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Scott Charles Allan

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Casenote

People's Rights Organization, Inc. v. City of Columbus: The Sixth Circuit Shoots Down Another Unconstitutional "Assault Weapons" Ban

I. Introduction

The federal judiciary has been unwilling to seriously examine the meaning of the "right to keep and bear arms" protected by the Second Amendment¹ since the Supreme Court's decision in *United States v. Miller*,² back in 1939.³ Until the Supreme Court decides the issue of what is protected by the

1. A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed. U.S. CONST. amend. II.

2. 307 U.S. 174 (1939).

3. *United States v. Miller* held that the district court could not take judicial notice that a short barreled shotgun was the type of weapon suitable for militia use and therefore protected by the Second Amendment. The case was remanded, but the issue was never decided because the defendant had fled after he was released. The other main cases in which the Supreme Court addressed the Second Amendment were *United States v. Cruickshank*, 92 U.S. 542, 553 (1876) and *Presser v. Illinois*, 116 U.S. 252, 264-65 (1886). These cases both challenged state laws which were claimed to violate the Second Amendment, and the Court held that the Second Amendment only applied to the federal government, not the states. However, both of these cases were decided before the Supreme Court began to incorporate the protections in the Bill of Rights to the states, which was not begun until 1897 in the case of *Chicago, B. & Q.R. Co. v. Chicago*, 166 U.S. 226 (1897). *But see* *United States v. Emerson*, 46 F. Supp. 2d 598 (N.D. Tex. 1999). This case, which was decided after this article was written, thoroughly reviewed the history and intention of the Second Amendment. The court concluded that the Second Amendment protects an individual right to keep and bear arms. The court held that a statute which made it illegal for anyone subject to a restraining order to possess a firearm was unconstitutional as a violation of the right to keep and bear arms, which is protected by the Second Amendment. *See* 18 U.S.C. § 922(g)(8) (1999). The case has been appealed to the Fifth Circuit. *See Emerson*, 46 F. Supp. 2d 598.

Second Amendment,⁴ those challenging gun control laws in the federal courts will have to attack them on other constitutional grounds. One available method that has achieved success in the Sixth Circuit against the assault weapons bans passed by the City of Columbus is the void for vagueness principle of the Due Process Clause of the Fourteenth Amendment.⁵

In 1989, the City of Columbus, Ohio passed an assault weapons ban, which defined assault weapons by listing specific models of firearms by manufacturer.⁶ A group of plaintiffs, including manufacturers, dealers, and consumers, sued alleging that the law was unconstitutional.⁷ Their lawsuit was successful, and the first assault weapons ban adopted by the City of Columbus was declared unconstitutional by the Sixth Circuit Court of Appeals in 1994.⁸ The city then amended its statute to define assault weapons using generic criteria.⁹ This statute was also challenged as being unconstitutional by a coalition of gun owners known as the People's Rights Organization.¹⁰ In the summer of 1998, the Sixth Circuit Court of Appeals overturned Columbus' second attempt at writing an assault weapons ban for being unconstitutional.¹¹

This casenote examines the city's second unsuccessful attempt to draft an assault weapons ban that will pass constitutional muster, and why the Sixth Circuit Court of Appeals again struck down all five definitions of assault weapons in the city's ordinance as being unconstitutionally void for vagueness.¹² It will argue that, while the Sixth Circuit ultimately reached the correct conclusion, it applied the wrong standard of review in

4. See Michael I. Garcia, Comment, *The "Assault Weapons" Ban, the Second Amendment, and the Security of a Free State*, 6 REGENT U. L. REV. 261 (1995) (arguing that the Second Amendment protects the fundamental, individual right to keep and bear arms, and that the arms most protected are those classified as "assault weapons," and that assault weapons bans are therefore unconstitutional).

5. U.S. CONST. amend. XIV, § 1 ("nor shall any State deprive any person of life, liberty, or property, without due process of law").

6. See *infra* Part II.E.

7. See *infra* Part II.F.

8. See *infra* Part II.F.

9. See *infra* Part II.G.

10. See *infra* Part III.

11. See *id.*

12. See *Columbus Gun Ban Overturned, Again*, AMERICAN RIFLEMAN, Oct. 1998, at 23.

deciding whether the ordinance was unconstitutionally vague. In addition, the paper will argue that the court should have addressed the issue of whether assault weapons ordinances are unconstitutional under the Second Amendment.

Section II describes the background law used by the Sixth Circuit in reaching its decision: justiciability; equal protection; and the void for vagueness principle of due process. It then discusses selected assault weapons statutes and the procedural history leading up to the court's decision in *People's Rights Organization v. City of Columbus*.¹³ Section III discusses both the majority opinion in *People's Rights Organization v. City of Columbus* and Judge Merritt's dissenting opinion. Section IV argues that while the Sixth Circuit ultimately reached the correct decision, it did so for the wrong reasons, and did not apply the correct standard of review. Section V concludes that in future cases courts should address whether the Second Amendment prohibits these types of assault weapons ordinances, and should apply the strict scrutiny standard of review in deciding whether such an ordinance is void for vagueness.

II. Background

A. *Justiciability*

The Constitution limits the power of the federal judiciary to the adjudication of actual cases and controversies only.¹⁴ The courts within the United States can only hear cases that may be resolved by the judicial process.¹⁵ The law of standing requires that "a litigant have suffered an actual injury-in-fact that is fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief."¹⁶ The Supreme Court has explained that there are three elements that must be met in order to have standing: the plaintiff must have suffered an actual injury to a legally protected right, or an injury must be imminent; there must be a causal connection between the injury and the conduct the plaintiff alleges caused the injury; and the plaintiff must show the probability that the re-

13. 152 F.3d 522 (6th Cir. 1998).

14. See U.S. CONST. art. III, § 2.

15. See *People's Rights Org.*, 152 F.3d at 527.

16. *Id.*

quested relief will remedy the injury.¹⁷ The party invoking federal jurisdiction bears the burden of proving that all three elements have been met.¹⁸

The Declaratory Judgment Act¹⁹ allows plaintiffs to seek judicial relief before an actual injury-in-fact has occurred when there is present injury or a substantial risk of harm in the future sufficient to warrant pre-enforcement relief.²⁰ The Declaratory Judgment Act allows a plaintiff to obtain preventive relief when an injury is certain to occur rather than having to wait for the injury to take place.²¹ A plaintiff does not need to expose himself to liability before challenging a criminal statute, when it is claimed that the statute interferes with the exercise of a constitutional right.²² Therefore, a party can seek pre-enforcement relief when he intends to engage in conduct that is claimed to be constitutionally protected, yet is banned by a statute which is likely to be enforced.²³

In certain cases, an association itself can serve as the representative plaintiff of its members even when there is no injury alleged to the association itself.²⁴ An association is more readily established as a proper representative plaintiff when it is a voluntary association and declaratory relief or an injunction is sought instead of damages.²⁵ An association has its own standing as the representative of its members when three requirements are met: the members would have individual standing to sue; the interests the organization seeks protection of are related to its purpose; and the claims and the requested relief do not require the individual members of the organization to take part in the lawsuit.²⁶

Another doctrine under Article III of the United States Constitution²⁷ is ripeness, which deals with the time the action

17. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-60 (1992).

18. See *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231 (1990).

19. 28 U.S.C. § 2201(a) (1999).

20. See *People's Rights Org.*, 152 F.3d at 527.

21. See *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923).

22. See *Steffel v. Thompson*, 415 U.S. 452, 459 (1974).

23. See *Doe v. Bolton*, 410 U.S. 179, 188 (1973).

24. See *Warth v. Seldin*, 422 U.S. 490, 511 (1975).

25. See *Hunt v. Washington Apple Adver. Comm'n*, 432 U.S. 333, 342 (1977).

26. See *Ass'n for Retarded Citizens of Dallas v. Dallas County Mental Health & Mental Retardation Cent. Bd. of Trustees*, 19 F.3d 241, 244 (5th Cir. 1994).

27. U.S. CONST. art. III, § 2.

is brought as opposed to the parties who bring it.²⁸ In deciding whether an issue is ripe for review, a court weighs three factors: "the hardship to the parties if judicial review is denied at the pre-enforcement stage[;] the likelihood that the injury alleged by the plaintiff will ever come to pass[;] and the fitness of the case for judicial resolution at this stage."²⁹ A pre-enforcement challenge to a law will only be ripe for review if declaratory judgment is proper due to the likelihood of the event occurring in the immediate future.³⁰

B. *Equal Protection*

The Equal Protection Clause of the Fourteenth Amendment states that "[n]o State shall deny to any person within its jurisdiction the equal protection of the laws."³¹ The Equal Protection Clause does not prohibit classifications, rather it prevents the government from treating people who are similar in all relevant respects differently.³² When legislation neither affects a fundamental right nor deals with a suspect class, it will be constitutional if it has a rational relationship to a legitimate state interest.³³

Legislatures are presumed to be acting within the confines of the Constitution even though the laws they pass result in some inequality in their application.³⁴ When the law does not affect a fundamental right or target a suspect class, equal protection is satisfied as long as the following three criteria are satisfied: there is a justifiable reason for the classification; based on rational facts that can be considered true; and the relationship between the classification and objective is not arbitrary.³⁵ "Rational basis review, while deferential, is not 'toothless,'"³⁶ the court will examine the relationship between the law's classi-

28. See *Navegar, Inc. v. United States*, 103 F.3d 994, 998 (D.C. Cir. 1997).

29. *People's Rights Org.*, 152 F.3d at 527 (the fitness of the case for judicial review is determined by whether the record is sufficiently developed to render a fair adjudication on the facts); see also *United Steelworkers of America, Local 2116 v. Cyclops Corp.*, 860 F.2d 189, 195 (6th Cir. 1988).

