IN THE SUPREME COURT OF OHIO

State of Ohio,	:	
	:	Case No. 2019-0544
Appellee	:	
	:	
v.	:	On appeal from the Clermont
	:	County Court of Appeals
Fredrick M. Weber,	:	Twelfth Appellate District
	:	
Appellant	:	Court of Appeals
	:	Case No. CA2018-06-040
	:	
	:	

BRIEF OF *AMICI CURIAE* GIFFORDS LAW CENTER TO PREVENT GUN VIOLENCE AND BRADY CENTER TO PREVENT GUN VIOLENCE IN SUPPORT OF APPELLEE STATE OF OHIO

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I. INTRODUCTION

Amici curiae urge this Court to uphold the constitutionality of Ohio Revised Code 2923.15, which imposes criminal liability on anyone who carries or uses a firearm while intoxicated. The statute is a valid exercise of the State's police power. It is narrowly tailored to advance the State's undeniably compelling interest in public safety and thus passes constitutional muster no matter what level of scrutiny this Court chooses to apply. Contrary to the arguments of Appellant, R.C. 2923.15 does not threaten law-abiding individuals' ability to use firearms responsibly in self-defense; it merely ensures that people who are intoxicated forgo using firearms until they become sober. Appellant's conviction should be affirmed.

II. STATEMENT OF *AMICI* INTEREST

Amicus Curiae Giffords Law Center to Prevent Gun Violence ("Giffords Law Center") is a non-profit policy organization dedicated to researching, writing, enacting, and defending laws and programs proven to effectively reduce gun violence. The organization was founded over

25 years ago following a gun massacre at a San Francisco law firm and was renamed Giffords Law Center in October 2017 after joining forces with the gun-safety organization led by former Congresswoman Gabrielle Giffords. Giffords Law Center provides free assistance and expertise to lawmakers, advocates, legal professionals, law enforcement officials, and citizens who seek to improve the safety of their communities.

Amicus Curiae the Brady Center to Prevent Gun Violence ("Brady") is the nation's most longstanding nonpartisan, nonprofit organization dedicated to reducing gun violence through education, research, and legal advocacy. For over 45 years, Brady has worked to prevent gun violence. It thus has a substantial interest in ensuring that the Constitution and laws that keep individuals, families, and communities safe are upheld.

Giffords Law Center and Brady have provided informed analysis as *amici* in many important firearm-related cases, including *District of Columbia v. Heller*, 554 U.S. 570 (2008); *United States v. Hayes*, 555 U.S. 415 (2009); *McDonald v. City of Chicago*, 561 U.S. 742 (2010); *Kolbe v. Hogan*, 849 F.3d 114 (4th Cir. 2017) (*en banc*), *cert. denied*, 138 S. Ct. 469 (2017); and *Peruta v. County of San Diego*, 824 F.3d 919 (9th

Cir. 2016) (en banc), *cert. denied sub nom. Peruta v. California*, 137 S. Ct. 1995 (2017).

Amici submit this brief to share research describing the unique dangers that arise from the combination of heavy alcohol use and access to firearms, and to ensure that Ohio is granted the flexibility allowed by law to tailor common-sense safety regulations to the needs of its residents.

III. LAW AND ARGUMENT

A. The statute is a lawful exercise of Ohio's police power designed to protect Ohio residents from the dangers posed by combining alcohol and firearms.

Ohio's "legislative enactments enjoy a strong presumption of constitutional validity." *State v. Robinson*, 2015-Ohio-4649, 48 N.E.3d 1030, ¶ 10 (12th Dist.). Weber, who purports to assert an as-applied challenge to R.C. 2923.15, "bears the burden of presenting clear and convincing evidence of a presently existing set of facts that make[s] the statute[] unconstitutional and void when applied to those facts." *Harold v. Collier*, 107 Ohio St.3d 44, 2005-Ohio-5334, 836 N.E.2d 1165, ¶ 38. He has failed to meet that weighty burden.

