No. 20-1640

IN THE

Supreme Court of the United States

FREDERICK M. WEBER,
Petitioner,

v.

STATE OF OHIO
Respondent.

On Petition For A Writ of Certiorari to The Ohio Supreme Court

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BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

What is the proper standard of constitutional review of a law that impacts the core value of the Second Amendment—possession and use of a firearm within the home?

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STATEMENT OF THE CASE

On February 17, 2018, Frederick Weber was charged in the Clermont County Municipal Court with one count of Using Weapons While Intoxicated in violation of section 2923.15(A) of the Ohio Revised Code. Pet. App. 74a-75a. After a trial to the bench and memoranda submitted by both the State and Weber, the trial court found Weber guilty, sentenced him to ten days in jail (suspending all ten), and ordered one year of community control. *Id.* at 3a, 75a-76a.

At trial, the following facts were presented: In the early morning hours of February 17, 2018, Sergeant

Jarman and Deputy Shouse, from the Clermont County Sheriff's Office, were dispatched to Weber's Clermont County residence on a report that someone was intoxicated with a firearm. *Id.* at 2a, 74a. Deputy Shouse stated it was Weber's wife, Angela Brown, who placed the call to 911. *Id.* When the sergeant and deputy arrived on scene, Angela told them that everything was alright and that Weber had put it away. *Id.* at 2a. Deputy Shouse asked her if they could come inside and she escorted them in. *Id.* at 75a. When Deputy Shouse and Sergeant Jarman entered, they observed Weber entering through a doorway, holding a shotgun by the stock with the barrel facing the ground. *Id.* at 75a.

Weber told the deputy that the gun was not loaded, as he had unloaded it to wipe it down. *Id.* The sergeant and deputy took possession of the gun and confirmed that it was not loaded. *Id.* Weber's counsel stated that Weber would stipulate that the firearm was operable; upon clarification, Weber also stipulated that the gun was a firearm within the statutory definition. *Id.*

Deputy Shouse noticed that Weber's speech was slurred and decided to conduct field sobriety tests. *Id.* at 2a, 75a. During the tests, Sergeant Jarman noticed that Weber's eyes were bloodshot and glassy, that he had slurred speech, and that he was unsteady on his feet, even swaying while standing in the instruction position. *Id.* at 2a. Deputy Shouse noted that Weber was unable to complete the horizontal gaze nystagmus (HGN) test, as he could not follow directions. *Id.* at 2a, 75a. The deputy also noted that while conducting the test, he noticed the smell of an alcoholic beverage coming from Weber. *Id.* Weber told Deputy

Shouse several times during this encounter that he was drunk. *Id.* Ultimately, Deputy Shouse described Weber as "very intoxicated," while Sergeant Jarman described Weber as "very impaired" and "highly intoxicated." *Id.*

Weber appealed the court's finding of guilt, alleging that it was contrary to law and that section 2923.15(A) was unconstitutional as applied to him. *Id.* at 76a-77a. Ohio's Twelfth District Court of Appeals held that section 2923.15 was narrowly tailored to serve a significant governmental interest and therefore, not unconstitutional. *Id.* at 76a-92a; *State v. Weber*, 2019-Ohio-916, 132 N.E.3d 1140 (12th Dist.). Weber timely appealed and the Ohio Supreme Court affirmed, applying a two-step approach in analyzing the statute's constitutionality as applied. Pet. App. 10a, 29a; *State v. Weber*, 163 Ohio St.3d 125, 2020-Ohio-6832, 168 N.E.3d 468, ¶¶ 19, 56. The court first looked to historical precedent to determine if this type of conduct was recognized as conduct that could be regulated. Pet App. 10a-12a. Assuming *arguendo* no historical precedent existed, the court then determined the extent to which the law burdened protected conduct and how close that conduct came to a core protected right. *Id.* at 13a-14a. Finding only a minimal burden on conduct deemed not to be a core protected right, the court applied an intermediate scrutiny test and held that the statute furthered an important governmental interest using means substantially related to that interest. *Id.* at 13a-25a. While the decision of the court garnered only a plurality, Justice DeWine concurred in judgment only, finding that, historically, Weber's conduct

fell outside the scope of the Second Amendment's protections and could be regulated. *Id.* at 42a-63a.