30. See *Golden v. Zwickler*, 394 U.S. 103, 108 (1969).

31. U.S. CONST. amend. XIV, § 1.

32. See *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992).

33. See *People's Rights Org.*, 152 F.3d at 531.

34. See *McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961).

35. See *Nordlinger*, 505 U.S. at 10-11.

36. *Mathews v. Lucas*, 427 U.S. 495, 510 (1976).

fication and its purpose³⁷ to ensure that the legislature has used rational means related to a legitimate end.³⁸

C. *The Void For Vagueness Principle*

The void for vagueness principle comes from the Due Process Clause of the Fourteenth Amendment.³⁹ A fundamental principle of due process is that a law is void for vagueness if what it prohibits is not clearly explained.⁴⁰ The vagueness doctrine is designed to serve two important principles. The first principle is to ensure that the ordinary citizen is able to understand what the law prohibits in order for him to be able to conform his conduct to it. The second principle is to prevent arbitrary enforcement by officials who themselves do not clearly understand what the law prohibits.⁴¹ Vague laws “offend several important values.”

[f]irst, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them.⁴²

In some instances, a law that does not “run the risk of chilling constitutional freedoms is void on its face only if it is impermissibly vague in all applications.”⁴³ However, a “relatively strict” test is needed when criminal penalties are involved⁴⁴ so that a criminal ordinance can be invalid on its face even when it could have a legitimate purpose.⁴⁵ The Constitution allows va-

37. See *Romer v. Evans*, 517 U.S. 620, 632 (1996).

38. See *People's Rights Org.*, 152 F.3d at 532.

39. U.S. CONST. amend. XIV, § 1.

40. See *People's Rights Org.*, 152 F.3d at 533.

41. See Robert Batey, *Vagueness and the Construction of Criminal Statutes – Balancing Acts*, 5 VA. J. SOC. POL'Y & L. 1, 4 (1997).

42. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

43. *Springfield Armory v. City of Columbus*, 29 F.3d 250, 251 (6th Cir. 1994).

44. See *People's Rights Org.*, 152 F.3d at 533.

45. See *Springfield Armory*, 29 F.3d at 255.

rying amounts of vagueness and levels of fair notice and fair enforcement, depending on the type of law.⁴⁶

The first part of a court's inquiry into a law challenged as being void for vagueness is whether it affects a constitutionally protected activity.⁴⁷ The main criteria in determining the clarity the Constitution requires from a statute is whether it threatens to impair the enjoyment of constitutional rights.⁴⁸ Some judges consider certain rights to be more important than others and therefore allow a greater degree of vagueness in the statute depending on how highly they value the right that is in danger of being impermissibly chilled.⁴⁹ However, there is nothing in the Constitution that states that certain rights are more important than others, with the sole exception that constitutional rights are considered more important than non-constitutional rights.⁵⁰

Vague laws may discourage citizens from engaging in perfectly legal conduct simply because they do not understand what the law prohibits, and want to ensure that they do not subject themselves to criminal penalties.⁵¹ Therefore, if the statute has the likelihood of deterring citizens from engaging in behavior that is both legal and constitutionally protected,⁵² the strictest standard of review is necessary, and in such a case, the statute will almost always be struck down.⁵³ In addition, if the conduct the law threatens to deter is beneficial to society at large, the general population is harmed when the individual

46. See *Women's Med. Profl. Corp. v. Voinovich*, 130 F.3d 187, 197 (6th Cir. 1997) (citing *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982)).

47. See *Springfield Armory*, 29 F.3d at 254.

48. See *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982).

49. See *Batey*, *supra* note 41, at 15.

50. See *id.* at 19.

51. See *id.* at 15.

52. See *generally* *Ashton v. Kentucky*, 384 U.S. 195 (1966) (vague law threatened to chill free speech); *Kolender v. Lawson*, 461 U.S. 352 (1983) (vagueness of statute inhibited freedom of movement); *Lawson*, 461 U.S. at 362-67 (Brennan, J., concurring) (right against unreasonable search and seizure was implicated by vague law); *Smith v. Goguen*, 415 U.S. 566 (1974) (freedom of expression infringed by vague law).

53. See *Batey*, *supra* note 41, at 15.

ceases his beneficial legal conduct to conform to what he assumes the law requires.⁵⁴

Another factor involved in determining if a statute is unconstitutionally vague, in the case of a criminal statute, is whether there is a scienter requirement or the imposition of strict liability.⁵⁵ Criminal laws that contain no scienter requirement are merely “a trap for those who act in good faith,” and this is compounded when the law is also vague.⁵⁶ The vagueness doctrine does not require that the defendant understand and be aware of what the law prohibits, merely that an ordinary person could understand what the law prohibits.⁵⁷

D. *Selected Cases Challenging Assault Weapons Bans*

In addition to the main case, there are two other cases dealing with assault weapons bans that are particularly applicable. The first case is *Arnold v. City of Cleveland*,⁵⁸ in which the Ohio Supreme Court reviewed the Cleveland assault weapons ban, which served as the model for the second assault weapons ban adopted by Columbus. The second case is *National Rifle Association v. Magaw*,⁵⁹ in which the Sixth Circuit reviewed the federal assault weapons ban.⁶⁰

In *Arnold v. City of Cleveland*,⁶¹ the Ohio Supreme Court upheld the assault weapons ban⁶² enacted by the City of Cleveland, which was identical to the second assault weapons ban enacted by Columbus.⁶³ The ordinance was challenged on the grounds that it violated the right to keep and bear arms under the Ohio Constitution.⁶⁴ The Ohio Supreme Court held that Section 4, Article 1, of the Ohio Constitution⁶⁵ protected the fun-

54. *See id.*

55. *See People's Rights Org. v. City of Columbus*, 152 F.3d 522, 534 (6th Cir. 1998).

56. *United States v. Ragan*, 314 U.S. 513, 524 (1942).

57. *See Batey*, *supra* note 41, at 4.

58. 616 N.E.2d 163 (Ohio 1993).

59. 132 F.3d 272 (6th Cir. 1997).

60. 18 U.S.C. § 922 (v), (w) (1994).

61. 616 N.E.2d 163 (1993).

62. *See CLEVELAND, OHIO, ORDINANCE No. 415-89 § 628.02* (1989).

63. *See Arnold*, 616 N.E.2d at 173.

64. *See id.* at 166.

65. “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

damental right to keep and bear arms.⁶⁶ However, the court upheld the statute as a reasonable limitation upon that right.⁶⁷ Although the Ohio Supreme Court had previously upheld an assault weapons ban identical to the second assault weapons ban enacted by Columbus, it did not address the issue of the ordinance being void for vagueness under the Due Process Clause of the Fourteenth Amendment, leaving that question for determination at a later time.⁶⁸

The other assault weapons case particularly suited to a discussion of the lead case is *National Rifle Ass'n v. Magaw*,⁶⁹ because it was also decided by the Sixth Circuit and involved a claim that the law was unconstitutionally vague.⁷⁰ In *Magaw*, the Sixth Circuit held that the plaintiffs lacked standing to bring their claim that the law was unconstitutionally vague because the Bureau of Alcohol, Tobacco, and Firearms had not exercised its rule making authority to clarify the regulation, so the Sixth Circuit never decided the issue.⁷¹ The law in question was the federal assault weapons ban,⁷² and the plaintiffs claimed that they were unable to ascertain which firearms were prohibited.⁷³

The Sixth Circuit noted that the plaintiffs had not availed themselves of the provision in the law⁷⁴ specifically designed to assist individuals in determining if a specific firearm was covered under the statute.⁷⁵ Therefore, the law was not unconsti-

up; and the military shall be in strict subordination to the civil power." OHIO CONST. § 4, art. I.

66. See *Arnold*, 616 N.E.2d at 171.

67. See *id.* at 173.

68. See *People's Rights Org. v. City of Columbus*, 152 F.3d 522, 538 (6th Cir. 1998).

69. 132 F.3d 272 (1997).

70. See *id.* at 277.

71. See *id.* at 293.

72. 18 U.S.C. §§ 922(v)(1), 922(w)(1) (1994).

73. See *Magaw*, 132 F.3d at 292.

74. See 18 U.S.C. § 926 (Congress delegated rulemaking authority to the Secretary of the Treasury to make further rules necessary to apply the law. This authority was then delegated to the Bureau of Alcohol, Tobacco and Firearms (BATF). See *Treas. Dep't Order No. 221*, 37 Fed. Reg. 11696, 11696-97 (1975); see also 27 C.F.R. Part 178. An individual desiring to know whether the statute covers a particular firearm can have a determination made by the BATF's Firearms Technology Branch.

