IN THE SUPREME COURT OF OHIO

STATE OF OHIO Plaintiff-Appellant, v. ELIJAH STRIBLIN Defendant-Appellee.	Case No. 2024-1050 On Appeal from the Muskingum County Court of Appeals, Fifth Appellate District Court of Appeals Case No. CT-2023-0027

MERIT BRIEF OF AMICUS CURIAE OHIO PROSECUTING ATTORNEYS ASSOCIATON IN SUPPORT OF APPELLANT STATE OF OHIO

ELIZABETH N. GABA (0063152)
1231 E. Broad Street
Columbus Ohio 43205
Phone:(614) 586-1586
Fax (614) 253-3933
Gabalaw@aol.com

Counsel for Appellee, Elijah Striblin

RONALD WELCH (0069133)
Muskingum County Prosecutor

JOHN CONNOR DEVER (0099136)
Assistant Prosecuting Attorney
27 North Fifth St., P.O. Box 189
Zanesville, Ohio 43702
Phone: (740) 455-7123 Fax: (740) 455-7141
jcdever@muskingumcounty.org

Counsel for Appellant, State of Ohio

MICHAEL C. O'MALLEY (0059592)
Cuyahoga County Prosecutor

TASHA L. FORCHIONE (0085814)
ANTHONY T. MIRANDA (0090759)
Assistant Prosecuting Attorneys
1200 Ontario Street, 8th Floor
Cleveland, Ohio 44113
(216) 443-5771
tforchione@prosecutor.cuyahogacounty.us
amiranda@prosecutor.cuyahogacounty.us

Counsel for *Amicus Curiae*, Ohio Prosecuting Attorneys Association

TABLE OF CONTENTS

Table of Authorities

Cases

Constitutional Provisions

Statutes

Other Authorities

INTRODUCTION

In Ohio, individuals with a concealed handgun license or de facto concealed handgun license can have a firearm in places that serve alcohol for consumption if the individual is not consuming alcohol or intoxicated. In this sense, R.C. §2923.121 does not prohibit people from having a gun in a bar; it prohibits them from consuming alcohol in the bar while having a gun. Consistent with the Second Amendment, law abiding and responsible citizens who choose not to drink can possess a firearm in a liquor permit premises.

R.C. §2923.121 is presumptively lawful under the sensitive places and dangerous persons doctrines. The sensitive places doctrine permits regulation of firearms in specific locations where public safety concerns are paramount. Government buildings, schools, polling places, airports, places of worship, public event spaces, and bars are examples of sensitive places where the State can restrict firearms. Bars are sensitive places because of the consumption of alcohol and attendant "reduced ability to reason" in a crowded public space.

Similarly, the dangerous person doctrine allows regulation of firearm possession based on a certain group's risk of harm to public safety. Violent felons, domestic violence offenders, the mentally ill, and intoxicated people are examples of groups considered potentially dangerous. People who consume alcohol and possess guns represent a risk of harm to public safety due to the physiological and physical effects of alcohol on behavior and decision making. For this reason, the State can temporarily disarm them.

Both doctrines mitigate *risk* of harm to others while balancing the Second Amendment right to bear arms. Here, the longstanding tradition of disarming individuals who pose a *threat* to public safety justifies R.C. §2923.121's disarmament of people consuming alcohol in liquor permit

premises. The fact that this is a temporary and voluntary disarmament balances and preserves the Second Amendment right of law abiding and responsible citizens.

STATEMENT OF AMICUS INTEREST

Ohio's prosecuting attorneys have an interest in prohibiting possession of firearms in places where people are consuming alcohol. This is because alcohol can impair judgment and someone with impaired judgment is far more likely to use that gun recklessly resulting in violent conflict or accidental discharge. And such risks to public safety are heightened in bars where the public congregates, often in crowded spaces.

Shootings in Ohio bars is not uncommon. *See State v. Diamond*, 2024-Ohio-473, ¶ 23 (8th Dist.) ("661467 involved a verbal altercation between Diamond and another male at a bar that resulted in Diamond firing into a crowd (but not striking anyone))"; *State v. Hollins*, 2020-Ohio-4290, ¶ 8 (8th Dist.) (patron pistol-whipped and bartender killed); *State v. Lash*, 2017-Ohio-4065, ¶ 1 (8th Dist.) (shooting near bar bathroom); *State v. Echols*, 2017-Ohio-1360, ¶ 3 (8th Dist.) (shooting inside a bar); *State v. McMiller*, 2016-Ohio-5844 ¶ 5 (8th Dist.) (three people shot inside a bar); *State v. Ortiz*, 2016-Ohio-354, ¶¶ 2-3 (5th Dist.) (argument between bar employees resulted in fatal shooting); *State v. Jones*, 2015-Ohio-4986, ¶ 5 (8th Dist.) (ejected patron returned and shot security guard at a bar); *State v. Davis*, 2013-Ohio-2770, ¶ 5 (10th Dist.) (argument in a bar resulted in a shooting); *State v. West*, 2013-Ohio-487, ¶ 5 (8th Dist.) (patron shot another patron trying to flee from the bar); *State v. Searles*, 2011-Ohio-6275, ¶ 9 (8th Dist.) (confrontation in a bar leads to a struggle and a shooting); *State v. Bray*, 2011-Ohio-4660, ¶¶ 3-5 (2d Dist.) (ejected patrons struggle with each other, resulting in a fatal shooting); *State v. Young*, 2011-Ohio-747, ¶ 3 (2d Dist.) (argument results in a fatal shooting inside a bar); *State v. Bridges*, 2009-Ohio-4569, ¶ 4

(8th Dist.) (shooting in the vestibule of a bar); *State v. Jones*, 2002-Ohio-2660, ¶¶ 3-4 (7th Dist.) (robbery at a bar results in a fatal shooting).

R.C. §2923.121 ensures that liquor permit premises remain safe.

STATEMENT OF THE CASE AND FACTS

A Muskingum County Grand Jury indicted Elijah M. Striblin for Inducing Panic, in violation of R.C. §2917.31(A)(3), with a three-year firearm specification pursuant to R.C. §2941.145(A), Illegal possession of a firearm in liquor permit premises, in violation of R.C. §2923.121(A), Carrying concealed weapons, in violation of R.C. §2923.12(A)(2), Having weapons while under disability, in violation of R.C. §2923.13(A)(1), Tampering with evidence, in violation of R.C. §2921.12(A)(1), and Felonious Assault, in violation of R.C. §2903.11(A)(2), with a three-year firearm specification pursuant to R.C. §2941.145(A). Index at 1.

Striblin filed a motion to dismiss arguing, among other assertions, that R.C. §2923.12, R.C. §2923.121, and R.C. §2923.13 are unconstitutional under the Second Amendment. Index at 25. The State filed a memorandum in opposition providing historical prohibitions relating to alcohol and firearms regulations that are analogous to R.C. §2923.121. Index at 29.

Striblin's motion to dismiss was denied by Journal Entry. Index at 31.

