IN THE SUPREME COURT OF OHIO

Case No. 02-585
On Appeal from The Court of Appeals
First Appellate District
Hamilton County, Ohio
Case Nos. C-020012
C-020013
C-020015
C-020021

CHUCK KLEIN, ET AL.,
Plaintiffs-Appellees

v.

SIMON L. LEIS, JR., SHERIFF, ET AL.
Defendants-Appellants

MERIT BRIEF OF AMICI CURIAE IN SUPPORT OF APPELLANTS

JAMES N. KLINE (0007577)
MARK E. PORTER (0072952)
ULMER & BERNE LLP
1300 E.9th Street, Suite 900
Cleveland, Ohio 44114
(216) 621-8400
Fax (216) 621-7488
jkline@ulmer.com
mporter@ulmer.com

Attorneys for Amici Curiae
City of Cleveland Department of Law, Subodh Chandra, Law Director City of Cleveland
Ohio Legal Professionals Task Force of the Firearms Law Center
Eric D. Fingerhut State Senator from Cleveland

Moritz College of Law at Ohio State University

Bruce S. Johnson
David Goldberger
Donald B. Tobin
Charles E. Wilson

Capital University Law School

James R. Beattie, Jr.
Carole Berry
Susan M. Gilles
Kent Markus
Christopher B. McNeil
N. Douglas Wells
Terrence T. Wheeler

Cleveland-Marshall College of Law

Kermit Lind
Christopher L. Sagers
Arthur R. Landever

University of Toledo College of Law

Roger Andersen
Beth A. Eisler
Howard M. Friedman
Bruce M. Kennedy
James M. Klein
Susan R. Martyn
Deborah M. Mostaghel
Lee A. Pizzimenti
Joseph E. Slater
James E. Tierney
Rebecca E. Zietlow

Claude W. Pettit College of Law at Ohio Northern University

Joanne Brant
Howard N. Fenton

Salmon P. Chase College of Law, Northern Kentucky University

Kenneth Katkin

Distinguished Attorneys

Robert M. Clyde, Columbus

Lee Fisher, Former Attorney General for the State of Ohio

David A. Kopech, Former Assistant Attorney General for the State of Ohio

John Lowe IV, Columbus

John Saros, Columbus

Anthony J. Coyne, Cleveland

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INTRODUCTION

In striking down R.C. 2923.12, Ohio's long-standing statutory prohibition against the carrying of concealed weapons, and finding the affirmative defenses provided by R.C. 2923.16(B) and (C) to be unconstitutional, the Hamilton County Court of Appeals ignored the well-established precedents of this Court, misapplied the standard of review governing legislative acts, and brazenly usurped the power properly exercised by the Ohio state legislature. By doing, so the Court of Appeals committed error and its decision must be reversed, as the unrestricted carrying of concealed weapons presents an immediate and substantial danger to the citizens of Ohio.

While many who wish to carry concealed weapons are law-abiding citizens, many others are not. Data from Texas indicates that during the first four and one-third years after that state began to permit concealed carrying of handguns, 3,370 license holders were arrested for crimes, including 23 charges of murder or attempted murder, 60 arrests for rape or sexual assault and 183 cases of alleged assault or aggravated assault with a deadly weapon. Violence Policy Center, License to Kill III: The Texas Concealed Handgun Law's Legacy of Crime and Violence 2-3 (August 2000), http://www.vpc.org/graphics/ltk3.pdf.

Gun violence has become a major public health issue. In August 2001, Dr. Richard F. Corlin, President of the American Medical Association stated: "Gun-related deaths and injuries have reached epidemic proportions in this nation. And this epidemic has become so serious - that it is clearly a threat to the public health. This is not a political statement or argument. This is a fact." Richard F. Corlin, MD, What We Don't Know Is Killing Us: The Need For Better Data About Firearm Injuries And Deaths, National Academy of Sciences, Committee on Law and Justice (Aug. 30, 2001), http://www.ama-assn.org/ama/pub/article/1752-5255.html.

It is precisely in areas such as this, where difficult interpretations of statistical studies are required, that the legislature, through its ability to hold public hearings unconstrained by the rules of evidence, is better able than the courts to fashion sound public policy. This was recognized by this Court in *Arnold v. Cleveland*, 67 Ohio St. 3d 35, 48 (1993). In *Arnold,* this long standing principle of judicial deference to the legislative process was recognized when the court, held that unless there is "clear and palpable abuse," the courts will defer to the judgment of the legislature and the people of Ohio in determining whether a particular regulation of firearms is constitutional as a reasonable exercise of the police power.

The existing state prohibition on carrying concealed firearms is entitled to the same deference articulated by the *Arnold* Court. Instead, the Court below failed to apply the "clear and palpable abuse" standard, or any other proper rule of judicial review. As a result, it wrongly overturned the current concealed carry prohibition and interfered with the ongoing legislative and political process regarding firearm safety. More importantly, it set a dangerous precedent for similar unwarranted intrusions in the future on any number of issues.

This is not a case where the legislature has been unresponsive to its constitutional obligations. *See, e.g,. DeRolph v. State*, 78 Ohio St. 3d 193 (1997). Legislators have actively carried out their duty to exercise the police powers of the state reasonably. As the noted constitutional scholar John Hart Ely has stated, so long as the political system is not "systemically malfunctioning," our elected representatives, not the courts, should make value judgments. The political system is not malfunctioning "simply because it sometimes generates outcomes with which we disagree, however strongly." Ely, *Democracy and Distrust*, 102-03 (Harvard Univ. Press, 1980). The Hamilton County Court of Appeals opinion involves unconstitutional judicial activism that hijacks the legislature's role in determining what is "reasonable regulation."

