

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff/Appellee,

v.

FREDERICK M. WEBER,

Defendant/Appellant.

Case No. 2019-0544

On Appeal from the Clermont County
Court of Appeals, Twelfth Appellate
District Case No. CA2018-06-040

**AMICUS BRIEF OF THE CITIES OF COLUMBUS, CINCINNATI, AKRON, DAYTON,
LIMA, AND TOLEDO IN SUPPORT OF APPELLEES AND AFFIRMANCE**

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INTEREST OF AMICUS CURIAE

Amici, the cities of Columbus, Cincinnati, Akron, Dayton, Lima, and Toledo are large and small cities who represent more than 1.6 million Ohioans.¹ Amici have a strong interest in maintaining the prohibition on the carrying and use of firearms by the currently intoxicated. Amici also have a strong interest in maintaining a standard of review under Article I, Section 4 of the Ohio Constitution that allows for legislative action to address a national gun violence epidemic that disproportionately impacts cities like Amici.

Amici are on the front lines of addressing the intersection of guns and alcohol. Their police officers are the first to respond to domestic violence incidents, interpersonal gun violence, gun suicides and unintentional shootings, all of which are made more lethal by the combination of guns and alcohol. They are the ones who have to respond to domestic violence calls where the mixture of guns and alcohol often leads to women being killed and officers being assaulted. They are the first to respond when an intoxicated person attempting to clean his gun shoots himself or a loved one because he forgot to clear the chamber. And they are the ones called to fights at closing time at bars and restaurants, where the addition of a gun can be the difference between combatants waking up with headaches and black eyes or dying on the street.

Within Amici's cities are five of the largest colleges in Ohio, with over 200,000 enrolled students. They also contain some of the State's most prominent entertainment venues, the enjoyment of which is often accompanied by alcohol consumption. Seven times every fall more than 100,000 football fans descend on Columbus, many of whom drink while tailgating or enjoying the game. Cincinnati is host to at least eight Bengals games, and eighty-one Reds games per year. Along with a similar number of Browns and Indians games, Cleveland also hosts

¹ U.S. Census Bureau, *Annual Estimates of the Resident Population: April 1, 2010 to July 1, 2018* available at <http://bit.ly/2kmVYWP> (accessed Sept. 16, 2019).

at least forty-one Cavaliers games each year. Dayton is home to the popular Oregon district where on August 4, 2019, a gunman under the influence of alcohol and drugs killed nine and injured twenty-seven.² And all of the Amici cities, even if they do not have professional sports teams or the Buckeyes, have lively nightlife districts, concerts, festivals, and events where the mixture of alcohol and guns could easily turn fatal. The safety of Amici’s residents and their law enforcement officers would all be put at risk by narrowing the scope of R.C. 2923.15.

Amici would also have to deal with the consequences if this Court adopts a standard of review under Article I, Section 4 that blocks reasonable legislative action to address the growing toll of gun violence. As recent events in Dayton, as well as El Paso and Odessa, Texas, show, unregulated possession and use of firearms often leads to tragedy and death. The public is now overwhelmingly calling for new common-sense gun regulations. This Court should not undermine these democratic efforts by invalidating reasonable publicly enacted laws, or establishing a standard of review so high that even the most basic gun-safety measures—like prohibiting intoxicated people from carrying and using firearms—may fail. That is especially so for a case like this one, where the regulated conduct is not protected by either the Second Amendment or Article I, Section 4.

INTRODUCTION AND SUMMARY OF ARGUMENT

Section 2923.15 of the Ohio Revised Code prohibits carrying or using any firearm or dangerous ordnance while under the influence of alcohol or any drug of abuse. It is the Ohio legislature’s response to the well-established correlation between alcohol and drug intoxication and an increased risk of gun injuries and deaths. The legislature understood that “carrying or using firearms or dangerous ordnance without having complete control of one’s faculties

² Dan Whitcomb, *Dayton gunman had cocaine, Xanax, alcohol in his system during attack*, Reuters (Aug. 15, 2019), <https://reut.rs/2kvdoRf>.

presents a danger as great as driving while intoxicated,” and that R.C. 2923.15 provided “a tool to permit law enforcement officers to step in and prevent the commission of more serious crimes, as well as tragic accidents.” R.C. 2923.15 Commt. Comment, 1974 Am.Sub.H.B. No. 511. As discussed in more detail below, this is an understanding that has been adopted by the federal government and has long been law in many states.