Striblin pleaded no contest to Count 1: Inducing Panic, a felony of the fourth degree, in violation of R.C. §2917.31(A)(3) and Count 2: Possession of firearm in beer liquor permit premises, a felony of the third degree, in violation of R.C. §2923.12(A)(2). Index at 39. The remaining counts and specifications were dismissed. Index at 45. On April 5, 2024, the trial court ordered Striblin to complete three years of community control. Index at 46.

On appeal, Striblin challenged his conviction on Count 2 as unconstitutional under the Second Amendment, both on its face and as applied to him. App. Index at 13. The Fifth

District reversed. *State v. Striblin*, 2024-Ohio-2142 (5th Dist.). The court concluded "the state did not meet its burden to show this regulation is consistent with the historical tradition of firearms regulation" and "uph[e]ld Striblin's constitutional challenge against R.C. 2923.121(A)." *Id*. at ¶ 38.

The court of appeals first determined that "Striblin's conduct is covered by the text of the Second Amendment and thus presumptively protected by the Second Amendment[.]" *Id*. at ¶ 21-22. The court then concluded that R.C. §2923.121 is not "consistent with the historical tradition of firearms regulation." *Id*. at ¶ 23-38.

The court gave little to no weight to historical regulations from the Reconstruction Era or later, which disarmed intoxicated individuals, prohibited sales to intoxicated individuals, and prohibited firearms in "sensitive places" serving alcohol. *Id*. at ¶ 24-26. The decision relied heavily on *United States v. Daniels*, 77 F.4th 337 (5th Cir.2023). In *Daniels*, the Fifth Circuit held that 18 U.S.C. 922(g)(3) was unconstitutional as applied to a non-violent marijuana user. In *Daniels*, the Solicitor General's Petition for writ of certiorari was granted. The Supreme Court vacated and remanded *Daniels* "for further consideration in light of *United States v. Rahimi.*" *United States v. Daniels*, 144 S. Ct. 2707 (2024).

The Fifth District acknowledged that public intoxication is "a constitutional reason for barring possession of firearms" but concluded that "the historical evidence does not appear to strongly support preventing someone from carrying a firearm into a place merely because *other* people are consuming alcohol." *Id*. at ¶ 32-34. (Emphasis added). The court was under the mistaken assumption that such evidence "must be a close match[.]" *Id*. at ¶ 27.

Finally, the Fifth District observed that some "'class D permit' facilities are quite unlike bars and pubs" and asserted "it is not evident to us that the sensitive places doctrine would permit

the prohibition of firearms in *every* location where alcohol is consumed." *Id*. at ¶ 36. (Emphasis added). The court concluded the State did not meet "its burden to show class D permit facilities are *all* sensitive places within the historical tradition of firearms regulation." *Id*. at ¶ 36 (Emphasis added). Under a facial challenge, the State had no such obligation.

Judge Wise dissented, finding "R.C. 2929.121 meets the licensing restrictions approved in *Bruen*." *Striblin*, 2024-Ohio-2142, ¶ 45.

ARGUMENT

Appellant's Proposition of Law No. 1: The only facts relevant to a constitutional appeal after a no-contest plea are the facts within the indictment.

A facial challenge requires the defendant to "establish that no set of circumstances exists under which the Act would be valid." *United States* v. *Salerno*, 481 U. S. 739, 745 (1987). Thus, "the presumption of constitutionality may be overcome only if the law is unconstitutional in *all* instances." *State v. Hacker*, 2023-Ohio-2535, ¶ 11. This differs from an as applied challenge where the defendant asserts a law is unconstitutional in a specific context or when applied to that defendant.

"Extrinsic facts are not needed to determine whether a statute is unconstitutional on its face." *City of Reading v. PUC*, 2006-Ohio-2181, ¶ 15. This means any "personalization" the defendant may rely on, i.e., the specific facts relative to his or her case that are not discernable from the plain text of the statute being challenged, are irrelevant to the analysis. *State v. King*, 2024-Ohio-4585, ¶ 17 (8th Dist.)

Here, the Fifth District erred in finding, "it is not evident to us that the sensitive places doctrine would permit the prohibition of firearms in *every* location where alcohol is consumed." *Striblin*, 2024-Ohio-2142, ¶ 36 (emphasis added). Likewise, it was error for the Fifth District to

conclude the State did not meet a "burden to show class D permit facilities are *all* sensitive places within the historical tradition of firearms regulation. 2923.121(A)." *Id* (emphasis added).

This analysis flipped the burden. In a facial challenge, the State is not required to show that "every" or "all" liquor permit premises are all sensitive places within the historical tradition of firearms regulation. It is Striblin's burden to prove the law is invalid in all circumstances. Striblin failed to meet this burden because R.C. §2923.121 can be applied constitutionally in some, if not all, cases.

The argument that certain liquor permit locations are not sensitive places where firearms can be restricted would be appropriate in an as applied challenge, which this is not. The Fifth District did not even analyze an as applied claim.

The factual distinction between consuming alcohol and being intoxication fails for the same reason. Some people who consume alcohol in bars will become intoxicated and should not have or use firearms. Thus, Striblin cannot show the law is invalid in *all* applications. Someone asserting they consumed alcohol but were not intoxicated or a risk to public safety would make the argument in the context of an as applied challenge.

Appellant's Proposition of Law No. 2: The proper standard of review for a facial-constitutional challenge under the Second Amendment must be compatible with *Bruen*.

The Second Amendment provides: "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." The Amendment guarantees an individual right to possess and carry arms for self-defense. But "the right secured by the Second Amendment is not unlimited." *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008); *See N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 21 (2022); *McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010) (plurality opinion); *United States v.*

Rahimi, 144 S. Ct. 1889, 1892 (2024); *Arnold v. Cleveland*, 67 Ohio St.3d 35, 47 (1993) ("the right to bear arms is not an unlimited right").

In *Heller*, the Supreme Court held that the Second Amendment protects an individual right to possess a firearm unconnected with service in the militia. However, Justice Scalia, writing for the majority explained that the right is "not unlimited." *Heller*, 554 U.S. at 626. The Court defined the right to bear arms as belonging to "law-abiding, responsible citizens." *Id*. at 635. Consistent with that definition, the Court cautioned that "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." *Heller*, 554 U.S. at 626-627. The Court described such prohibitions as "presumptively lawful" and falling within "exceptions" to the protected right to bear arms. *Id*. at 627 n.26, 635.

In *McDonald*, a plurality of the Supreme Court stated that the Second Amendment protects, "the safety of * * * law-abiding members of the community." *Id*. at 790. The Court repeated its "assurances" that *Heller* "did not cast doubt on such longstanding regulatory measures" such as "'prohibitions on the possession of firearms by felons and the mentally ill,'" and "'laws forbidding the carrying of firearms in sensitive places such as schools and government buildings[.]" *McDonald*, 561 U.S. at 786 (quoting *Heller*, 554 U.S. at 626).