Amici Curiae include law professors and lawyers with a deep concer for the sound development of Ohio constitutional law. They believe not only that *Klein v. Leis* was wrongly decided, but also that the unprecedented state constitutional law doctrines announced by the Court of Appeals threaten the integrity of jurisprudence generally in the state of Ohio. In particular, they believe that the Court of Appeals has unsettled basic principles of constitutional law in Ohio by: (1) characterizing normal affirmative defenses as unconstitutional presumptions of guilt; (2) holding that the supposed misapplication of disorderly conduct or "inducing panic" statutes can somehow render the unrelated prohibition on carrying concealed weapons unconstitutional; and (3) applying the "void for vagueness" doctrine in a way that threatens a large percentage of Ohio's criminal prohibitions.

As residents of the state of Ohio, amici also share with other citizens of the state a concern that their personal safety, and the public health of all Ohio residents, will be threatened should the Court of Appeals decision be sustained.

The Amici Curiae also represent a diverse group of citizens from all across the state and the nation who are in favor of maintaining Ohio's ban on the carrying of concealed firearms. The Ohio Coalition Against Gun Violence is a statewide organization dedicated to the reduction and prevention of gun violence. The Ohio Legal Professionals Task Force is comprised of Ohio lawyers and law professors supporting efforts to reduce gun related injuries and deaths through appropriate legal means. It was formed under the auspices of the Firearms Law Center, a national project of amicus Legal Community Against Violence. The Legal Community Against Violence educates local communities as a means to reduce gun related injuries and deaths.

STATEMENT OF FACTS

Plaintiff-Appellees filed a complaint in the Court of Common Pleas, Hamilton County on July 17, 2000 seeking injunctive relief and a declaratory judgment. Additional Plaintiffs filed a similar action on October 16, 2001. The cases were consolidated and tried beginning on November 29, 2001.

Three plaintiffs appeared at the trial, each claiming the need to carry a concealed weapon for personal defense. None of them were in custody for violating the statute in question nor under present threat of prosecution. All were demanding a declaratory judgment that Ohio's concealed weapons prohibition was unconstitutional.

The trial court, having already granted Plaintiff-Appellees' motion for injunctive relief, ruled that R.C. 2923.12 and 2923.16(B) and (C) were unconstitutional. *See* Exhibit A. The First District Court of Appeals affirmed on April 10, 2002. *See* Exhibit B. An emergency stay pending appeal, motion for immediate stay and expedited ruling were granted by this Court on April 25, 2002.

PROPOSITION OF LAW NO. 1

I. R.C. 2923.12 By Regulating Concealed Weapons, Is Reasonable And Therefore Is A Constitutional Exercise Of The Legislature's Power.

From the dawn of the 20th century, this Court has consistently upheld laws prohibiting the carrying of concealed firearms. *See State v. Hogan*, 63 Ohio St. 202 (1900). In *Hogan*, the defendant, a "tramp" as that term was defined by the statute then in force (R.S. 6995), had been arrested for threatening bodily harm to another while carrying a concealed firearm. The trial court ordered the defendant released, and the state appealed. *Id.* at 202-3.

The state argued that the law was a reasonable public safety measure. Moreover, the statute did not impermissibly infringe upon the individual's right to bear arms as guaranteed by the U.S. and Ohio Constitutions. Rather, it was a valid exercise of the state's police power.

This Court agreed. Justice Spear, writing for a unanimous Court, declared, "A man may carry a gun for any lawful purpose, for business or amusement, but he cannot go about with that or any other dangerous weapon to terrify and alarm a peaceful people." *Id.* at 219. Neither the Second Amendment nor its Ohio counterpart were offended by a statute designed to "secure the repose and peace of society." *Id*. at 220. Thus, over one-hundred years ago, this Court's recognized the wisdom and validity of a ban on concealed weapons, and employed a rational basis test in upholding it.

Twenty years later, this Court took a second opportunity to sustain a similar statute. *See State v. Nieto*, 101 Ohio St. 409 (1920). In *Nieto*, the defendant had been arrested in the company bunkhouse after threatening bodily harm to a company cook. As he was being taken into custody, a revolver fell out his pocket. Nieto was subsequently charged with carrying a concealed weapon in violation of G.C. 12819. The jury acquitted him, obeying the trial judge's instruction that if the defendant had been arrested in his "home," there could have been no crime as a matter of law. *Id.* at 409-10.

This Court reversed. The Court, with one justice dissenting, determined that the statute "does not operate as a prohibition against the carrying of weapons, but as a regulation of the manner of carrying them. The gist of the offense is the concealment." *Id*. at 414. Specifically citing *Hogan*, the Court added that the U.S. Bill of Rights "was never intended as a warrant for vicious persons to carry weapons with which to terrorize others." *Id. citing Hogan, supra*, at 218-9. The Court then concluded that the statute was a valid exercise of the state police power

under the U.S. and Ohio Constitutions. Accordingly, the law permitted the state to prohibit the carrying of concealed weapons *even in the home*. *Id.* (emphasis added).