Ohio Revised Code 2923.15 is narrowly tailored to balance an important constitutional right with an undeniably important state interest: protecting the public from the grave risk of harm that results when alcohol and firearms are combined. More than 36,000 people die from gun violence every year in the United States, and roughly 100,000 Americans are shot and injured each year. *See* Centers for Disease Control and Prevention, Web-based Injury Statistics Query and Reporting System, *Fatal Injury Reports*, https://www.cdc.gov/injury/wisqars (accessed Sept. 19, 2019); Centers for Disease Control and Prevention, Web-based Injury Statistics Query and Reporting System, *Nonfatal Injury Reports*, https://www.cdc.gov/injury/wisqars (accessed Sept. 19, 2019). The right to bear arms is thus "unique among all other constitutional rights to the individual because it permits the user of a firearm to cause serious personal injury—including the ultimate injury, death—to other individuals, rightly or wrongly." *Piszczatoski v. Filko*, 840 F. Supp. 2d 813, 816 (D. N.J. 2012). "Firearms may create or exacerbate accidents or deadly encounters, as the longstanding bans on private firearms in airports and courthouses illustrate." *Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121,

1126 (10th Cir. 2015). And while the Supreme Court has upheld the right of individuals to possess a gun for self-defense, *see McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 786-785 (2010); *District of Columbia v. Heller*, 554 U.S. 570, 625-626, 628-629, 635 (2008); *accord Arnold v. Cleveland*, 67 Ohio St.3d 35, 46, 616 N.E. 2d 163 (1993), firearms are often used in situations that do not involve self-defense. Jonathan Lowy & Kelly Sampson, *The Right Not to Be Shot: Public Safety, Private Guns, and the Constellation of Constitutional Liberties*, 14 Geo. J. L. & Pub. Pol'y 187, 192 (2016) ("[A] gun in the home is twenty-two times more likely to be used in a domestic homicide, suicide, or accidental shooting than in self-defense."). In *Heller*, the Court expressly recognized states' continuing authority to regulate those dangerous risks attendant to firearm ownership. *See Heller*, 554 U.S. at 626-27 & n.26.

Gun ownership is significantly more dangerous when intoxicating substances are involved. Research suggests that people who abuse alcohol or illicit drugs are at increased risk of committing acts of violence. *See* Webster & Vernick, *Keeping Firearms from Drug and Alcohol Abusers*, 15 Injury Prevention 425, 425 (2009). Gun owners who commit

alcohol-related offenses, such as driving while intoxicated, are substantially more likely to commit violent or firearm-related crimes. *See* Kate Masters, *Alcohol Abuse is a Major Predictor for Gun Crimes*, The Trace (Feb. 2, 2017), https://www.thetrace.org/2017/02/gun-owners-alcohol-abuse-crime/ (finding nearly a third of gun buyers in study who had prior alcohol-related conviction went on to commit a violent or firearm-related crime). Civilian access to military-style weaponry worsens the consequences of firearm misuse and substance abuse: a single individual whose judgment is impaired by alcohol or drugs may kill or injure numerous victims. Just last month, a gunman under the influence of cocaine, Xanax, and alcohol opened fire on a crowded street in Dayton, Ohio. Armed with an assault rifle equipped with a 100-round ammunition magazine, he fired 41 rounds of ammunition in less than 30 seconds, killing 9 and injuring an additional 27 people. *See* Dan Whitcomb, Reuters, *Dayton Gunman had Cocaine, Xanax, Alcohol in His System During Attack* (Aug. 15, 2019), https://www.reuters.com/article/us-usa-shooting-ohio/dayton-gunman-had-cocaine-xanax-alcohol-in-his-system-during-attack-idUSKCN1V600V; Holly Yan, et al., CNN, *The*

Dayton Gunman Killed 9 People by Firing 41 Shots in 30 Seconds. A High-Capacity Rifle Helped Enable That Speed (Aug. 5, 2019), https://cnn.it/2Yp2Ju7.