Bruen reshaped the legal framework for analyzing firearm regulations including those involving "sensitive places." The Court held that when the plain text of the Second Amendment covers the regulated conduct, the Constitution presumptively protects it. *Bruen*, 597 U.S. at 17. To justify a regulation of that conduct, the government must demonstrate that a challenged law is "consistent with this Nation's historical tradition of firearm regulation." *Id*. The government must

show that any regulation, including restrictions on carrying firearms in sensitive places or prohibitions on the possession of firearms by irresponsible individuals, aligns with historical analogues from the Founding Era or the Reconstruction period. *Bruen*, 597 U.S. at 30-31.

Justice Thomas, writing for the majority, emphasized that "analogical reasoning" is not a "regulatory straightjacket." *Bruen*, 597 U.S. at 30. The Second Amendment "requires only that the government identify a well-established and representative historical *analogue*, not a historical *twin*." *Id.* The majority reaffirmed *Heller*'s assurances that restriction of firearms in sensitive places are presumptively constitutional. *Bruen*, 597 U.S. at 30.

> Consider, for example, *Heller*'s discussion of "longstanding" "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings." 554 U. S., at 626, 128 S. Ct. 2783, 171 L. Ed. 2d 637. Although the historical record yields relatively few 18th- and 19th-century "sensitive places" where weapons were altogether prohibited—*e.g.*, legislative assemblies, polling places, and courthouses—we are also aware of no disputes regarding the lawfulness of such prohibitions. See D. Kopel & J. Greenlee, The "Sensitive Places" Doctrine, 13 Charleston L. Rev. 205, 229-236, 244-247 (2018); see also Brief for Independent Institute as *Amicus Curiae* 11-17. We therefore can assume it settled that these locations were "sensitive places" where arms carrying could be prohibited consistent with the Second Amendment. And courts can use analogies to those historical regulations of "sensitive places" to determine that modern regulations prohibiting the carry of firearms in *new* and analogous sensitive places are constitutionally permissible.

Bruen, 597 U.S. at 30.

The Supreme Court clarified the scope of the history and tradition test under the Second Amendment in *Rahimi*. In *Rahimi*, the Court noted that "some courts ha[d] misunderstood the methodology of [its] recent Second Amendment cases" and explained that "[t]hese precedents were not meant to suggest a law trapped in amber." *Rahimi*, 144 S. Ct. at 1897. The Court explained that the Second Amendment "permits more than just those regulations identical to ones that could be found in 1791" and thus does not require a "historical twin" to justify a modern firearm restriction. *Id*. at 1897-98 (quoting *Bruen*, 597 U.S. at 30). Instead, the test is whether the

restriction is "consistent with the principles that underpin our regulatory tradition," meaning whether it is "'relevantly similar' to laws that our tradition is understood to permit." *Id*. at 1898 (quoting *Bruen*, 597 U.S. at 29). "Why and how the regulation burdens the [Second Amendment] right are central to this inquiry." *Id*.

The Court clarified that while the Second Amendment protects an individual's right to bear arms, the right is not absolute. *Rahimi*, 144 S. Ct. at 1897; *id*. at 1912 (Kavanaugh, J., concurring); *Id*. at 1924 (Barrett, J., concurring). Chief Justice Roberts, writing for the majority, explained there is a long-standing tradition of restricting firearm possession for individuals considered dangerous. *Rahimi*, 144 S. Ct. at 1899-1901. He detailed 18th and 19th century laws prohibiting firearm possession by individuals who posed threats to public, namely surety and going arms laws. *Id*.

The Court noted that early English laws restricted armed carriage in public to prevent violence and keep the peace. *Rahimi*, 144 S. Ct. at 1899. Similar "going armed" laws were adopted in early America. *Id.* at 1899-1901. These laws prohibited individuals from carrying a firearm or other weapons in a way that caused fear or alarm to others. *Id.* The purpose of such laws was to keep the public order and prevent violence. *Id.* Punishment included "'forfeiture of the arms . . . and imprisonment.'" *Id*. at 1901 citing 4 Blackstone 149. Surety laws were also prevalent in the Founding Era and required individuals deemed dangerous to post a bond or surety to retain certain rights, including firearm rights. *Rahimi*, 144 S. Ct. at 1899-1901.

Applying these principles, the Court reasoned that modern domestic violence restraining orders are analogous to earlier regulations which proactively disarmed individuals who posed a threat to the safety of others. The Court rejected a facial challenge to 18 U.S.C. § 922(g)(8) and held that "[a]n individual found by a court to pose a credible threat to the physical safety of another

may be temporarily disarmed consistent with the Second Amendment." *Rahimi*, 144 S. Ct. at 1903.

The Court once again stated that prohibitions, like those on the possession of firearms by "felons and the mentally ill," are "presumptively lawful." *Rahimi*, 144 S. Ct. at 1902, 1923 (quoting *Heller*, 554 U.S. at 626, 627, n. 26).

While *Rahimi* does not directly address sensitive places, laws regulating firearms in such places are historically justified by the need to protect the physical safety of others.

Appellant's Proposition of Law No. 3: Under Bruen's test, interpretative weight should be afforded to the prevailing understanding of the right to bear arms circa the ratification of the Fourteenth Amendment in 1868.

The "Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty." *McDonald,* 561 U.S. at 778. The Second Amendment right to keep and bear arms was incorporated and applied to the states by virtue of the Fourteenth Amendment, which was ratified in 1868. *McDonald*, at 777, 791 (finding that incorporation occurs through the Due Process Clause); *McDonald*, 806 (Thomas, J., concurring) (finding that incorporation occurs through the Privileges and Immunities Clause). "Constitutional rights are enshrined with the scope they were understood to have *when the people adopted them*." *Bruen*, 597 U.S. at 34 (emphasis added), citing *District of Columbia v. Heller*, 554 U.S. 570, 634-35 (2008). Nonetheless, there exists "an ongoing scholarly debate on whether courts should primarily rely on the prevailing understanding of an individual right when the Fourteenth Amendment was ratified in 1868." *Bruen*, 597 U.S. at 37-38 (2022); *see also United States v. Rahimi*, 144 S.Ct. at fn 1 (2024). Appellant's third proposition of law calls upon this Court to resolve that debate.

The Fifth District in this case held that "the incorporation of the Second Amendment to the States through the Fourteenth Amendment carried with it the contextual understanding and public meaning of the text from Founding Era." *State v. Striblin*, 2024-Ohio-2142, ¶ 24 (5th Dist.). It refused to analyze the right to bear arms at the time of the ratification of the Fourteenth Amendment for two main reasons. First, the Fifth District believed that the Supreme Court's decision in *Bruen* "strongly suggests that the comparative analysis of examples of historical firearm regulations be rooted in the Founding Era or earlier." *Id*. Second, the Fourteenth Amendment was ratified at a time of "prolific discrimination against entire classes of people" which requires that the period receive "special scrutiny." *Id*.