More recently, the Court reviewed a municipal ordinance prohibiting the purchase, sale, possession or display of firearms defined as "assault weapons." *See Arnold v. City of Cleveland*, 67 Ohio St.3d 35 (1993). In *Arnold*, this Court explicitly declared that the defendant City could effectively prohibit the introduction of assault rifles, such as the AK-47, from the streets of Cleveland. The Court began its analysis by stating the oft-quoted maxim that courts must presume "the constitutionality of lawfully enacted legislation." *Id.* at 38 (citations omitted). A plaintiff must also establish that the statute is unconstitutional "beyond a reasonable doubt." *Id.* at 39. The *Arnold* plaintiffs had sought a declaratory judgment that the City's ordinance was unconstitutional as violating both the Second Amendment and the Supremacy Clause of the U.S. Constitution. *Id*. at 40.

The *Arnold* Court rejected plaintiffs' arguments. Cleveland's ordinance did not violate either section of the U.S. Constitution. Moreover, while Section 4, Article I of the Ohio Constitution conferred upon the citizens of this state the "fundamental right" to bear arms for the defense of self, country and property, "this right is not absolute." *Id*. at 46. Significantly, the Court intimated that *only* a total ban on *all* firearms would violate the Ohio Constitution. *Id.* However, a reasonable restriction imposed pursuant to the police power conferred by the Ohio Constitution would be upheld provided the statute or ordinance was reasonable, i.e. promoted the "welfare and safety' of the populace. *Id.* at 47-8, *citing Mosher v. Dayton*, 48 Ohio St.2d 243, 247-8 (1976). In order to overcome this, plaintiffs must show that a general law or ordinance embodies a "clear and palpable abuse of power," which is obviously a very high standard to meet. Accordingly, Cleveland's ordinance was held constitutional. *Id.* at 49.

Thus, for the third time in almost a century, this Court upheld a gun restriction on the grounds that the statute or ordinance was reasonable. One can only conclude, therefore, that a rational basis test is the applicable standard when evaluating laws regulating the carrying of concealed firearms. More importantly, the present laws clearly meet the requisite standard and are therefore constitutional

In the case at bar, the Court of Appeals erred in upholding the trial court's decision to strike down R.C. 2923.12 (the lineal statutory descendant of R.S. 6995) and R.C. 2923.16(B) and (C). The Court of Appeals ignored this Court's well-established line of precedent affirming the constitutionality of R.C. 2923.12. Moreover, plaintiffs/appellees failed to overcome the presumption of constitutionality conferred upon all legislative enactments, including these statutes. Fundamentally, they did not show beyond a reasonable doubt that the statutes are unconstitutional, i.e. a clear and palpable abuse of power. Rather, they simply demonstrated that if they were arrested for carrying concealed weapons, they would have to prove that they were entitled to engage in such conduct under the law.

These statutes are proper exercises of the state's police power. They address in a reasonable and very clear manner a problem endemic throughout the state -- persons armed with dangerous weapons, such as firearms, with no need to carry them at all. The defendants' testimony at trial demonstrated in unequivocal fashion that the problem is as pervasive in the rural areas of the state as it is in more densely populated areas, such as Cincinnati. It defies logic and the well-established precedent of this Court for an appeals court to posit, as did the First District, that these statutes as enacted by the Ohio legislature offend the Federal or Ohio Constitutions.

PROPOSITION OF LAW NO. 2

II. The Affirmative Defenses provided by R.C. 2923.12 (B) and (C) Do Not Create An Impermissible Presumption of Guilt And Thus are Constitutional.

The Court of Appeals erred by implicitly adopting the dissenting opinion of Justice Wanamaker in *Nieto,* 101 Ohio St. *supra,* at 417, 429. The dissent was based upon his belief that an affirmative defense to the charge of carrying a concealed weapon was insufficient to save the statute from constitutional infirmity. *Id* at 429. Judge Wanamaker argued that subjecting an individual to arrest before permitting him to assert an affirmative defense made the law unconstitutional. He wrote, "[The defendant] must be subjected to the humiliation of an indictment; he must employ counsel, bear the expense of a trial, and defend as against an act of the Legislature[,] though in the exercise of a right which the Constitution clearly... gives him." *Id*.

The majority of this Court in *Nieto* rejected this reasoning, commenting that the defense had not been raised in the court below. *Id.* at 417. Moreover, nearly one-hundred years later, this Court in *Arnold* Court cited *Nieto* with approval. Thus, contrary to the First District's assertion, *Arnold* does not supercede *Nieto*; rather, the two cases are complimentary. The teaching of both is clear: The state may exercise its power to regulate the manner in which individuals can carry a firearm provided there is a rational basis underlying the statute. Accordingly, the Revised Code sections at issue, which are founded upon the need to ensure the safety of the public and the police, are constitutional.

The affirmative defense addressed by the *Nieto* Court is incorporated into R.C. 2923.12(C). Moreover, R.C. 2923.12(B) states that the concealed weapon ban does not apply to peace officers or military personnel performing their duties. Fundamentally, R.C. 2923.12 provides a reasonable excuse for those who carry a concealed firearm for legitimate reasons. It

is contradictory to both common sense and the clear intent of the Ohio legislature to hold, as the First District did, that the affirmative defenses created in these provisions create a presumption of guilt.

The well-established law of Ohio with regard to affirmative defenses is clear: They provide a legal excuse for conduct admitted as unlawful. *See State v. Frost*, 57 Ohio St.2d 121 (1979). In *Frost*, the defendant had been convicted for selling stock without a broker's license. In the words of this Court, the defendant then "sought to avoid criminal liability... by claiming the protection of the [statutory] exemption." *Id*. at 127. It was incumbent upon the defendant to demonstrate his entitlement to the exemption through a preponderance of the evidence.