Often the victims of substance-involved gun violence are gun owners' family members or gun owners' themselves. Drug and alcohol use by domestic abusers is strongly linked to perpetration of fatal and non-fatal domestic violence. Webster & Vernick, *supra*, at 425. An overwhelming proportion of abusers who kill their intimate partners are under the influence of substances when the crime occurs, and alcohol consumption is a strong predictor of intimate partner violence targeting women. Darryl W. Roberts, *Intimate Partner Homicide: Relationships to Alcohol and Firearms*, 25 J. Contemp. Crim. Justice 67, 70 (2009). Studies also show a strong correlation between heavy drinking and self-inflicted firearm injury, including suicide. *See* Charles C. Branas, et al., *Alcohol Use and Firearm Violence*, 38 Epidemiol. Rev. 32, 36 (2016). R.C. 2923.15 was designed to address these risks, and it does so without offending the Second Amendment.

B. The Court should evaluate the statute using the consensus two-step framework for Second Amendment challenges.

Federal courts have uniformly adopted a two-step approach for evaluating challenges under the Second Amendment to the U.S. Constitution.[1] *First*, courts ask whether "'the challenged statute regulates activity falling outside the scope of the Second Amendment right as it was understood at the relevant historical moment—1791 [Bill of Rights ratification] or 1868 [Fourteenth Amendment ratification].'" *Stimmel v. Sessions*, 879 F.3d 198, 204 (6th Cir. 2018) (quoting *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012)). If the regulation falls outside the scope of the Second Amendment, the "inquiry is complete," and the challenged law is valid. *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010); *accord Stimmel*, 879 F.3d at 204.

Second, if the law does implicate protected rights, courts then "determine and apply the appropriate level of heightened means-end scrutiny" based on whether and how severely a particular law burdens the

[1] *See, e.g.*, *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012); *see also, e.g.*, *Kolbe*, 849 F.3d at 132-133 (listing decisions from the Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuits applying the two-step approach); *Gould v. Morgan*, 907 F.3d 659, 669 (1st Cir. 2018) (adopting the two-step approach after *Kolbe*).

core Second Amendment right. *Stimmel*, 879 F.3d at 204; *see United States v. Chester*, 628 F.3d 673, 680-683 (4th Cir. 2010). If the challenged law does not severely burden the "core" of the Second Amendment's protections, courts apply intermediate scrutiny. *See Chester*, 628 F.3d at 680-683; *see also Stimmel*, 879 F.3d at 206 ("[I]n choosing to apply intermediate scrutiny, we are informed by (1) how close the law comes to the core of the Second Amendment right, and (2) the severity of the law's burden on the right.") (internal quotation marks omitted). Under intermediate scrutiny, the statute is constitutional so long as it furthers an important governmental interest and does so by means that are substantially related to that interest. *Chester*, 628 F.3d at 683. In *United States v. Yancey*, 621 F.3d 681 (7th Cir. 2010), for example, the Seventh Circuit rejected a Second Amendment challenge to 18 U.S.C. § 922(g)(3), which makes it a felony for a person "who is an unlawful user of or addicted to any controlled substance" to possess a gun. *Id.* at 682. The court reasoned that the objective of "suppressing armed violence . . . is without doubt an important one." *Id.* at 684. And because "[a]mple academic research confirm[ed] the connection between drug use and

violent crime," *id.* at 686, the court concluded that the challenged statute was "substantially related" to that "important governmental objective," *id.* at 683; *see also United States v. Masciandaro*, 638 F.3d 458, 469-474 (4th Cir. 2011) (applying intermediate scrutiny to affirm conviction for possessing a loaded handgun in a motor vehicle within a national park).

If, on the other hand, a statute severely burdens the core of the Second Amendment right, courts apply strict scrutiny. *See Marzzarella*, 614 F.3d at 97-98. A challenged law survives strict scrutiny if it furthers a compelling governmental interest and the state's chosen means are narrowly tailored to advance that interest. *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 465 (2007). In *United States v. Marzzarella*, 614 F.3d 85, the Third Circuit held that a law imposing criminal liability for possession of a firearm with an obliterated serial number furthered a compelling governmental interest by assisting law enforcement in the investigation of crimes, and that it was narrowly tailored to achieve that governmental objective because it restricts possession only of weapons that have been made less susceptible to tracing. *Id.* at 100-101; *see also Mance v. Sessions*, 896 F.3d 699, 704-711 (5th Cir. 2018) (assuming, without

deciding, that strict scrutiny applies to statute prohibiting federally licensed firearm dealers from selling handguns to out-of-state buyers and holding statute satisfies strict scrutiny).

