

⁸⁸ See, e.g., Zimring trial testimony pp. 1:24 to 11:18, see especially at 8:17 - 9:10 (stipulating to accuracy of curriculum vitae), Exhibit A (curriculum vitae); Transcript pp. 500, 507 (admitting exhibits, including c.v.); Zimring trial testimony at 10:6-9 (he has conducted studies of the impact of firearms regulation, and has written three books principally on strategies of firearms control); *id.* 14:1-8, 15:4-8, 51:16-19, 51:23 to 53:9 (his opinions were based on seven or eight studies he conducted, including on the impact of concealed carry laws, other data perceived by him); *id.* 17:8-12 (he was familiar with Ohio's laws at issue in this case).

City=s perspective, would go merely to weight of the evidence and would not provide a basis to totally strike the testimony.

The trial court stated that Professor Zimring=s testimony is also based on studies by authors such as Nagin, Black and Duggin [sic], none of which were admitted into evidence * * *.⁸⁹ In fact, one of those articles, *More Guns, More Crime*,⁹⁰ by University of Chicago Professor Mark Duggan, was admitted as City=s Exhibit B to Professor Zimring=s testimony, which was made part of the record, without objection.⁹⁰

The trial court also stated that Professor Zimring himself did several studies on the impact of firearms on society, [but] the studies are more than 30 years old.⁹¹ Not only is the age of studies not a legal basis to strike testimony, but the judge is incorrect; the studies are not 30 years old.⁹²

Several of the trial court=s other quibbles with Professor Zimring=s testimony are based on questions Professor Zimring was asked by plaintiffs= counsel in cross-examination, but the trial court erroneously ignored the Professor=s actual answers to those questions, answers which supplied actual evidence. The trial court criticized Professor Zimring for writing a critique of the Lott-Mustard study (the basis for Mustard=s testimony) supposedly without review[ing] or request[ing] the data upon which the study was based.⁹³ However, there is no evidence that Professor Zimring never reviewed that data. Professor Zimring testified that he had reviewed the statistical materials

⁸⁹ Findings of Fact and Conclusions of Law, T.d. 231, p. 12.

⁹⁰ Transcript pp. 500, 505:16-22; Zimring trial testimony at 69:1-25, 80:10-13.

⁹¹ Findings of Fact and Conclusions of Law, T.d. 231, p. 12.

⁹² See, e.g., Zimring trial testimony. 39:24 B 40:7 (testimony based in part on 1991 Zimring article).

in the Lott-Mustard work, as well as Mustard=s deposition and affidavit.⁹⁴ Professor Zimring stated that he never Arequested@ that data because there was no need since it was publicly available.⁹⁵

⁹³ Findings of Fact and Conclusions of Law, T.d. 231, p. 12.

⁹⁴ Zimring trial testimony p. 24:3 B 12.

⁹⁵ Zimring trial testimony p. 45:12-17.

The trial court chided Professor Zimring for concluding that the rate of gun-related violence would almost certainly increase if carrying loaded weapons became widespread supposedly without a study to support that statement; but the trial court ignored Professor Zimring's un rebutted testimony that no such study exists because there is no place in the United States (or elsewhere where studies have been conducted) in which carrying loaded weapons *is* widespread.⁹⁶

Contrary to the trial court's supposition,⁹⁷ there is no legal or practical requirement that an expert witness testifying on the reasonable public safety grounds for Ohio's carrying concealed weapons laws be a statistician or economist. Indeed, the plaintiffs' preferred expert witness is not a statistician, and the issues before the court did not involve economics. Neither statistics nor economics are a prerequisite for an expert opinion that the Ohio General Assembly had reasonable grounds to generally restrict untrained, unlicensed civilians from carrying dangerous weapons in public, absent a showing of legitimate self-defense need. Whether Professor Zimring had done statistical studies on the impact of shall-issue concealed carry laws is even less relevant,⁹⁸ since Ohio does not have a shall issue regime and the impact of those laws (enacted in states other than Ohio) is not a legal issue in this case.

