**IN THE COURT OF COMMON PLEAS**
**FRANKLIN COUNTY, OHIO**

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| STUDENTS FOR CONCEALED CARRY FOUNDATION, INC., et al.,<br><br>Plaintiffs,<br><br>v.<br><br>THE OHIO STATE UNIVERSITY,<br><br>Defendant. | Case No. 14 CV 006927<br><br>Judge Daniel T. Hogan |

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**MOTION TO DISMISS OF THE OHIO STATE UNIVERSITY**

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Pursuant to Rules 12(B)(1) and 12(B)(6) of the Ohio Rules of Civil Procedure, The Ohio State University moves the Court to dismiss this case for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted. A memorandum in support is attached.

Respectfully submitted,

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## MEMORANDUM IN SUPPORT

Students for Concealed Carry Foundation, Inc., Ohioans for Concealed Carry, and Ryan A. Guenther (collectively "Plaintiffs") mount a challenge to four of The Ohio State University's policies related to firearms. They have sufficiently alleged standing to challenge only a provision of Ohio State's Code of Student Conduct, but not the other three challenged policies.

Even if Plaintiffs had standing to challenge the other three policies, those claims would fail on the merits as well. The same justifications that support the Code of Student Conduct provision likewise support the other challenged provisions.

The student-code challenge should be dismissed, because it fails to state a claim on the merits. Plaintiffs stake their case on the idea that R.C. 9.68(A) prohibits any restriction on the open carrying of firearms beyond those in state statutes. Yet R.C. 9.68(A) does not restrict state entities, and even if it does, it exempts restrictions that are "specifically provided by . . . state law." The Code of Student Conduct has legal authority equal to rules codified in the Ohio Administrative Code, meaning it is "state law" within the meaning of R.C. 9.68(A).

## STATEMENT OF THE CASE AND FACTS

### I. Legal Background

In 2004, the General Assembly enacted a comprehensive licensing scheme governing the concealed carrying of handguns. *See* R.C. 2923.126. A person wishing to carry a concealed weapon must satisfy safety regulations and obtain a license. *Id.* Even licensed individuals may not carry concealed handguns in certain locations, including, among others, schools, courthouses, child-care centers, and—as relevant here—universities. R.C. 2923.126(B).

Enactment of Ohio's concealed-carry licensing scheme did not affect the right of property owners to decide whether to allow open carry on their property. Several municipalities, however, passed ordinances regulating firearms. *See, e.g.*, *City of Cleveland v. State*, 128

Ohio St. 3d 135, 2010-Ohio-6318 ¶ 3. To the extent the ordinances related to concealed carry, they were preempted by R.C. 2923.126(B). *See Ohioans for Concealed Carry, Inc. v. City of Clyde*, 120 Ohio St. 3d 96, 2008-Ohio-4605 ¶¶ 1, 54. But to the extent the ordinances related to open carry, they remained valid in the absence of contrary state law—at least until 2007.

In that year, R.C. 9.68 became effective. The legislature enacted that statute in reaction to the emerging jumble of local firearms ordinances. It provides, in part: "Except as specifically provided by the United States Constitution, Ohio Constitution, state law, or federal law, a person, without further license, permission, restriction, delay, or process, may own, possess, purchase, sell, transfer, transport, store, or keep any firearm." That language acts to "nullify all municipal laws" related to firearm possession. *Ohioans for Concealed Carry, Inc.*, 2008-Ohio-4605 ¶ 40.

There is no doubt that *municipal* regulation—not regulation by *state* entities—was the target of R.C. 9.68. The lead sponsor in the House of Representatives emphasized that "local firearms ordinances result[] in a complex patchwork of restrictions," and that it was "simply not reasonable" to ask law-abiding gun owners "to gain knowledge and understanding of hundreds of different ordinances while traveling from city to city in Ohio." House Session (Mar. 8, 2006), 126th Gen. Assem. (Rep. Aslanides). Likewise the lead sponsor in the Senate expressed concern that a hodgepodge of local firearm ordinances "put[s] the law-abiding citizen carrying a firearm in some kind of conflict from one jurisdiction to the next." Senate Session (Nov. 29, 2006), 126th Gen. Assem. (Sen. Jordan). That history forms the backdrop to this dispute.