Significantly, the Court determined that requiring the defendant to make this showing did not offend the Due Process Clause of the 14th Amendment. This Court stated emphatically, "It is not unconstitutional to require a defendant to carry this burden of proof in such a case." *Id.* The Court has adopted similar views with other affirmative defenses. *See State v. Martin*, 21 Ohio St. 3d 91 (1986); *accord, State v. Rhodes*, 63 Ohio St.3d 613 (1992). Thus, inconvenience and economic loss attendant to an arrest, followed by the successful assertion of an affirmative defense as provided by statute, are not enough to render these public safety provisions unconstitutional.

In this case, the First District erred in holding that the defenses afforded by R.C. 2923.12 create a presumption of guilt. Instead, they operate to excuse the conduct alleged by the state. Plaintiffs-Appellees below showed this to be true by their own experience: Patrick Feely, for example, was found "Not Guilty" because he had a <u>legitimate</u> reason for carrying a concealed firearm, a defense afforded by R.C. 2923.12(C)(2). Requiring a defendant to prove an affirmative

defense following arrest is not an unwarranted burden on the accused. Certainly, it is not enough to declare the underlying statute unconstitutional in this instance.

PROPOSITION OF LAW NO. 3

III. R.C. 2932.12 and R.C. 2923.16 (B) And (C) Are Not Vague And Thus Are Constitutional.

The court below erroneously ruled that R.C. 2923.12 and R.C. 2923.16(B) and (C) are unconstitutionally vague. In doing so, the Appellate Court's decision threatens to undermine a broad array of long-accepted legislative enactments which utilize similar terms and require similar analysis in their application. More specifically, the court below held that the use of terms such as "prudent person," "lawful purpose," "reasonable cause," and "particularly susceptible," rendered the statutes unconstitutionally vague.

Again, it must be recognized that an enactment of the General Assembly is presumed to be constitutional. *American Cancer Society, Inc. v. Dayton*, 160 Ohio St. 114 (1953). In *Kallenberger v. Kallenberger*, 1992 WL 180104 (Mercer Cty. 1992), the court stated:

> In drafting statutes, the General Assembly is presumed to be knowledgeable of, and in compliance with all constitutional requirements. R.C. 1.47(A). Thus, the laws of this state are presumed to be constitutional, and the person challenging a statute has the burden of proving beyond a reasonable doubt that the statute contains a constitutional defect. *State ex rel. Dickman v. Defenbacher*, 164 Ohio St. 142, 147(1955);

This court made it abundantly clear in *State v. Anderson*, 57 Ohio St.3d 168 (1991), that the use of interpretive statutory language is constitutionally permissible. In *Anderson*, the Ohio Supreme Court overturned an Appellate Court decision which had ruled that Ohio's vicious dog statute was unconstitutionally vague due to the statute's definition of the term "vicious dog." The lower court held that this definition was unconstitutionally vague because it

referred to "pit bulls," yet there was no identifiable breed of dog known as a "pit bull dog." This Court stated:

> Appellee claims that R.C. 955.11(A)(4)(a)(iii) is unconstitutionally void for vagueness. In order to prove such an assertion, the challenging party must show that the statute is vague "not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard conduct is specified at all. . . . In other words, the challenger must show that upon examining the statute, an individual of ordinary intelligence would not understand what he is required to do under the law. Thus, to escape responsibility under R. C. §955.11(A)(4)(a)(iii), appellee must prove, beyond a reasonable doubt, that the statute was so unclear that he could not reasonably understand that it prohibited the acts in which he engaged.

(Emphasis added).

This court further stated, "occasional doubt or confusion about the applicability of a statute does not render the statute vague on its face." Furthermore,

> To be enforceable, legislation need not be drafted with scientific precision. . . . Upholding a state statute against a vagueness challenge, the United States Supreme Court, in *Boyce Motor Lines v. The United States* (1952), 342 U.S. 337, 340, 72 S.Ct. 329, 331, 96 L.Ed. 367 stated that since "* * * few words possess the precision of mathematical symbols, most statutes must deal with untold and unforeseen variations in factual situations, and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out prohibitions. . . . See, also, *Ferguson v. Estelle* (C.A. 5, 1983), 718 F.2d 730, 734 ("* * *") [t]here are inherent limitations in the precision with which concepts can be conveyed by the English language * * *".

The court in *Kallenberger,* supra, recognized that "Many statutes contain some inherent vagueness and could have been drafted with greater precision or clarity." *Papachristou v. City of Jacksonville*, 405 U.S. 156 162 (1972). Some uncertainty, however, is not enough to render a statute unconstitutional. *Edgerson v. Cleveland Electric Illuminating Co*., 28 Ohio App.3d 24 (Cuyahoga Cty. 1985). Neither is a statute vague because it may be difficult to

determine whether marginal cases fall within its scope. *U.S. v. Midwest Fireworks Mfg. Co., Inc.*, 248 F.3d 563 (6th Cir. 2001). Rather, the essence of statutory drafting is notice. *Singer v. City of Cincinnati*, 57 Ohio App.3d 1 (Hamilton Cty. 1990). Only where a statute is so vague that the average person has no notice of what conduct is prohibited, does that statute potentially run afoul of the constitution. *State v. Wilcox*, 10 Ohio App.3d 11 (Delaware Cty. 1983). *See also State v. Tanner*, 15 Ohio St.3d 1 (1984). See also generally, *State v. Williams*, 88 Ohio St.3d 513, 728 N.E.2d 342 (2000)(in which this court addressed and upheld Ohio's sexual predator legislation).