⁹⁶ Findings of Fact and Conclusions of Law, T.d. 231; Zimring trial testimony, pp. 42:9 - 43:13.

⁹⁷ Findings of Fact and Conclusions of Law, T.d. 231, p. 12.

⁹⁸ Findings of Fact and Conclusions of Law, T.d. 231, p. 12.

The primary objection made at trial to Professor Zimring's testimony was that he didn't say the magic words that he holds his opinions to a reasonable degree of scientific certainty.⁹⁹ The trial court expressly overruled this objection by plaintiffs at trial, even stating that it thought plaintiffs' argument was silly.¹⁰⁰ On this point, the trial court was correct.¹⁰¹ The second argument to exclude Professor Zimring's testimony made at trial was that it was based on the studies of others. First, this argument simply did not apply to the gist of Professor Zimring's testimony that Ohio's laws were reasonable; those opinions were based on his expertise and his own studies.¹⁰²

Only Professor Zimring's criticism of Mustard's study regarding the purported benefits of concealed carry licensing statutes (a wholly different point) was based, if at all, on the work of others. To the extent that it was, one study was admitted without objection (City Exhibit B to Professor Zimring's testimony), and the others were merely referenced as examples of the barrage of attacks made by academics against the Lott-Mustard study.

⁹⁹ Transcript, pp. 188 B 190.

¹⁰⁰ *Id.*

¹⁰¹ See, e.g., *Coe v. Young* (2001), 2001 WL 965026 (Ohio App. 11 Distr.), *3 (there is no requirement that an expert utter any "magic language," i.e., that his opinion was within the reasonable degree of certainty or reasonable degree of certainty within the particular knowledge of his professional experience); Zimring trial testimony at 18: 10-18 (objective of Ohio legislature couldn't be clearer).

¹⁰² Zimring trial testimony, pp. 14:1-15:22.

The trial court patently abused its discretion in ignoring and striking Professor Zimring=s unrefuted expert testimony.

2. Second Issue Presented for Review and Argument

The trial court erred in relying on plaintiffs= expert, David Mustard who provided no relevant evidence to support the trial court=s decision.

a) Introduction

The plaintiffs= proffered expert, David Mustard, did not support the plaintiffs= substantive claims or the trial court=s decision. At trial, the plaintiffs argued that Mustard=s testimony was not relevant to the constitutionality of Ohio=s existing laws but, rather, was relevant to whether there is potential harm to the public by the granting of this preliminary or permanent injunction.¹⁰³ It was error for the trial court to rely on Mustard=s irrelevant testimony to rule that Ohio=s laws were unconstitutional B a point Mustard did not even attempt to support.¹⁰⁴

b) Mustard Is Not Qualified To Offer Expert Testimony On The Issues in This Case

Unlike Professor Zimring=s vast expertise on issues of firearms policy and regulations, Mustard=s study of firearms issues is extremely limited, and does not include any analysis of the reasonable grounds for Ohio=s carrying concealed weapons laws.

¹⁰³ Transcript, pp. 90:11-92:5.

¹⁰⁴ The trial court denied the City=s motion that Mustard=s testimony was irrelevant. Transcript, pp. 90-92.

While Professor Zimring has studied firearms policy for over thirty years, and has published over 100 articles and 21 books and monographs on crime and firearms issues, Mustard's expertise on gun policy matters is limited; he is an assistant professor in economics, a position he has held for four years,¹⁰⁵ he has degrees in history and economics,¹⁰⁶ has written no books on gun policy,¹⁰⁷ has never served on any firearms task forces,¹⁰⁸ and has never served on an editorial board of any journal involving criminology¹⁰⁹. His research in his short academic career has focused on gambling, lottery, punitive damages and tort claims, sentencing disparities, casinos, crime and labor markets¹¹⁰. He has published one article on gun policy, an article he co-authored, while a graduate student, with his professor, John Lott; another article on gun policy will be published soon.¹¹¹ While Professor Zimring has been a law professor for 34 years, Mustard does not have a legal degree, nor does he claim any expertise in law.¹¹² Mustard has never been accepted as an expert by any court on any subject, other than the case at bar.¹¹³