## II. Current Proceedings

On July 6, 2014, Plaintiffs initiated this action raising a facial challenge to four of Ohio State's firearms policies ("the challenged provisions"):

1. Code of Student Conduct § 3335-23-04(E), prohibiting "[s]torage or possession of . . . firearms . . . unless authorized by an appropriate university official or permitted by a university policy, even if otherwise permitted by law."

2. Workplace and Family and Relationship Violence Policy § 7.05, which prohibits "[p]ossession of deadly weapons on university property" and specifies that firearms "shall not be stored in personal vehicles parked on state-owned and/or leased property."

3. Department of Recreational Sports Standard of Conduct § 4.1.1, prohibiting "[c]oncealed weapons" on campus "except by a licensed person in a locked vehicle."

4. Residence Hall Handbook Standard of Conduct § 7.2, providing that "[p]ossession and/or use of any type of firearm or other weapon is not permitted in or around University Housing," including "persons in possession of a concealed firearms permit."

*Open-carry challenge.* Plaintiffs chiefly challenge how these provisions affect open carry. They accept that state law generally prohibits even a concealed-carry licensee from carrying a concealed handgun on Ohio State property. *See* R.C. 2923.126(B)(5); Am. Compl. ¶ 27. Accordingly, their central claim is that R.C. 9.68(A) prohibits Ohio State from imposing restrictions on open carry beyond what is required by state statutes. *See* Am. Compl. ¶ 28.

*Locked-car challenge.* The Amended Complaint also brings a secondary challenge regarding the storage of firearms in locked cars. Plaintiffs read R.C. 2923.126(B)(5) as conferring an affirmative right to store firearms in locked vehicles on university property and seek to invalidate the challenged provisions on that ground. *See id.* ¶ 27.

Plaintiffs seek declaratory and injunctive relief, striking down the challenged provisions as facially unlawful. They also request an order directing Ohio State "to immediately expunge and destroy all disciplinary records" related to the challenged provisions. And Plaintiffs seek costs and attorney fees. *See id.* Prayer for Relief.

## ARGUMENT

### I. Plaintiffs have standing only to the extent their suit seeks to enjoin the Code of Student Conduct. The Amended Complaint should otherwise be dismissed for lack of subject matter jurisdiction

Before an Ohio court can consider the merits of a legal claim, the party seeking relief bears the burden of establishing it has standing to sue. *Ohio Contractors Ass'n v. Bicking*, 71

Ohio St. 3d 318, 320 (1994). To establish standing, litigants at the pleading stage must allege "that they suffered (1) an injury that is (2) fairly traceable to the defendant's allegedly unlawful conduct, and (3) likely to be redressed by the requested relief." *Moore v. City of Middletown*, 133 Ohio St. 3d 55, 2012-Ohio-3897 ¶ 22. A plaintiff must "demonstrate standing separately" for "each claim he seeks to press" and "for each form of relief sought." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) (internal quotation marks omitted).

### A. Ryan Guenther has standing to challenge only the firearms regulation in the Code of Student Conduct

1. In contrast to the Original Complaint, the Amended Complaint establishes this Court's jurisdiction over the Code of Student Conduct claim. The Code of Student Conduct binds "all students" and "governs all campuses of the university." Code of Student Conduct § 3335-23-02. Guenther alleges that he is "an undergraduate student at Defendant The Ohio State University," Am. Compl. ¶ 3, and that he "has chosen to not carry a firearm for purposes of self-defense on the OSU campus" due to the Code of Student Conduct. *Id.* ¶ 22. At this stage of the litigation, these allegations establish that Guenther has standing to challenge Code of Student Conduct § 3335-23-04(E). Because one party with standing suffices to establish jurisdiction over the claim, the Court need not consider whether the interest groups independently have standing. *See State ex rel. Ohio Gen. Assembly v. Brunner*, 114 Ohio St. 3d 386, 2007-Ohio-3780 ¶ 22.