It is also supported by the social science. A large meta-analysis of sixty-six studies found that frequent alcohol use is positively associated with firearm suicide, firearm homicide, child gun use, and gun assault, compared with non-excessive or light drinking. *See* Danhong Chen & Li-Tzy Wu, *Association Between Substance Use and Gun-Related Behaviors*, 38 *Epidemiologic R.* 46, 61 (2016). A recent study of over 4,000 handgun owners in California found that those who have been convicted of alcohol-related offenses, such as drunk or disorderly conduct or driving under the influence, are up to five times as likely to be arrested for a violent or firearm related crime than those who have not been convicted of alcohol-related offenses. *See* Garen Wintemute et. Al., *Firearms, Alcohol and Crime*, 24 *Injury Prevention* 68, 71 (2018); Kate Masters, *Alcohol Abuse Is A Major Predictor for Gun Crime*, thetrace.org (February, 2, 2017), <https://bit.ly/2kmPqmr>. In fact, “[f]or men, deaths from alcohol-related firearm violence equal those from alcohol-related motor vehicle crashes.” Garen Wintemute, *Alcohol Misuse, Firearm Violence Perpetration, and Public Policy in the United States*, 79 *Preventive Medicine* 15 (2015).

This case is a criminal appeal of Defendant-Appellant’s conviction under R.C. 2923.15 for carrying a weapon while intoxicated. Defendant-Appellant seeks a determination that R.C. 2923.15 is unconstitutional as applied to the facts of this case and that strict-scrutiny is the appropriate review. Because the carrying and use of firearms by the currently intoxicated is not

conduct protected by either the Second Amendment or Article I, Section 4, Amici submit this brief to urge this Court to affirm defendant's conviction and to reject his effort to have this Court establish a new standard of review. This is a position supported by a centuries-long history of laws prohibiting the carrying, use, and possession of firearms by the currently intoxicated as well as prohibitions on possession and carrying by those addicted to alcohol and other controlled substances. This historical tradition survives to the present day as shown by the widespread existence of laws like R.C. 2923.15, which have been adopted by both the states and the federal government. This longstanding, widespread, and ongoing tradition of regulation shows that laws prohibiting the carrying and use of firearms by the currently intoxicated are outside of the scope of firearms rights and raise no constitutional questions.

ARGUMENT

I. The Carrying and Use of Firearms by the Currently Intoxicated is Not Within the Scope of the Second Amendment or the Ohio Constitution.

Under either this Court's current Article I, Section 4 reasonableness approach, or the two-part test that has been adopted by the federal courts of appeals in Second Amendment cases, the application of R.C. 2923.15 to the Defendant in this case is clearly constitutional. Whatever the standard applied, the use and carrying of firearms by the currently intoxicated is not conduct protected by either the Second Amendment or Article I, Section 4.

A. The Right to Bear Arms Under Article I, Section 4 of the Ohio Constitution Allows for Reasonable Regulation.

Article I, Section 4 of the Ohio Constitution grants Ohioans, in relevant part, "the right to bear arms for their defense and security." Like the Second Amendment to the U.S. Constitution, this right is subject to reasonable regulations. *Arnold v. Cleveland*, 67 Ohio St. 3d 35, 47-48, 616 N.E.2d 163 (1993) (citation omitted); see *District of Columbia v. Heller*, 554 U.S. 570, 626,

(2008) (“Like most rights, the right secured by the Second Amendment is not unlimited . . . the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.”) Reasonable regulations of the right protected by Article I, Section 4 “must bear a real and substantial relation to the object sought to be obtained, namely, the health, safety, morals or general welfare of the public.” *Arnold* at 171 (citation omitted). In *Arnold*, this Court distinguished the “wisdom of the legislation” from its reasonableness and established that courts are to defer to the judgment of the legislature unless there is a “clear and palpable abuse of power.” *Id.* at 48. Ohio courts have upheld numerous regulations of the right to bear arms as reasonable under this standard. *See Akron v. Williams*, 113 Ohio App. 293, 296, 177 N.E.2d 802 (9th Dist.1960) (upholding Akron ordinance that prohibited convicted felons from possessing firearms); *Mosher v. Dayton*, 48 Ohio St. 2d 243, 247, 358 N.E.2d 540 (1976) (upholding Dayton ordinance that required an identification card to be obtained prior to possessing a weapon); *Hale v. Columbus*, 63 Ohio App. 3d 368, 375-376, 578 N.E.2d 881 (10th Dist.1990) (upholding Columbus ordinance that banned the possession and sale of “assault weapons” and “large capacity magazines” and “required the registration and licensing of assault weapons currently in possession”); *Arnold v. Cleveland*, 67 Ohio St. 3d 35, 49, 616 N.E.2d 163 (1993) (finding that former Cleveland ordinance that prohibited the possession and sale of assault weapons was a proper exercise of the police power); *Cincinnati v. Langan*, 94 Ohio App. 3d 22, 29-30, 640 N.E.2d 200 (1st Dist.1994) (upholding Cincinnati ordinance that prohibited possession of semiautomatic firearms); *Klein v. Leis*, 99 Ohio St. 3d 537, 541, 2003-Ohio-4779, ¶ 15 (upholding statute that prohibited the carrying of concealed weapons).