Professor Mustard's knowledge of firearms or weapons issues was limited to studies of Ashall issue@ concealed carry regimes that are wholly different from either existing Ohio law or the Anything goes@ regime that would take effect if the trial

¹⁰⁵ Transcript, pp. 130:17-22; Plaintiffs= Exhibit 2.

¹⁰⁶ *Id.*, pp. 130:23-131:3.

¹⁰⁷ *Id.* 132:11-13.

¹⁰⁸ *Id.* 132:14-18.

¹⁰⁹ *Id.* 133:14-23.

¹¹⁰ *Id.* 133:24 B 134:16.

¹¹¹ *Id.* 77:3-17, 78:3-9, 134:17-135:7.

¹¹² Compare City Exhibit A (to Zimring trial testimony) to Transcript, pp. 131:19 B 132:7.

¹¹³ *Id.* 131:12-18.

court=s decision is affirmed. Mustard had insufficient expertise and evidentiary basis to offer expert testimony in this case. Further, the information on which Professor Mustard based the bulk of his opinions were not perceived by him.¹¹⁴

c) Mustard Did Not Dispute That There Were Reasonable Grounds For The Laws At Issue

Although the trial court relied extensively on Mustard=s testimony to support its Findings of Fact and Conclusions of Law, Mustard=s testimony did not support plaintiffs= case or the trial court=s decision. Mustard did not even suggest that the Ohio laws at issue in this case were unreasonable. Indeed, his views were clearly to the contrary. Plaintiffs= witness Mustard supported the position that Ohio=s carrying concealed weapons laws are reasonable.

¹¹⁴ Transcript, pp. 157:15 B 158:6.

Mustard conceded that there are some dangers that are posed by carrying concealed weapons in public that are not posed by possessing guns in private homes.¹¹⁵ He also conceded that laws that prohibit people from carrying concealed weapons provide police with an opportunity for early intervention when there is a reasonable suspicion that a deadly weapon is concealed (although the trial court erroneously refused to allow the City to develop this line of questioning on cross-examination and, moreover, stated its opinions on this matter before Mustard or any other witness presented testimony on it).¹¹⁶ Mustard also admitted that even shall issue permitting laws may result in an increase to property crimes, such as burglary, larceny, and auto theft.¹¹⁷

Mustard conceded in the summary judgment record that Ohio's public safety policy was reasonable:

Q [Ganulin]. You're not testifying today, in this case, are you, that the Ohio statutes that are being challenged by these Plaintiffs are unreasonable?

A [Mustard]. That's how would you define unreasonable?

Q. What I mean by unreasonable in that question is that, when it comes to policy determinations that are inherent in decisions to enact statutes, such as what you testified to this morning, that reasonable people can differ?

A. I think reasonable people can differ on the issue of whether there should be a concealed weapons law, a may issue, or shall issue.

Q. Or no issue?

¹¹⁵ Transcript, pp. 141:15-21.

¹¹⁶ *Id.*, pp. 142:3 B 146:18.

¹¹⁷ *Id.*, pp. 177:21-178:16.

A. Or no issue regime in any of these.¹¹⁸

¹¹⁸ Mustard deposition testimony, T.d. 133, pp. 105-106. This testimony came out at trial in Professor Zimring=s examination, and was also proffered by defendants after the trial judge improperly prevented cross-examination on it. Zimring trial testimony, pp. 76:3 B 77:1; Transcript, pp. 191-192; Proffer of City of Cincinnati, T.d. 216.