75. See *Magaw*, 132 F.3d at 292.

tutionally vague on its face because there had been no final interpretation by the rulemaking agency, and therefore the plaintiffs' lawsuit was premature.⁷⁶ However, the District of Columbia Circuit has held this law to be vague as applied to a criminal prosecution for possession of an assault weapon.⁷⁷

Additional cases where the courts have addressed challenges to assault weapons bans include *Richmond Boro Gun Club, Inc. v. City of New York*⁷⁸ where the Second Circuit upheld New York City's assault weapons ban⁷⁹ against a pre-enforcement challenge that it was unconstitutionally vague on its face.⁸⁰ Since the plaintiffs conceded that the law did not affect a fundamental right, the Second Circuit therefore held that the law was not unconstitutionally vague, since it was not vague in any and every conceivable application.⁸¹

In *Fresno Rifle and Pistol Club, Inc. v. Van de Kamp*,⁸² the Ninth Circuit reviewed and upheld California's assault weapons ban.⁸³ In *Fresno*, the plaintiffs challenged the law based on claims that it (1) was preempted by the Civilian Marksmanship Program,⁸⁴ (2) was a bill of attainder, and (3) violated the Second Amendment.⁸⁵ Although the law was not challenged as being void for vagueness, there is reason to believe that it would be struck down if challenged on this ground, because the Columbus City Council copied this law in making their first as-

76. *See id.*

77. *See United States v. Spinner*, 152 F.3d 950, 956-60 (D.C. Cir. 1998) (holding government was unable to prove rifle contained features qualifying it as an assault weapon, and that it was not proven that the defendant knew the rifle was an assault weapon).

78. 97 F.3d 681 (2d Cir. 1996).

79. NEW YORK, N.Y. ADMINISTRATIVE CODE § 10-301(16) (defining assault weapons generically, as semiautomatic firearms with one or more enumerated features).

80. *See Richmond Boro Gun Club*, 97 F.3d at 686.

81. *Id.* at 684.

82. 965 F.2d 723 (9th Cir. 1992).

83. *See id.*; CAL. PENAL CODE §§ 12275-90 (West 1989).

84. 10 U.S.C. §§ 4307-13 (1994) (designed to promote training in firearms among men of military age).

85. *See Fresno Rifle*, 965 F.3d at 724.

sault weapons ban,⁸⁶ which was overturned as being void for vagueness.⁸⁷

E. *The Predecessor Statute*

In 1989, presumably due to a widely publicized shooting in Stockton, California, Columbus passed an ordinance to ban assault weapons.⁸⁸ This was the city's first attempt at writing an assault weapons ban⁸⁹ and they did so by listing specific firearms by manufacturer rather than attempting to define and ban a class of firearms.⁹⁰ The ordinance listed forty-six different firearms,⁹¹ including thirty-four specific rifles,⁹² three specific shotguns,⁹³ nine specific pistols,⁹⁴ and "[o]ther models by the same manufacturer with the same action design that have slight modifications or enhancements of the firearms listed in subparagraphs (1), (2), and (3), provided the caliber exceeds .22 rimfire."⁹⁵ The sale of any of the firearms defined as assault weapons was banned,⁹⁶ and possession of them was made unlawful⁹⁷ unless they were registered.⁹⁸ Registration was only possible for assault weapons that were lawfully possessed before October 31, 1989 and properly registered between November 1 and November 30, 1989.⁹⁹

86. See *Springfield Armory v. City of Columbus*, 29 F.3d 250, 254 (6th Cir. 1994).

87. See *id.* at 251-52.

88. See Thomas W. McGoldrick, Note & Comment, *Happiness is a Warm Gun: The Sixth Circuit Shoots Down a Ban on Assault Weapons*, 5 TEMP. POL. & CIV. RTS. L. REV. 203 (1996) (author supports assault weapons ban although noting that assault weapons are almost never used in crime, because it serves as a useful step toward more restrictive gun control, because assault weapons have a "menacing appearance" and are "easy targets" for gun control proponents). See *id.* at 214-16.

89. Apparently, the city council did not even attempt to write their own ordinance, but simply copied the California assault weapons ban, CAL. PENAL CODE §§ 12275-90 (West 1989). See *Springfield Armory*, 29 F.3d at 254.

90. COLUMBUS, OHIO, CITY COUNCIL ORDINANCE No. 1226-89 (1989).

91. COLUMBUS, OHIO, CITY CODE § 2323.01 (1989).

92. *Id.* § 2323.01(I).

93. *Id.* § 2323.01(II).

94. *Id.* § 2323.01(III).

95. *Id.* § 2323.01(IV).

96. See COLUMBUS, OHIO, CITY CODE § 2323.05(A) (1989).

97. See *id.* § 2323.05(B).

98. See *id.* § 2323.05(C).

99. See *id.*

F. *Treatment of the Predecessor Statute in Springfield Armory, Inc. v. City of Columbus*

Two firearms manufacturers,¹⁰⁰ a federally licensed firearms dealer from Columbus, and three residents of Columbus challenged the ordinance in the United States District Court for the Southern District of Ohio.¹⁰¹ The plaintiffs brought the action under the Declaratory Judgment Act.¹⁰² Two of the rifles manufactured by Colt,¹⁰³ and two of the rifles manufactured by Springfield Armory,¹⁰⁴ were banned by the ordinance, along with any other rifles they manufacture that have the "same action design [and] that have slight modifications or enhancements of" the listed rifles.¹⁰⁵ Both the plaintiffs and the defendants filed motions for summary judgment.¹⁰⁶ The due process issues in this case were that the term "slight modifications or enhancements" is unconstitutionally vague, and that "Colt AR-15" is either unconstitutionally vague, or does not include the "Colt AR-15 Sporter."¹⁰⁷ The district court denied the motions for summary judgment.¹⁰⁸

The plaintiffs appealed the decision of the district court denying summary judgment to the Sixth Circuit Court of Appeals. The court ruled that the ordinance was both unconstitutionally vague on its face and irrational.¹⁰⁹ The law as written banned only the forty-six firearms specifically named in it, not banning identical firearms manufactured by other companies or explaining the criteria used in deciding which company's firearms to ban.¹¹⁰ Furthermore, the stated intention of the city council

100. Colt Manufacturing and Springfield Armory.

101. See *Springfield Armory, Inc. v. City of Columbus*, 805 F. Supp. 489, 491 (S.D. Ohio 1992).

102. 28 U.S.C. § 2201 (1994); see also *supra* Part II.A.

103. The AR-15 and the CAR-15; see also COLUMBUS, OHIO, CITY CODE § 2323.01(I)(5) (1989).

104. The BM59 and the SAR-48; see also § 2323.01(I)(13).

105. *Springfield Armory*, 805 F. Supp. at 491.

106. See *id.*

107. *Id.* at 492.

108. The final opinion from the district court is not published, however based upon the background in the opinion from the Sixth Circuit, the district court never addressed the issue of whether the ordinance was unconstitutionally vague on its face, but did decide that the law was vague as applied to two of the firearms. See *Springfield Armory*, 29 F.3d at 251.

109. See *id.* at 251-52.

110. See *id.* at 252.

was to ban assault weapons and remove them from the streets, but the law did not accomplish this because it only applied to an irrationally grouped subset of assault weapons while leaving identical ones by other manufacturers legal.¹¹¹

Since the city council also failed to define the terms "same action design," and "slight modifications,"¹¹² consumers and law enforcement officials could not determine what the terms meant.¹¹³ The legislature failed to give any reason why they chose to list the firearms by brand name rather than by characteristics, and why certain brands were included while identical firearms made by different manufacturers were not.¹¹⁴

The circuit court stated that although the use of the term "slight modifications" made the ordinance vague because it did not give any criteria to determine what constituted a "slight" modification, the use of the term "modification" itself is also vague because it would require the person to know if his firearm was designed based upon one of the listed firearms.¹¹⁵ Therefore, only individuals familiar with the design history of their firearms would know if they were covered under the ordinance.¹¹⁶ However the average gun owner is not familiar with the design characteristics of his firearm, and therefore would not know if it was covered under the ordinance.¹¹⁷

In dicta, the circuit court added that the vagueness problems could be easily remedied and that being more exact would not interfere with the goals of the legislation.¹¹⁸ The circuit court listed two assault weapons bans¹¹⁹ that use generic definitions to describe a class of firearms, giving the impression that it believed those laws comported with due process.¹²⁰

111. *See id.*

112. COLUMBUS, OHIO, CITY CODE § 2323.01(I) (1989).

113. *See Springfield Armory*, 29 F.3d at 252.

114. *See id.*

115. *See id.* at 253.

116. *See id.*

117. *See id.*

118. *See Springfield Armory*, 29 F.3d at 253.

119. The two assault weapons bans referenced by the Circuit Court were the Cleveland, Ohio ban, CLEVELAND, OHIO, ORDINANCE No. 415-89 § 628.02 (1989), and the federal ban, 18 U.S.C. §§ 922(v)(1), 922(w)(1) (1999).