C. The two-step framework is consistent with *Heller* and *McDonald.*

The federal courts of appeals apply the two-step framework because it is most faithful to the Supreme Court's decisions in *Heller* and *McDonald*. *See, e.g.*, *Nat'l Rifle Ass'n of Am. v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 700 F.3d 185, 197 (5th Cir 2012) ("Having sketched our two-step analytical framework, we must emphasize that we are persuaded to adopt this framework because it comports with the language of *Heller*."). Both *Heller* and *McDonald* recognize that states may continue to enact reasonable firearm regulations. *See McDonald*, 561 U.S. at 786; *Heller*, 554 U.S. at 626. The Court made clear in *Heller* that its holding did not undermine prohibitions on the possession of firearms by felons and the mentally ill, or a host of other "longstanding" or "presumptively lawful" firearm regulations. *Heller*, 554 U.S. at 626-27 & n.26; *accord McDonald*, 561 U.S. at 786

("We repeat those assurances here. . . . [I]ncorporation does not imperil every law regulating firearms.").

All this explains why courts that have considered the proper level of scrutiny after *Heller* and *McDonald* have continued to apply the two-step framework. A two-step approach reconciles *Heller*'s list of "presumptively lawful regulatory measures" with its directive to treat the Second Amendment like other constitutional rights. *See Heller*, 554 U.S. at 582 (analogizing scope of Second Amendment to scope of First Amendment). Like regulations that affect individuals' First Amendment rights, "a law impinging upon the Second Amendment right must be reviewed under a properly tuned level of scrutiny—*i.e.*, a level that is proportionate to the severity of the burden that the law imposes on the right." *Nat'l Rifle Ass'n*, 700 F.3d at 198. "In the analogous First Amendment context, the level of scrutiny [courts] apply depends on the nature of the conduct being regulated and the degree to which the challenged law burdens the right." *Chester*, 628 F.3d at 682; *see also id.* at 679 (noting that history alone cannot account for *Heller*'s list of lawful regulations, making it more appropriate to apply means-end scrutiny).

Applying the two-step framework to evaluate Second Amendment claims thus faithfully reflects the heightened scrutiny the Supreme Court invoked in *Heller* and *McDonald*.

D. Under the two-step framework, the statute does not violate the Second Amendment.

1. The statute does not impose a burden on conduct falling within the scope of the Second Amendment.

Weber's claim falters at the first of these two steps because R.C. 2923.15 does not burden conduct falling within the scope of the Second Amendment. The Second Amendment protects "the right of a law-abiding, responsible citizen to possess and carry a weapon for self-defense." *Chester*, 628 F.3d at 680-683 (citing *Heller*, 554 U.S. at 635). Differentiating between responsible and irresponsible gun use is a longstanding, permissible distinction on which to base gun regulations. "[M]ost scholars of the Second Amendment agree that the right to bear arms was tied to the concept of a virtuous citizenry and that, accordingly, the government could disarm 'unvirtuous citizens.'" *Yancey*, 621 F.3d at 685 (citing Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 Tenn. L. Rev. 461, 480 (1995); Don B. Kates, Jr., *The*

Second Amendment: A Dialogue, Law & Contemp. Probs., Winter 1986, at 143, 146 (1986)).

Ohio lawmakers reasonably concluded that an intoxicated gun user is not acting responsibly. R.C. 2923.15 does not impose any burden on a non-intoxicated citizen, who remains free to use or carry a firearm in the home, including for self-defense. Rather, the statute is intended to prevent an intoxicated individual from engaging in behavior that is particularly dangerous as a result of their impaired state—namely, carrying or using a firearm. The statute is thus fully consistent with *Heller*'s holding that the Second Amendment protects the right of "law-abiding, *responsible* citizens to *use* arms in defense of hearth and home." 554 U.S. at 635 (emphasis added).