SUMMARY OF THE ARGUMENT

While the Ohio Supreme Court found section 2923.15 of the Ohio Revised Code constitutional as applied to Weber by using the predominant two-prong approach, no matter what standard of review this Court adopts with regard to Second Amendment challenges, the statute at issue is constitutional and therefore, this Court need not grant certiorari. Petitioner Weber was convicted in the Clermont County Municipal Court of Using Weapons While Intoxicated under section 2923.15 of the Ohio Revised Code. He claims the statute violates the Second Amendment by depriving him of the ability to defend hearth and home; however, as applied to the facts of this case, under any standard of scrutiny, the statute survives a constitutional challenge.

A historical analysis of laws in force at the time the Second Amendment was ratified and of postratification legal sources, demonstrates that laws aimed at regulating the behavior of intoxicated individuals and individuals who posed a clear danger to the public were commonplace and a legitimate exercise of legislative authority. Moreover, a number of states, as early as 1868, specifically prohibited intoxicated individuals from carrying or using firearms. Buttressed by the presumptive lawfulness of statutes prohibiting certain dangerous individuals from having firearms and the fact that an intoxicated individual with a firearm is such a dangerous individual, section 2923.15

passes constitutional muster using a strict historical analysis.

Even if this Court applied an intermediate scrutiny or strict scrutiny test, the law is constitutional. Section 2923.15 of the Ohio Revised Code addresses a compelling governmental interest in that it aims to protect the public from dangerous individuals, *i.e.* intoxicated individuals carrying or using firearms. Moreover, the statute is narrowly tailored to serve this interest by the least restrictive means. This statute only applies while the individual is intoxicated (and least in control of their faculties) and only applies to carrying or using the firearm. It does not prohibit an individual from drinking and carrying a firearm and does not prohibit an intoxicated individual from owning a firearm. Additionally, all an intoxicated individual needs to do to regain their Second Amendment right to carry or use a firearm is sober up.

While Weber claims this law infringes on his right to defend hearth and home, at the time police arrived, he was not attempting to defend hearth and home. Therefore, as applied to Weber, the statute was not unconstitutional. Further, even if his right to defend hearth and home were considered, Ohio law indicates section 2923.15 is inapplicable to such situations where an individual is acting in self-defense.

Though a need to establish a standard of review for Second Amendment claims may exist, this is not the case best suited to the task, as under any standard of review, section 2923.15 as applied to Weber is constitutional.

ARGUMENT

Regardless of the standard of review this Court adopts to analyze cases involving the Second Amendment, section 2923.15 of the Ohio Revised Code passes constitutional muster in this case; therefore, this Court should deny the petition for a writ of certiorari. The Second Amendment states, "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." This Court noted that, at its core, the amendment protects "the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008). However, this Court also recognized that this right is not unlimited. *Id.* at 626. It held:

> Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, 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.

Id. at 626-627. This Court declined to establish a test applicable to challenges to laws that appear to impinge on a person's Second Amendment right, as it recognized D.C.'s law would, "fail constitutional muster" "under any of the standards of scrutiny that we have applied to enumerated constitutional rights * * * ." *Id.* at 628.

After *Heller*, a number of courts, including some

Ohio courts, have interpreted this to mean when faced with a Second Amendment challenge, courts are to apply at least an intermediate scrutiny test. *Tyler v. Hillsdale Cnty. Sheriff's Dep't*, 837 F.3d 678, 692-693 (6th Cir. 2016) (citing *United States v. Chovan*, 735 F.3d 1127 (9th Cir. 2013); *United States v. Staten*, 666 F.3d 154 (4th Cir. 2011); *United States v. Booker*, 644 F.3d 12, 23 (1st Cir. 2011); *United States v. Chester*, 628 F.3d 673 (4th Cir. 2010); *United States v. Skoien*, 614 F.3d 638 (7th Cir. 2010); *United States v. Williams*, 616 F.3d 685 (7th Cir. 2010); *United States v. Reese*, 627 F.3d 792 (10th Cir. 2010)); *State v. Glover*, 2015-Ohio-2751, 34 N.E.3d 1000, ¶ 6 (9th Dist.); *State v. Shover*, 2014-Ohio-373, 8 N.E.3d 358, ¶¶ 12-13 (9th Dist.); *State v. Wheatley*, 2018-Ohio-464, 94 N.E.3d 578, ¶ 17 (4th Dist. 2018). However, as this Court made clear, a review of historical analogues is an important first step in determining whether the defendant's conduct was that type of conduct originally intended to fall under the protections of the Second Amendment. *Ezell v. City of Chicago*, 651 F.3d 684, 702 (7th Cir. 2011) (citing *Heller* and *McDonald v. City of Chicago, Ill.*, 561 U.S. 742 (2010)); Miller, *Text, History, and Tradition: What the Seventh Amendment Can Teach Us About the Second*, 122 YLJ 852, 918 (2013).