120. *See Springfield Armory*, 29 F.3d at 253 (the CLEVELAND, OHIO, ORDINANCE No. 415-89 § 628.02 is identical to the second ban adopted by the City of Columbus, and the federal ban, 18 U.S.C. § 922(r), listed specific firearms or copies

The circuit court concluded that the ordinance was unconstitutionally void for vagueness on its face, and because it did not contain a severability clause, the whole law relating to assault weapons was invalid, and it would be better for the legislature to redraft the law rather than leave any part of it intact.¹²¹

G. *The Statute at Issue in the Lead Case – People’s Rights Organization v. City of Columbus*

After their first attempt at writing an assault weapons ban was declared unconstitutional by the Sixth Circuit Court of Appeals, the City Council of Columbus adopted a new ordinance using generic definitions copied from Cleveland’s assault weapons ban.¹²² The new ordinance stated that “[n]o person shall sell, offer or display for sale, give, lend or transfer ownership of, acquire or possess any assault weapon”¹²³ and “[n]o person shall knowingly possess a large capacity magazine.”¹²⁴

The new ordinance defined assault weapons as (1) “any semiautomatic action, center fire rifle or carbine that accepts a detachable magazine with a capacity of 20 rounds or more,”¹²⁵ (2) “any semiautomatic shotgun with a magazine capacity of more than six rounds;”¹²⁶ and (3) “any semiautomatic handgun that is: (a) a modification of a rifle described in division [(G)](1), or a modification of an automatic firearms [sic]; or (b) originally designed to accept a detachable magazine with a capacity of more than 20 rounds.”¹²⁷ In addition to banning these classes of firearms as assault weapons, the ordinance also banned “any firearm which may be restored to an operable assault weapon” as defined above.¹²⁸ “[A]ny part, or combination of parts, designed or intended to convert a firearm into an assault weapon . . . or any combination of parts from which an assault

thereof and any firearms that can accept a detachable magazine of five rounds or more and had at least two of five listed features).

121. *See id.* at 254.

122. *See id.* at 255.

123. COLUMBUS, OHIO, CITY CODE § 2323.31(A) (1994).

124. *Id.* § 2323.32(A).

125. *Id.* § 2323.11(G)(1).

126. *Id.* § 2323.11(G)(2).

127. *Id.* § 2323.11(G)(3).

128. COLUMBUS, OHIO, CITY CODE § 2323.11(G)(4) (1994).

weapon . . . may be readily assembled if those parts are in the possession or under the control of the same person” were also banned by the ordinance.¹²⁹

A large capacity magazine was defined as a “box, drum, clip or other container which holds more than twenty rounds of ammunition to be fed continuously into any semiautomatic firearm, except a magazine designed to hold only .22 caliber rimfire cartridges.”¹³⁰ The ordinance exempted any assault rifle that had been lawfully possessed and registered under the previous assault weapons ban,¹³¹ and any large capacity magazine which “belongs to or is possessed by the owner of a firearm registered under the National Firearms Act”¹³²

H. *Treatment of the Lead Case – People’s Rights Organization Inc. v. City of Columbus in the District Court*

The new assault weapons ban was challenged in the United States District Court for the Southern District of Ohio on the grounds that its provisions “are unconstitutionally ‘vague, violate the right to due process of law, create unreasonable discriminations [sic], and deny the equal protection of the laws.’”¹³³ The district court ruled (1) that the plaintiffs had standing to bring suit,¹³⁴ (2) that the grandfather clause did not violate equal protection,¹³⁵ and (3) that the law was unconstitutionally vague as applied to rifles and carbines,¹³⁶ handguns,¹³⁷ firearms that could be restored to assault weapons,¹³⁸ and parts used to make an assault weapon,¹³⁹ but not as to shotguns.¹⁴⁰ The district court also held that the law did not violate due process by

129. *Id.* § 2323.11(G)(5).

130. *Id.* § 2323.11(F).

131. *Id.* § 2323.31(B)(3).

132. *Id.* § 2323.32(B)(2).

133. *People’s Rights Org. Inc. v. City of Columbus*, 925 F. Supp. 1254, 1257 (S.D. Ohio 1996) *citing People’s Rights Org. Complaint* ¶ 1.

134. *See id.* at 1260.

135. *See id.* at 1263.

136. *See id.* at 1265.

137. *See id.* at 1268.

138. *See People’s Rights Org.*, 925 F. Supp. at 1268.

139. *See id.* at 1268-69.

140. *See id.* at 1266.

denying the fundamental right to keep and bear arms, protected by the Ohio Constitution.¹⁴¹

The district court upheld the grandfather clause relating to assault weapons registered under the former assault weapons ban as reliance upon former law, even though it noted that it was poorly tailored and that due to the law's vagueness, some individuals might not have registered their firearms because they did not realize that it was necessary.¹⁴² The district court concluded that the grandfather provision met the requirements of equal protection, because it was in some fashion related to the interest of protecting the ownership interests of those who had registered their firearms in reliance upon the previous law.¹⁴³

The district court also held that the provision relating to shotguns as assault weapons was not void for vagueness, even though it did not specify the length of shell to be used in order to determine whether the shotgun had a magazine capacity of over six rounds.¹⁴⁴ The district court concluded that the statute provides warning that it covers a shotgun with a magazine capacity of over six rounds of any length, and therefore adequately warns which shotguns are classified as assault weapons.¹⁴⁵

The court also concluded that the statute did not violate due process by denying the fundamental right to keep and bear arms under the Ohio Constitution because such rights are not absolute, and the law was a reasonable exercise of the police power.¹⁴⁶ However, the court noted that the city clearly could not ban all firearms, as opposed to just a certain subset of them, and still comply with the right to keep and bear arms under the Ohio Constitution.¹⁴⁷ The parts of the assault weapons ban that the district court overturned are discussed in Part III.

141. *See id.* at 1269.

142. *See id.* at 1262.

143. *See People's Rights Org.*, 925 F. Supp. at 1263.

144. *See id.* at 1266.

145. *See id.*

146. *See id.* at 1269.

147. *See id.*

III. The Sixth Circuit Court of Appeal's Decision in the Lead Case – *People's Rights Organization, Inc. v. City of Columbus*

A. *Standing of People's Rights Organization, Inc.*

The court held that the People's Rights Organization, Inc. had standing to challenge Columbus' assault weapons ban.¹⁴⁸ It was alleged in the complaint that the People's Rights Organization, Inc. has many members who own firearms and large capacity magazines that may be classified as assault weapons under the current statute.¹⁴⁹ Although these members lawfully owned their firearms and large capacity magazines within the City of Columbus before October 31, 1989, they did not register them under the previous assault weapons ban because they were uncertain as to whether they were classified as assault weapons under the previous ordinance and therefore subject to registration, which would have exempted them from the current assault weapons ban.¹⁵⁰ The individual members continue to own these firearms and large capacity magazines, yet are unable to determine whether or not they are considered to be illegal assault weapons under the current statute.¹⁵¹ The City of Columbus states that it will prosecute individuals for any violations of the assault weapons ban, and therefore the People's Rights Organization has standing.¹⁵²

The individual plaintiffs own rifles,¹⁵³ and are unable to determine whether their rifles are classified as assault weapons under the second assault weapons ban.¹⁵⁴ Gerald Smolak owns a Winchester semiautomatic centerfire hunting rifle, and Paul Walker owns an M1 Carbine.¹⁵⁵ They did not register them under the previous ordinance because they did not believe they qualified as assault weapons under the first assault weapons ban.¹⁵⁶ Smolak and Walker also own semiautomatic handguns, but they are unable to determine whether they are considered

148. See *People's Rights Org. v. City of Columbus*, 152 F.3d 522, 530 (6th Cir. 1998).

149. See *id.* at 528.

150. See *id.*

151. See *id.*

152. See *id.*

153. See *People's Rights Org.*, 152 F.3d at 528.

154. See COLUMBUS, OHIO, CITY CODE § 2323.11(G)(1) (1994).

155. See *People's Rights Org.*, 152 F.3d at 528.

156. See *id.*

to be assault weapons, because they do not know, and have no way of determining, the design history of the guns.¹⁵⁷

The court therefore held that the People's Rights Organization and the individual plaintiffs, Smolak and Walker, had standing to challenge the assault weapons ban in a declaratory judgment action because, the previous assault weapons ban was declared "unconstitutionally vague," and as a result "they were not on notice that they should have previously registered their lawfully possessed firearms."¹⁵⁸ The current statute contains no provision for gun owners to register firearms that were lawfully possessed in the City of Columbus prior to October 31, 1989 but not registered under the previous ordinance, because the ban was so vague that it did not provide notice that they were capable of registration as assault weapons, or because registration was not then possible because the current ban is more extensive than the original one.¹⁵⁹ Furthermore, the "case is ripe for a decision on the merits," because the plaintiffs are presented with a Hobson's choice,¹⁶⁰ they can keep their firearms in the city and risk prosecution, or store them outside of the city, in which case they are denied possession and use of their property.¹⁶¹ The case was ripe for a decision on the merits because the three required factors had been met: there would be substantial hardship on the plaintiffs if pre-enforcement review was denied; it was likely that the plaintiffs would be prosecuted for possessing the firearms; and the case was already fit for judicial resolution.¹⁶²

157. *See id.*

158. *Id.*

159. *See id.* at 528-29.

160. The term "Hobson's choice" comes from Thomas Hobson, a stable keeper who lived in England in the 17th century and serviced the route from Cambridge University to London. He hired out horses to students. However, to keep his best horses from being ridden to exhaustion, he sent the horses out in order and gave the renter his choice of whatever horse he wanted, as long as that horse was the next in line to go out. A "Hobson's choice" is therefore not really a choice at all. *See* CHARLES EARLE FUNK, *A HOG ON ICE AND OTHER CURIOUS EXPRESSIONS* 31-32 (Harper & Row 1948).