The Ohio Constitution, like United States Constitution, has always allowed for reasonable regulations to protect public safety while protecting the right to bear arms. The Bill

of Rights of the Ohio Constitution of 1802, passed 11 years after the ratification of the Second Amendment, provided “the people have a right to bear arms for the defense of themselves and the State.” Ohio Constitution of 1802, Article VIII, Section 20. In 1851, a new constitutional convention was called which revised the language slightly to read: “The people have the right to bear arms for their defense and security.” Ohio Constitution, Article I, Section 4. As this Court noted, “[t]here is no reported debate over the right-to-bear-arms language as used in either the 1802 or 1851 versions. We can only surmise that no debate ensued over these provisions because the right to possess and use certain arms under certain circumstances was widely recognized and uncontroversial.” *Arnold* at 169. The lack of recorded debate also indicates that both the 1802 and 1851 provisions were not dramatic divergences from the right protected by the federal constitution, as that kind of change would likely have drawn recorded comment.

The ability to regulate the possession, use and carrying of firearms was also widely recognized and uncontroversial. While the 1802 constitutional provision was in effect, the State, as well as cities like Amici here, passed laws regulating where firearms could be discharged and how gunpowder could be stored. *See Ordinances of the Town of Marietta (1837) available at <https://bit.ly/2kvx9YV>* (prohibiting discharging firearms unless authorized by the town council); 1832 Ohio Laws 194 (regulating the amount of gunpowder that could be stored in one location in the city of Cincinnati); *see also* An Act of Feb. 17, 1831, § 6, *reprinted in 3 Stats. of Ohio and Northwestern Territory 1740* (Salmon P. Chase ed., 1835) *available at <https://bit.ly/2kd8XKu>* (prohibiting any person to “play bullets along or across any street in any town or village within this state . . . [or] shoot or fire a gun at a target within the limits of any recorded town plat in this state”). Shortly after the passage of the 1851 Constitution, the State enacted a prohibition on

carrying concealed weapons, *see* 1859 Ohio Laws 56, and in 1913 the State prohibited the sale of firearms to minors under seventeen, *see* 1913 Ohio Laws 906.

B. The Federal Appeals Courts, Including the Sixth Circuit, Have Adopted a Two-Step Framework to Resolve Second Amendment Challenges.

In *District of Columbia v. Heller*, the Supreme Court of the United States held that the Second Amendment protects an individual right to possess firearms for purposes of self-defense. 554 U.S. 570, 592. But, this individual right to keep and bear arms “is not unlimited,” and various “longstanding” regulations of conduct that fall outside the scope of the Second Amendment’s protections are “presumptively lawful.” *Id.* at 626-27 & n.26. Like every federal circuit court that has established a standard of review, the Sixth Circuit has adopted a two-step approach to Second Amendment analysis in the wake of the Supreme Court’s opinion in *Heller*. *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir.2012); *see also United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir.2010); *Ezell v. City of Chicago*, 651 F.3d 684, 701–03 (7th Cir.2011); *United States v. Reese*, 627 F.3d 792, 800–01 (10th Cir.2010). “Under the first prong, the court asks whether the challenged law burdens conduct that falls within the scope of the Second Amendment right, as historically understood.” *Greeno* at 518. If the regulated activity—or person—falls outside of the scope of the Second Amendment, then the analysis ends, as the Second Amendment is not implicated. *Id.* Several federal appellate courts have upheld laws at step one of this two-step analysis. *Medina v. Whitaker*, 913 F.3d 152, 161 (D.C.Cir.2019) (Sentelle, J.) (“Because we conclude that convicted felons are excluded from the scope of the Second Amendment, [] Medina’s claim fails. Because the claim fails at the first step of the Schrader analysis, we need not reach the second step.”); *Peterson v. Martinez*, 707 F.3d 1197, 1211 (10th Cir.2013) (“Peterson’s Second Amendment claim fails at step one of our two-step analysis”); *Peruta v. Cty. of San Diego*, 824 F.3d 919, 939 (9th Cir.2016) (*en banc*) (“Our

holding that the Second Amendment does not protect the right of a member of the general public to carry concealed firearms in public fully answers the question before us.”). And it is only where the regulated activity or person is not “categorically unprotected,” then the court moves to the second prong, determining whether the regulation is justified under the “appropriate level of scrutiny.” *Greeno* at 518.

