Testimony against HB62
House State and Local Government Committee
June 8, 2021
by Douglas Rogers

Chair Wiggam, Vice Chair John, Ranking Member Kelly and other members of the House State and Local Government Committee. Thank you for the opportunity to testify against HB62, titled the "Ohio Second Amendment Safe Haven Act."

By way of background, I graduated from Yale Law School in 1971. Then I was: (i) a captain in the Military Police; (ii) a partner in the Vorys law firm in Columbus for over 20 years, and (iii) an adjunct professor at the Moritz College of Law at The Ohio State University for about 5 years. I am also submitting this testimony on behalf of MOMS Demand Action for Gun Sense in Ohio.

HB62 would move Ohio backwards and weaken the rule of law. The courts would declare HB62 invalid, but between enactment and the court's action, HB62 would hurt Ohioans, because:

- Some Ohioans would follow its provisions and violate federal firearm laws, only to be prosecuted and convicted subsequently for violating those federal laws;
- Any Ohioan (whether a federal or state employee or private individual) following federal firearms law could be subject to suits in Ohio courts for monetary damages and other penalties;[1] and
- Ohio would be hurt economically when organizations move their conferences out of Ohio and businesses decide to locate elsewhere.

HB62 could encourage a smaller insurrection than what we saw on January 6, 2021 in Washington, D.C. by some duped individuals.

Attempts to Nullify Federal Law Have Led to Public Indignation, Civil War and the Calling Out of Federal Troops

HB62 says that each state in the United States "has an equal right to judge for itself as to whether infractions of the compact [the U.S. Constitution] have occurred, as well as to determine the mode and measure of redress" (lines 58-60). Ohio Gun Owners has plainly stated the purpose of HB62: "HB62 would nullify federal gun control laws."[2] The assertion that states have a right to disregard federal laws without going to court is delusional.

Article VI, clause 2 of the U.S. Constitution (the "Supremacy Clause") says that "the Laws of the United States which shall be made in Pursuance therefore … shall be the Supreme Law of the Land." The U.S. Supreme Court answered the question of who decides the meaning and constitutionality of federal laws in 1803 in *Marbury v. Madison*.[3] For a unanimous Court, Chief Justice Marshall held, "The constitution vests the whole judicial power of the United States in one supreme court …. This power is expressly extended go all cases arising under the laws of the United States."[4]

In November of 1832, the South Carolina legislature "nullified" the federal Tariff Act of 1832, directly challenging the authority of the President of the United States.[5] President Jackson said that nullification was "incompatible with the existence of the Union, contradicted expressly by the letter of the Constitution, unauthorized by its spirit, inconsistent with every principle on which it was founded, and destructive of the great object for which it was formed."[6]

The Civil War ended the controversy over slavery and should have ended thoughts about nullification with the passage of the Thirteenth, Fourteenth and Fifteenth Amendments. The passage of these Amendments, particularly the Fourteenth Amendment, reflected a "fundamental shift in the relationship between the Federal Government and the states."[7]

Yet after the Supreme Court ruled in 1954 that segregated schools in the United States violated the Equal Protection Clause of the Fourteenth Amendment,[8] the doctrine of nullification raised its ugly head again in massive resistance to the *Brown* decision. President Eisenhower called out federal troops to integrate the schools in Little Rock, Arkansas, but massive resistance to the rule of law and the role of federal courts continued.

My father, William P. Rogers, was Attorney General of the United States during a crucial part of the struggle for integration. In a number of speeches in 1958 and 1959, my father spoke in that time of national crisis in words equally applicable to the claims of nullification today:

- May 1, 1958: "if we are willing only to pay lip service to the law – if we reserve the right to ignore or openly flout the law when we find it not to our liking – there is no law, there is only its negation, and **that is anarchy;"[9]**

- December 7, 1958: "A grave consequence of attitudes of defiance is that they **create an atmosphere in which extremists and fanatics are encouraged to take the law into their own hands**;"[10]

- February 7, 1959: "As recently as last fall, there was still a substantial body of opinion in certain areas of the country which held tenaciously to the view that the Supreme Court's decision might be permanently **nullified**."[11]

The U.S. government defeated massive resistance in the 1950's and 1960's. The Ohio General Assembly must not resurrect a failed doctrine – nullification - that would drag Ohio backwards to a bygone century.