Constitutional challenges fall into two types: 1) a facial challenge, and 2) a challenge of a statute as-applied. In *Williams*, the court addressed these challenges, where it stated: "As an initial matter, it should be noted that the defendants are raising facial-vagueness challenges to R.C. Chapter 2950. Facial- vagueness challenges are generally allowed only where the statute is vague in all of its applications. *Anderson,* 57 Ohio St.3d at 173, 566 N.E.2d at 1228, fn. 2, citing *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.* , 455 U.S. 489, 494-495, 102 S.Ct. 1186, 1191, 71 L.Ed.2d 362 (1982)(Emphasis added).." In *Women's Medical Profession Corp. v. Voinovich*, 130 F.3d 187 (6th Cir. 1997), the court discussed these two types of constitutional challenges:

> A court may hold a statute unconstitutional either because it is invalid "on its face" or because it is unconstitutional" as applied" to a particular set of circumstances. Each holding carries an important difference in terms of outcome: If a statute is unconstitutional as applied, the State may continue to enforce the statute in different circumstances where it is not unconstitutional, but if a statute is unconstitutional on its face, the State may not enforce the statute under any circumstances. Traditionally, a plaintiff's burden in an as-applied challenge is different from that in a facial challenge. In an as-applied challenge, "the plaintiff contends that application of the statute in the particular context in which he has acted, or in which he proposes to act, would be unconstitutional." *Ada v. Guam Soc'y of Obstetricians and*

> *Gynecologists,* 506 U.S. 1011, 1012, 113 S.Ct. 633, 634, 121 L.Ed.2d 564 (1992) (Scalia, J., dissenting), *denying cert. to* 962 F.2d 1366 (9th Cir.1992). Therefore, the constitutional inquiry in an as-applied challenge is limited to the plaintiff's particular situation. In comparison, the Court explained in *Salerno* that [a] facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that [an Act] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an "overbreadth" doctrine outside the limited context of the First Amendment. (Emphasis added).

With respect to plaintiffs-appellees' position that the statutes are void for vagueness, this is largely a facial challenge. In order to make and support such a challenge, the courts below should have determined whether the statutes were unconstitutional in all their possible applications. Instead, the courts looked to see whether there were some circumstances under which the statutes might be unconstitutional, and then used these circumstances as a basis for striking down the statutes. This hardly comports with the standards to be utilized in a facial challenge. Rather, it ignores these standards entirely in order to undo a valid exercise of the power of legislature and the people of Ohio.

The court below essentially relied upon the mere possibility of a variation in results in different cases to justify a finding that the statutes were vague. The court viewed such results as "the vagaries of what a random judge or jury might find reasonable," and then likened such variation to be "a foundation of quicksand."

Virtually all statutes require some interpretation, and are subject to some variation in their application whether by law enforcement officials, prosecutors, judges, or juries. *Accord Anderson*. Until now, the courts have rightly refused to impose a linguistically impossible burden on the state legislature to utilize language that is mathematically precise and not subject to any

variation in its interpretation. The Appellate Court's ruling in this case, however, departs with this long held view and imposes an impossible burden on the legislature, thereby threatening to eviscerate a wide range of statutes on a host of issues. Thus to allow the decision of the Appellate Court to stand unchallenged not only endangers the public by eliminating an essential component of Ohio's public safety laws, but also threatens substantial harm to Ohio's judicial system generally by undermining the authority of the state legislature, as well as reliance upon judges and juries as the finders of fact wherever and whenever any interpretation of a statute is required.

PROPOSITION OF LAW NO. 4

IV. R.C. 2932.12 Is Not Rendered Unconstitutional Based Upon the Misapplication Of Separate And Independent Statutes.

The Court below found that R. C.2923.12 and R.C. 2923.16(B) and (C) were not necessarily unconstitutional on their own or even as applied, but only "became" unconstitutional because of the manner in which other unrelated statutes were allegedly applied by local law enforcement officers in one particular jurisdiction. More specifically, the Court determined that the concealed weapons statutes became a ban on possession of all guns because certain law enforcement officers allegedly relied upon R. C. 2917.31 (relating to inducing panic) and R. C. 2917.11 (relating to disorderly conduct), to arrest persons who were openly carrying a firearm. First, this analysis was inappropriate since the Appellees had only asserted a facial challenge to the concealed weapons statutes. No one asserted a challenge to these or the other statutes "as applied."

More importantly, this analysis threatens every law in Ohio. To hold that one law which is under review is unconstitutional because another unrelated law may be subject to a misapplication, proves too much. It creates an unfounded pretext for rendering any and all

statutes unconstitutional, based on the possibility of the misapplication of other unrelated statutes. This is completely at odds with the requisite method of judicial review which limits a reviewing court to addressing only the written content of the specific statute before it. For example, a court may not read any words into a statute which are not actually contained in it, *State ex rel McDulin v Industrial Commission*, 89 Ohio St.3d 390 (2000), nor may a court delete any words actually contained in the statute either. *State v. Hughes,* 86 Ohio St.3d 424 (1999); *Elder v. Fischer*, 129 Ohio App.3d 209 (Hamilton Cty. 1998); *State v. Patterson,* 128 Ohio App.3d 174 (Hamilton Cty. 1998). In addition, a court must sever and strike only those portions of a statute which are found to be unconstitutional. R.C. 1.50; *See also Geiger v. Geiger*, 117 Ohio St. 451 (1927). As the court in *Kallenberger* supra, noted:

> Further, a statute will not be held unconstitutional simply because part of the act is unconstitutional, unless the unconstitutional part is so inseparably connected with the entire statute as to raise a presumption that the constitutional part would not have been enacted without the unconstitutional provision; but, if the remainder of the statute is capable of independent enforcement as a valid and constitutional law it will be upheld. *State ex rel. Woodmen Acc. Co. v. Conn* (1927), 116 Ohio St. 127, paragraph three of the syllabus.