161. *See People's Rights Org.*, 152 F.3d at 528-29.

162. *See supra* text accompanying notes 28-31.

B. *Equal Protection – The Grandfather Clause Under the Previous Assault Weapons Ban*

The People's Rights Organization has many members who lawfully possessed firearms and large capacity magazines in the City of Columbus prior to November, 1989.¹⁶³ These firearms were not registered because they were not sure whether they were classified as assault weapons under the previous ordinance, and therefore subject to registration.¹⁶⁴ The individual members of the People's Rights Organization still own these firearms and large capacity magazines, which may be prohibited under the current assault weapons ban.¹⁶⁵

The current assault weapons ban exempts from prosecution anyone who owns an assault weapon that was registered under the previous assault weapons ban.¹⁶⁶ The plaintiffs argue that the grandfather provision for assault weapons that were registered under the previous ordinance "creates an irrational discrimination against plaintiffs and in favor of persons who did register their firearms because they speculated that their firearms were assault weapons . . . capable of registration under the 1989 definitions."¹⁶⁷ The city responded that the provision was designed to protect the ownership interests of those who had registered their firearms in reliance on the registration provision of the previous ordinance.¹⁶⁸

The Sixth Circuit overruled this provision as a violation of equal protection because there was no rational criteria for the court to use in order to distinguish between those who lawfully possessed firearms in November, 1989 and registered them based upon their guess that they were considered assault weapons under the statute, and those who did not.¹⁶⁹ The test for equal protection was therefore not met because there was no justifiable reason based on rational facts to distinguish between those who had registered their firearms and those who had not,

163. *See People's Rights Org.*, 152 F.3d at 528.

164. *See id.*

165. *See id.*

166. *See* COLUMBUS, OHIO, CITY CODE § 2323.31(B)(3) (1994).

167. *People's Rights Org.*, 152 F.3d at 531.

168. *See id.* at 532.

169. *See id.* at 532-33.

thus making the relationship between the classification and objective arbitrary.¹⁷⁰

C. *Equal Protection – Large Capacity Magazines Possessed With Firearms Registered Under the National Firearms Act*¹⁷¹

The Sixth Circuit upheld the district court's decision that the provision exempting those who owned large capacity magazines in conjunction with firearms registered with the federal government under the National Firearms Act¹⁷² from the provisions of the assault weapons ban prohibiting large capacity magazines¹⁷³ did not violate the Equal Protection Clause.¹⁷⁴ The plaintiffs had argued that this provision would allow those who owned a firearm registered under the National Firearms Act to own as many large capacity magazines as they wanted, even if the magazines were not for the registered firearm, and that this discriminated against those who did not own firearms subject to the National Firearms Act.¹⁷⁵

The Sixth Circuit disagreed with the plaintiff's proposition, stating that because individuals legitimately expect that they will be able to use the firearms that they have registered with the federal government, the city could protect their reliance interests through the use of the grandfather clause.¹⁷⁶ Legislation is presumed to be constitutional even though it may result in some inequalities.¹⁷⁷ The court therefore ruled that the grandfather clause for magazines should be upheld because the city drew its classification based on those who had firearms registered with the federal government under the National Firearms Act, and not on a suspect classification.¹⁷⁸ Therefore, the grandfather clause for high capacity magazines passes the equal protection test and is constitutional.¹⁷⁹

170. See *supra* text accompanying note 35.

171. 26 U.S.C. §§ 5801-71.

172. *Id.*

173. See COLUMBUS, OHIO, CITY CODE § 2323.32(B)(3) (1994).

174. See *People's Rights Org.*, 152 F.3d at 533.

175. See *id.*

176. See *id.*

177. See *McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961).

178. See *People's Rights Org.*, 152 F.3d at 533.

179. See *id.*

D. *Lack of a Scienter Requirement in Regard to Void for Vagueness Claims*

Columbus' second assault weapons ban does not contain a scienter requirement.¹⁸⁰ Though the city raised a default scienter requirement¹⁸¹ for the first time on appeal, arguing that while the statute does not contain a level of culpability, it does not clearly indicate the intent to apply strict liability, the Sixth Circuit ruled that the statute clearly intended for strict liability to apply.¹⁸² The former assault weapons ban contained the requirement that the individual knowingly commit the offense to be found guilty,¹⁸³ which was eliminated from the provision regarding assault weapons when the city rewrote the law¹⁸⁴ after it was ruled unconstitutional.¹⁸⁵ However, the city kept the "knowing" requirement for the provision relating to large capacity magazines.¹⁸⁶ Therefore, the court concluded that if the city had intended a scienter requirement to apply, it would have explicitly included one.¹⁸⁷

Due to the absence of a scienter requirement and the criminal penalties involved, "a relatively stringent" review of the assault weapons ordinance is required.¹⁸⁸ While the court concluded that a "relatively stringent" review was required due to the criminal penalties and the lack of a scienter requirement, the court also stated that the level of review required depended on the nature of what the statute regulates.¹⁸⁹ The court continued to say that because the statute did not regulate a consti-

180. *See id.* at 534 (scienter requires a culpable state of mind as opposed to strict liability).

181. When the section defining an offense does not specify any degree of culpability, and plainly indicates a purpose to impose strict criminal liability for the conduct described in such section, then culpability is not required for a person to be guilty of the offense. When the section neither specifies culpability nor plainly indicates a purpose to impose strict liability, recklessness is sufficient culpability to commit the offense. COLUMBUS, OHIO, CITY CODE § 2301.21(B) (1994).

182. *See People's Rights Org.*, 152 F.3d at 534.

183. *See* COLUMBUS, OHIO, CITY CODE § 2305(A)-(B); § 2306(A) (1994).

184. *See id.* § 2323.31(A).

185. *See Springfield Armory*, 29 F.3d at 254.

186. *See* COLUMBUS, OHIO, CITY CODE § 2323.32(A) (1994).

187. *See People's Rights Org.*, 152 F.3d at 534.

188. *See id.*

189. *See id.*

tutionally protected activity, the highest degree of clarity is not required in order to satisfy due process.¹⁹⁰

E. *Definition of Rifles and Carbines Under the Assault Weapons Ban is Void For Vagueness*

The Sixth Circuit held that the definition of rifles and carbines that are considered to be assault weapons is unconstitutionally vague.¹⁹¹ The term "accepts a detachable magazine with a capacity of 20 rounds or more,"¹⁹² does not give any guidance as to which of the following alternatives is correct:

- (1) [t]he owner must actually possess a detachable magazine with a twenty round or greater capacity;
- (2) the weapon, as manufactured and sold, included a twenty round or larger magazine;
- (3) the owner does not possess a twenty round or larger magazine, but one is commercially available; or
- (4) a twenty round or larger magazine is unavailable or does not exist, but one would fit the weapon if it existed.¹⁹³

Though the city conceded in its brief that the fourth alternative would probably not be correct, "it would seem next to impossible to ever prove someone guilty of violating the code without having the detachable magazine with a capacity of 20 rounds or more to fit a particular weapon,"¹⁹⁴ the statute is still unclear as to which of the first three alternatives is correct.¹⁹⁵ Therefore, it "fails to provide sufficient information to enable a person of average intelligence to determine whether a particular firearm is included within its prohibition."¹⁹⁶ The Sixth Circuit concluded that this provision was unconstitutionally vague because it could subject anyone who owned a semiautomatic rifle or carbine capable of accepting a detachable magazine to criminal liability, even though they were unaware that a magazine with a capacity of twenty rounds or more was capable of fitting their rifle or carbine.¹⁹⁷ The court hypothesized that this

190. *See id.* at 533 n.13.

191. *See id.* at 536.

192. COLUMBUS, OHIO, CITY CODE § 2323.11(G)(1) (1994).

193. *People's Rights Org.*, 152 F.3d at 535.

194. *Id.* at 535 (quoting Appellant's brief).

195. *See id.*

196. *Id.*

197. *See id.* at 536 (one of the plaintiffs, Smolak, owns a hunting rifle which accepts a four round detachable magazine, and he has never seen a magazine of

was not the intention of the city council when they wrote the law, as they could have simply banned any semiautomatic rifle or carbine that accepts a detachable magazine if that had been their intention.¹⁹⁸

F. *Definition of Shotguns Under the Assault Weapons Ban is Void For Vagueness*

The Sixth Circuit reversed the holding of the district court, ruling that the definition of whether or not a semiautomatic shotgun is an assault weapon is unconstitutionally vague.¹⁹⁹ The statute determined whether or not a semiautomatic shotgun was an assault weapon based on a magazine capacity of more than six rounds.²⁰⁰ The district court upheld this definition even though shotgun shells come in different lengths, and the length of the shells used could determine the number of shells the magazine would hold.²⁰¹ The district court concluded that the owner is warned that any shotgun holding more than six shells of any length is prohibited.²⁰² The circuit court overturned that conclusion because the "provision is a trap for the unwary. . . it imposes criminal liability regardless of whether a shotgun owner knows of the existence of the shorter length rounds."²⁰³ The city relied on its default scienter requirement as its sole defense to this provision, so that the owner would not be liable unless he knew the shotgun qualified as an assault weapon; however, the court held this to be invalid because it had already concluded that there was no scienter requirement, and that strict liability applied.²⁰⁴

greater capacity that would fit the rifle. He acknowledged that if one were made it would fit the rifle. The court decided that the law did not satisfy due process because he would be subject to prosecution if such a magazine were discovered).