The Supreme Court of the United States has *not* suggested that the courts should confine their analysis of the right to bear arms to the Founding Era. To the contrary, it has twice explicitly left that matter open to debate. *Bruen*, 597 U.S. at 37-38 (2022); *see also Rahimi*, 144 S.Ct. at 1898, fn 1. Additionally, the Supreme Court itself has referenced the Reconstruction Era multiple times in its opinions dealing with the Second Amendment. *Bruen*, at 64-65 (analyzing 1870s era Texas statute); *McDonald*, 561 U.S. at 777 ("In 1868, 22 of the 37 States in the Union had state constitutional provisions explicitly protecting the right to keep and bear arms.")

The Fifth District also erred by discounting consideration of Reconstruction Era statutes due to the period's "prolific discrimination against entire classes of people." *Striblin*, at ¶ 25. That logic would foreclose consideration of any historical time period, including the Founding Era when slavery was legal in many states. By deciding not to consider Reconstruction Era statutes due to racism existing at the time, the Fifth District has *fundamentally* rejected *Bruen*'s command to determine whether Ohio's law is "consistent with the Second Amendment's text and historical understanding." *See Bruen* at 26.

As of the writing of this brief, post-*Rahimi* caselaw is sparse. Nonetheless, numerous federal appellate judges have written that it is necessary to look to the Reconstruction Era when determining the public meaning of the right to bear arms in a case involving a state regulation. *See Antonyuk v. James*, 2024 U.S. App. LEXIS 26958 *53 (2d Cir. October 24, 2024) ("It would be incongruous to deem the right to keep and bear arms fully applicable to the States by Reconstruction standards but then define its scope and limitations exclusively by 1791 standards."); *Lara v. Comm'r Pa. State Police*, 97 F.4th 156, 157-58 (3d Cir.2024) (Krause, J., dissenting from denial of rehearing) ("At a minimum, one would think that the states' understanding of the Second Amendment at the time of the 'Second Founding' – the moment in 1868 when they incorporated the Bill of Rights against themselves – is part of the 'the Nation's historical tradition of firearms regulation' informing the constitutionality of modern-day regulations."); *NRA v. Bondi*, 61 F.4th 1317, 1324 (11th Cir.2023) ("After all, it makes no sense to suggest that the States would have bound themselves to an understanding of the Bill of Rights – including that of the Second Amendment – that they did not share when they ratified the Fourteenth Amendment."), *vacated by, rehearing granted by, en banc*, 2023 U.S. App. LEXIS 17960 (11th Cir. July 14, 2023).

Scholars from across the ideological spectrum have also embraced the view that, when applying the federal Bill of Rights to state regulations, the original public meaning of the right in 1868 should control. *See* Kurt T. Lash, *ARTICLE: Respeaking the Bill of Rights: A New Doctrine of Incorporation*, 97 Ind. L.J. 1439, 1441 (2022) ("Whatever the original meaning of the 1791 amendments, the people of 1868 spoke those older rights into a new context, one reflecting decades of battles over the meaning of the Bill of Rights and the importance of protecting those rights against both federal and state abridgment."); Blackman and Shapiro, *ARTICLE: Keeping*

Pandora's Box Sealed: Privileges or Immunities, the Constitution in 2020, and Properly Extending the Right to Keep and Bear Arms to the States, 8 Geo. J.L. & Pub. Pol'y 1, 52 (2010) ("1868 is thus the proper temporal location for applying a whole host of rights to the states, including the right that had earlier been codified as the Second Amendment as applied to the federal government."); Calabresi & Agudo, *Article: Individual Rights under State Constitutions when the Fourteenth Amendment was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 Tex. L. Rev. 7, 115-16 (2008) ("[F]or those wondering about incorporation or judicial protection against the states of unenumerated rights in federal constitutional law, the question is controlled not by the original meaning of the first ten Amendments in 1791 but instead by the meaning those texts and the Fourteenth Amendment had in 1868."); Akhil Amar, *The Bill of Rights: Creation and Reconstruction*, at 223 (1998) ("[W]hen we 'apply' the Bill of Rights against the states today, we must first and foremost reflect on the meaning and the spirit of the amendment of 1866, not the Bill of 1789.").

It is now well-established that the ratification of the Fourteenth Amendment in 1868 protects an individual's right to keep arms against state regulations. Because constitutional rights should be interpreted to have "the scope they were understood to have when the people adopted them," *Heller*, 554 U.S. at 634, the right to keep arms should be interpreted to have the meaning understood by the people in 1868 when analyzed in the context of a state statute.

Appellant's Proposition of Law No. 4: R.C. 2923.121 is constitutional under the Second Amendment.

1. R.C. §2923.121 is not a complete ban on carrying a gun in a bar.

R.C. §2923.121(A) generally makes it a crime to "possess a firearm in any room in which any person is consuming beer or intoxicating liquor in a premises for which a D permit has been issued under Chapter 4303 of the Revised Code or in an open air arena for which a permit of that

nature has been issued."[1] Such premises include, for example, retailers, restaurants, bars, and clubs – places in which alcohol is sold for consumption on the premises. *See* R.C. 4303.13 *et seq*.

But carrying a gun in a bar is legal under certain circumstances. The law "does not apply" when the firearm is possessed by a "person who has been issued a concealed handgun license that is valid at the time * * * as long as the person is not consuming beer or intoxicating liquor or under the influence of alcohol or a drug of abuse." R.C. §2923.121(B)(1)(e).[2] Additionally, a qualifying adult "may carry a concealed handgun that is not a restricted firearm anywhere in this state in which a person who has been issued a concealed handgun license may carry a concealed handgun." R.C. §2923.111(B)(2).[3]

Both the licensee and the "qualifying adult" are exempted from R.C. §2923.121(A) as long as they do not consume alcohol while carrying. *See* R.C. §2923.111(C)(1)(d).

A "qualifying adult" is twenty-one years of age or older; not legally prohibited from possessing or receiving a firearm under 18 U.S.C. 922(g)(1) to (9) or under R.C. 2923.13 (HWWUD); and satisfies all of the licensing predicates from R.C. §2923.125(D)(1)(a) to (j), (m), (p), (q), and (s) for a concealed handgun license. *See* R.C. §2923.111(A)(2). As such, the

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[1] In 2008, the General Assembly amended R.C. §2923.121 by replacing the prohibition against a person possessing a firearm in any room in which "liquor is being dispensed" in a premises for which a D permit has been issued under R.C. Chapter 4303, with a prohibition against a person possessing a firearm in any room in which "any person is consuming liquor" in a premises for which such a permit has been issued. *See* Sub. S.B. 184, Eff. September 9, 2008; R.C. 2923.121(A); R.C. 2923.126(B)(4).

[2] S.B. 184 also changed the law so that the prohibitions in R.C. 2923.121(A) would not apply to certain individuals including any person who is carrying a valid concealed handgun license as long as the person is not consuming liquor or under the influence of alcohol or a drug of abuse. R.C. §2923.121(B)(1)(d) and (e).

[3] S.B. 215 made amendments to R.C. 2923.111 that became effective on June 13, 2022, before the underlying offense was committed.

"qualifying adult" need not have a concealed handgun license but must possess the qualifications to be able to obtain such a license if he or she applied for one.