2. Yet the fact that Guenther has standing to challenge the student-code provision does not mean Plaintiffs have standing for each count in the Amended Complaint. Because "standing is not dispensed in gross," *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996), a plaintiff who raises multiple causes of action "must demonstrate standing for each claim he seeks to press." *Cuno*, 547 U.S. at 352. In other words, with respect to *each* asserted claim, Plaintiffs must establish that they have "a direct interest" in the challenged legal provision "of such a nature that [their]

rights will be adversely affected by its enforcement." *Anderson v. Brown*, 13 Ohio St. 2d 53, syl. ¶ 1 (1968).

Guenther's allegations do not satisfy this standard. Guenther has alleged that he is a student at Ohio State and is thereby bound by the Code of Student Conduct, but he has conspicuously *not* alleged that he is employed at an Ohio State job, uses Ohio State recreational facilities, or lives in Ohio State housing. He therefore has not established that he is bound by Ohio State's employment, recreation, or residential policies. Having failed to allege a "direct, personal stake" in the enforcement of these provisions, Guenther lacks standing to challenge them. *ProgressOhio.org, Inc. v. JobsOhio*, 139 Ohio St. 3d 520, 2014-Ohio-2382 ¶ 1.

3. Guenther not only needs to establish standing for each claim asserted; he also "must demonstrate standing separately for each form of relief sought." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000). He has failed do so for the records-expungement count. *See* Am. Compl. Prayer for Relief ¶ c. Guenther does not allege that he has been disciplined under the challenged provisions. Instead he alleges only the *threat* of disciplinary action. *See id.* ¶ 29. That might establish standing to enjoin future discipline against Guenther, but it does not establish the Court's jurisdiction to "immediately expunge and destroy all disciplinary records" related to individuals not before this Court. *Id.* Prayer for Relief ¶ c.

Nor does Guenther have standing to bring the locked-car challenge. Nowhere in the Amended Complaint does he state that he uses a vehicle on campus or that he wishes to store a firearm in a locked vehicle. He also fails to allege that he *would* store a firearm in his vehicle *but for* Ohio State's policies. Without those allegations, he has not established injury-in-fact.

**B. Plaintiffs fail to establish injury caused by the other challenged provisions**

The two interest groups, Students for Concealed Carry and Ohioans for Concealed Carry, have also failed to establish standing to challenge the employment, recreation, or residential

policies. They do not assert any injury to themselves as organizations, but rather sue on behalf of their members. To establish standing in a representational capacity at the pleading stage, an association must allege that "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Bicking*, 71 Ohio St. 3d at 320 (internal quotation marks omitted). The groups fail on all three grounds.

*No individual member with standing.* First, the groups "have not established that any of their members have been injured by" the challenged provisions. *State ex rel. Am. Subcontractors Ass'n v. Ohio State Univ.*, 129 Ohio St. 3d 111, 2011-Ohio-2881 ¶ 16. By claiming associational standing, Plaintiffs must specifically "identify members who have suffered the requisite harm." *Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009). Guenther is the only member of either group identified, *see* Am. Compl. ¶ 3, and because he alleges insufficient facts to establish standing to challenge the employment, recreation, and residential policies, the interest groups' claim to associational standing likewise fails. Although the groups profess to have members (or *affiliates* that have members) who work at Ohio State, *id.* ¶¶ 1-2, this barebones allegation, bereft of detail or identification, cannot establish standing. *See Summers*, 555 U.S. at 499.

*No germaneness.* The groups also fail to establish that the interests they seek to protect are germane to their organizational purposes. This case primarily concerns *open* carry. *See* Am. Compl. ¶ 28. Yet, to see the groups' purposes, the Court needs to look no further than their names, which invoke only the right to *concealed* carry. Importantly, not every organization advocating concealed carry necessarily advocates open carry, and vice versa. In fact, Students for Concealed Carry's website clarifies that the group "only advocates the legalization of

CONCEALED carry by LICENSED individuals on COLLEGE campuses." *See* http://concealedcampus.org/faq/ (last visited Sept. 16, 2014). The organization concedes it "has no official position on," among other issues, "open carry." *Id.* Saying that open carry is relevant to an organization that takes "no official position on" that issue gives relevance a bad name.