(Emphasis added).

At the same time a court has an obligation to reconcile the separate parts of a statute so as to render the statute constitutional. R.C. 1.52.

Obviously if a court may only strike that part of a single statute which is unconstitutional while upholding the rest, this same approach should apply when looking at a particular statute within the context of the entire Ohio Revised Code. That is, the particular statute being scrutinized should be analyzed separate and apart from other unrelated statutes.

Here, however, the Appellate Court went completely beyond the statute, reaching out to and embracing the mere possibility of a misapplication of other, unrelated statutes to justify a finding of unconstitutionality. If the Appellate Court was concerned with the manner in which R. C. 2917.31 and R. C. 2917.11 were applied, then the Court should have restricted itself to dealing with those particular statutes and the manner in which they were being applied or misapplied. If the standards used by the court below were applied to all statutes, none would withstand scrutiny. All statutes are subject to potential misapplication. The fact that a statute could be misapplied, however, hardly renders it unconstitutional. Under those circumstances, it is not the statute that is unconstitutional, but rather the conduct of the persons enforcing it that is unconstitutional. Thus, it is the unconstitutional conduct that should be dealt with, but not the statute itself. Otherwise, the viability of the entire Revised Code is undermined by the mere possibility of misapplication.

Instead of restricting itself to reviewing the particular statutes challenged, the Court below took an expansive view and found that the unintended effect of the concealed weapons statutes, when combined with the alleged manner of enforcement of other unrelated statutes, created an unconstitutional infringement on the claimed right to bear arms. However, the fact that a statute may have unintended consequences, does not make a statute unconstitutional. *Serenity Recovery Homes, Inc. v. Somani*, 126 Ohio App.3d 494 (Mahoning Cty. 1998); *State Ex Rel Nimburger v. Bushnell*, 95 Ohio St. 203 (1917) . If the consequences of a statute are objectionable, but the terms of the statute are not, then the change must come from the legislature and not the judiciary. *Austintown Township Board of Trustees v. Tracy*, 76 Ohio St.3d 353 (1996); *Columbus Building & Construction Trades Council v. Moyer*, 163 Ohio St. 189 (1955); *Weibel v. Poda*, 116 Ohio App. 38 (Summit Cty. 1962). This rule does not change when there are separate statutes involved. In fact, when the alleged unintended consequences

arise from the interaction of two separate statutes, the claim of unconstitutionality becomes even more tenuous. And when this unintended effect is due simply to the manner in which the other, unrelated statute is allegedly applied, there can be no claim of unconstitutionality of the statute under review.

Any other result would impose an impossible burden on the state legislature when drafting new laws. The state legislature would be forced to assess not only the language of the proposed statute, but every other statute already in place. Moreover, it would then be forced to assess how all of the other existing statutes were or might be applied. It would then need to determine whether there might be an unintended infringement on some claimed constitutional right when combined with the proposed new law. This has not been nor should it be the obligation of the state legislature. The Court below, by imposing such a burden, impermissibly interfered with the legislative process and violated the separation of powers. As such, this decision cannot be permitted to stand.

In essence, the Courts below speculated about scenarios under which the legislation might become unconstitutional based on the misapplication of these other statutes. The court in *Kallenberger*, supra, rejected such an approach as going far beyond the court's mandate, stating:

> The municipal court's journal entry clearly indicates the court deviated from the facts of the case and engaged in speculation about instances where the statutes **may** prove to be unconstitutional. The record in the present case contains no indication that Appellee was ever jailed for any length of time for breaching the peace. "Although a statute, under some applications, might be unconstitutional, it will not be so held in a case which does not involve an unconstitutional application of the statute." *State ex rel. Speeth v. Carney* (1955), 163 Ohio St. 159, paragraph five of the syllabus. Appellee suffered no injury as a result of this provision of the statute and therefore has no standing to challenge its constitutionality. Because the present case does not involve any

> of the situations contemplated by the trial court, declaring the statutes unconstitutional on these presupposed bases was error.

(Emphasis added).

Similarly, in the present case, the court essentially hypothesized about situations not presented by the actual case. None of the parties had been jailed. Rather, the court looked to the manner in which other, unrelated statutes were enforced in order to find circumstances under which it believed R.C. 2923.12 would become unconstitutional. This clearly deviated from the trial court's mandate of constitutional review. Instead, it demonstrated the very worst kind of judicial activism, intended to thwart the long-standing enactments of the legislature and the will of the people. In *State v. Hendrix*, 144 Ohio App.3d 328, 760 N.E.2d 43 (12th Dist. 2001), the court noted: "Accordingly, "a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the court." *Los Angeles Police Dept. v. United Reporting Publishing Corp.*, 528 U.S. 32, 38, 120 S.Ct. 483, 489, 145 L.Ed.2d 451, 458 (1999), citing *New York v. Ferber*, 458 U.S. 747, 767, 102 S.Ct. 3348, 3360, 73 L.Ed.2d 1113, 1129(1982). *State v. Meyer*, 14 Ohio App.3d 69, 470 N.E.2d 156 (Greene Cty. 1983) (" The Supreme Court has held that although a statute under some applications might be unconstitutional, it will not be so held in a case which does not involve an unconstitutional application of the statute. *State, ex rel. Speeth v. Carney*, 163 Ohio St. 159, 126 N.E.2d 449 [56 O.O. 194] (1955); see, also, *State v. Wetzel*, 173 Ohio St. 16, 179 N.E.2d 773 [18 O.O.2d 203] (1962).")