Thus, R.C. §2923.121(A) is not a complete ban on carrying a gun in a beer or liquor permit premises. Rather, the law "merely provides a licensing requirement before such activity can be conducted." *See State Jackson*, 2023-Ohio-2063, ¶ 13 (8th Dist.) (construing R.C. §2923.16(B)). Ohioans can lawfully carry a firearm in a bar when they either (1a) have a concealed handgun license pursuant to R.C. 2923.125 or (1b) meet the "qualifying adult" requirements of so called "permitless carry"; (2) are not consuming beer or intoxicating liquor or under the influence of alcohol or a drug of abuse; and (3) the premises does not prohibit firearms.

2. Ohio's "shall-issue" licensing regime is presumptively lawful.

Because possessing a firearm in a beer or liquor permit premises is legal when the individual has a valid concealed handgun license (or is a qualifying adult) and is not consuming alcohol, R.C. §2923.121(A) must be evaluated within the context of Ohio's concealed weapon licensing scheme.

Under current and former law, Ohio is a "shall issue" jurisdiction, "where authorities must issue concealed-carry licenses whenever applicants satisfy certain threshold requirements, without granting licensing officials discretion to deny licenses based on a perceived lack of need or suitability." *Bruen*, 597 U.S. at 13. Contrast "may issue" licensing regimes, "under which authorities have discretion to deny concealed-carry licenses even when the applicant satisfies the statutory criteria, usually because the applicant has not demonstrated cause or suitability for the relevant license." *Id*. at 2124.

R.C. §2923.125 sets forth the concealed handgun application and licensing process in Ohio. To apply, the applicant must submit the following to the sheriff: (1) a nonrefundable license fee;

(2) a color photograph of the applicant that was taken within the last 30 days; (3) a firearms competency certification (or equivalent); (4) a certification by the applicant that the applicant has read the pamphlet prepared by the Ohio peace officer training commission; (5) a set of fingerprints; (6) for non-citizens, the name of the applicant's country of citizenship and the applicant's alien registration number; and (7) for non-residents, proof of employment in Ohio. *See* R.C. §2923.125(B)(1)-(7). The sheriff will conduct a criminal records and incompetency records check. R.C. §2923.125(C). The sheriff "shall issue" a concealed handgun license to an applicant that meets all the requirements of R.C. §2923.125(D)(1)(a)-(s).

In *Bruen*, the Supreme Court expressed its approval of "shall-issue" licensing regimes, which "are designed to ensure only that those bearing arms in the jurisdiction are, in fact, 'law-abiding, responsible citizens.'" *Bruen*, 142 S. Ct. at 2138 n.9 (citing *Heller*, 554 U. S. at 635); *see also Bruen,* at 2123 n.1 (endorsing R.C. §2923.125). The Supreme Court made clear that "nothing in our analysis should be interpreted to suggest the unconstitutionality of the 43 States' 'shall-issue' licensing regimes," under which 'a general desire for self-defense is sufficient to obtain a [permit]'" *Id*. citing *Drake* v. *Filko*, 724 F. 3d 426, 442 (3rd Cir. 2013) (Hardiman, J., dissenting).

Justice Kavanaugh, in his concurring opinion, reiterated that "the Court's decision does not prohibit States from imposing licensing requirements for carrying a handgun for self-defense." *Bruen*, 142 S. Ct. at 2161 (Kavanaugh, J., concurring]). Justice Kavanaugh stated that "the Second Amendment allows a 'variety' of gun regulations," which include the "shall-issue" license regimes employed by the other forty-three states. *Id*. at 2162. Justice Alito, in his concurring opinion, similarly stated that the Court's decision "decides nothing about who may lawfully possess a firearm or the requirements that must be met to buy a gun. Nor does it decide anything about the kinds of weapons that people may possess. Nor have we disturbed anything that we said in *Heller*

or *McDonald* v. *Chicago*, 561 U. S. 742 (2010), about restrictions that may be imposed on the possession or carrying of guns." *Id*. at 2157 (Alito, J., concurring).

Thus, *Bruen* permits the State to impose objective shall-issue licensing regimes for carrying handguns for self-defense, which generally restrict the concealment and transport of loaded firearms outside of the home. Ohio's weapons control statutes, including R.C. 2923.125, R.C. 2923.111 and R.C. 2923.121, are constitutional under the Second Amendment post-*Bruen*.

Striblin did not address the application of R.C. §2923.121(B)(1)(e) in the context of a facial challenge. He also failed to analyze the constitutional validity of Ohio's shall-issue licensing requirements for carrying concealed weapons outside of the home in R.C. §2923.125, Ohio's permitless carry law under R.C. §2923.111.

The Fifth District also overlooked the licensing scheme. The court required a historical analogue "preventing someone from carrying a firearm into a place merely because other people are consuming alcohol." *Striblin*, 2024-Ohio-2142, at ¶ 24. While relevantly similar laws do exist, that is the incorrect analysis. The only way someone is prosecuted for being in a liquor premises "merely because other people are consuming alcohol" is if that person lacks a concealed handgun license or would not be considered a qualifying adult. In that instance, the issue is with the presumptively lawful licensing scheme, and not R.C. §2923.121.

Striblin's facial challenge fails because Ohioans who have a concealed handgun license, or a de facto license as a qualified adult, can lawfully possess a gun in a bar so long as they are not consuming alcohol or under the influence. Thus, R.C. §2923.121(A) is not unconstitutional in *all* instances.

3. Bars that sell alcohol for consumption on the premises are sensitive places where possession of firearms may be restricted.

The State can restrict carriage of firearms in certain locations deemed "sensitive places" such as schools and government buildings. *Heller*, 554 U.S. at 626; *McDonald*, 561 U.S. at 786; *Bruen*, 597 U.S. at 30-31; 597 U.S. at 80-81 (Kavanaugh, J., concurring); *Rahimi*, 144 S. Ct. at 1923 (Kavanaugh, J., concurring); 144 S. Ct. at 1925-1926 (Barrett, J., concurring). This is because the presence of firearms in certain locations poses a greater risk to public safety. Liquor permit premises, such as bars and restaurants, are sensitive locations because alcohol impairs judgment, increasing the potential for violence when combined with firearms.

Treatment of bars as 'sensitive places' is justified by the Founding Era history. "The taverns were a vital early American institution – an institution highly regarded by most colonials and attended as faithfully as many churches." Lender & Martin, *Drinking in America*, at 14 (1987). "Before and during the Revolution, for example, inns were favorite places for political discussions, and they served as rallying points for the militia and as recruiting stations for the Continental army." *Id*., at 13. "When the tavern wasn't being used as a de facto meeting-house, it often doubled as a courthouse." Sismondo, *America Walks into a Bar*, at 13, (2011). "And even when a dedicated courthouse already existed, many towns granted licenses for tavern-keepers to open up next door so that trials could be held there on cold days and small disputes settled 'out of court.'" *Id*.