Weber seems to suggest that a state cannot prohibit the use of firearms in the home on the basis of any impairment—whether permanent or temporary—because it may prevent an individual from using a firearm in self-defense at home. But that cannot be what the Second Amendment requires. An individual who is a felon, drug user, or chronic alcoholic might also wish to carry a weapon in self-defense at home, but courts have

not hesitated to uphold state statutes banning these individuals from possessing a firearm. *See, e.g.*, *Wilson v. Lynch*, 835 F.3d 1083, 1095 (9th Cir. 2016); *United States v. Carter*, 669 F.3d 411, 421 (4th Cir. 2012); *Yancey*, 621 F.3d at 687; *United States v. Seay*, 620 F.3d 919, 925 (8th Cir. 2010); *United States v. Westley*, No. 17-cr-171, 2018 WL 1832912, *3 (D. Conn. Apr. 17, 2018); *United States v. Conrad*, 923 F. Supp. 2d 843, 850-851 (W.D. Va. 2013); *United States v. Emond*, No. 2:12-cr-00044-NT, 2012 WL 4964506, *5-6 (D. Me. Oct. 17, 2012); *United States v. Prince*, No. 09-10008-JTM, 2009 WL 1875709, *2 (D. Kan. June 26, 2009), *rev'd on other rounds*, 593 F.3d 1178 (10th Cir.2010); *United States v. Bumm*, No. 2:08-cr-00158, 2009 WL 1073659, *3 (S.D. W. Va. Apr. 17, 2009); *Piscitello v. Bragg*, No. EP-CA-266-KC, 2009 WL 536898, *3 (W.D. Tex. Feb. 18, 2009). Even convicted felons would seemingly fall within the scope of Weber's as-applied challenge, as their felon status prevents them from carrying or using a firearm within their own home. *Cf. Marzzarella*, 614 F.3d at 94 (rejecting challenge to firearm regulation because under the challenger's rationale "any type of firearm

possessed in the home would be protected merely because it could be used for self-defense").

As the Court explained in *Heller*, "we do not read the Second Amendment to protect the right of citizens to carry arms for *any* sort of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for *any* purpose." *Heller*, 554 U.S. at 595. The First Amendment does not, for example, protect an individual's right to yell "fire" in a crowded theater because doing so would threaten public safety. *Schenck v. United States*, 249 U.S. 47, 52 (1919); *see also* Lowy & Sampson, *supra*, at 199. Here, the challenged statute aims to protect public safety by restricting the right of individuals to carry arms only when their ability to use a firearm safely is impaired by their intoxicated state—irresponsible conduct that the Second Amendment does not protect. Because the conduct Weber wishes to engage in does not fall within the scope of the Second Amendment, the Court's inquiry need go no further.

2. Even assuming the conduct falls within the scope of the Second Amendment, it triggers only intermediate scrutiny.

Even if the Court finds that the Second Amendment protects intoxicated firearm use, R.C. 2923.15 does not impose a heavy burden on core Second Amendment conduct. Weber's challenge should therefore be analyzed under intermediate scrutiny.

Intoxication is a temporary state. R.C. 2923.15 does not amount to a permanent ban on anyone's use of a firearm for self-defense. Weber needed only to avoid excessively drinking or to wait until he became sober before picking up a firearm. The burden imposed by R.C. 2923.15 is minimal compared to other state statutes that impose permanent or semi-permanent bans on the use of firearms. *See, e.g.*, *Carter*, 669 F.3d at 421 (upholding validity of statute prohibiting gun possession by those who are addicted to a controlled substance); *United States v. Dugan*, 657 F.3d 998, 999 (9th Cir. 2011); *Yancey*, 621 F.3d at 682; *Seay*, 620 F.3d at 925; *United States v. Richard*, 350 Fed. Appx. 252, 260 (10th Cir. 2009). The Court should therefore apply intermediate scrutiny to Weber's claim.