<u>The Second Amendment Does Not Bar Federal Firearm Legislation</u>

HB62 reflects a distorted view of the Second Amendment. In *District of Columbia v. Heller,* conservative Supreme Court Justice Scalia said that "we do not read the Second Amendment to protect the right of citizens to carry arms for *any sort* of confrontation."[12] He cautioned: "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms."[13]

The Ohio Supreme Court has also rejected any argument that the Ohio Constitution prohibits all restrictions on the right to carry guns. In *Klein v. Leis*, the Ohio Supreme Court held that the concealed carry statute "does not unconstitutionally infringe the right to bear arms; there is no constitutional right to bear concealed weapons."[14]

Some proponents of HB62 have suggested that the "anti-commandeering doctrine" of the U.S. Supreme Court prevents the U.S. Congress from regulating firearms.[15] However, in *Printz v. United States*,[16] the Supreme Court only held that under the anti-commandeering doctrine, the Federal government could not direct state officials how to act, but the Court agreed the federal government could prohibit private individuals from acting.[17]

How HB62 Would Harm Ohioans and Ohio

One of the proponents of HB62 erroneously referred in her testimony to "some favorable case law cited by LSC" (Ohio Legislative Service Commission). In fact, the LSC report on HB62 only cites one case, *United States v Cox*, but that decision shows that HB62 is unconstitutional.[18] In *Cox*, reviewing a similar Kansas statute, the federal court concluded the Kansas sanctuary statute "would upset the balance of powers between states and the federal government and contravene the Supremacy Clause of"[19] of the U.S. Constitution.

Passage of HB62 would encourage many people to disregard federal law regulating firearms. Due to the Supremacy Clause, however, that reliance on HB62 would fail. What would the sponsors of HB62 say to people who had to pay fines or serve jail time for violating federal gun laws due to their reliance on the false statements in HB62?

A growing number of major corporations have spoken forcefully on the need for common sense gun legislation to protect the lives of citizens throughout this country.[20] The CEO of Walmart wrote, "we encourage our nation's leaders to move forward and strengthen background checks and to remove weapons from those who have been determined to pose an imminent danger."[21] The CEO of Levi Strauss urged Congress to enact federal gun legislation and said, "gun violence is impacting everybody's business now."[22] Ohio could lose business as a result of the passage of HB62.

Conclusion

HB62 seeks to nullify federal law, but it cannot succeed. The U.S. Constitution declares federal law to be supreme. The Supreme Court is the ultimate body that decides constitutionality - not states. Ohio joined the United States and has ratified the Constitution, consenting to this doctrine. Nothing is to be gained, and there is much to lose, in trying nullification again and bringing ridicule on Ohio. It is subversive legislation that would harm Ohio and Ohioans if passed.

Please vote against HB62. Thank you very much.

Doug Rogers

[1] Proposed R.C. §2923.50(G)&(H).
[2] https://www.ohiogunowners.org/action/pass-sapa-em/ (emphasis on web page).
[3] 5 U.S. 137 (1803).
[4] *Id.* at 173.
[5] Meachum, chapter 17.
[6] Id., chapter 18.
[7] See "The Fourteenth Amendment and States' Rights," https://www.law.cornell.edu/constitution-conan/amendment-14/section-1/the-fourteenth-amendment-and-states-rights .
[8] *Brown v. Board of Education*, 347 U.S. 483 (1954)
[9] https://www.justice.gov/ag/speeches-attorney-general-william-pierce-rogers (emphasis added).
[10] *Id.,* emphasis added.
[11] *Id.,* emphasis added.
[12] 554 U.S. at 595.
[13] *Id.* at 626-627.
[14] *Id.*
[15] See, e.g., testimony of Rob Knisely at https://ohiohouse.gov/committees/state-and-local-government/bills/hb62 .
[16] 421 U.S. 898 (1997)
[17] The Supreme Court in *Printz* explained, "the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States.421 U.S. at 921. In her crucial concurring opinion in *Printz* that determined the result in *Printz,* Justice O'Connor explained, "of course …. Congress is free to amend the interim program to provide for its continuance on a contractual basis with the States if it wishes, as it does with a number of other federal programs." Id. at 936
[18] 906 F.3d 1170 (10th Cir. 2018), cert. denied, 2019 LEXIS3931 (U.S., June 10, 2019)
[19] https://www.legislature.ohio.gov/download?key=15784&format=pdf, p. 8, quoting *United States v. Cox,* 906 F.3d 1170, 1192 (10th Cir. 2018). In *Cox* the defendants had been prosecuted for conduct that they believed was lawful under the provisions of the purportedly nullifying state statute. The Tenth Circuit affirmed the convictions of the defendants.
[20] https://www.nytimes.com/2019/09/12/business/dealbook/gun-background-checks-business.html?smid=nytcore-ios-share
[21] https://corporate.walmart.com/newsroom/2019/09/03/mcmillon-to-associates-our-next-steps-in-response-to-the-tragedies-in-el-paso-and-southaven
[22] https://www.nytimes.com/2019/09/12/business/dealbook/gun-background-checks-business.html .