Based on this, the Sixth Circuit developed the following test:

> First, the government must show 'that 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].' *Id.* (internal quotation marks and citation omitted). If the government satisfies its initial burden, 'then the analysis can stop there; the regulated activity is categorically unprotected, and the law is not subject to further Second Amendment review.' *Id.* (citation omitted).
>
> If the government offers 'historical evidence [that] is inconclusive or suggests that the regulated activity is *not* categorically unprotected,' however, then we must inquire 'into the strength of the government's justification for restricting or regulating the exercise of Second Amendment rights.' *Id.* (citation omitted). Under this second prong, we determine and apply the appropriate level of heightened means-end scrutiny, given that the Supreme Court has rejected rational-basis review in this context. *Id.*; *see Heller*, 554 U.S. at 628 n.27, 128 S.Ct. 2783.

Stimmel v. Sessions, 879 F.3d 198, 204 (6th Cir. 2018) (citing *United States v. Greeno*, 679 F.3d 510 (6th Cir. 2012)). The court noted that the determination of the level of scrutiny applied in the second prong is governed by how close the law is to a core Second Amendment right and how severely it burdens that right. *Id.* at 206 (citing *Tyler*).

Section 2923.15 of the Ohio Revised Code, as applied to Weber, does not impose a burden on conduct falling within the scope of the Second Amendment as originally conceived; therefore, if this Court were to adopt a standard of review that looked only to historical precedent, Weber's challenge would fail. Under the *Greeno* test, the first question asks whether the law

at issue imposes a burden on conduct falling "within the scope of the Second Amendment right, as historically understood." *Greeno*, 679 F.3d at 518. The key to this first question is an examination of any historical analogues that may give a clue as to whether the defendant's actions were understood at the time of the ratification of the Second Amendment to fall under that well recognized right. Here, section 2923.15, as applied to Weber who was carrying his shotgun while highly intoxicated, does not impose a burden on conduct that falls within the scope of the Second Amendment and historical precedent demonstrates that this type of law would be recognized as a legitimate exercise of legislative authority.[1] The Seventh Circuit noted in *United States v. Yancey* that the majority of Second Amendment scholars believe that the right to bear arms was "tied to the concept of a virtuous citizenry and that, accordingly, the government could disarm 'unvirtuous citizens.' " 621 F.3d 681, 684-685 (7th Cir. 2010) (citing *United States v. Vongxay*, 594 F.3d 1111 (9th Cir. 2010); *Skoien*). The First Circuit reiterated this understanding that the Founding Fathers believed the right to bear arms was "limited to those who could exercise it in a virtuous manner." *Booker*, 644 F.3d at 23 (citing *United States v. Rene E.*, 583

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[1] As Judge Barrett recognized in *Kanter v. Barr*, framing the question as whether history would recognize the legitimacy of the legislative action rather than whether the defendant's conduct fell within the scope of the Second Amendment as originally conceived is a more palatable and appropriate way to analyze these types of cases. 919 F.3d 437, 451-453 (7th Cir. 2019) (Barret, J. dissenting).

F.3d 8 (1st Cir. 2009)). While the concept of the "unvirtuous citizen" may be somewhat amorphous, it is clear that at the very least, it applies to intoxicated individuals wielding a firearm.