*The groups' relief requires individual participation.* Finally, at least some of Plaintiffs' requested relief requires individual participation. They ask for an order directing Ohio State "to immediately expunge and destroy all disciplinary records" arising out of the challenged provisions since March 14, 2007. Am. Compl. Prayer for Relief ¶ c. The groups fail to establish that Ohio State has imposed discipline on anyone—much less on any of their members—under the provisions. Equally important, improper maintenance of a record injures only the subject of that record, and a third party cannot assert those personal rights. *See City of N. Canton v. City of Canton*, 114 Ohio St. 3d 253, 2007-Ohio-4005 ¶ 14. Plaintiffs have not sought class certification, nor have they explained why an order related to other individuals would be no more burdensome than necessary to protect their members. *See Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). The Court should therefore dismiss at least the records-expungement count for want of individual participation.

## II. The Amended Complaint should be dismissed for failure to state a claim upon which relief can be granted

What remains is a narrow challenge to Code of Student Conduct § 3335-23-04(E). That challenge fails to state a claim. Furthermore, if the Court believes Plaintiffs have standing to enjoin the other challenged provisions, those challenges also fail on the merits.

### A. To prevail in their pre-enforcement facial challenge, Plaintiffs must establish that there is no set of circumstances in which the challenged provisions would be lawful

Plaintiffs do not allege that the challenged provisions are unlawful as applied to their particular circumstances. Instead, they bring a pre-enforcement facial challenge, seeking to wipe the provisions off the books completely. *See* Am. Compl. Prayer for Relief ¶ a. This kind of challenge is "the most difficult to bring successfully" because the plaintiff "must establish that there exists no set of circumstances under which" the defendant could enforce the provisions. *Harrold v. Collier*, 107 Ohio St. 3d 44, 2005-Ohio-5334 ¶ 37. In this context, Plaintiffs need to show that Ohio State cannot lawfully apply the challenged provisions to *anyone*.

Plaintiffs carry a heavy burden in bringing a facial challenge. Start with the fact that their preferred rule of law would have effects far beyond this case. Many state entities, in exercising their longstanding, traditional authority to control their property, prohibit open carry and storing firearms in vehicles. As this motion will explain, all of those agency rules would be at risk if Plaintiffs' reading of R.C. 9.68(A) were the law. On top of that, facial challenges "raise the risk of premature interpretation," as well as erroneous interpretation. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008) (internal quotation marks omitted). They also may as a practical matter resolve the rights of parties not before the Court. And the risk of erroneous or unnecessary interpretations matters because of what is at stake—the wholesale invalidation of a law. As a result, the judiciary is "*highly deferential*" to the politically accountable branches when entertaining facial challenges. *Arbino v. Johnson & Johnson*, 116 Ohio St. 3d 468, 2007-Ohio-6948 ¶ 113.

### B. Plaintiffs' challenge to Code of Student Conduct § 3335-23-04(E) lacks merit

Plaintiffs contend that R.C. 9.68(A) precludes state agencies from imposing open-carry regulations beyond those required by state statutes. *See* Am. Compl. ¶ 28. Yet R.C. 9.68(A)

restricts only local governments, not state entities. Even if the statute binds state entities, it exempts restrictions that are "specifically provided by . . . state law." And the Code of Student Conduct is a reasonable condition on receiving a public education.

