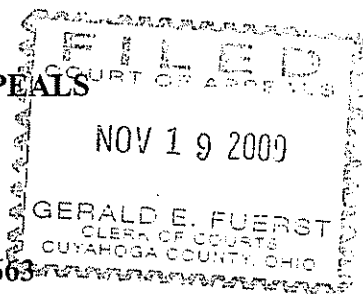


IN THE EIGHTH DISTRICT COURT OF APPEALS
CUYAHOGA COUNTY, OHIO



CITY OF CLEVELAND, *et al.*,

Appellant,

v.

STATE OF OHIO, *et al.*,

Appellee.

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Case No. 09-092663

Trial Court Case No. CV-07-618492

APPELLEE STATE OF OHIO'S MOTION FOR STAY
PENDING APPEAL TO THE OHIO SUPREME COURT

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**MEMORANDUM IN SUPPORT OF APPELLEE STATE OF OHIO'S
MOTION FOR STAY PENDING APPEAL TO THE OHIO SUPREME COURT**

Pursuant to Ohio App.R. 27, Appellee State of Ohio respectfully requests that this Court enter a stay of execution of its November 12, 2009 judgment mandate pending an appeal of the decision to the Ohio Supreme Court. As a governmental entity, the State of Ohio is entitled to a stay as of right pending appeal of this Court's decision to invalidate R.C. 9.68, a law providing for the uniform regulation of firearms by the State. Furthermore, a stay in this case would simply maintain the status quo that has been in place since the December 12, 2006 effective date of Sub. H.B. 347, as neither the court below nor this Court has enjoined the law. Finally, significant harm to the State's interests would occur if the Court's mandate to the trial court is executed and R.C. 9.68 is invalidated before final adjudication by the Ohio Supreme Court. Thus, a stay should be granted to preserve the status quo pending further consideration by the Ohio Supreme of the constitutionality of R.C. 9.68.

I. The State is entitled to a stay as of right pending review by the Ohio Supreme Court.

When an appeals court issues a mandate directing the trial court to execute judgment, as the Court has done here, Ohio App. R. 27 provides that "a stay of execution of the judgment mandate pending appeal may be granted upon motion, and a bond or other security may be required as a condition to the grant or continuance of the stay." When the State is seeking a stay pending appeal, courts have consistently held that the State is entitled to a stay as a matter of right, and as such, courts have no discretion to deny the stay. See *State ex rel. Fire Marshal v. Curl*, 87 Ohio St.3d 568, 571, 2000-Ohio-248; *State ex rel. Ocasek v. Riley* (1978), 54 Ohio St. 2d 488; *State ex rel. Geauga Cty. Bd. of Commsrs. v. Milligan* (2003), 100 Ohio St. 3d 366; *City of Hamilton v. Fairfield Township* (1996), 112 Ohio App. 3d 255. In fact, the Ohio Supreme

Court has gone as far as stating that “a contrary holding would require overruling precedent that has not been successfully challenged for more than 25 years.” *Milligan*, 100 Ohio St. 3d 366.

Although these decisions concerned stay of a trial court decision pending appeal pursuant to Civ.R. 62, the same reasoning applies to an App. R. 27 application for stay. Civ. R. 62(C) provides that, “When an appeal is taken by this state or political subdivision, or administrative agency of either, or by any officer thereof acting in his representative capacity and the operation or enforcement of the judgment is stayed, no bond, obligation or other security shall be required from the appellant.” Because Civ.R. 62(C) eliminated the bond requirement for the government, the Ohio Supreme Court concluded that Civ.R. 62(B) and (C) together mandated an automatic stay in favor of the government. *State ex rel. Fire Marshal v. Curl*, 87 Ohio St.3d at 570-571. Here, too, R.C. 2505.12(A)(3) relieves the State of the requirement to give a bond as a condition for appeal under App. R. 27. Accordingly, the State is entitled to an automatic stay of execution of judgment.

II. A stay should be granted to preserve the status quo and to prevent the harm and confusion that would result from execution of the Court’s mandate.

In the alternative, the Court should exercise its discretionary powers and grant the State’s motion for stay in order to preserve the status quo and to prevent harm to the State’s interests in providing uniform regulation of firearms.

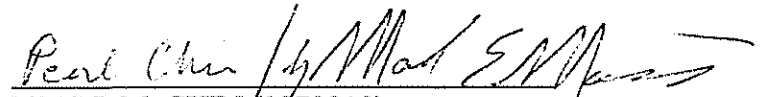
A stay of the Court’s mandate will simply maintain the status quo that has been in place since the December 12, 2006 effective date of Sub. H.B. 347. Although the trial court entered a stay of its order granting summary judgment for the State, neither the trial court nor this Court has entered an order enjoining the enforcement of R.C. 9.68. Therefore, R.C. 9.68 has been in effect throughout the pendency of this litigation.

On the other hand, if the execution of this Court's judgment mandate is not stayed, there is great potential for harm to the interests sought to be protected by the enactment of R.C. 9.68. With the passage of R.C. 9.68, the General Assembly announced its intention to provide uniform regulation of the ownership, possession, purchase, acquisition, transport, storage, carrying, sale, and transfer of firearms and ammunition. Temporary invalidation of the law before final adjudication by the Ohio Supreme Court would create a window of time where confusion would ensue and gun owners would be subject to patchwork municipal regulation.

In sum, a stay would simply preserve the status quo while allowing the Ohio Supreme Court to determine whether it will review the important issues raised by the constitutional challenge. Accordingly, the State of Ohio respectfully requests the Court to enter a stay of execution of its judgment mandate pursuant to App.R. 27 pending appeal to the Ohio Supreme Court.

Respectfully submitted,

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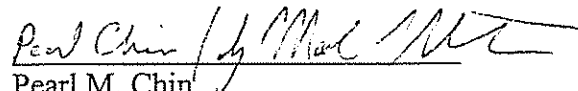
Attorneys for Appellee State of Ohio

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Appellee State of Ohio's Motion for Stay Pending Appeal to the Ohio Supreme Court was served by regular U.S. Mail, postage prepaid, on November 19, 2009, upon the following:

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