Weber, by holding his firearm while intoxicated, was not exercising his right to bear arms in a virtuous manner as the founders intended. Though there does not appear to be a historical equivalent of section 2923.15 of the Ohio Revised Code at the time the Second Amendment was ratified, history in general does support findings that states regularly prohibited certain behavior of intoxicated individuals (even behavior otherwise constitutionally protected) and shows that some states, at least as early as 1868, prohibited the combination of intoxication and firearms.

Section 4 of Chapter XCIII ("An act for the prevention of certain immoral practices") in the Statutes of Ohio and of the Northwestern Territory, states:

> That if any person by being intoxicated, shall be found making or exciting any noise, contention or disturbance, at any tavern, court, election or other meetings of the citizens for transacting or doing any business appertaining to or enjoined on them, the person so offending shall, on conviction thereof, be fined in any sum, not exceeding two dollars, and if necessary, imprisoned 'till such court, election or meeting is over.

1 Statutes of Ohio and the Northwestern Territory 503 (S. Chase ed. 1833). Further, in section 58 of Chapter DCXXXVI ("An act defining the duties of justices of the peace, and constables in criminal and civil cases.") it states, "no justice of the peace shall * * *

swear or examine as a witness, any person who (in the opinion of the justice) at the time, shall be intoxicated with spirituous liquors." 2 Statutes of Ohio and the Northwestern Territory 1446 (S. Chase ed. 1834).

As Justice DeWine noted in his concurring opinion, "[t]here is no question that colonial Americans understood intoxication could be grounds for the temporary suspension of one's ability to exercise a protected right." *Weber*, 2020-Ohio-6832, at ¶ 107 (DeWine, J. concurring in judgment only). In fact, Justice DeWine found, alcohol and its consumption was "probably the most regulated subject in the early republic," and that these laws "explicitly recognized the dangers intoxicated individuals could pose." *Id.* at ¶¶ 103-107. In particular, he cited an 1811 Maryland law that prohibited the sale of "spirituous or fermented liquors" on election day, an 1854 Pennsylvania law prohibiting the furnishing of intoxicating drinks to minors, insane persons, drunk or intoxicated individuals, or individuals with "known intemperate habits," and an 1817 Pennsylvania law prohibiting the pilot of a vessel from being intoxicated while having charge of that vessel. *Id.* at ¶¶ 106-107. What these laws demonstrate is that around the time of the drafting of the Second Amendment and in the postratification period, intoxicated individuals were prohibited from engaging in otherwise constitutionally protected activities.

Laws from other states dating back to 1868 also demonstrate that being intoxicated and carrying or

using a firearm did not fall under the Second Amendment umbrella of protected activity.[2] As early as 1868 in Kansas, it was illegal to be under the influence of alcohol and carry a pistol or other deadly weapon. Chapter 31, Art. IX, § 282, General Statutes of Kansas of 1868. In 1880 in Mississippi, it was illegal to sell certain weapons, such as a pistol, to someone who was intoxicated. Revised Code of Mississippi 1880, Chapter 77, § 2986. By 1889 in Missouri, it was illegal to have on your person a deadly or dangerous weapon while intoxicated. Mo. Rev. Stat. § 3502 (1889). In 1907 in Arizona, peace officers were forbidden to have a pistol, gun, or firearm on their person while intoxicated. 1907 Ariz. Sess. Laws 15, ch. 16, § 1. In 1909 in Idaho, it was illegal to carry a weapon on your person while intoxicated. 1909 Idaho Sess. Laws 6, § 1. In 1916 in New Jersey, a person was forbidden from entering into the woods or fields with a gun or firearm while intoxicated. 1916 N.J. Laws 275-276, ch. 130, § 1. In 1931 in Michigan, it was illegal to possess or use a firearm while under the influence of alcohol or drugs. 1931 Mich. Pub. Acts 671, § 237.[3] As these statutes demonstrate, prohibiting citizens from having a firearm on their person while intoxicated was not uncommon and was recognized as a legitimate police

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[2] As this Court in *Heller* recognized, postratification legal sources are "critical tool[s] of constitutional interpretation" that assist in determining "the public understanding of a legal text in the period after its enactment or ratification." 554 U.S. at 605.

[3] Out-of-state statutes initially discovered through Repository of Historical Gun Laws, Duke University School of Law, https://law.duke.edu/gunlaws/

power.