### 1. Although R.C. 9.68(A) displaces local-government firearm regulation, it does not bind state entities

Property owners in Ohio enjoy dominion and control over their property, "including the power . . . to admit people to the premises and exclude them from the premises." *Cooper v. Roose*, 151 Ohio St. 316, 323 (1949). In the absence of a statute to the contrary, the power to exclude others encompasses the lesser power of admitting only unarmed individuals. Consequently, for most of Ohio's history the decision to prohibit or allow firearms rested with the property owner. The Ohio General Assembly over time has restricted firearm possession, use, and discharge on certain categories of property, regardless of the property owner's preference. These included both private property (for example, liquor establishments, R.C. 2923.121) and public property (for example, courthouses, R.C. 2923.123). But for property owners not covered by legislation, the background principle remains: owner's choice.

The question in this case is: Does R.C. 9.68(A) diminish state entities' authority to control firearms on state property? The answer is no.

The text of R.C. 9.68(A) does not mention state entities or otherwise suggest that it limits state authority to regulate firearms on state property. The text and statutory structure suggest it binds only municipalities. For example, subsection (D) exempts from the statute's coverage certain "zoning ordinance[s]"—an exemption that reveals a municipal focus. The history behind R.C. 9.68(A) (as described above) also shows that the General Assembly enacted it to eliminate a growing patchwork of local firearm ordinances. Had the General Assembly meant to diminish

the longstanding authority of state entities to control their property, it would have said so more clearly than Plaintiffs suggest.

Beyond that, the telltale evidence that R.C. 9.68 does not bind state entities is that state entities have continued to adopt and enforce firearm restrictions after the statute's enactment. In other words, Ohio State is hardly alone among state entities in prohibiting the open carrying of firearms and storing weapons in locked vehicles. The General Assembly has not intervened to stop this practice, and in fact has legislated with the background assumption that the practice is proper. Take, for example, the Weapons Use Policy of the Ohio Department of Administrative Services, which controls a large amount of state property. That policy "prohibit[s] employees from possessing or having under their control a weapon" while on state business. Ohio DAS Policy No. 500-06, at 1 (eff. Jan. 4, 2013), *available at* http://1.usa.gov/1qjwV1W. The policy emphasizes that individuals with permits "to carry a concealed weapon in the State of Ohio are not exempt" from the prohibition. *Id.* at 2. The list of state agencies that have similar policies regulating firearms includes, among others, the Ohio Environmental Protection Agency and the Departments of Agriculture, Commerce, Job and Family Services, Natural Resources, Rehabilitation and Correction, Taxation, and Transportation. If Plaintiffs are correct that R.C. 9.68(A) prohibits state entities from imposing firearm restrictions above and beyond what is required by state statutes, then all of these state agencies have misread R.C. 9.68(A). The efforts of all of these state agencies to impose reasonable controls on the use of firearms would be vanquished, and open carry would be the rule on nearly all state property.

We know that was not the General Assembly's intent in part because it has legislated under the assumption that state entities may control firearms on their property in the absence of a contrary state statute. For instance, it recently enacted a statute allowing guns to be stored in

locked vehicles in the Statehouse and Riffe Center garages. Am. Sub. H.B. No. 495 (eff. Mar. 27, 2013). That superseded a policy—not a statute—prohibiting possession in those locations. More particularly, a Department of Administrative Services policy prohibits storing weapons "in personal vehicles parked in or on state-owned . . . parking facilities, lots or garages." Ohio DAS Policy No. 500-06, at 1. Yet if Plaintiffs are correct that R.C. 9.68(A) prohibits state entities from adopting firearm restrictions, then no statute was needed to authorize carrying firearms in those garages. The fact that the General Assembly saw the need to pass a statute also supports the fact that R.C. 9.68(A) limits only local governments, not state entities.

**2. Alternatively, because the student-code provision amounts to "state law" within the meaning of R.C. 9.68, it is a valid firearm regulation**

Even if R.C. 9.68 binds more than just local governments, it still would not render Code of Student Conduct § 3335-23-04(E) unlawful. The statute allows restrictions on an individual's right to carry a firearm "as specifically provided by . . . state law." R.C. 9.68(A). The student-code provision is "state law" within the meaning of that statute.