In Ohio, taverns acted as first-generation courthouses. When Hamilton County was created in 1790, the "first courts were held in the barroom of a rented tavern owned by George Avery near the banks of the Ohio River." Jason Alexander, Hamilton County Clerk of Courts, *A Brief History of Hamilton County's Various Courthouses*, https://www.courtclerk.org/IMAGES/historical/History%20of%20Hamilton%20County%20Courthouses.pdf (accessed December 12, 2024), https://perma.cc/3S73-MHYP**.** Cuyahoga County

was established in 1807 and it held court "in various taverns and inns around town" until the first courthouse was completed in 1813. Chris Roy, Cleveland Historical, *Cuyahoga County Courthouse*, https://clevelandhistorical.org/index.php/items/show/791?tour=27&index=11 (accessed December 12, 2024), https://perma.cc/G2E3-2LYK. Court was also held in the "Benjamin Overfield Tavern on November 5, 1808" in Miami County, a tavern that became the court's "regular meeting place." Overfield Tavern Museum, *A Frontier Tavern*, https://www.overfieldtavernmuseum.com/a-frontier-tavern (accessed December 12, 2024), https://perma.cc/F4U8-37JM**.**

The Supreme Court's landmark gun cases make clear that the government may prohibit guns in sensitive places like courts and other government buildings. *Heller*, 554 U.S. at 626-627; *McDonald*, 561 U.S. at 786; *Bruen*, 597 U.S. at 30; *Rahimi*, 144 S. Ct. at 1923 (Kavanaugh, J., concurring). It follows that a law forbidding the carrying of firearms in taverns, historically treated as government buildings, is presumptively lawful.

Restricting firearms in sensitive places has roots in English law. The Statute of Northampton, relied upon in *Rahimi*, 144 S. Ct. at 1899, prohibited people from going "armed by night nor by day, in Fairs, Markets, nor in the presence of the Justices or other Ministers." 2 Edw. 3 c. 3 (1328). Later, the prohibitions also applied to "Churches" and "Highways." 4 Hen. 4 c. 29 (1402). Over time, the law prohibited arms in court (and within a two-mile radius of a court), as well as in "any towne, churche, fayre, markett or other congregacion." 26 Hen. 8 c. 6, § 3 (1534). It was also a crime to ride on highways with certain types of arms, including loaded guns. 33 Hen. 8 c. 6, § 3 (1541). And justices of the peace could arrest people who went "armed offensively * * * in Fairs, Markets, or elsewhere." M. Dalton, The Countrey Justice, Containing the Practices of the Justices of the Peace 38 (1666 ed.).

Similar sensitive place restrictions were adopted in the American colonies. For example, Maryland prohibited individuals from bearing arms in its legislative houses. 1647 Md. Laws 216; 1650 Md. Laws 273. Delaware had a constitutional provision restricting carriage of arms and gathering of militias at polling places. Del. Const. art. 28 (1776) ("no persons shall come armed to any [elections], and no muster of the militia shall be made on that day.")

Into the 19th and 20th centuries, State and local governments continued to regulate firearm possession in specific locations such as churches, polling locations, courts, schools, event spaces, places of public assembly, and places where alcohol was consumed or sold.

For instance, shortly after the ratification of the Fourteenth Amendment, Tennessee restricted carrying firearms into "any election * * * fair, racecourse, or other public assembly of the people." 1869 Tenn. Pub. Acts ch. 22, § 2 at 23–24. Georgia prohibited carrying arms "to any court of justice, or any election ground or precinct, or any place of public worship, or any other public gathering in this State." 1870 Ga. Laws no. 285, § 1 at 421. Texas prohibited arms in places of worship, election precincts, and "any school room, or other place where persons are assembled for amusement or for educational or scientific purposes, or into any circus, show, or public exhibition of any kind, or into a ball room, social party, or social gathering" or "any other place where people may be assembled to muster, or to perform any other public duty, * * * or any other public assembly." 1871 Tex. Gen. Laws ch. 34, § 3 at 25–26. Likewise, Arizona and Oklahoma prohibited firearms in courthouses, places of worship, polling places, schools, places of public assembly, and social venues. 1889 Ariz. Sess. Laws no. 13, § 3 at 30–31; 1890 Okla. Stats. ch. 25, art. 47, § 7 at 496.

Louisiana prohibited carrying firearms "on any day of election during the hours the polls are open." 1870 La. Acts no. 100, § 73 at 159– 60. Maryland prohibited carrying weapons on

election days in certain counties. 1874 Md. Laws ch. 250, § 1 at 366–67; 1886 Md. Laws ch. 189, § 1 at 315. Pennsylvania prohibited carrying firearms in Fairmount Park, located in Philadelphia. 1868 Pa. Laws no. 1020, § 21 at 1088.

More to the point, States, territories, and municipal governments prohibited firearms in places where alcohol was consumed or sold. New Mexico prohibited individuals from carrying arms at a "Ball or Fandango" and "room adjoining said ball where Liquors are sold." 1852 N.M. Laws § 3 at 69. "In 1870, San Antonio, Texas, banned firearms at any "bar-room" or "drinking saloon." *Wolford v. Lopez*, 116 F.4th 959, 986 (9th Cir. 2024). In 1879, New Orleans prohibited carrying "a dangerous weapon, concealed or otherwise, into any theatre, public hall, tavern, picnic ground, place for shows or exhibitions, house or other place of public entertainment or amusement." Edwin L. Jewell *The Laws and Ordinances of the City of New Orleans* 1 (1882) (§ 1), https://babel.hathitrust.org/cgi/pt?id=nyp.33433014832970&seq=27; (accessed December 15, 2024); https://perma.cc/9U38-4R8P. Oklahoma also prohibited firearms in "any place where intoxicating liquors are sold." 1890 Okla. Stats. ch. 25, § 7 at 496. This was in addition to the many State and local laws prohibiting intoxicated individuals from using firearms, discussed below.

Relatedly, Ohio prohibited carrying concealed weapons in 1859, which would have covered firearms in bars and other liquor permit places. R.S. 6892, 56 Ohio Laws 56 (1859); *Klein v. Leis*, 2003-Ohio-4779, ¶ 9.

State supreme courts generally upheld sensitive place restrictions. *See, e.g.*, *Andrews v. State*, 50 Tenn. 165, 182 (1871) ("a man may well be prohibited from carrying his arms to church, or other public assemblage, as the carrying them to such places is not an appropriate use of them"); *English v. State*, 35 Tex. 473, 478-479 (1872) ("it appears to us little short of ridiculous, that any

one should claim the right to carry upon his person any of the mischievous devices inhibited by the statute, into a peaceable public assembly, as, for instance into a church, a lecture room, a ball room, or any other place where ladies and gentlemen are congregated together."); *Hill v. State*, 53 Ga. 472, 474 (1874) (upheld a law that prohibited carrying any weapon "'to any court of justice or any election ground or precinct, or any place of public worship, or any other public gathering in this state, except militia muster grounds.'")

4. R.C. §2923.121 fits within the historical tradition of temporarily disarming individuals whose possession of firearms would endanger themselves or others.