PROPOSITION OF LAW NO. 5

V. A Court May Not Impermissibly Interfere With The Legislative Process In Violation Of The Separation Of Powers.

The Legislature is the branch of government charged with the duty of weighing the difficult and often competing policies pertaining to the public health and safety of the community. The statutes that embody the ultimate decisions of the legislative branch reflect the policy choices of the people's elected representatives, and the wisdom of these choices is not open to second-guessing by the courts. Under the Ohio Constitution, the separation of powers between these two branches of government requires that the judiciary defer to the legislature. Ohio Const., Art. 2 Sections 1, 32; Art. 4, Section 1.

As the courts have long acknowledged, the doctrine of separation of powers requires that the judiciary undertake review of the constitutionality of a legislative act with the utmost deference:

> "The question whether a law be void for its repugnancy to the Constitution is at all times a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case….But it is not on slight implication and vague conjecture that the Legislature is to be pronounced to have transcended its powers, and its acts to be considered as void."

Fletcher v. Peck, 6 Cranch. (10 U.S.) 87, 3 L. Ed.162 (1810).

To ensure that the judicial branch does not encroach on the domain of the Legislature, certain time-honored rules apply to judicial review of the constitutionality of a legislative act. Chief among these rules are that "every reasonable presumption will be made in favor of the validity of a statute "[*State v. Parker*, 150 Ohio St. 22 (1948)]; that the presumption of constitutionality of a legislative act is overcome only by proof beyond a reasonable doubt [*State v. Anderson*, 57 Ohio St.3d 168 (1991)]; and that this presumption "cannot be overcome unless it appear that there is a clear conflict between the legislation in question and some particular provision or provisions of the Constitution." *State ex rel. Dickman v. Defenbacher*,

164 Ohio St. 142, (1955) (quoting *City of Xenia v. Schmidt*, 101 Ohio St. 437 (1920)(emphasis added).

As the opinion appealed from amply demonstrates, the court below failed to give even lip service to these principles. More egregious, the appellate court failed to confine itself to a review of the challenged statute, on its face and as applied. Instead, from evidence admitted at trial and related to how certain other statutes regulating disorderly conduct have been or may be enforced, the appellate court cobbled together a pretext upon which it could argue that the statute, which merely prohibits the carrying of concealed weapons, should be viewed as a flat prohibition on the "bearing" in any manner of all firearms. Appellate Opinion, Exhibit B.

However, the Legislature is presumed to be aware of the other laws it has enacted. If it is true that certain laws are being applied to prosecute Ohioans for nothing more than the open carrying of firearms, which state law allows, then the appropriate challenge is to the improper enforcement of those laws. Instead, by considering this evidence as probative on the issue of the constitutionality of R.C. 2923.12, what the appellate court implicitly concluded was that the Legislature was wrong and unwise in prohibiting the carrying of concealed firearms in the first place. That is, how other statutes may be applied to bearing arms can only be relevant to the constitutionality of R.C. 2923.12 if one accepts the proposition that the legislature should have known at the time it enacted R.C. 2923.12 that such other statutes would necessarily be uniformly improperly enforced against the open carrying of firearms, and thus this practice, existing alongside R.C. 2923.12, would preclude Ohioans from lawfully bearing arms at all. Had the appellate court adhered to the applicable principles of judicial review of legislative acts, it would readily have conceived a different state of facts in which R.C. 2923.12 may be interpreted consistent with the state right to bear arms, i.e., in the absence of improper enforcement of other statutes.

Likewise, had the appellate court analyzed R.C. 2923.12 on its own terms, as a statute that merely prohibits the carrying of concealed firearms except in certain defined circumstances which constitute affirmative defenses, the court would have been compelled to find that statutory framework well within the bounds of due process under controlling law. Specifically, Ohio law contemplates that a "law abiding person" may indeed be subject to arrest, incarceration, indictment, trial, legal fees, etc. for doing a legal act, where that legal act is an affirmative defense to the charge of a crime. R.C. 2901.05 provides the statutory framework for the burden of proof in such cases, placing the burden of proving every element of the offense charged beyond a reasonable doubt on the prosecution, but placing the burden of going forward with the affirmative defense on the accused, and requiring that the defense be proved by a preponderance of the evidence. R.C. 2901.05.

The very existence of this statute, and of controlling case law upholding the statute against constitutional challenge under the Due Process clause, undercut the appellate court's notion that the structure of R.C. 2923.12 violates fundamental fairness. *See White v. Arn,* 788 F.2d 338 (6th Cir. 1986), *cert. denied*, upholding R.C. 2901.05 against a due process challenge by a criminal defendant who asserted the affirmative defense of self-defense when charged with murder in connection with the shooting death of her spouse. Because the defense of self-defense does not negate any of the elements of the crime of murder, the requirement that the accused prove her defense of self-defense does not enable the state to unconstitutionally avoid its obligation to prove beyond a reasonable doubt every fact necessary to the charge. *Id.* at 343 – 345. The court also rejected appellant's argument that self-defense is a "constitutional right" and therefore the foregoing due process test was inapplicable to her challenge. *Id.* at 347.