This Court need not reach the question of tiers of scrutiny, as this case can be decided at step one of the two-part test. The carrying and use of firearms by the currently intoxicated is conduct that falls outside the historical scope of the Second Amendment and, for the same reasons, should be found to fall outside the scope of Article I, Section 4—and is thus not subject to heightened constitutional scrutiny under any standard.

C. The Currently Intoxicated are Not Within the Scope of the Right to Keep and Bear Arms as Historically Understood.

What does it mean for a law to be “longstanding”? Under *Heller*, numerous courts have recognized that it does not require that a law “mirror limits that were on the books in 1791.” *United States v. Skoien*, 614 F.3d 638, 641 (7th Cir.2010) (en banc). Under the federal two-part test, laws may qualify as longstanding even if they “cannot boast a precise founding-era analogue.” *Nat'l Rifle Ass'n of Am., Inc. v. Bur. of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 196 (5th Cir.2012)—as was the case with “the early 20th Century” regulations deemed longstanding in *Heller*. *Heller II*, 670 F.3d at 1253. But laws like R.C. 2923.15, regulating the combination of guns and alcohol, are not twentieth-century creations. They are part of a regulatory tradition which precedes the Second Amendment and continues through today in widely adopted state laws and the federal criminal code. This kind of historical record is not necessary to find a regulation falls outside of the scope of the Second Amendment and Article I, Section 4, but it is certainly sufficient.

1. Laws regulating the use and carrying of firearms are longstanding.

The history of laws regulating the use and carrying of firearms by the intoxicated goes back to the earliest days of our nation. In 1655, Virginia, the first permanently settled English colony in what would become the United States, enacted a law that fined any persons 100 pounds of tobacco that “shoot any guns at drinking.” 1655 Va. Acts 402. The law did exclude funerals and weddings from the prohibition. *Id.*

Then, throughout the nineteenth and early twentieth centuries, many other states and localities enacted laws that sought to prevent intoxicated individuals from carrying firearms. Kansas,³ Missouri, Idaho, and Wisconsin enacted laws that criminalized carrying weapons (or going armed) while intoxicated. *See The General Statutes of the State of Kansas*, 378 (1868); 1883 Mo. Laws 76, Chapter 24, Section 1; Arthur Loomis Sandborn, *Supplement to the Revised Statutes of the State of Wisconsin*, 1878, 890 (1883); 1909 Idaho Sess. Laws 6, Section 1 (“any person who shall be found intoxicated, who shall carry concealed deadly weapons in said city”). The cities of Boonville, Moberly, and Huntsville in Missouri passed ordinances that prohibited having or carrying a weapon while intoxicated or “under the influence of intoxicating drinks.” *See J. H Johnston, The Revised Charter and Ordinances of the City of Boonville, Mo.* 91 (1881); *The Revised Ordinances of the City of Huntsville, Missouri, of 1894*, 58-59 (1894); 1873 Mo. Laws 328, Article III, Section 1, pt. 15 (Moberly, Missouri) (“If any person . . . or shall have or carry any such weapon upon or about his person when intoxicated, or under the influence of intoxicating drinks . . .”). Functionally equivalent to Ohio’s statute, Michigan’s Penal Code included a prohibition against using, carrying, or having possession or control of a “fire-arm”

³ With regard to the inability to lawfully carry a firearm on his person, Kansas’ law placed “any person under the influence of intoxicating drink” on equal standing with “any person who has ever borne arms against the government of the United States.”

while under the influence of “intoxicating liquor” or “stupefying drug.” 1931 Mich. Pub. Acts 671, Chapter 36, Section 237. Rhode Island exempted “common drunkards” from mandatory militia enrollment. 1844 R.I. Pub. Laws 501, Section 1. And New Jersey enacted a law, specifically tailored to hunting, making it “unlawful for any person to go into the woods or fields at any time with a gun or firearm when intoxicated or under the influence of any drug or drugs or of intoxicating liquor.” 1916 N.J. Laws 275-76, Chapter 130, Sections 1-2.