198. See *People's Rights Org.*, 152 F.3d at 536.

199. See *id.*

200. See COLUMBUS, OHIO, CITY CODE § 2323.11(G)(2) (1994).

201. See *People's Rights Org.*, 152 F.3d at 536.

202. See *id.*

203. *Id.*

204. See *id.*

G. *Definition of Handguns Under the Assault Weapons Ban is Void For Vagueness*

The court ruled that the statute's definition of handguns that are considered to be assault weapons²⁰⁵ was void for vagueness.²⁰⁶ The district court held that all three definitions of handguns as assault weapons were invalid, and the City of Columbus did not even defend this provision in its brief.²⁰⁷ The court held that the first²⁰⁸ and third²⁰⁹ definitions of handguns as assault weapons were void for vagueness for the same reasons as the provisions defining rifles and carbines²¹⁰ to be assault weapons, i.e., because it did not adequately specify the meaning of the ability to accept a large capacity magazine.²¹¹

The first definition of a handgun as an assault weapon²¹² is unconstitutionally vague because it necessarily depends on the clarity of the definition of a rifle²¹³ as an assault weapon.²¹⁴ Since the court ruled that the definition of a rifle²¹⁵ as an assault weapon is void for vagueness,²¹⁶ the court held that it follows that the definition of a semiautomatic handgun that is "a modification of a rifle described in subsection (G)(1)"²¹⁷ is also vague.²¹⁸

The third definition of a handgun as an assault weapon is vague for the same reason that the definition of a rifle or a carbine as an assault weapon is vague.²¹⁹ Since the definition of a rifle or carbine as an assault weapon is vague because of the provision defining it as accepting a magazine with a capacity of more than twenty rounds,²²⁰ the definition of a semiautomatic

205. See COLUMBUS, OHIO, CITY CODE § 2323.11(G)(3) (1994).

206. See *People's Rights Org.*, 152 F.3d at 537.

207. See *id.*

208. See COLUMBUS, OHIO, CITY CODE § 2323.11(G)(3)(a)(i) (1994).

209. See *id.* § 2323.11(G)(3)(b).

210. See *id.* § 2323.11(G)(1).

211. See *People's Rights Org.*, 152 F.3d at 537.

212. See COLUMBUS, OHIO, CITY CODE § 2323.11(G)(3)(a)(i) (1994).

213. See *id.* § 2323.11(G)(1).

214. See *People's Rights Org.*, 152 F.3d at 537.

215. See COLUMBUS, OHIO, CITY CODE § 2323.11(G)(1) (1994).

216. See *People's Rights Org.*, 152 F.3d at 536.

217. COLUMBUS, OHIO, CITY CODE § 2323.11(G)(3)(a)(i) (1994).

218. See *People's Rights Org.*, 152 F.3d at 537.

219. See *id.*

220. See *id.* at 536.

handgun as an assault weapon because it is "originally designed to accept a detachable magazine with a capacity of twenty rounds or more,"²²¹ is also void for vagueness.²²² Since there is no scienter requirement and no way to determine which of the four alternatives are correct, and, like a rifle, a handgun that accepts a detachable magazine will accept a magazine of whatever capacity is created for it, the statute does not provide adequate warning of whether it covers a particular handgun.²²³

The second definition of a handgun as an assault weapon is a semiautomatic handgun that is "a modification of an automatic firearm."²²⁴ The court held that this definition is unconstitutionally vague because "[o]rdinary consumers cannot be expected to know the developmental history of a particular weapon."²²⁵ It is also unclear whether the term "modification" specifies an individual semiautomatic handgun that was modified from an automatic firearm, or whether it refers to a manufacturer originally making an automatic firearm and then designing a semiautomatic handgun based upon it.²²⁶ Therefore, the court held it is void for vagueness because there is no way for the average gun owner to ascertain whether a handgun falls under this provision due to its developmental history, and because there is no definition of the term "modification."²²⁷

H. *Definition of a Firearm That Can be Readily Restored to an Assault Weapon is Void For Vagueness*

The court held that the definition of a firearm that can readily be restored to an assault weapon is void for vagueness for two reasons.²²⁸ First, it is vague because the definition of assault weapons is unconstitutionally vague.²²⁹ Second, it is vague because the law fails to define what is meant by "may be

221. COLUMBUS, OHIO, CITY CODE § 2323.11(G)(3)(b) (1994).

222. See *People's Rights Org.*, 152 F.3d at 537.

223. See *id.*

224. COLUMBUS, OHIO, CITY CODE § 2323.11(G)(3)(a)(ii) (1994).

225. *People's Rights Org.*, 152 F.3d 522, 537 (quoting *Springfield Armory v. City of Columbus*, 29 F.3d at 253).

226. See *People's Rights Org.*, 153 F.3d at 537.

227. See *id.*

228. See *id.*

229. See *id.* at 535.

restored.”²³⁰ The city argued that the phrase “may be restored” prohibits unregistered ownership of any firearm that may be restored to an assault weapon, however, this is vague because guidance is not given as to whether it means that the current owner can restore it to an assault weapon, or whether a master gunsmith with any tool at his disposal can restore it to an assault weapon.²³¹ This provision is vague and violates due process because it imposes strict liability on an owner if his firearm could be converted to an assault weapon by a master gunsmith, making the owner criminally liable for owning the firearm even if he was unaware of this and unable to convert it on his own.²³²

I. *Definition of Parts Used to Make an Assault Weapon is Void For Vagueness*

The court ruled that the definition of parts that may be used to make an assault weapon²³³ is also void for vagueness because the definition of an assault weapon is void for vagueness.²³⁴ Furthermore, the statute does not define the meaning of the phrase “may be readily assembled,”²³⁵ so that a person of ordinary intelligence could understand its meaning and determine which parts are illegal.²³⁶ Nor does the law statutorily define the parts that are to be considered in determining whether they can be used to make an assault weapon.²³⁷ Therefore, the definition of parts used to make an assault weapon is also void for vagueness.²³⁸

J. *Decision in Springfield Armory Inc. v. City of Columbus Did Not Necessarily Approve of New Assault Weapons Ban*

The court ruled that the city’s contention that the Sixth Circuit approved of the current version of the assault weapons

230. COLUMBUS, OHIO, CITY CODE § 2323.11(G)(4) (1994).

231. *See People’s Rights Org.*, 152 F.3d at 537.

232. *See id.*

233. *See* COLUMBUS, OHIO, CITY CODE § 2323.11(G)(5) (1994).

234. *See People’s Right Org.*, 152 F.3d at 537.

235. COLUMBUS, OHIO, CITY CODE § 2323.11(G)(5) (1994).

236. *See People’s Rights Org.*, 152 F.3d at 538.

237. *See id.*

238. *See id.*

ban is without merit.²³⁹ In *Springfield Armory Inc. v. City of Columbus*,²⁴⁰ the Sixth Circuit overturned the city's previous ban, which defined assault weapons by listing specific firearms by manufacturer, on void for vagueness grounds.²⁴¹ In dicta, the court stated that the vagueness problems could be remedied by being more specific, such as by using a generic definition for all assault weapons.²⁴² The dicta, in which the court pointed out assault weapons statutes which use generic definitions such as those of Cleveland, Ohio²⁴³ and the federal government,²⁴⁴ was "not meant to sanction any . . . particular piece of legislation, but instead was merely an attempt to illustrate the possibility of using generic definitions."²⁴⁵

The City of Columbus used the Cleveland assault weapons ban²⁴⁶ as a model for its current statute.²⁴⁷ Even though the Cleveland assault weapons ban,²⁴⁸ on which Columbus' second statute was based, was upheld by the Ohio Supreme Court,²⁴⁹ that case did not involve a challenge to the statute based on vagueness grounds.²⁵⁰

K. *The Dissent*

Judge Merritt, who wrote the majority opinion in *Springfield Armory Inc. v. City of Columbus*,²⁵¹ stated that "[n]o longer does the ordinance simply and irrationally outlaw certain brand named guns, or any modifications thereof, leaving untouched the same type weapons with other brand names," and this change corrects the main problem with the earlier statute, i.e., defining assault weapons using specific models rather than generic definitions.²⁵²

239. *See id.*

240. 29 F.3d 250 (6th Cir. 1994).

241. *See People's Rights Org.*, 152 F.3d at 538.

242. *See id.*

243. *See* CLEVELAND, OHIO, ORDINANCE No. 415-89 § 628.02 (1989).

244. *See* H.R. 4296 § 2, 103rd Cong. (1994).

245. *People's Rights Org.*, 152 F.3d at 538.

246. CLEVELAND OHIO ORDINANCE No. 415-89 § 628.02 (1989).

247. *See People's Rights Org.*, 152 F.3d at 538.

248. *See* CLEVELAND, OHIO, ORDINANCE No. 415-89 § 628.02 (1989).

249. *See* *Arnold v. City of Cleveland*, 616 N.E.2d 163 (Ohio 1993).

250. *See id.*

251. 29 F.3d 250 (6th Cir. 1994).

252. *People's Rights Org.*, 152 F.3d at 539 (Merritt J., dissenting).