At trial, Mustard never disagreed with those views; indeed, he began to reiterate them, until the trial judge improperly cut off cross-examination on the issue. Mustard did not even intimate that Ohio=s laws were unreasonable. He conceded that reasonable people can disagree about what components of a concealed weapons policy to implement in a state, and stated that Any of the state laws out there [regarding concealed carrying] I would in some sense say are somewhat reasonable. Or a vast majority of the ones I looked at would seem to be in some sense broadly defined as reasonable.¹¹⁹ He stated it was reasonable for a state to require that those who wish to carry concealed firearms first demonstrate that they can safely handle and use a firearm or demonstrate knowledge of certain laws.¹²⁰

¹¹⁹ Transcript, pp. 151:1-17.

¹²⁰ *Id.*, pp. 149:17 B 150:24, 151:1 - 6.

When asked by the City more specifically whether he agreed that Ohio's carrying concealed weapons laws were reasonable, plaintiffs' counsel objected and the trial court sustained the objection to the question and an entire line of similar questioning. The trial court refused to provide the grounds for sustaining the objection, at one point stating "I don't give legal seminars."¹²¹ The trial court did not provide grounds for sustaining the objection because there were none; if the plaintiffs' proffered expert was permitted to testify at all, the City should have been allowed to expose that he agreed with the City on the central issue of the case – that Ohio's concealed carry laws are reasonable. The trial court erred in sustaining the plaintiffs' objection and barring the City from cross-examining Mustard on this point. The City proffered that had the trial court not improperly sustained the plaintiffs' objections, Mustard would have testified at trial as he did in his deposition on the reasonableness of Ohio's laws.¹²² The trial court later ordered Mustard to not answer a related question posed by the State of Ohio.¹²³

Thus, the plaintiffs' own expert witness supported the position that there are reasonable grounds for Ohio's carrying concealed weapons statutes, although the trial court ignored all of this testimony. The trial court erred by relying upon Mustard's irrelevant testimony about "shall issue" licensing regimes to conclude that the challenged statutes are unconstitutional.

d) Mustard's Testimony Concerned Statutory Firearms Licensing Schemes Wholly Different from The "Anything Goes" Regime Implemented By The Trial Court's Order

¹²¹ *Id.*, pp. 151:18 – 154:19.

¹²² Transcript, pp. 191-192; City's Proffer, T.d. 216.

¹²³ Transcript, pp. 187-188.

The Lott-Mustard study, supported by the plaintiffs, does not provide any data on the effect of having no restrictions at all on the carrying of concealed weapons, nor does it purport to.¹²⁴ The study only purports to determine the effect of enacting “shall issue” licensing laws, under which permits to carry concealed firearms are issued if the applicant meets the state-mandated criteria for permit-holders (such as, for example, passing written and/or firing tests, and completing a certain amount of training).¹²⁵ Mustard testified that the “shall issue” licensing regimes that were the subject of his study are similar to states that issue driver’s licenses for those who meet the testing and other criteria required to drive on public roads.¹²⁶

¹²⁴ Zimring trial testimony at 24:13 B 17.

¹²⁵ *Id.* at 24:18 B 25:16; *see also* Transcript, pp. 135:8-11; 136:17 B 140:23. Only a tiny fraction of the study B one portion of Idaho B did not involve areas that adopted a “shall issue” licensing regime. Transcript, pp. 136:1-16. Vermont is the only state that allows unregulated concealed carrying of firearms, but as that state did not alter its policy during the study period, the effects of implementing that policy could not be studied. Transcript, pp. 135:21 B 136:16.

¹²⁶ *Id.* at 137:7-21.

Unlike the statutory licensing regimes that form the basis of Mustard's opinions, neither existing Ohio law, nor the regime which would exist in Ohio under the trial court's ruling, requires a permit to carry a concealed firearm, or training or knowledge of firearms. Further, Ohio law (and the trial court's decision) covers all weapons, while "shall issue" regimes only permit carrying concealed handguns, not box-cutters, knives, or other weapons.¹²⁷ Thus, Mustard's testimony is no different than concluding that since statutory licensing regimes for driving motor vehicles are effective, it would be beneficial to allow everyone over the age of 16 to drive without any licensing, education, or testing requirements. The plaintiffs' logic is a *non sequitur*, without foundation, and irrelevant to the case at bar.