Arizona and Oklahoma enacted more narrowly targeted laws that even prohibited law enforcement and public officials from carrying firearms while intoxicated. Arizona barred “any constable or other peace officer” from carrying or having a “pistol, gun, or other firearm” while “under the influence of intoxicating liquor of any kind.” 1907 Ariz. Sess. Laws 15 Chapter. 16, Section 1.⁴ Oklahoma’s law, which generally prohibited carrying a pistol or revolver, provided that any public officer, who would otherwise be excepted from the prohibition, who carried while under the influence of intoxicating drinks would be guilty of a violation of the firearm carry law “as though he were a private person.” Leander G. Pitman, *The Statutes of Oklahoma*, 1890, 495-496 (1891).

The historical commitment to passing legislation to protect from the deadly combination of firearms and alcohol is further demonstrated by the laws meant to prevent the currently intoxicated and “habitual drunkards” from even obtaining firearms. In 1911, Delaware enacted a law making it illegal to sell “any revolver, pistol, or revolver or other pistol cartridges” to “any intoxicated person.” 1911 Del. 28, Section 3. Mississippi had already passed a similar law in 1878. *See* 1878 Miss. Laws 175-76, Chapter 46, Sections 2-3 (“It shall not be lawful for any person to sell to any minor or person intoxicated knowing him to be a minor or in a state of

⁴ Civilians were prohibited from carrying firearms within populated areas of Arizona. 1889 Ariz. Laws 16, Chapter. 13, Section 1

intoxication, any weapon of the kind or description in the foregoing first section of this Act described”)

Then, between 1931 and 1936, Pennsylvania, Alabama, South Dakota, and Washington passed the Uniform Firearms Act (UFA), which barred the delivery of a firearm to “an habitual drunkard” and enforced the prohibition by requiring gun dealers to notify law enforcement of gun sales and imposing a waiting period to give law enforcement time to object to the sale. *See* 1931 Penn. Sess. Laws 499, Section 8 (“No person shall deliver a firearm to any person under the age of eighteen, or to one who has reasonable cause to believe has been convicted of a crime of violence, or is a drug addict, an habitual drunkard, or of unsound mind.”); 1935 S.D. Laws 355, Chapter 208, Section 8; 1935 Wash. Sess. Laws 599, Section 8; 1936 Ala. Sess. Laws 51, No. 82, Section 8. The National Conference of Commissioners on Uniform State Laws (now the Uniform Law Commission) had adopted the UFA as a national model for gun regulation. *See* Charles Imlay, *Uniform Firearms Act Reaffirmed*, 16 A.B.A. J. 799 (1930). Gun rights proponents viewed the UFA as moderate common-sense gun legislation and it was even endorsed by the National Rifle Association which advocated for its passage in states around the country. *See Sportsmen Fight Sullivan Law*, 23 J. Crim. L & Criminology 665 (1932).

Between 1911 and 1931, many states also passed discretionary licensing laws that would likely have operated to prevent individuals known to be addicted to alcohol from obtaining a permit to purchase or possess a firearm. *See* 1923 Ark. Acts 379; 1919 Haw. Sess. Laws 166, Act 124; 1921 Mo. Sess. Laws 691; 1927 N.J. Sess. Laws 746; 1919 N.C. Sess. Laws 398, Chapter 197, Section 3; 1913 Ore. Sess. Laws 497, Chapter 256; 1931 Tex. Acts 447, Chapter 267; *see also* 1911 N.Y. 443 (discretionary issuance of permit to possess). In 1925, West Virginia passed a licensing law explicitly requiring (among other criteria) that applicants show they are “not

addicted to alcohol” in order to be able to obtain a dangerous or deadly weapon including “any revolver or other pistol.” 1925 W.Va. Acts 25-30, Chapter 3, Section 7.

2. Other historical laws regulating the intersection of firearms and alcohol further support the constitutionality of R.C. 2923.15.

During the late-nineteenth century, several states and cities passed laws that prohibited the sale of alcohol near firearms related activities—precursors to current laws that regulate the presence of firearms in establishments that sell or serve alcohol. In 1851, Chicago enacted a law that barred “retailer[s] of intoxicating liquors” or “any intemperate person” from also selling gun powder and gun cotton. *See* George Manierre, *The Revised Charter and Ordinances of the City of Chicago*, 123-125 (1851). Connecticut protected both public safety and the good order of its militia by prohibiting “any booth . . . within one mile of any military parade ground, muster-filed or encampment . . . occupied for the sale of spiritous or intoxicating liquor” 1859 Conn. Acts 62, Chapter 82, Section 5. And in 1890, Oklahoma passed a law that made it illegal for anyone other than a peace officer to carry designated weapons, including a pistol or revolver, into “any place where intoxicating liquors are sold.” Pitman, *The Statutes of Oklahoma* at 496.

