

IN THE SUPREME COURT OF OHIO

State of Ohio : Case No. 2019-0544

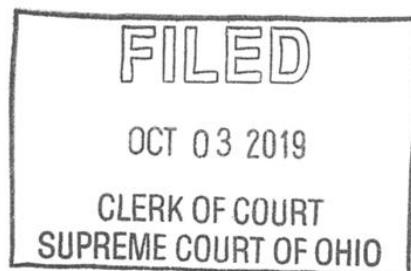
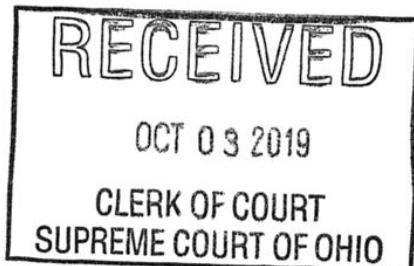
Appellee :
On Appeal from the Clermont
County Court of Appeals,
Twelfth Appellate District

Appellant :
Fredrick M. Weber : Court of Appeals
Case No. CA2018-06-040

REPLY BRIEF OF APPELLANT FREDRICK M. WEBER

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REPLY BRIEF OF APPELLANT FREDRICK WEBER

At this point, the Court is sufficiently familiar with the procedural posture and facts of the case that reiteration is unnecessary. The outset of this reply will focus on the Third Proposition of Law: Under any of the standards of scrutiny applied to enumerated constitutional rights, a prohibition of having firearms while intoxicated in the home-where defense of self, family and property is most acute-fails constitutional muster.

There is nothing in the brief of the State of Ohio or in the brief of any amici that overruled *District of Columbia v. Heller*, 554 U.S. 570, 128 S.Ct. 2783 (2008; *Heller*)¹ and, contrary to the State of Ohio's view, the Ohio Constitution provides those in Ohio greater protection than the 2nd Amendment: Ohio's Constitution provides that "*The people* have the right to bear arms for their **defense and security**", the 2nd Amendment provides for the "right...to keep and bear arms".

The business at hand is really rather singular: to establish whether the Ohio using a weapon while intoxicated statute is constitutional as applied to the facts of this case and those similarly situated to Weber. Necessarily, the Court must establish a standard of review, as the State of Ohio concedes that, to date, the Court has not established such in cases involving Article I, Section 4 of the Ohio Constitution (Art. I, Sec 4) or the Second Amendment of the United States Constitution (2nd Amendment). Threaded into or through this is the element of the sanctity of, and privacy in, the home² and a statute that is in need of revision.

¹ As the Court is aware, *Heller* is made applicable to the states by *McDonald v. City of Chicago*, Ill., 561 U.S. 742, 130 S.Ct. 3020 (2010).

² *Griswold v. Connecticut*, 381 U.S. 489, 85 S.Ct. 1678 (1965). The Ohio Constitution, Art. I, Sec 1, provides as follows: All men are, by nature, free and independent, and have inalienable rights, among which are those of enjoying and defending liberty, acquiring, possessing, and protecting property, and seeking happiness and safety.

As has been stated in Weber's brief in chief, and as Justice Scalia noted in *Heller*, under any of the standards of scrutiny used by the United States Supreme Court to analyze constitutionality, a rational basis, intermediate or strict scrutiny test, regulation of handguns in the home will not pass muster. Weber suggests that what *Heller* says is that, absent some legal disqualification (and drunk in your home is not one), the right to have arms in the home is absolute. The standard of review in this case is that Weber, who was not otherwise disqualified from having arms in his home, had an absolute right to have arms in his home. The standard of absolute protection is applied to other core rights, most notably, the right to free exercise of religion, *Cantwell v. Connecticut*, 310 U.S. 296, 303, 60 S.Ct. 900, 903 (1940) and the right to speak freely. See, *National Rifle Ass'n. v. Dayton Newspapers, Inc.*, 555 F.Supp 1299 (1983, S.D. Ohio, Western Division, Rice, J. and citing the relevant authorities).

The issue is simple: Fred Weber is in his house with an empty shot gun. Possession of a gun, any gun, in the home is a core right and the standard that should be applied is that the right is absolutely protected. The using a weapon while intoxicated statute, as applied to Fred Weber and the facts of this case, is unconstitutional. Most certainly, there are situations where the statute may be constitutional such as where the firearm is actually used in the home in violation of a different law. Those situations give rise to a wholly separate offense based upon *use* of the firearm. The takeaway is that the standard of scrutiny to apply in this case is that there is an absolute right to have arms in the home.