¹²⁷ *Id.* 140:24 B 141:14. "Shall-issue" regimes are also different from the regime that would exist in Ohio if plaintiffs prevail in that only a small percentage of persons actually obtain permits to carry in shall issue states, approximately 2 percent. Zimring Trial Testimony at 25:12 B 26:2. As Professor Zimring noted, "I don't think that a study of the 2 percent environment can tell us anything about a hundred-percent, anything-goes, carrying-concealed-weapons situation." *Id.* at 25:24 B 26:2.

The Lott-Mustard study, furthermore, does not even prove what it purports, that the implementation of a shall issue concealed carry permitting law might reduce some crime rates.¹²⁸

3. Third Issue Presented for Review and Argument

The trial court prejudicially erred by limiting the City's cross-examination

¹²⁸ Zimring trial testimony at 26:3 B 12; see also *id.* at 26:14 B 28:14.A.

A[T]he Lott and Mustard study doesn't do a very good job of determining what are all of the factors that, over time and cross-sectionally, lead to variations of crime and violence in the United States. Zimring trial testimony at 28:8-14. Mustard admitted that the study omitted variables that could actually cause the changes in crime rates that they attribute to shall issue permitting laws. Transcript, pp. 160:19-162:14. Numerous academic studies, published in peer-reviewed journals, have indicated that the Lott and Mustard study was flawed in numerous respects, including that it omitted important causes of crime in its analysis, causes which could explain the changes in crime rates which Lott and Mustard attribute to implementation of shall issue permitting laws. Zimring trial testimony, at 28:20 - 32:11; Transcript, pp. 166:7 - 173:19.

The Lott and Mustard study mistakenly jumps to the conclusion that shall issue permitting laws decrease violent crime without even knowing, for example, how many more people carry guns or use guns in self defense after such laws are enacted as compared with before the laws enacted. Zimring trial testimony at 30:24 - 32:11.

Professor Mark Duggan, one of David Mustard's teachers at the University of Chicago (in a study admitted without objection as City of Cincinnati Exhibit B to Professor Zimring's testimony) concluded that shall issue permitting laws have no effect on crime rates. *Id.* at 48:1 - 49:3 and Exhibit B. Professor Dugan concluded that increases in gun ownership lead to substantial increases in the overall homicide rate. City of Cincinnati Exhibit B to Zimring trial testimony, p. 26.

The trial court erred in refusing to allow the City to complete its cross-examination of Mustard. The cross-examination would have emphasized that the plaintiffs' expert witness agreed that the Ohio laws at issue are reasonable.¹²⁹ The trial court anticipated this line of cross-examination because opening statements referred to Mustard's deposition testimony that reasonable people can differ on carrying concealed weapons policy.¹³⁰

The trial court also refused to allow additional cross-examination that would have further exposed the fallacies of Mustard's contention that concealed carry licensing regimes may decrease some crime rates. Indeed, the trial judge cut off cross-examination by the City before Mustard could admit criticisms by a (Apro-gun@) expert who found the Lott-Mustard study Aimplausible@ for many of the same reasons as Professor Zimring.¹³¹ At that point the trial judge stopped the cross-examination, stating:

I think he's about done. I think we have done enough on cross-examination. I don't see what else we can go over here. We can go on B if I let this go on, we could be here for months, days, years, you know. There is a point where you can cross, you're not doing much.¹³²

The trial court then turned to counsel for Hamilton County and asked, AWhat else are you going to do?@¹³³ Plaintiffs' direct examination of this witness took 57 pages of transcript; the cross-examination at that point was 43 pages.