No one would dispute that consuming alcohol can impair judgment, lower inhibitions, and affect decision making. For this reason, alcohol can increase aggression and make people more likely to engage in conflict. Combining alcohol and guns in bars increases the risk of armed violence, or even accidental shootings, in crowded public spaces. Individuals who possess guns while drinking are at risk of breaching the peace.

Distinct from sensitive places, the Second Amendment allows the State to temporarily disarm individuals whose possession of firearms would endanger themselves or others. This is supported by three distinct types of historical analogues including (1) statutes disarming those adjudged dangerous or disloyal (2) statutes disarming the mentally ill or insane, and (3) statutes disarming intoxicated individuals.

a. Analogues disarming those adjudged dangerous or disloyal

To begin, "the best available evidence about the founding generation's understanding of the right to bear arms reveals that the right did not preclude restrictions on classes of people who presented a present danger to others." *State v. Weber*, 2020-Ohio-6832, ¶ 77 (DeWine, J., concurring). Throughout history, governments have properly disarmed individuals whose access

to firearms poses a danger, including loyalists, rebels, minors, individuals with mental illness, felons, intoxicated individuals, and drug addicts.

i. *Pre-Founding*.

Disarming people who were considered dangerous or a threat to public safety has strong roots in English tradition. *See, e.g., Kanter v. Barr*, 919 F.3d 437, 456-457 (7th Cir.2019) (Barrett, J., dissenting). Beginning in 602 A.D., the Laws of King Aethelberht made it unlawful to "furnish weapons to another where there is strife." Joseph G.S. Greenlee, *The Historical Justification for Prohibiting Dangerous Persons from Possessing Guns*, 20 Wyoming Law Review, 249-286, at 258 (2020) ("Greenlee"); https://scholarship.law.uwyo.edu/wlr/vol20/iss2/7 (accessed December 15, 2024), https://perma.cc/3EKT-L74J.

England's 1662 Militia Act allowed the King's agents to "search for and seize all arms in the custody or possession of any person or persons whom the said lieutenants or any two or more of their deputies shall judge dangerous to the peace of the kingdom." *Id*. at 259. In 1684, King Charles ordered lieutenants to seize arms from "dangerous and disaffected persons," and disaffected persons were "those being disloyal to the current government, who might want to overthrow it. *Id*.

In the colonies, firearm regulations sought to disarm persons who were considered dangerous and were like the Statute of Northampton, which prohibited carrying firearms in an aggressive and terrifying manner. Greenlee at 262. Massachusetts Bay, New Hampshire, Massachusetts, and Virginia all had similar laws in which, according to Virginia's law of 1736 "'the constable may take away Arms from such who ride, or go, offensively armed, in Terror of the People' and may bring the person and their arms before the Justice of the Peace." *Id*. quoting George Webb, The Office of Authority of a Justice of the Peace 92-93 (1736).

Colonists also disarmed people considered a threat to the governmental authority. *Kanter*, 919 F.3d at 457-458 (Barrett, J., dissenting). Maryland disarmed anyone unwilling to take an oath of allegiance to the King while Virginia disarmed those who would take such an oath. *Id*. In 1776, the Continental Congress recommended the colonies "disarm persons 'who are notoriously disaffected to the cause of America, or who have not associated, and shall refuse to associate, to defend, by arms, these United Colonies.'" *Id*. quoting 1 Journals of the Continental Congress, 1774-1789, 285 (1906). Shortly after, New Jersey, North Carolina, Virginia, and Pennsylvania enacted similar regulations. *Id*.

Connecticut prohibited those who defamed or libeled acts of Congress from keeping arms. *See* G.A. Gilbert, The Connecticut Loyalists, 4 Am. Hist. Rev. 273, 282 (1899). Pennsylvania required any "person [who] 'refuse[d] or neglect[ed] to take the oath or affirmation' of allegiance to the state . . . to deliver up his arms to agents of the state, and he was not permitted to carry any arms about his person or keep any arms or ammunition in his 'house or elsewhere.'" Saul Cornell & Nathan DeDino, A Well Regulated Right: The Early American Origins of Gun Control, 73 Fordham L. Rev. 487, 506 (2004) (quoting Act of Apr. 1, 1778, ch. LXI, § 5, 1777-1778 Pa. Laws 123, 126). Massachusetts also disarmed "such Persons as are notoriously disaffected to the Cause of America, or who refuse to associate to defend by Arms the United American Colonies." *Id.* at 507 (quoting Act of Mar. 14, 1776, ch. VII, 1775-1776 Mass. Acts 31, 31).

ii. Founding

[F]ounding-era legislatures categorically disarmed groups whom they judged to be a threat to the public safety. *Kanter*, 919 F.3d at 458 (Barrett, J., dissenting). Some of the historical evidence "support[ing] the proposition that the state can take the right to bear arms away from a

category of people that it deems dangerous" is described by Judge, now Justice, Barrett in *Kanter*, 919 F.3d at 453-464. The evidence is also reviewed in *Rahimi*, 144 S. Ct. at 1900-1901, and *Weber*, 2020-Ohio-6832, ¶ 89-96 (DeWine, J., concurring).

The Ratifying Conventions are particularly relevant. Debates from the Pennsylvania, New Hampshire, and Massachusetts ratifying conventions confirm that the right to keep and bear arms did not extend to those who were likely to commit violent offenses. *See Binderup v. Attorney Gen. United States*, 836 F.3d 336, 368 (3d Cir. 2016) (en banc) (Hardiman, J., concurring in part and concurring in the judgments).

Pennsylvania voted to ratify the Constitution, 46–23. The Anti-Federalist minority report (the Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to Their Constituents) issued by the 23, opponents recognized that the government could disarm potentially dangerous or irresponsible people, stating that "people have a right to bear arms … unless for crimes committed, or real danger of public injury from individuals." *The* Report is available at https://www.loc.gov/resource/bdsdcc.c0401/?st=text (accessed December 15, 2024), https://perma.cc/HQ24-9NTM. Anti-Federalists proposed a bill of rights that, among other things, forbade "disarming the people, or any of them, unless for crimes committed, or real danger of public injury from individuals." *The Documentary History of the Ratification of the Constitution (Documentary History)* 598 (Merrill Jensen ed., 1976). The Federalists defeated the proposal, but the AntiFederalists published it in the Dissent of the Minority of the Convention, *id*. at 624, which was widely read and proved "highly influential." *Heller*, 554 U.S. at 604.