D. The Historical Tradition of Regulating the Intersection of Firearms and Alcohol Survives to this Day.

States continue to have laws in effect that function similarly to R.C. 2923.15 by making it illegal to carry or use a firearm while intoxicated. These laws are a continuation of the longstanding tradition, detailed above, prohibiting the carrying and use of firearms by those who are too intoxicated to handle them.

1. Many states have laws regulating the carrying of firearms while intoxicated.

At least 27 states, including Ohio, currently prohibit carrying firearms while intoxicated: Alaska, Connecticut, Delaware, Idaho, Illinois, Iowa, Kansas, Louisiana, Maryland, Michigan,

Minnesota, Missouri, Montana, Nebraska, New Mexico, Nevada, North Carolina, Oklahoma, South Dakota, Tennessee, Texas, Utah, Virginia, and Wisconsin. *E.g.*, Alaska Stat. Ann. 11.61.210(a)(1); Idaho Code Ann. 18-3302B(1); 430 Ill. Comp. Stat. Ann. 66/70(d); La. Stat. Ann. 40:1379.3(I)(3)(a); Mich. Comp. Laws Ann. 750.237(1)(a-c); Mont. Code Ann. 45-8-327; Neb. Rev. Stat. Ann. 69-2441(5); N.M. Stat. Ann. 30-7-4(2); Okla. Stat. Ann. Title 21, Section 1289.9; Tenn. Code Ann. 39-17-1321(a); Tex. Penal Code Ann. 46.035(d); Wis. Stat. Ann. 941.20(1)(b); 76-10-528(1); Va. Code Ann. 18.2-308.012(1)(A). These laws vary in their exact coverage; some, like R.C. 2923.15, prohibit all carrying of firearms, while others are limited to carrying weapons concealed. *Compare* Mich. Comp. Laws Ann. 750.237(1)(a-c) (prohibiting all intoxicated carry) *with* Mont. Code Ann. 45-8-327 (prohibiting carrying concealed weapons while intoxicated). Likewise, some of these laws cover carrying all types of firearms, while others are limited to handguns. *E.g.*, Okla. Stat. Ann. Title 21, Section 1289.9 (covering “shotguns, rifles, [and] pistols”); Tenn. Code Ann. 39-17-1321(a) (limited to handguns).

Alaska, Georgia, Michigan, New Mexico, Ohio, Oklahoma, South Carolina Tennessee, Texas, and Wisconsin similarly criminalize using or discharging a firearm while under the influence. Alaska Stat. Ann. 11.61.210(a)(1); Ga. Code Ann. 16-11-134(a); Mich. Comp. Laws Ann. 750.237(1)(a-c); Ohio Rev. Code Ann. 2923.15(A); Okla. Stat. Ann. Title 21, Section 1289.9; S.C. Code Ann. 23-31-400(A)(B); Tenn. Code Ann. 39-17-1321(a); Tex. Penal Code Ann. 46.035(d); Wis. Stat. Ann. 941.20(1)(b). As mentioned in the discussion of historical laws, New Jersey continues to prohibit using a firearm to hunt while intoxicated. N.J. Stat. Ann. 23:4-36. And, in other states, laws prohibiting carrying firearms while intoxicated likely preempt the need to codify a prohibition on firearms use or discharge because the prohibition on carrying while intoxicated would generally also be violated. While in a federal system there will always

be variation in exactly how states regulate misconduct, the continued widespread existence of laws like R.C. 2923.15 shows the durability, and reasonableness, of the centuries-old tradition of prohibiting firearms by the those who are currently intoxicated.