Further, it is clear from the enactment of section 2923.15 that those who carry or use a firearm while under the influence of drugs or alcohol are acting in a manner that puts other citizens in danger and therefore, should be presumptively constitutional. As this Court recognized in *Heller*, "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill * * * ." 554 U.S. at 626-627. These prohibitions center on the dangerousness of the individual, *Yancey*, 621 F.3d at 683-685, indicating that laws prohibiting dangerous individuals from possessing a firearm are presumptively constitutional. Here, there is little doubt that intoxication and firearms present a dangerous combination both inside and outside of the home. As the committee comment to H.B. 511—the bill that enacted section 2923.15 in 1974—states, "[t]his section enacts a new prohibition against carrying or using any firearm * * * while intoxicated. The rationale for the offense is that carrying or using firearms * * * without having complete control of one's faculties presents a danger as great as driving while intoxicated." 1972 H.B. No. 511, 1974 Committee Comment. Therefore, by handling the firearm while highly intoxicated, Weber was as much a risk to the public as someone driving under the influence.

This type of law is not uncommon. As the Seventh Circuit in *Yancey* noted, nearly half the states in the country have laws restricting habitual drug users or alcoholics from possessing or carrying firearms. 621 F.3d at 684 (citing Ala.Code 13A-11-72(b); Ark.Code Ann. 5-73-309(7), (8); Cal.Penal Code 12021(a)(1);

Colo.Rev.Stat. 18-12-203(e), (f); Del.Code Ann. Title 11, 1448(a)(3); D.C.Code 22-4503(a)(4); Fla. Stat. 790.25(2)(b)(1); Ga.Code Ann. 16-11-129(2)(f), (i), (j); Haw.Rev.Stat. 134-7(c)(1); Idaho Code Ann. 18-3302(1)(e); 720ILCS5/24-3.1 (a)(3); Ind.Code 35-47-1-7(5); Kan. Stat. Ann. § 21-4204(a)(1); Ky.Rev.Stat. Ann. 237.110(4)(d), (e); Md.Code Ann., Public Safety, 5-133(b)(4), (5); Mass. Gen. Laws, Chapter 140, 129B(1)(iv); Minn.Stat. 624.713(10)(iii); Mo.Rev.Stat. 571.070(1)(1); Nev.Rev.Stat. 202.360(1)(c); N.H.Rev.Stat. Ann. 159:3(b)(3); N.J. Stat. Ann. 2C:58-3(c)(2); N.C. Gen.Stat. 14-404(c)(3); R.C. 2923.13(A)(4); R.I. Gen. Laws 11-47-6; S.C.Code Ann. 16-23-30(A)(1); S.D. Codified Laws 23-7-7.1(3); W.Va.Code 61-7-7(2), (3); *see State v. White*, 3d Dist. Marion No. 9-96-66, 1997 WL 180307, *3 (Mar. 28, 1997) ("Clearly, the legislative policy is to allow firearm access to responsible citizens in responsible circumstances, while limiting such access to persons and situations wherein substantial harm to the public's safety and welfare will likely result. As manifested within R.C. 2923.13(A)(4), the General Assembly has identified firearms in the possession of those who are drug dependent * * * as a circumstance where substantial harm could result to the public."). Additionally, federal law applies a complete ban on possessing firearms for those who are unlawful users of or addicted to any controlled substance. 18 U.S.C. § 922(g)(3). This prohibition appears to apply both inside and outside of the home and has been upheld as constitutional. *Yancey*, 621 F.3d at 687.