The dissenting opinion argued that the Ohio state courts could correct many of the problems in the statute by imposing a scienter requirement.²⁵³ “In most of its applications, assuming a scienter requirement is imposed, the ordinance will be valid.”²⁵⁴ The ordinance can be applied only to assault weapons that are knowingly possessed, in which case the ordinance will not be invalid on its face.²⁵⁵

The dissenting judge wrote that the Ohio state courts could narrowly interpret the statute, thereby curing the defects in the provision relating to semiautomatic rifles, carbines and handguns that accept a detachable magazine with a capacity of twenty rounds or more.²⁵⁶ The dissent stated that the Ohio state courts could give this provision a narrow scope by stating that “such a magazine has to be readily available for purchase,” so that a firearm would not otherwise be considered an assault weapon.²⁵⁷

The dissent said that the grandfather provisions, whereby owners who registered their firearms under the previous assault weapons statute,²⁵⁸ or owned large capacity magazines in connection with firearms registered under the National Firearms Act,²⁵⁹ are not unfair because “[t]hey are based on a gun owner’s reliance on prior law, a rational distinguishing characteristic.”²⁶⁰

The dissenting judge further stated that the case is not yet ripe for review even though there are some instances in which the ordinance could be unconstitutional.²⁶¹ There are many laws that may be unconstitutional in certain applications, but the courts should wait until they are applied in an enforcement proceeding before making a judgment on the law as a whole.²⁶² Instead of issuing a long opinion trying to answer a number of hypothetical questions in a declaratory judgment action, the

253. *See id.*

254. *Id.*

255. *See id.* at 539-40.

256. *See id.* at 539.

257. *People’s Rights Org.*, 152 F.3d at 539 (Merritt J., dissenting).

258. *See* COLUMBUS, OHIO, CITY CODE § 2323.31(B)(3) (1994).

259. *See id.* § 2323.32(B)(2).

260. *People’s Rights Org.*, 152 F.3d at 539 (Merritt J., dissenting).

261. *See id.*

262. *See id.*

court should wait until it can see how the law is applied in a real case.²⁶³

IV. Analysis

The decision of the Sixth Circuit Court of Appeals had a greater effect than merely overturning Columbus' second attempt at writing an assault weapons ban.²⁶⁴ It also had the effect of invalidating the Cleveland statute upon which it was based,²⁶⁵ since the Cleveland statute was copied verbatim.²⁶⁶ Though the Cleveland ordinance had survived judicial scrutiny earlier,²⁶⁷ it has been indirectly overruled as unconstitutionally vague, because its language is identical to that of Columbus' second assault weapons ban.²⁶⁸ By copying both the specific manufacturer and model list and the generic definition type of assault weapons bans from California²⁶⁹ and Cleveland²⁷⁰ respectively, the Columbus City Council provided a testing ground for the Sixth Circuit to rule on the vagueness challenges that are bound to adhere to assault weapons standards.

The California ban had previously survived judicial scrutiny, but had never been tested to see if it met the due process requirement that it be understandable to an ordinary citizen and thus, not "void for vagueness."²⁷¹ Since Columbus simply copied California's statute²⁷² instead of taking the time to research and write its own, anyone wishing to challenge California's assault weapons ban on the grounds that it is void for vagueness, has a compelling case to rely upon even though it is not binding because California is in the Ninth Circuit.

The same principle applies to the Cleveland ordinance from which Columbus copied its second assault weapons ban,²⁷³ with

263. *See id.* at 539-40.

264. *See id.*

265. *See* CLEVELAND, OHIO ORDINANCE No. 415-89 § 628.02 (1989).

266. *See Columbus Gun Ban Overturned, Again*, AMERICAN RIFLEMAN, Oct. 1998, at 23.

267. *See supra* text accompanying notes 62-69.

268. *See supra* text accompanying note 123.

269. *See* CAL. PENAL CODE §§ 12275-90 (1999).

270. *See* CLEVELAND, OHIO, ORDINANCE No. 415-89 § 628.02 (1989).

271. *See supra* text accompanying notes 83-88.

272. *See supra* text accompanying note 90; *see also* CAL. PENAL CODE §§ 12275-90 (1999).

273. *See supra* text accompanying note 123.

the exception that Cleveland is within the Sixth Circuit and the decision holding an identical statute void for vagueness is binding. If the Columbus City Council decides to adopt yet a third assault weapons ban, it will be interesting to see if they study the issue of assault weapons and write their own ordinance, or copy yet another ordinance, therefore opening it up to attack on vagueness grounds. Should they copy yet a third ordinance they might want to adopt the federal assault weapons ban, which is a hybrid of the two types.²⁷⁴ It would be interesting to see what the Sixth Circuit would decide regarding this law, as it has earlier ruled the federal version was not subject to facial attack for vagueness because Congress gave rule making authority to the Bureau of Alcohol, Tobacco and Firearms to clarify any issues regarding the firearms covered under it.²⁷⁵

The Sixth Circuit was correct in ruling that the People's Rights Organization had standing to challenge Columbus' assault weapons ban.²⁷⁶ The People's Rights Organization was composed of individual gun owners who had standing to sue in their own right, the lawsuit was germane to the organizations purpose, and the requested relief did not require the participation of individual members in the lawsuit.²⁷⁷ Although an actual injury in fact had not yet been suffered by the plaintiffs, this was not necessary as the suit was brought under the Declaratory Judgment Act.²⁷⁸ This allows pre-enforcement relief because there was present injury in that the plaintiffs did not know whether they were exposed to criminal prosecution. There was also a likelihood of future prosecutions under the assault weapons statute as the city stated that it intended to prosecute any violations.²⁷⁹

The court correctly held that the plaintiffs had standing: the allegedly unlawful statute threatened the plaintiffs' rights; there was a causal connection between the statute and the threatened injury; the future injury could be remedied through the judicial process; and the plaintiffs proved their burden of

274. See *supra* text accompanying notes 70-78.

275. See *supra* text accompanying note 75.

276. See *supra* Part III.A.

277. See *supra* text accompanying notes 24-27.

278. See *supra* text accompanying notes 19-23.

279. See *supra* text accompanying notes 19-23.

showing that these elements existed.²⁸⁰ Further, the Sixth Circuit was correct in holding that the assault weapons ban was ripe for review. If review was denied there would be a substantial hardship on the plaintiffs since they could not ascertain whether they were violating the law and thus subjecting themselves to criminal prosecution.²⁸¹ The prosecutions the plaintiffs feared under the assault weapons statute were probable in the immediate future and therefore a declaratory judgment that the assault weapons ban was unconstitutional was proper.²⁸²

The Sixth Circuit was correct in holding that all five definitions of an assault weapon in the City of Columbus, Ohio's ordinance were unconstitutionally vague because it was impossible for the average person to understand whether or not a particular firearm was classified as an assault weapon.²⁸³ The definition of rifles and carbines did not give adequate warning as to whether a rifle or a carbine was classified as an assault weapon only if possessed in conjunction with a large capacity magazine, whether one had to be available, or if it would be an assault weapon simply because a large capacity magazine could be manufactured that would fit it.²⁸⁴ Since the statute imposed criminal penalties, and the city stated that it would prosecute for violations of the statute, citizens were left with the Hobson's Choice of guessing the meaning of the statute with the risk of going to jail if they guessed wrong, or giving up their firearms.²⁸⁵ This same guessing game applied when a person was trying to determine whether a handgun was an assault weapon under the ordinance.²⁸⁶

The definition of which shotguns were classified as assault weapons was also incomprehensible because magazine capacity is determined by the length of the shell in shotguns that hold them lengthwise in a tube under the barrel.²⁸⁷ Shotgun owners were left to speculate on the length of the shell to be used to determine magazine capacity and subject to prosecution if their

280. See *supra* text accompanying notes 17-18.

281. See *supra* text accompanying notes 28-31.

282. See *supra* text accompanying notes 30-31.

283. See *supra* Parts III.E.-I.

284. See *supra* Part III.E.

285. See *supra* Parts III.A. and D; see also *supra* note 160.

286. See *supra* Part III.G.

287. See *supra* Part III.F.

shotgun held over six shells of any length, even if they did not know that such a short shell existed.²⁸⁸ It logically follows that since the definition of firearms classified as assault weapons was incomprehensible, that the definition of firearms that can be readily restored to an assault weapon or of parts used to assemble such a firearm are also unconstitutionally vague.²⁸⁹ The Sixth Circuit's decision that there were no rational grounds to distinguish those who had registered their firearms under Columbus' first assault weapons ban from those who had not, is correct.²⁹⁰ Since the first assault weapons ban had been ruled void for vagueness in that the average person could not determine which firearms could be registered under it, it does not make sense to grant them an exemption from a subsequent ban simply because they guessed correctly while others did not.²⁹¹

While the majority correctly ruled on most aspects of the statute, their decision to uphold the grandfather provision²⁹² regarding large capacity magazines possessed in conjunction with a firearm registered under the National Firearms Act²⁹³ is troubling. Though the court reasoned that the provision should be upheld as reliance on federal law, because the grandfather provision applied to those who owned firearms registered under the National Firearms Act,²⁹⁴ the provision exempting those who owned large capacity magazines in connection with firearms registered under the National Firearms Act was overbroad, and therefore should have been struck down as being in violation of equal protection.²⁹⁵

While it is sound reasoning to uphold such a provision if it were narrowly tailored to conform to the exception it is based upon, the extent of the provision does not comport with its stated justification. The Sixth Circuit held that it was constitutional and did not violate equal protection as written. However, in order to comply with the stated intention of the city, to allow those who owned firearms registered under the National Fire-

288. *See supra* Parts III.F. and D.