R.C. 9.68(A) does not speak in narrow terms of "state statutes" but in broad terms of "state law." The term "state law" generally includes "[a] body of law in a particular state consisting of the state's constitution, statutes, *regulations*, and common law." Black's Law Dictionary (9th ed. 2009) (emphasis added). Rules in the Code of Student Conduct have the same legal authority as rules codified in the Ohio Administrative Code. *See* Legislative Service Commission, An Overview of Administrative Rule-Making Procedure in Ohio 18 (Jan. 23, 2013), *available at* http://bit.ly/1uxDTj5. In fact, the Ohio Administrative Code incorporates the Code of Student Conduct by reference, though it does not publish the full text. *See* Ohio Admin. Code 3335-23-01 to 3335-23-22. Because Ohio State's firearm regulation is published in the Code of Student Conduct, it is "state law" exempted from R.C. 9.68(A)'s preemptive scope.

### 3. Code of Student Conduct § 3335-23-04(E) is a reasonable condition on receiving a government benefit

The student-code provision is also lawful because it is a reasonable condition on a government benefit. By enrolling at Ohio State, students voluntarily accept certain restrictions on their conduct. The government is limited in its ability to condition benefits on waivers of rights, but courts strike down conditions only when they are coercive or unrelated to the benefit. For a coercion example: The U.S. Supreme Court has struck down as coercive a requirement that certain veterans take a loyalty oath as a condition of receiving a property-tax benefit. *Speiser v. Randall*, 357 U.S. 513, 518-19 (1958). For an unrelatedness example: The Supreme Court has struck down as unrelated a condition on a building permit that required the property owner to allow public access across the property. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987). Conditions that are neither coercive nor unrelated survive judicial scrutiny.

So far as bears on this case, the student-code provision is a reasonable condition on receiving public higher education. First, it is not coercive. It does not place a severe burden on anyone's rights to possess a firearm or to seek higher education. Second, there is a close relationship between the benefit offered and the condition imposed. The provision relates only to firearms on Ohio State property and in Ohio State activities. Ohio State does not limit open carry in contexts unrelated to the university. What is more, Ohio State may reasonably see a relationship between a safe and productive educational environment and a prohibition on carrying firearms. That reasonable belief seems to be shared by the General Assembly, which prohibits the concealed carrying of firearms in school safety zones, R.C. 2923.126(B)(2), and Congress, which prohibits the knowing possession of certain firearms in school zones, 18 U.S.C. § 922(q)(2)(A). In short, this restriction—which is non-coercive and relates to Ohio State's educational objectives—is a reasonable one.

### C. Even if the Court concludes that Plaintiffs have standing to attack the other challenged provisions, those claims should be dismissed

Given that Plaintiffs have established standing only to enjoin the student-code provision, that should be the end of the matter. If the Court proceeds to the merits of the other challenges, however, those claims should also be dismissed because all three arguments supporting the student-code provision also support the other provisions.

*First*, the principle that R.C. 9.68(A) does not bind state entities applies equally to all of the challenged provisions. Because the student-code provision lies beyond the statute's preemptive scope, so do the other provisions.

*Second*, like the Code of Student Conduct, the other challenged provisions are "specifically provided by . . . state law" within the meaning of R.C. 9.68(A). The Legislature has directed that the Ohio State Board of Trustees "shall regulate" the university "so that law and order are maintained" and so that Ohio State "may pursue its educational objectives and programs in an orderly manner." R.C. 3345.21. More broadly, the Legislature has delegated to Ohio State the authority to "adopt bylaws, rules, and regulations for the government of the university," R.C. 3335.08, and the power to "have general supervision of all lands, buildings, and other property belonging to the university." R.C. 3335.10. Ohio State adopted all of the challenged provisions in accordance with these statutes. Given this statutory authorization, the challenged provisions were "specifically provided by . . . state law." R.C. 9.68(A).

*Third*, all of the challenged provisions are reasonable conditions on receiving a public education. None of the challenged provisions are coercive, and all of them are reasonable efforts to create a safe environment for students to learn.