2. Many states regulate the presence of firearms near the sale of alcohol.

States have also continued the tradition of passing laws to exclude firearms from establishments that serve alcohol. Alaska, Illinois, Kentucky, Louisiana, Michigan, New Mexico, North Dakota, Ohio, Oklahoma, Texas, Washington, and the District of Colombia have prohibitions on carrying in bars. Alaska Stat. Ann. 11.61.210(a)(1), 11.61.220(a)(2); 720 Ill. Comp. Stat. Ann. 5/24-1(a)(8), 430 Ill. Comp. Stat. Ann. 66/65(a)(9); Ky. Rev. Stat. Ann. 244.125(1), 237.110 (16)(e); La. Stat. Ann. 14:95(A-B); Mich. Comp. Laws Ann. 750.234d(2)(h), Mich. Comp. Laws Ann. 28.425o(1)(d); Miss. Code. Ann. 97-37-7(2); N.M. Stat. Ann. 30-7-3(A)(4), 30-7-4(2); N.D. Cent. Code Ann. 62.1-02-04(1); R.C. 2923.121(A-B); Okla. Stat. Ann. Title 21, Section 1272.1(A); Tex. Penal Code Ann. 46.035 (b)(1); Wash. Rev. Code Ann. 9.41.300(1)(d); D.C. Code Ann. 7-2509.07(a)(7). These laws vary in their exact coverage; some prohibit carrying firearms anywhere alcohol is sold, while others limit the restriction to bars and taverns, where alcohol is the primary product sold. *Compare* 720 Ill. Comp. Stat. Ann. 5/24-1(a)(8) (prohibiting carrying firearms in all locations that serve alcohol) *with* N.D. Cent. Code Ann. 62.1-02-04(2)f (excluding the "restaurant portion of an establishment" if individuals under 21 are allowed in that part of the establishment."). Some states make exceptions for unloaded firearms, for the owners of the establishments, and for peace officers. *E.g.*, Ky. Rev. Stat. Ann. 244.125(1) ("unlawful to possess a loaded firearm"); La. Stat. Ann. 14:95.5(C) ("The owner or lessee of such an establishment and that person's agent or employee are exempt."); Mich. Comp. Laws Ann. 750.234d(2)(b) ("This section does not apply

to any of the following: A peace officer.”). Other states prohibit openly carried firearms at bars while remaining silent as to concealed firearms. Ariz. Rev. Stat. Ann. 4-244(29-30); N.M. Stat. Ann. 30-7-3(A)(1); N.C. Gen. Stat. Ann. 14-269.3(a); N.D. Cent. Code Ann. 62.1-02-04(1); S.C. Code Ann. 16-23-465(A); Wis. Stat. Ann. 941.237(2). And still other states bar only the concealed carrying of firearms in bars. Fla. Stat. Ann. 790.06 (12)(a)(12); Miss. Code. Ann. 45-9-101(13), Mo. Ann. Stat. 571.107(1)(7); Mont. Code Ann. 45-8-328(1)(c); Neb. Rev. Stat. Ann. 69-2441(1)(a); Va. Code Ann. 18.2-308.012(B); Wyo. Stat. Ann. 6-8-104 (t)(vii). Differences aside, these laws show the continued national consensus around regulating the consumption of alcohol and possession of firearms.

3. Many states disqualify persons who currently or previously abused alcohol from possessing, purchasing or carrying a firearm.

Going further than R.C. 2923.15, many states have laws that either prohibit the possession or purchase of a firearm or deny a license to carry in public to those known to abuse alcohol. Such laws go well beyond Ohio’s, which simply prohibits the carrying or use of firearms while currently intoxicated.

At least five states—Hawaii, Kansas, Massachusetts, New Jersey, and South Carolina—prohibit firearms possession for some individuals who are addicted to alcohol. Haw. Rev. Stat. Ann. 134-7(c)(1); Kan. Stat. Ann. 21-6301(13); Mass. Gen. Laws Ann. Chapter 140, Section 131(d)(iii)(D); N.J. Stat. Ann. 2C:58-3(c)(2-3); S.C. Code Ann. 16-23-30(B). New Jersey and South Carolina apply the prohibition to the somewhat archaic category of “habitual drunkards,” and Hawaii prohibits anyone “under treatment or counseling for addiction to, abuse of, or dependence upon . . . intoxicating liquor.” N.J. Stat. Ann. 2C:58-3(c)(2-3); S.C. Code Ann. 16-23-30(A)(1); Haw. Rev. Stat. Ann. 134-7(c)(1). The prohibitions in Massachusetts and Kansas are more limited, covering only those who have previously been committed by court order for

treatment for their drug of alcohol addiction. Mass. Gen. Laws Ann. Chapter 140, Section 131(d)(iii)(D); Kan. Stat. Ann. 21-6301(13). Federal law also has an analogous restriction for drug use, prohibiting the possession of firearms for those who abuse illegal drugs. 18 U.S.C. 922(g)(3) (prohibiting firearms possession for anyone who is “an unlawful user of or addicted to any controlled substance”).