Similarly, the affirmative defenses provided in R.C. 2923.12 do not allow the state to avoid its constitutional obligation of proving every fact necessary to the charge of carrying a concealed weapon. Accordingly, they meet due process requirements under controlling law. However, by choosing to construct a context in which it could interpret the activity regulated by R.C. 2923.12 as equivalent to a prohibition on all arms bearing, the appellate court sidestepped analysis of the statute's affirmative defenses under controlling law. It was then free to conclude - as it did without citation and considerable outrage - that a citizen may not be subject to arrest and prosecution merely for exercising a fundamental right. See Appellate Decision, Exhibit B. However, even *assuming arguendo* that a person may not be arrested and prosecuted merely for exercising a fundamental right, that premise is simply irrelevant to the question of whether the affirmative defenses provided in R.C. 2923.12 offend basic notions of fairness, because the statute does not in fact subject a citizen to arrest and prosecution merely for "bearing arms." It criminalizes the carrying of concealed weapons except as provided by the statute, and nothing more.

In sum, the decision of the court below amply demonstrates the dangers inherent in judicial review of a legislative act when that review is conducted without regard to the fundamental principles governing such review. The Legislature of Ohio has determined the extent to which the carrying of concealed firearms will be permitted. That fact alone should have compelled the reviewing court to construe the statute liberally to save it from constitutional infirmity. *State ex rel. Dickman v. Defenbacher,* 164 Ohio St. 142, 149 (1955). Instead, as shown above, the appellate court largely ignored controlling law and the rules of statutory construction, and in so doing, made every presumption against the validity of the statute instead of in its favor.

Moreover, because the Legislature was engaged in evaluating the current public policy concerns related to the permissible carrying of concealed weapons while this matter was before the lower courts, the appellate court should have approached its task with heightened, rather than diminished deference. As this Court has so aptly put it, "while the right and duty of interference in a proper case are thus undeniably clear, the principles by which a court should be guided in such an inquiry are equally clear, both upon principle and authority,[citations omitted] and it is only when manifest assumption of authority and clear incompatibility between the Constitution and the law appear that judicial power can refuse to execute it. Such interference can never be permitted in a doubtful case." *Id.* at 148 (quoting the opinion of Justice Ranney in *Cincinnati, Wilmington & Zanesville R. Co. v. Clinton County Commissioners*, 1 Ohio St. 77 (1852), emphasis added).

The legislature of the State of Ohio has determined and continues to consider the extent to which the carrying of concealed firearms should be permitted for the defense and security of the citizens of the State of Ohio. By doing so, the legislature has demonstrated that this subject matter is a proper topic for public consideration *i.e.*, the state legislature should be the governmental body which determines the circumstances under which guns may or may not be carried. The Trial and Appellate Courts, by immersing themselves in this legislative process, conducting legislative-like fact-finding and castigating the legislature's reasonable basis for enacting these laws, violated the separation of powers. The courts below would have done well to remember that "each of the three grand divisions of the government, must be protected from the encroachments of the others, so far that its integrity and independence may be preserved." *South Euclid v. Jemison*, 28 Ohio St.3d 157 (1986) quoting *Fairview v. Giffee*, 73 Ohio St. 183 (1905).

As the legislature is actively engaged in establishing the parameters of permissible conduct with respect to firearms, the decisions of the courts below constitute an improper invasion of the legislative process. Such conduct is not justified given the legislature's compliance with its own constitutional obligation to legislate. *DeRolph v. State*, 78 Ohio St.3d 193 (1997). Therefore, this Court should overturn the decision of the Court below. Otherwise this decision will not only impede the proper exercise of legislative power in the field of firearms safety, but it will also serve as a potential predicate for such invasions in the legislative process in every other field of public interest now and in the future.

CONCLUSION

For all of the foregoing reasons, Amici Curiae, City of Cleveland Department of Law, Ohio Legal Professionals Task Force of the Firearms Law Center, Eric D. Fingerhut, and the listed legal educators and distinguished attorneys respectfully urge this Court to reverse the decision of the Appellate Court.

Respectfully submitted,

JAMES N. KLINE (0007577)
MARK E. PORTER (0072952)
ULMER & BERNE LLP
Penton Media Building
1300 East Ninth Street, Suite 900
Cleveland, Ohio 44114
Telephone: (216) 621-8400
Facsimile: (216) 875-2113
jkline@ulmer.com
mporter@ulmer.com

Attorneys for Amici Curiae

CERTIFICATE OF SERVICE

A copy of the foregoing Brief of Amici Curiae In Support of Appellants' Memorandum in Support of Jurisdiction was served by regular U.S. Mail on _____ _____, 2002 on:

Michael K. Allen
John J. Arnold
David Stevenson
Prosecutor's Office
230 East 9th Street
Suite 150
Cincinnati, Ohio 45202

Attorneys for the County, Township and Municipal Appellants

Betty D. Montgomery
Darrell M. Pierre
David S. Timms
Arthur J. Marziale, Jr.
Kirk A. Lindsey
Office of the Attorney General of Ohio
30 East Broad Street, 17th Floor
Columbus, Ohio 43215

Attorneys for the State Appellants

Fay D. Dupuis
Richard Ganulin
Solicitor's Office
Room 214 City Hall
801 Plum Street
Cincinnati, Ohio 45202

Attorneys for the City Of Cincinnati

William M. Gustavson
580 Walnut Street, Suite 275
Cincinnati, Ohio 45202

Timothy A. Smith
119 East Court Street, Suite 406
Cincinnati, Ohio 45202

Attorneys for Appellees

_____
JAMES N. KLINE (0007577)
MARK E. PORTER (0072952)
ULMER & BERNE LLP

Attorneys for Amici Curiae

1207240 00000-00000