Even though Weber was in his home and the gun

was unloaded when deputies arrived, the dangerousness of his conduct was not diminished. As multiple courts have held, handling a firearm while intoxicated presents a significant threat and is just as dangerous inside the home as it is outside the home. *State v. Waterhouse*, 7th Dist. Belmont No. 93-B-26, 1995 WL 70125, *2 (Feb. 16, 1995) ("The danger to innocent persons is the same whether the intoxicated person is inside his home or in a public place."); *Gibson v. State*, 930 P.2d 1300, 1302 (Alaska App. 1997) ("People who handle firearms while intoxicated, even in their own homes, pose a significant threat to the health and safety of their family members, their neighbors, and themselves."); *People v. Wilder*, 307 Mich.App. 546, 563, 861 N.W.2d 645 (2014) ("Handling a firearm in a highly drunken and highly emotional state, even if briefly, posed a substantial danger to defendant herself, let alone the complainant who was nearby, of an accidental discharge or even an intentional discharge clouded by the alcohol."); *Dunston v. State*, 124 Ala. 89, 90, 27 So. 333 (1900) ("The mental suggestions which proceed from constant contact with weapons specially adapted to, and usually worn for the purpose of, inflicting bodily harm to persons, may come as well when the wearer is in his domicile as elsewhere. The only matter relied on to acquit the defendant is that he was in his home when carrying the pistol concealed upon his person, and that until the time of his arrest he was alone. This neither avoids the operation of the statute nor excuses its violation."). Additionally, the fact that the gun was unloaded changes nothing about the threat to safety as Weber had just unloaded the weapon in order to clean it, meaning not only had the weapon been loaded while he handled it in his highly

intoxicated state, but as it was recently unloaded, there was ammunition around and readily available.

According to the Bureau of Justice Statistics, from 2002 to 2008, two-thirds of alcohol-involved violence known to law enforcement occurred in a residence or home and alcohol related incidents of violence were more likely to involve victims and offenders who were in a domestic relationship. BJS: Bureau of Justice Statistics, *Alcohol and Crime Data from 2002 to 2008*, https://www.ncjrs.gov/App/Topics/Morepublications.aspx?Topic Id=102 (accessed Sept. 5, 2019). Moreover, as noted in Acute Alcohol Intoxication Impairs Top-down Regulation of Stroop Incongruity as Revealed by BOLD fMRI, a study conducted on the effects of alcohol on the brain, "[b]y disrupting top-down, strategic processing, alcohol may interfere with goal-directed behavior, resulting in poor self control. The present results support models proposing that alcohol-induced prefrontal impairments diminish inhibitory control and are modulated by dispositional risk factors and levels of consumption." Marinkovic, Rickenbacher, Azma, Artsy, *Acute Alcohol Intoxication Impairs Top-down Regulation of Stroop Incongruity as Revealed by BOLD fMRI*, Hum Brain Mapp (Feb. 2012) available at National Institutes of Health Public Access https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3754428/pdf/ nihms501367.pdf (accessed Sept. 5, 2019). What this shows is what the Ohio General Assembly already appeared to know in enacting section 2923.15: intoxication and firearms create dangerous situations whether in the house or out in public. Moreover, the majority of alcohol induced violent events appear to occur in the home and occur between

those in a domestic relationship, thereby exacerbating the danger posed by carrying or using a firearm in the house while in a state of diminished inhibition and poor self-control.

As Justice DeWine noted in his concurring opinion, "[t]here is strong evidence that the founding generation believed that those who posed a present danger to others fell outside of the Second Amendment's protection." *Weber*, 2020-Ohio-6832, at ¶ 101. He pointed out that Judge (now Justice) Barrett recognized that "founding 'legislatures disqualified categories of people from the right to bear arms only when they judged that doing so was necessary to protect the public safety' " and that "[h]istory * * * is consistent with common sense: it demonstrates that legislatures have the power to prohibit dangerous people from possessing guns." *Id.* at ¶ 89 (quoting *Kanter* (Barret, J., dissenting)). Citing debates and proposals at state ratifying conventions suggesting those citizens who were not "peaceable" or who presented a "real danger of public injury" should not enjoy the right to bear arms and citing a number of colonial laws regulating the use of firearms such as a 1655 Virginia Law imposing a fine for those who "shoot any guns at drinking," a 1760s New York ordinance that prohibited firing a weapon in a place where "persons frequently walk," and mid-1700s laws prohibiting the firing of weapons in Philadelphia, New York City, and Boston, Justice DeWine recognized, as Judge Barrett did in *Kanter* and Judge Hardiman did in *Binderup v. Atty. Gen.*, 836 F.3d 336 (3d Cir. 2016), that at the time of the founding, it was well accepted that those who posed a real danger to the public could be disarmed. *Weber*,

2020-Ohio-6832, at ¶¶ 89-96.