Several other states—Georgia, Indiana Iowa, Maryland, Oklahoma, Pennsylvania, Tennessee, and Texas—prohibit issuing public carry permits to those who abuse alcohol. Ga. Code Ann. 16-11-129(b)(2)(J); Ind. Code Ann. 35-47-1-2. Iowa Code Ann. 724.8(2) MD Pub. Safety 5-306(a)(4). Okla. Stat. Ann. Title 21, Section 1290.11(A)(5-7). Tenn. Code Ann. 39-17-1351(c)(10-11). These prohibitions are triggered by alcohol-related criminal convictions, recent treatment for alcohol abuse, or a determination by licensing authorities that a person is addicted to alcohol. *See, e.g.*, Ga. Code Ann. 16-11-129(b)(2)(J) (prohibiting issuance of a carry license for those “hospitalized as an inpatient in any...alcohol or drug treatment center within the [prior five years]”); Iowa Code Ann. 724.8 (2) (prohibiting issuance of a license to anyone “addicted to the use of alcohol”); Okla. Stat. Ann. Title 21, Section 1290.11(A)(5-7) (prohibiting issuance of a license to those with “Two or more convictions of public intoxication” or “two or more misdemeanor convictions relating to intoxication or driving under the influence of an intoxicating substance or alcohol”). These laws, too, go well beyond R.C. 2923.15, providing further support for Amici’s position that regulating the possession of firearms by the currently intoxicated falls outside of the scope of both the Second Amendment and Article I, Section 4.

II. If Step Two of the Federal Analysis is Reached, Intermediate Scrutiny is the Appropriate Standard of Review.

If this Court reaches the scrutiny analysis, intermediate scrutiny is clearly the appropriate standard to apply. Revised Code 2923.15 comes nowhere near a prohibition on the possession,

use, or carrying of firearms; it merely regulates the time in which firearms can be used or carried to anytime a person is not intoxicated. This self-evidently reasonable restriction imposes a burden for a brief period of time and only after a person has voluntarily consumed drugs or alcohol to the point of intoxication. This comes nowhere near the types of total restrictions which potentially warrant a higher degree of scrutiny; intermediate scrutiny is appropriate.

In the vast majority of cases decided under the two-part test, courts have applied intermediate scrutiny to laws that regulate the possession and use of firearms. *E.g.*, *Jackson v. San Francisco*, 746 F.3d 953 (9th Cir.2014) (upholding both regulation of handgun storage and prohibition of hollow point ammunition under intermediate scrutiny); *Woollard v. Gallagher*, 712 F.3d 865 (4th Cir.2013) (upholding “good and substantial reason” requirement for handgun permits under intermediate scrutiny); *Nat’l Rifle Ass’n of Am.*, 700 F.3d 185 (5th Cir.2012) (upholding federal statute prohibiting the sale of handguns to underage individuals under intermediate scrutiny). The appropriateness of intermediate scrutiny in this case is further supported by the longstanding and widespread history of regulating the intersection of guns and alcohol. When “the weight of the historical evidence [] suggests [a challenged regulation] do[es] not restrict the ‘core right of armed defense,’ but rather burdens ‘activity lying closer to the margins of the right’”, a “less rigorous” standard of review is appropriate. *Kanter v. Barr*, 7th Cir. No. 18-1478, 2019 WL 1219564, at *8 n.10 (Mar. 15, 2019); *see also Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 96 (2d Cir.2012) (“Because our tradition so clearly indicates a substantial role for state regulation of the carrying of firearms in public, we conclude that intermediate scrutiny is appropriate in this case.”)

* * *

Whether this Court continues to apply the reasonableness standard it has previously adopted or moves to a standard more akin to that applied by the federal courts, Defendant's conviction under R.C. 2923.15 should be upheld. Carrying a firearm while intoxicated is dangerous conduct that has been widely and traditionally prohibited, going back hundreds of years in American history. Because prohibitions on the carrying and use of firearms by the currently intoxicated are longstanding, they fall outside the scope of the right to bear arms protected by the Second Amendment and should be found to also fall outside of the scope of Article I, Section 4. Accordingly, this Court need not apply any of the tiers of heightened scrutiny. As then-Circuit Judge, now Chief Justice of the United States, John Roberts cautioned, "if it is not necessary to decide more, it is necessary not to decide more." *PDK Labs. Inc. v. U.S. D.E.A.*, 362 F.3d 786, 799 (D.C.Cir.2004) (Roberts, J., concurring). That is precisely the situation here.

CONCLUSION

For the foregoing reasons, Amici file this brief in support of Appellee and urge this Court to affirm the judgment of the court of appeals.

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CERTIFICATE OF SERVICE

I hereby certify that on September 19, 2019, copies of the foregoing were served by electronic mail to the following individual(s) and that, on September 19, 2019, copies of the foregoing were served upon these same individuals by ordinary U.S. mail, postage prepaid:

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