289. *See supra* Parts III.H. and I.

290. *See supra* Part III.B.

291. *See supra* Parts II.B., E., G. and III.B.

292. *See* COLUMBUS, OHIO, CITY CODE § 2323.32(B)(2) (1994).

293. 26 U.S.C. §§ 5801-71.

294. *See id.*

295. *See supra* Part III.C.

arms Act²⁹⁶ to continue to use them in reliance on federal law, the court should have struck down the provision as being overbroad and forced the city council to rewrite it to conform with its stated intentions. As written and upheld by the Sixth Circuit, the provision allows an individual who owns a firearm registered with the federal government under the National Firearms Act,²⁹⁷ to own an unlimited number of large capacity magazines of any type. It does not even restrict the exemption to magazines designed for the firearm, which provided the exception in the first place. For this reason, the classification of individuals covered by the grandfather provision does not conform to a rational criteria and should have been held to violate equal protection as it was written.

Although it had no effect on the outcome of the case, the standard of review the Sixth Circuit chose for the vagueness aspects of the statute also deserves further attention.²⁹⁸ The Sixth Circuit concluded, in dicta, that the statute did not regulate a constitutionally protected activity, and therefore could withstand a greater degree of vagueness.²⁹⁹ Though it did not affect the outcome in this instance, the courts should apply strict scrutiny in determining whether an assault weapons ban is void for vagueness, not a "relatively stringent" standard as applied by the court.³⁰⁰ The statute implicated the right to keep and bear arms protected by the Second Amendment,³⁰¹ and the Ohio Constitution,³⁰² and therefore should be reviewed under the same standard as laws affecting other constitutional rights, such as freedom of speech under the First Amendment.³⁰³ All laws affecting rights protected under the Bill of Rights³⁰⁴ should be reviewed using the strict scrutiny standard. Individual

296. 26 U.S.C. §§ 5801-71.

297. *See id.*

298. *See supra* text accompanying notes 188-89.

299. *See supra* text accompanying note 189.

300. *See supra* text accompanying note 188.

301. U.S. CONST. amend. II; *see also supra* note 1.

302. OHIO CONST. § 4, art. I. *See supra* text accompanying note 66.

303. *See* William VanAlstyne, *The Second Amendment and the Personal Right to Arms*, 43 DUKE L.J. 1236, 1250 (1994) (comparing right to keep and bear arms and the right to free speech and freedom of the press); *see also* Printz v. United States, 521 U.S. 898, 935-40 (1997) (Thomas J., concurring) (comparing First and Second Amendments).

304. U.S. CONST. amends. I-X.

judges should not be left to determine which rights they favor more than others and thus afford greater protection. Therefore, vague laws which threaten to impede the right to keep and bear arms, should be reviewed just as strictly as libel laws that threaten to chill free speech.³⁰⁵

The dissent in *People's Rights Organization v. City of Columbus* took an interesting approach in reviewing the law.³⁰⁶ By stating that the law was much better than the city's first attempt, it gave the impression that the law should be upheld and rewritten by the Ohio courts,³⁰⁷ simply because their second attempt was better than their first.³⁰⁸ There is reason to believe that Judge Merritt had a personal interest in having this second version of the law upheld. In the opinion for *Springfield Armory, Inc. v. City of Columbus*,³⁰⁹ which he wrote, he noted after holding the city's assault weapons ban unconstitutional that it was easy to remedy, and specifically noted the law of Cleveland,³¹⁰ which the city then based its new law upon.³¹¹ Though the majority stated that the opinion was not meant to sanction any particular law,³¹² it can be inferred that at the time Judge Merritt believed that the Cleveland law³¹³ would in fact satisfy due process.

Rather than admit that he had not analyzed the Cleveland law³¹⁴ and was merely listing it as a possible alternative, it appears that Judge Merritt believed the city council read his opinion and took it to be an approval of an ordinance that the court would uphold.³¹⁵ There is reason to believe that Judge Merritt voted to uphold the new law, due to the city's probable reliance on his earlier decision in choosing it, and force the Ohio courts to in effect do the city council's job by rewriting it to make it constitutional. He specifically stated that the Ohio courts could impose a scienter requirement that the person had to know the

305. See Batey, *supra* note 41, at 62-63.

306. See *supra* Part III.K.

307. See *supra* Part III.K.

308. See *supra* Part III.K.

309. 29 F.3d 250 (6th Cir. 1994).

310. CLEVELAND, OHIO ORDINANCE NO. 415-89 § 628.02 (1989).

311. See *supra* text accompanying notes 118-21.

312. See *supra* Part III.J.

313. CLEVELAND, OHIO ORDINANCE NO. 415-89 § 628.02 (1989).

314. See *id.*

315. See *supra* Part III.J.

firearm was classified as an assault weapon, and narrowly interpret it by stating that a magazine with a capacity of twenty rounds or more had to be readily available.³¹⁶ Furthermore, he argued that the case was not ripe for review because it was not yet known how it would be enforced by the Ohio courts,³¹⁷ even though in *Springfield Armory Inc. v. City of Columbus* he had argued the exact opposite.³¹⁸

Though there is mounting evidence to support the proposition that such gun control laws are in fact unconstitutional under the Second Amendment,³¹⁹ it has not yet been incorporated to the states, meaning that the Second Amendment does not prohibit the states from enacting gun control laws.³²⁰ Until the Supreme Court makes this determination, plaintiffs will have to rely on state constitutional provisions when challenging these laws as a violation of the right to keep and bear arms.³²¹ Though there is no reason to write the assault weapons bans in the first place except as a stepping stone toward further gun control laws,³²² legislatures that do so should take care in drafting them so that they are not so vague that they serve as a trap for the unwary.

Two factors that appear essential for an assault weapons ban to survive a void for vagueness challenge are a scienter requirement, and a provision for a rule-making agency to interpret the law to determine whether certain firearms qualify as assault weapons under the law or not.³²³ Since those who are familiar with firearms see no reason to ban assault weapons in the first place, those who draft the laws must take the time to educate themselves on the subject. When the legislature drafts a law without understanding the subject matter, it is preposterous to believe that the public will be able to understand what the law is referring to. In writing the law, one method that will

316. *See supra* Part III.K.

317. *See supra* Part III.K.

318. *See supra* Part II.F.

319. *See supra* text accompanying notes 3, 4, and 302.

320. *See supra* text accompanying note 3.

321. *See* David B. Kopel et al., *A Tale of Three Cities: The Right to Keep and Bear Arms in State Supreme Courts*, 68 *TEMP. L. REV.* 1177 (1995) (state courts frequently strike down gun control laws as a violation of the right to keep and bear arms under the state constitution).

322. *See supra* text accompanying note 88.

323. *See supra* text accompanying notes 70-78.

help to avoid a vagueness challenge is to statutorily define the meaning of all the terms used, so that the public and the courts are not left to guess at their meaning, and to assume that the person reading the law knows no more about firearms than the person writing the law. If the city council is finally able to adopt an assault weapons law that will survive judicial scrutiny based on due process claims, then hopefully the courts will be more inclined to give serious consideration to the claim that such laws violate the right to keep and bears arms.

It is therefore the recommendation of the author that the City of Columbus should not adopt yet a third assault weapons ban. However, in the event that it does so, it should contain an explicit definitions section, a scienter requirement, and a provision to allow it to be interpreted by a regulatory agency. If such a statute is passed and challenged again in the Sixth Circuit, the court should apply a strict scrutiny standard in reviewing claims of unconstitutionality because it impinges upon a constitutionally protected right. Any plaintiffs challenging a third assault weapons ban enacted by the City of Columbus should also sue under the additional theory that it is a violation of the Second Amendment right to keep and bear arms, so that hopefully the Supreme Court will grant certiorari and determine whether or not to incorporate the Second Amendment to the states.

V. Conclusion

The Sixth Circuit Court of Appeals was correct in ruling that all of the definitions of an assault weapon under Columbus' second statute were unconstitutionally vague, even though it adopted the wrong standard of review in doing so. In the event that the city decides to "continue down the fruitless path of gun control"³²⁴ by writing yet a third assault weapons ban too vague to be understood by an ordinary person, the courts should apply a strict scrutiny standard in reviewing vagueness claims, as such laws threaten to infringe upon a constitutionally protected activity. However, to keep the cycle from continuing on *ad nauseum*, if the city does decide to reenact yet another version of an assault weapons ban, any plaintiffs should additionally

324. See *Columbus Gun Ban Overturned, Again*, AMERICAN RIFLEMAN, Oct. 1998, at 23.

challenge it on the ground that it is a violation of the fundamental individual right to keep and bear arms. Their challenge should be made under both the Ohio and the United States Constitutions, so that hopefully the Supreme Court will grant *certiorari* and decide whether to incorporate the Second Amendment to the states through the Due Process Clause of the Fourteenth Amendment, since it has not reviewed this question since ruling against incorporation in *Cruikshank* and *Presser*, both of which were decided before the Court began to incorporate the Bill of Rights to the states.³²⁵

*Scott Charles Allan**

325. *See supra* text accompanying note 3.

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