Since a person carrying or using a firearm while intoxicated is a particularly dangerous individual and since history shows that regulation of dangerous individuals' access to firearms is presumptively lawful, even if this Court adopts a limited historical approach to analyzing Second Amendment claims, section 2923.15 of the Ohio Revised Code is constitutional as applied to Weber.

If this Court were to adopt the majority two-pronged approach, section 2923.15 is still constitutional as it satisfies both intermediate and strict scrutiny. Under an intermediate scrutiny, "a law must be 'narrowly tailored to serve a significant governmental interest.' " *Packingham v. North Carolina*, 137 S.Ct. 1730, 1736, 198 L.Ed.2d 273 (2017) (quoting *McCullen v. Coakley*, 573 U.S. 464 (2014)). "In other words, the law must not 'burden substantially more [] than is necessary to further the government's legitimate interests.' " *Id.* As a number of courts have recognized, protecting the public from a dangerous individual with a firearm is a compelling governmental interest. *Waterhouse*, 1995 WL 70125, *2 (prohibiting an intoxicated individual from handling a firearm is a legitimate governmental interest that protects innocent people both inside and outside the home); *Wilder*, 307 Mich.App. at 561 ("[T]he governmental objective of protecting persons and society from an intoxicated individual who actually possesses a firearm is certainly substantial and important."); *Gibson*, 930 P.2d at 1302 (protecting health and welfare of public by preventing intoxicated person from using a firearm in the home is legitimate governmental interest); *Roberge v. United States*,

E.D.Tenn. Nos. 1:04-cr-70, 1:10-cv-273, 2013 WL 4052926, *18 (Aug. 12, 2013) (where defendant faced a ban because of methamphetamine use, "this Court has no difficulty finding that an important federal interest is served by the enforcement of 18 U.S.C. § 922(g)(3). Section 922(g)(3) is substantially and reasonably related [to] the government's important objective of protecting the public from crime by keeping firearms out of the hands of dangerous persons."); 1974 Committee Comment to H.B. 511 (2923.15 enacted to prohibit intoxicated person from using or carrying a firearm as they pose as great a risk to the public as a drunk driver).

Since section 2923.15 only applies to carrying or using a firearm and since it only applies for the period of time where the offender is intoxicated, it is narrowly tailored to serve the compelling state interest of mitigating the dangerous situation an offender creates by being intoxicated and carrying or using a firearm. *Wilder*, 307 Mich.App. at 562-564 (under intermediate scrutiny, preventing intoxicated person from carrying or actually possessing a firearm is substantially related to the important governmental interest of protecting people from the increased dangers inherent in a highly intoxicated individual possessing a gun); *see Waterhouse*, 1995 WL 70125, at *2 (statute designed to protect citizens from intoxicated individuals with firearms and "bears a real and substantial relation to a legitimate government objective * * * ."). This statute, rather than constituting a complete and indefinite ban, only prevents people from handling a firearm in an intoxicated state. It does not, as Weber suggests, prevent someone from drinking to the point

of intoxication in their own home while they own a gun—section 2923.15 does not contain the words "have," "own," or "possess."

Further, this disability leaves avenues open to being able to exercise the right to bear arms. Indeed, it is one easily avoided as all a person has to do to maintain or regain their right to use or carry a firearm is sober up before handling their firearm or not drink to the point of intoxication if they know they are going to be carrying or using their firearm. *See Roberge*, 2013 WL 4052926, at *19 ("[U]nlike people who have been convicted of a felony or committed to a mental institution and so face a lifetime ban, an unlawful drug user may regain his right to possess a firearm simply by ending his drug abuse." (quoting *United States v. Dugan*, 657 F.3d 998 (9th Cir. 2011))); *Yancey*, 621 F.3d at 687 ("Thus the gun ban extends only so long as Yancey abuses drugs. In that way, Yancey himself controls his right to possess a gun; the Second Amendment, however, does not require Congress to allow him to simultaneously choose both gun possession and drug abuse."). While Weber had the right, sober or intoxicated, to own and have his shotgun in the house, he did not have the right, while intoxicated, to carry or use that shotgun. Nothing in the Second Amendment requires the legislature to allow Weber to choose to both drink to the point of intoxication and to use or carry a firearm.