One last thing: The Amended Complaint mentions the Ohio Constitution in passing, but does not seem to seek relief on constitutional grounds. Plaintiffs premise the Court's jurisdiction

on R.C. 9.68, Am. Compl. ¶ 5; their primary claim is that the challenged provisions "violate ORC § 9.68," *id.* ¶ 8; and they base their prayer for attorney fees on R.C. 9.68(A). *Id.* ¶ 41. Given this overwhelming statutory focus, the Amended Complaint does not state a constitutional claim upon which relief could be granted.

**D. Even if the Court has jurisdiction to consider the locked-car challenge, the Amended Complaint fails to state a claim that the prohibition on storing firearms in personal vehicles is invalid in all circumstances**

Finally, Plaintiffs complain that Ohio State prohibits storing firearms in locked vehicles on campus. The target of the challenge is not altogether clear. The Recreational Sports provision expressly *exempts* from its prohibition firearm possession by "a licensed person in a locked vehicle." Meanwhile the Workplace and Family and Relationship Violence Policy expressly mentions that firearms "shall not be stored in personal vehicles parked on state-owned and/or leased property." And the other two challenged provisions do not mention vehicles by name. So the Amended Complaint does not make clear the scope of this challenge.

No matter. In this pre-enforcement facial challenge, Plaintiffs "must establish that there exists no set of circumstances under which" the challenged provisions could be enforced. *Harrold*, 2005-Ohio-5334 ¶ 37. But the provisions can be enforced in at least three settings. First, although Plaintiffs read a statute as allowing individuals *with* concealed-carry licenses to have handguns in locked vehicles, *see* Am. Compl. ¶ 27 (citing R.C. 2923.126(B)(5)), the provisions could still be enforced against individuals *without* licenses. Second, even if concealed-carry licenses grant the right to carry handguns in locked cars, the provisions could still be enforced against individuals carrying other types of firearms. Third, the provisions could be enforced against concealed-carry licensees without their licenses and personal identifications in their possession. *See* R.C. 2923.126(A). Given that Ohio State could lawfully apply the challenged policies at least in these circumstances, this facial challenge fails.

Beyond the problems with the facial nature of this challenge, Plaintiffs misread the text of R.C. 2923.126. A concealed-carry licensee generally may not "carry a concealed handgun" on the premises of "any public or private college, university, or other institution of higher education." R.C. 2923.126(B)(5). This applies "unless the handgun is in a locked motor vehicle or the licensee is in the immediate process of placing the handgun in a locked motor vehicle." *Id.* Plaintiffs read the "unless" clause as conferring an affirmative right to store firearms in locked vehicles on university property. But the better reading is that it lifts the categorical ban on possessing a handgun on campus. By lifting the ban, it resets to the default rule of property owner's choice. It does *not* grant a right to store a handgun in a locked motor vehicle. As other States have proven, legislatures know how to do so. *Cf.* Texas Government Code § 411.2032(b) (affirmatively forbidding universities from adopting rules "prohibiting or placing restrictions on the storage or transportation of a firearm or ammunition in a locked, privately owned or leased motor vehicle" by a concealed-carry licensee).

Even if subsection (B)(5) grants an affirmative right to carry a handgun in a locked motor vehicle, that right would be exceedingly narrow. The concealed-carry statute allows licensees to carry handguns only if "the licensee is in *actual possession* of a concealed handgun." R.C. 2923.126(A) (emphasis added). That means, at most, the concealed-carry license would grant a right to carry a handgun on campus in a locked motor vehicle when the licensee was in actual possession of the firearm. The narrowness of this right reinforces why this facial challenge cannot succeed. At bottom, the fact that concealed-carry licensees may have the right to carry handguns at Ohio State in locked motor vehicles "under some plausible set of circumstances" will not render the challenged provisions "wholly invalid." *Harrold*, 2005-Ohio-5334 ¶ 37.

## CONCLUSION

For these reasons, the Court should dismiss the Amended Complaint.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Motion to Dismiss and Memorandum of Support of The Ohio State University were served through the Court's electronic filing system this 16th day of September, 2014, upon the following counsel:

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