3. The statute satisfies even strict scrutiny.

In any event, should the Court conclude that the statute imposes a severe burden on individuals' Second Amendment right to self-defense in the home, the statute withstands strict scrutiny. The statute advances a compelling state interest: protecting the public from the dangerous combination of intoxication and firearms. As noted above, the risk of unintentional firearm injury, domestic violence assaults, and self-harm significantly increases when a gun owner is intoxicated. This heightened danger is exactly why courts have long recognized states' interest in preventing individuals who are intoxicated or under the influence of drugs from using firearms. *See State v. Waterhouse*, 7th Dist. Belmont No. 93-B-26, 1995 WL 70125, *2 (Ohio Ct. App. 1995); *People v. Wilder*, 307 Mich. App. 546, 561 (Mich. Ct. App. 2014); *Gibson v. State*, 930 P.2d 1300, 1302 (Alaska App. 1997); *Roberge v. United States*, No. 1:04-cr-70, 2013 WL 4052926, *18 (E.D. Tenn. Aug. 12, 2013).

Ohio Revised Code 2923.15 is narrowly tailored to address this compelling state interest. It criminalizes firearm use only when an individual is actually intoxicated. It thus targets the particular social

danger only for as long as the danger is present. Once an individual becomes sober, he is no longer limited in his ability to use or carry a firearm at home. If anything, R.C. 2923.15 is more narrowly tailored than other statutes that permanently prohibit firearm possession by an entire class of individuals, such as drug users or those who are chronic alcoholics. *See, e.g.*, R.C. 2923.13; *see also, e.g.*, 18 U.S.C. § 922(g)(3); Alaska Stat. § 11.61.200; Cal. Penal Code §§ 23515, 29800-30010; Cal. Welf. & Inst. Code §§ 8100, 8101, 8103, 8105; Kan. Stat. §§ 21-6301(a)(10), (13), 21-6304 ; Okla. Stat. Tit. 21, §§ 1283, 1289.10, 1289.12 ; Tenn. Code §§ 39-17-1307, 39-17-1316, 39-17-1321 ; Tex. Penal Code §§ 46.04, 46.06(a)(3); Tex. Health and Safety Code § 573.001; Tex. Crim. Proc. Code Art. 18.191; Wis. Stat. §§ 51.20 (13)(cv), 51.45(13)(i)(1), 54.10(3)(f)(1), 55.12(10)(a), 941.29.

Weber claims the challenged statute is nonetheless invalid as applied to him because it may prevent him from defending himself with a gun. But Weber cannot circumvent Second Amendment case law by framing his argument as an as-applied challenge. First and foremost, nothing from the record suggests that Weber intended to use his firearm

for self-defense while intoxicated in his home. Weber was—by his own admission—intoxicated and carrying a firearm. *State v. Weber*, 12th Dist. Clermont No. CA2018-06-040, 2019-Ohio-916, ¶ 2 (2019). When the police entered his home, he claimed he was cleaning the gun. But no court has held that cleaning a firearm is within the core of the Second Amendment's protection.

Second, to the extent that heavy alcohol use increases the risk of domestic violence, the facts of Weber's case appear to fall squarely within the intent of the Ohio legislature in enacting this statute. Police were dispatched to Weber's home after receiving a call from his wife, and he was found inside the home, "very intoxicated" and carrying a firearm. *Id.* To be sure, Weber believed the gun was unloaded. *Id.* But because he was intoxicated, he could have easily been mistaken. This is precisely the type of situation that could have resulted in severe injury either to Weber, his wife, or the law enforcement officers responding to her call.

Third, even assuming Weber is correct that his particular situation posed no immediate danger—even though his wife was concerned enough to alert the police—that fact does not affect the validity of the statute as

applied to Weber. It would be improper to require courts to resolve any as-applied constitutional challenge by reference only to the personal circumstances of the challenger. For example, in the context of the First Amendment, the Court has held that the government may properly enforce a "prophylactic" rule designed to prevent harm, even if actual harm cannot be linked to the challenging individual. *See Ohralik v. Ohio State Bar Assoc.*, 436 U.S. 447, 462-67 (1978). In other words, a "restriction's validity is judged by the relation it bears to the general problem . . . not by the extent to which it furthers the Government's interest in an individual case." *United States v. Edge Broad. Co.*, 509 U.S. 418, 430-431 (1983) (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 801 (1989)). Barring intoxicated individuals from possessing guns is valid under this standard.