Should the Court see it another way, i.e., that the right is not absolute, Weber refers the Court to the National Rifle Association's (NRA) amici brief as filed in *Heller*. The NRA argued that, as to the review by the Supreme Court of the United States in that case, strict scrutiny was the

proper standard. Rather than reinvent the wheel, Weber incorporates herein by reference the amici brief of the NRA as filed in *Heller* and that brief may be found at the NRA-ILA website under Heller: The Supreme Decision (June 27, 2008).

In their respective briefs, the State of Ohio and amici are pre-occupied with intoxication.³ Essentially, the briefs seem to argue that if one is consuming alcohol in the home and arms are present, the right to possess those arms is forfeited. However, the State of Ohio speaks out of the other side of its mouth at p. 23 of its brief when it offers that "...it is doubtful that any prosecuting authority in the State of Ohio would prosecute someone for lawfully repelling an intruder in their home with a weapon when they were intoxicated." Weber's conduct was

³ The primary issue in this case is not, and should not be, that of intoxication. A footnote reply should suffice.

From the historical perspective, the drinking habits of the colonists and founding fathers are well documented. One signer of the Declaration of Independence, Benjamin Franklin, authored *The Drinker's Dictionary* which was published in the 1737 *Pennsylvania Gazette*.

The average colonist drank about seven gallons of booze each year. During the relevant historical moment (1737-1791?), the framers of the Constitution were imbibing alcohol at what appears to be a greater rate per capita than today. We know that George Washington (a signer of the Declaration of Independence) and his army bore arms. Post his presidency, Washington opened and ran a distillery at Mt. Vernon and the distillery produced 11,000 gallons of bourbon in the year of his death, 1799. During his presidency, Thomas Jefferson, another signer of the Declaration, imported more than 20,000 bottles of wine. See generally, Adam Boles, The Daily Meal, June 27, 2014, *The Surprising Drinking Habits of Our Founding Fathers*. Was it an "unvirtuous citizenry" that won and created a free republic?

Ohio became a state in 1803. Recognizing that there may have been localities that were "dry", the only time that alcohol has been illegal in Ohio was when the 18th Amendment (to the U.S. Constitution) was ratified in 1919. Of course, pharmacist/lawyer/businessman George Remus (among many others) made a mockery of the 18th Amendment. Remus, who became very wealthy as a result of Prohibition and his ability to find "loopholes" in the Volstead Act, also holds a place in the Reports of this Court: *In re Remus*, 119 Ohio St. 166 (1929). In 1933, the 21st Amendment was ratified and Prohibition ended. Since that time, the State of Ohio has had no problem passing laws that control the production, importation, distribution and, perhaps most importantly, the taxation of alcohol. Ohio is hardly a "zero tolerance" state.

benign, simple possession of an unloaded arm. If the State is not likely to prosecute active conduct by someone who is intoxicated and armed in the home, why is Weber here?

Conclusion

Contrary to the State of Ohio and amici's positions, Weber did not forfeit his Second Amendment or Art. I, Sec 4 right because he possessed an unloaded shotgun in his hearth and home after he had been drinking. Contrary to the State of Ohio's stated position at p. 23 of its brief, this is exactly a situation where the prosecuting authority of the State of Ohio has chosen to prosecute someone for the totally harmless exercise of an absolutely privileged core right. The government has no interest, compelling or otherwise, in what Fred Weber does in the privacy of his home and if he chooses to fall asleep drunk with arms (loaded or unloaded) under his pillow, it his absolute and protected core right to do so. The standard that the Court should adopt is that, absent some other offense, an absolute privilege exists as to the possession of arms in the home.

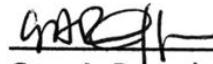
Lastly, as to this case, under any standard of review as to Weber's constitutional claim, the using weapons while intoxicated statute as applied to Weber and anyone similarly situated, is unconstitutional under the right to bear arms provisions of both the Ohio and U.S. Constitutions.



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CERTIFICATE OF SERVICE

I certify that on October 2, a copy of this Reply Brief was served as follows: by delivering a copy to the office of the Clermont County Prosecutor and by ordinary mail, postage prepaid to the counsel of Amici Giffords Center & Brady Center, Yvette McGee Brown, Jones Day, 325 John McConnell Blvd, Suite 600, Columbus, Ohio 43215 and Amici for Cities of Columbus, et al., Eric Tirschwell, et al., 450 Lexington Ave, P.O. Box 4184, New York, NY 10017 and by fax to Amici for Cities of Columbus, et al., Charles P. Campisano at 614 645.6949 and fax to Amici for Giffords and Brady Centers, Benjamin C. Mizer at 202 626.1700.



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