¹²⁹ See City's Proffer, T.d. 216; Transcript, pp. 190-192.

¹³⁰ Transcript, p. 59:10 B 24.

¹³¹ Transcript, pp. 171:24 B 173:3 (Note that the court reporter erred by typing A plausible@ instead of Aimplausible@ in the question at 172:19.)

¹³² Transcript, p. 173:9-16.

¹³³ Transcript, p. 173:16-17.

The trial court=s termination of the City=s cross-examination was error. The trial court was arbitrary and unreasonable, abused its discretion, and prejudiced the City=s defense.

4. Fourth Issue Presented for Review and Argument

The trial court made clearly erroneous findings concerning the policies of the Cincinnati Police Division

Consistent with its biased conduct throughout this proceeding, the trial court adopted the hearsay testimony of a long-retired lower level police officer that the Cincinnati Police Division will arrest any person found in possession of a concealed firearm or in possession of a loaded firearm in a motor vehicle.¹³⁴ The basis for this testimony from a retired officer was a hearsay statement by yet another retired officer and some unidentifiable individuals.¹³⁵ By contrast, as described above, the current Assistant Chief of the Cincinnati Police Division, Lt. Richard Janke, testified that it is the policy and practice of the Division to train its officers to consider the existence of affirmative defenses prior to charging an individual with the offense of carrying a concealed weapon. Lt. Janke further testified that Cincinnati Police Division officers would not charge an individual who has a known affirmative defense. The trial court relied exclusively on the hearsay of the long-retired officer and ignored the testimony of the current Assistant Chief of Police. The trial court's finding of fact was clearly erroneous.

D. CITY OF CINCINNATI'S FOURTH ASSIGNMENT OF ERROR

The Trial Court Erroneously Entered Judgment for the Plaintiffs

1. First Issue Presented for Review

The trial court violated the code of judicial conduct, disregarded the plaintiffs' lack of standing, spited stare decisis, usurped legislative authority, ignored burden of proof, made clearly erroneous findings, misapprehended the law, and otherwise abused its discretion

¹³⁴ Findings of Fact and Conclusions of Law, T.d. 231, p. 6.

¹³⁵ Transcript, p. 409.

For all the factual, legal, and prudential reasons previously discussed, and all the arguments presented by the State of Ohio and Hamilton County, the trial court=s entry of judgment for the plaintiffs was reversible error.

2. Second Issue Presented for Review and Argument

The challenged statutes do not deny the plaintiffs equal protection of the law or due process

The City of Cincinnati incorporates by reference the arguments presented by the State of Ohio and Hamilton County establishing that the challenged statutes do not deny plaintiffs Klein, Cohen, or Feely equal protection of the law or due process.

CONCLUSION

The trial court was prejudicially biased, abused its discretion, and committed multiple reversible errors. The plaintiffs do not have standing to sue the City of Cincinnati to challenge the City=s hypothetical enforcement of the State of Ohio=s carrying concealed weapons statutes. The plaintiffs= claims are not justiciable. The State=s statutes have been held constitutional by the Supreme Court of Ohio. Reasonable grounds exist for the statutes.

The Supreme Court of Ohio, the Supreme Court of the United States, and many other high courts have held that an individual does not have a fundamental right to carry concealed weapons in a public place for a private purpose. The plaintiffs admitted that there is no fundamental right to carry concealed weapons. Their witness admitted that reasonable people can disagree about concealed carry public safety policies. Ohio does not prohibit an individual from carrying a concealed weapon if the individual has just cause. The City of Cincinnati considers affirmative defenses when it investigates the propriety of charging an individual with carrying a concealed weapons.

The City=s motions to dismiss should have been granted; the City=s motion for summary judgment should have been granted; judgment should have been entered in favor of the City. The trial court=s decision should be reversed and the complaints dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief of City of Cincinnati Defendants-Appellants has been served on all counsel of record by ordinary U. S. Mail on this 12th day of February, 2002.

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