Even if this Court were to apply a strict scrutiny standard, section 2923.15 would still not be unconstitutional. Under a strict scrutiny standard, a heavy burden is placed on the State to demonstrate that there is a compelling interest for the law and that the

law is the least restrictive means capable of effectively furthering the government's interest. *Reno v. Am. Civ. Liberties Union*, 521 U.S. 844, 874 (1997); *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000)). As noted *supra* pages 18-19, preventing those who are intoxicated from handling a firearm, even within their own home, is a compelling state interest. Moreover, there is no less restrictive means to give effect to this interest than by preventing a person from handling a firearm only while they are intoxicated. This law does not prevent someone from being intoxicated and owning a gun or having one in their home. It does not prevent someone from consuming alcohol and handling a firearm. It only applies to a person who is actually handling a firearm while intoxicated.

While Weber argues that the law does not carve out an exception for using the firearm in defense of hearth and home, and therefore is not the least restrictive means, there is a key piece of evidence missing: a defense of hearth and home. There is no evidence Weber believed there were intruders in his home and therefore, his claim that this law infringes on his right to protect hearth and home is unsupported. *See State v. Enos*, 9th Dist. Summit No. 8251, 1977 WL 198812, *2-3 (Mar. 23, 1977) (defendant cannot claim constitutional protection where he was not defending himself or his property and was instead bearing arms "under such circumstances as give rise to a clear and present danger" the law was enacted to avoid). Weber cannot raise an as applied constitutional violation based on hypothetical facts. *Ulster County Court v. Allen*, 442 U.S. 140 (1979) (Generally, "if there is no

constitutional defect in the application of the statute to a litigant, he does not have standing to argue that it would be unconstitutional * * * in hypothetical situations."). Since no evidence was presented to show Weber was carrying or using his firearm in defense of hearth and home, he cannot rely on a hypothetical set of facts to show that section 2923.15 was unconstitutional as applied. Therefore, the question in this case is not whether section 2923.15 is unconstitutional as applied to those intoxicated individuals carrying or using a firearm in defense of hearth and home. The question instead, is whether section 2923.15 is unconstitutional as applied to an intoxicated individual inside his or her own home where there is no current threat to persons or property. Perhaps application of section 2923.15 to the former question would place this case on more dubious grounds constitutionally; however, the former question is not before this Court, as it was not before the Ohio Supreme Court, the Twelfth District Court of Appeals, or the trial court.

Moreover, even if Weber's challenge could be analyzed as a prohibition on intoxicated individuals using or carrying firearms in defense of hearth and home, Ohio Courts have indicated that these types of firearm restrictions simply do not apply where the owner is using the firearm to thwart an attack. *State v. Hardy*, 60 Ohio App.2d 325, 328-329, 397 N.E.2d 773 (8th Dist. 1978); *see State v. Martz*, 163 Ohio App.3d 780, 2005-Ohio-5428, 840 N.E.2d 648, ¶¶ 37-43 (5th Dist.) (indicating that self-defense is a possible defense to a charge of having weapons under disability); *State v. Smead*, 9th Dist. Summit No. 24903, 2010-Ohio-4462, ¶ 12 ("Even if we were to agree * * * that an individual

has an inalienable right of self-defense in his home that could qualify as a defense to the charge of having a weapon under disability, we conclude that the trial court did not err by so failing to instruct the jury."); *State v. Kyle*, 8th Dist. Cuyahoga No. 108702, 2020-Ohio-3281, ¶¶ 32-33 ("A legitimate act of self-defense is much more a mere reflex action than one committed voluntarily" and therefore, may be a defense to carrying a weapon under a disability). In other words, even though a person may have a disability, it does not prevent them from lawfully wielding or using a firearm to protect themselves or their home. Therefore, it is unclear whether Weber's hypothetical set of facts would ever come before this Court, as section 2923.15 simply would not apply.

Since an as applied challenge to the constitutionality of section 2923.15 would survive both intermediate and strict scrutiny, no matter what standard of review this Court decides to adopt, this law passes constitutional muster.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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