E. This Court need not opine on R.C. 9.68 or Ohio constitutional law to resolve Weber's appeal.

In addition to advancing his Second Amendment argument, Weber argues his conduct is protected under either Ohio Revised Code 9.68 or Ohio constitutional law. But neither is true. R.C. 9.68 protects the right

of an individual to "own, possess, purchase, sell, transfer, transport, store, or keep any firearm." But, like the Second Amendment, the rights recognized by R.C. 9.68 may be limited. Individuals are guaranteed the right to bear arms only insofar as that right is not "*specifically excepted by* the United States Constitution, the Ohio Constitution, *state law*, or federal law." R.C. 9.68 (emphasis added). And R.C. 2923.15 is a state law that specifically excepts the conduct for which Weber was charged. Weber's bald assertion that R.C. 9.68 protects his conduct is thus unavailing.

Nor is Weber correct that the Ohio Constitution protects his conduct. Weber vaguely asserts in his memorandum in support of jurisdiction that the right to bear arms under Article 1, Section 4 of the Ohio Constitution is "at least co-extensive with and, perhaps, broader, than the Second Amendment right." Appellant Mem. in Support of Jurisdiction at 2. In his merit brief, Weber seemingly retreats from that position, asserting only that imposing liability on a gun owner whenever they became intoxicated "would not be consistent with the protections of the Second Amendment and Article I, § 4 of the Ohio Constitution." Appellant Br.

3. But Weber again fails to expound further on this assertion. Whether or not the contours of the Ohio Constitution differ from the U.S. Constitution in this respect, this Court should decline Weber's invitation to opine on it for three reasons.

First, Weber makes no attempt to explain how Article 1, Section 4 of the Ohio Constitution differs from the protections afforded by the Second Amendment or why it protects his conduct. Weber merely speculates that the Ohio Constitution is "perhaps" broader than the U.S. Constitution in this respect, leaving it to this court to fill in the blanks of his argument.

Second, this Court has traditionally evaluated challenges brought under Article 1, Section 4 of the Ohio Constitution under a reasonableness standard. In *Arnold v. Cleveland*, the Court explained that "the right to bear arms is not an unlimited right and is subject to reasonable regulation." *Arnold v. Cleveland*, 67 Ohio St.3d 35, 47, 616 N.E. 2d 163 (1993). Because "[a]lmost every exercise" of the state's police power will "interfere with a personal or collective liberty," the Court reasoned that the proper "test is one of reasonableness." *Id.* Under the reasonableness

test, "the question is whether the legislation is a reasonable regulation, promoting the welfare and safety of the people." *Id.* "'[U]nless there is a clear and palpable abuse of power, a court will not substitute its judgment for legislative discretion.'" *Id.* (quoting *Porter v. Oberlin*, 1 Ohio St.2d 143, 149 (1965)). In the nearly 30 years since *Arnold*, Ohio courts have continued to apply the reasonableness standard when a litigant argues a law violates the right to bear arms under the Ohio Constitution. *See, e.g.*, *Klein v. Leis*, 2003-Ohio-4779, 795 N.E. 2d 633, ¶ 14; *State v. Henderson*, 2012-Ohio-1268, 2012 WL 1029187, ¶ 50 (11th Dist.) (holding R.C. 2923.16(B), which regulated the manner in which a firearm may be transported in a vehicle, was a reasonable exercise of police power); *State v. Shover*, 2012-Ohio-3788, ¶ 10 (9th Dist.) ("The test for whether a gun control law is constitutional [under the Ohio Constitution] is one of reasonableness.") (internal quotation marks omitted).

Indeed, after *Heller* and *McDonald*, many state courts have continued to evaluate state constitutional claims under the reasonableness standard, which differs from the rational basis review that *Heller* rejected. *See, e.g.*, *State v. Jorgenson*, 312 P.3d 960, 964 (Wash. 2013) (concluding

that the "firearm rights guaranteed by the Washington Constitution are subject to reasonable regulation pursuant to the State's police power"); *Hertz v. Bennett*, 751 S.E.2d 90, 96 (Ga. 2013) (rejecting state constitutional challenge to licensing regulation and noting "the recognized authority of the State to enact reasonable regulations under its general police power") (citation omitted); *State v. Christian*, 307 P.3d 429, 437-38 (Or. 2013) (rejecting challenge under state right to keep and bear arms provision and noting legislature's authority to enact reasonable regulations to promote public safety); *State v. Cole*, 665 N.W.2d 328, 338 (Wis. 2003) ("[W]e find the correct test to be whether or not the restriction. . .is a reasonable exercise of the State's inherent police powers. Such a test should not be mistaken for the rational basis test."); *Bleiler v. Chief, Dover Police Dep't*, 927 A.2d 1216, 1223 (N.H. 2007) (distinguishing between the reasonableness standard and rational basis test); *Robertson v. City & County of Denver*, 874 P.2d 325, 333 (Colo. 1994) (same); *People v. Schwartz*, No. 291313, 2010 WL 4137453, at *4 (Mich. Ct. App. Oct. 21, 2010) (applying reasonableness test and explaining "[t]he recent decisions by the Supreme Court of the United

States do not implicate the proper interpretation and scope of this state's guarantee of the right to bear arms"); *State of Wisconsin v. Flowers*, 808 N.W.2d 743, 2011 WL 6156961, at *1, *4 (Wis. Ct. App. Dec. 13, 2011) (noting that "nothing in *Heller* . . . has the effect of overruling our supreme court's decision" and that the proper question is whether "the statute is a reasonable exercise of police power") (citation omitted); *State v. Fernandez*, 808 S.E.2d 362, 366 (N.C. Ct. App. 2017) (noting that a regulation of the right to keep and bear arms must "be at least 'reasonable and not prohibitive, and must bear a fair relation to the preservation of public peace and safety.'") (citation omitted). In any event, because R.C. 2923.15 would pass muster even under the heightened scrutiny contemplated by *Heller* and *McDonald*, this Court need not revisit the applicability of the reasonableness standard to resolve Weber's appeal.

Third, the prohibition Weber challenges has a long history in Ohio. The statute was enacted in 1974, and for the past 45 years, it has been upheld by Ohio courts. *See State v. Beyer*, 2012-Ohio-4578, ¶ 18 (5th Dist.) (rejecting challenge to Ohio statute prohibiting an intoxicated person from carrying or using a firearm). "It is only with great solemnity

and with the assurance that the newly chosen course for the law is a significant improvement over the current course that [Ohio courts] depart from precedent." *Westfield Ins. Co. v. Galatis*, 2003-Ohio-5849, 797 N.E. 2d 1256, ¶ 1 (2003). Weber cites no basis for overturning 45 years of Ohio court practice. *Cf. id.* at ¶ 48 ("[I]n Ohio, a prior decision of the Supreme Court may be overruled where (1) the decision was wrongly decided at that time, or changes in circumstances no longer justify continued adherence to the decision, (2) the decision defies practical workability, and (3) abandoning the precedent would not create an undue hardship for those who have relied upon it."). And the prohibition is consistent with the even older historical practice of states limiting the use of firearms by individuals who are impaired—either permanently or temporarily. Thomas M. Cooley, A Treatise on Constitutional Limitations 29 (Boston, Little Brown & Co. 1868). In light of this history and the conclusory nature of Weber's argument, there is no basis for the Court to revisit decades-long precedent governing the right to bear arms under the Ohio Constitution.

IV. CONCLUSION

R.C. 2923.15 is a narrowly tailored means of advancing a compelling governmental interest. It deters individuals from carrying or using firearms when intoxication impairs their cognitive ability and substantially increases the risk of harm to others and themselves. Because this statute survives any level of scrutiny, Appellant has not met his burden in overcoming the statute's presumed constitutionality. This Court should affirm the judgment of the Court of Appeals.

Respectfully submitted,

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Certificate of Service

I hereby certify that on September 19, 2019, the foregoing was electronically filed with the Clerk of the Court by using the e-Filing system.

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