Samuel Adams offered an amendment at the Massachusetts convention to ratify the Constitution, recommending "that the said Constitution be never construed to authorize Congress * * * to prevent the people of the United States, who are *peaceable citizens*, from keeping their

own arms." *See* 2 Bernard Schwartz, The Bill of Rights: A Documentary History 662 (1971); Stephen Halbrook, That Every Man Be Armed: The Evolution of a Constitutional Right 86 (revised ed. 2013) ("[T]he Second Amendment . . . originated in part from Samuel Adams's proposal . . . that Congress could not disarm any peaceable citizens.") The convention rejected the proposal, but only because Adams waited until the morning of the day of ratification to present it. Letter from Jeremy Belknap to Ebenezer Hazard (Feb. 10, 1788). John P. Kaminski, et al. The Documentary History of the Ratification of the Constitution, digital edition. Charlottesville: University of Virginia Press, 2009, https://archive.csac.history.wisc.edu/ma_belknap_to_hazard.pdf (accessed December 15, 2024), https://perma.cc/P47N-FH7L.

New Hampshire's majority proposal provided, "Congress shall never disarm any Citizen, unless such as are or have been in actual Rebellion." 1 Jonathan Elliott, The Debates in the Several State Conventions on the Adoption of the Federal Constitution 326 (2d ed. 1891); *Heller* at 657. Thus, this proposal disarmed only those individuals who were both dangerous and who openly rebelled against the government.

Even though these proposals were not adopted, they are evidence of how people of the founding understood the right to keep and bear arms. *Heller* at 603-605; *Weber*, 2020-Ohio-6832, ¶ 91 (DeWine, J., concurring). There was agreement that disarming persons perceived to be dangerous was consistent with a right to keep and bear arms. *Kanter v. Barr*, 919 F.3d 437, 456 (7th Cir. 2019) (Barrett, J., dissenting) ("[T]hese three proposals … are most helpful taken together as evidence of the scope of [F]ounding-[E]ra understandings regarding categorical exclusions from the enjoyment of the right to keep and bear arms.")

The ratifying conventions are just one piece of "considerable historical evidence that restrictions on firearm use by those who presented a present danger to others fell outside the Second Amendment right." *Weber*, 2020-Ohio-6832, ¶ 89 (DeWine, J., concurring).

iii. Post-Founding

Almost every state "disarmed loyalists and non-associators (i.e., colonists who refused to take an oath of allegiance or support volunteer military associations)" *Brief of Amicus Curiae Professors of History and Law in Support of Petitioner*, *United States v. Zackey Rahimi*, No. 22-915 (August 21, 2023), https://www.supremecourt.gov/DocketPDF/22/22-915/275858/20230821165213803_22-915%20tsacProfessorsOfHistoryAndLaw.pdf (accessed December 16, 2024), https://perma.cc/SMK8-SB4N**,** *citing* 1776 Pa. Laws 11, § 1; 1777 Pa. Laws 61, ch. 21, §§ 2, 4; 1777 Va. Laws, ch. 3, in 9 Hening's Statutes at Large 281, 281-282 (1821); 1777 N.C. Sess. Laws 231, ch. 6, § 9; 1777 N.J. Laws 90, ch. 40, § 20.

The history and law professors also discuss the various ways in which the States, "disarmed individuals based on specific religions, political views, ethnicities, or other categories perceived by the state governments at the time as threatening to the public order." *Id*. at p. 9-11. Although these classifications would certainly be unconstitutional on other grounds today, "the underlying principle that allowed persons perceived to be dangerous (and therefore able to be disarmed) has not changed." *Id*. at p. 11.

As time passed, disarmament laws "restricting firearm possession based on whether people were peaceable, and of sound mind and character." *Id*. at p. 12. For example, governments prohibited firearms sales to or possession by intoxicated people, drug addicts, minors, those with mental illness, and those considered "disorderly," or as "tramps" or "vagrants." *Id*. at p. 12-13. Many states also passed offensive-use prohibitions against causing terror. *Id*. at p. 13-14. As

examples, Massachusetts continued to make it a crime for anyone to "ride or go armed offensively, to the fear or terror of the good citizens of this Commonwealth." 1795 Mass. Acts 436, ch. 2.20. Delaware law stated that any justice of the peace could arrest and bind "all who go armed offensively to the terror of the people." 1852 Del. Laws 733, ch. 97, § 13. States also adopted surety laws, "which required individuals deemed to be dangerous to post a surety or face imprisonment (and thereby disarmament as well)." Br. of Professors of History and Law at p. 14-15. Finally, States enacted licensing laws restricting the right to carry dangerous weapons in public. *Id*. at p. 16-17.

These regulations demonstrate that while firearms were an important part of early American life, regulation of their possession was also commonly accepted to ensure that people seen by the government as dangerous had limited or, in most cases, no access to them.

b. Analogues disarming the mentally ill or insane

The Supreme Court has repeatedly approved of "longstanding prohibitions on the possession of firearms by * * * the mentally ill." *Heller*, 554 U.S. at 626. This is because mental illness can correlate with an increased risk of harm to oneself and others:

> If the government can restrict gun ownership by someone who is currently mentally ill without running afoul of the Second Amendment, it would seem to also be the case that the government can restrict gun handling by someone who is intoxicated. One is hard-pressed to make any distinction between someone who is temporarily intoxicated and someone who is currently suffering from mental illness. In both cases, the person is unable to rationally exercise his right to bear arms and presents a danger to others.

Weber, 2020-Ohio-6832, ¶ 80 (DeWine, J., concurring). The Fifth District acknowledged that, "intoxication was a constitutional reason for possessing firearms because they posed a 'present danger to others.'" *Striblin*, 2024-Ohio-2142, ¶ 32. However, the court of appeals distinguished

intoxication from consuming alcohol finding the State did not provide a "close match" reflecting a historical tradition of disarming individuals who "consume" alcohol." *Id*. at ¶ 27, 33.

This analysis is flawed in a few ways. First, under *Bruen*, courts are required to determine whether a restriction is consistent with the nation's historical tradition of firearms regulation. The Supreme Court does not require an exact "match" but instead requires a "relevantly similar" historical analogue. *Bruen*, 597 U.S. at 28-29. "The law must comport with the principles underlying the Second Amendment, but it need not be a 'dead ringer' or a 'historical twin.'" *Rahimi*, 144 S. Ct. at 1898; *Bruen*, 597 U.S. at 30. In this case, the court of appeals effectively required a "historical twin." The enduring "principle" here is the State can temporarily disarm individuals whose access to firearms poses a risk of harm to others.

The second flaw was identifying Striblin's argument as a facial challenge but evaluating it as an as applied claim. The Fifth District concluded that the Second Amendment does not permit disarming someone who is consuming alcohol when they are not intoxicated. An analogy demonstrates why this is incorrect. Someone who is mentally ill may experience symptoms some or all the time. In fact, Blackstone defined a "lunatic" as "one that hath lucid intervals; sometimes enjoying his senses, and sometimes not." 1 William Blackstone, Commentaries on the Laws of England 294 (1765). Coke defined a "[l]unatique" as a person "that hath sometime his understanding, and sometime not." Edward Coke, The First Part of the Institutes of the Lawes of England, or, A Commentarie upon Littleton § 405, at 247 (1628). Nevertheless, restricting the possession of firearms by the mentally ill is presumptively legal. *See Heller*, 554 U.S. at 626-27. Just as governments may disarm individuals who are mentally ill during lucid periods, the State may temporarily disarm individuals consuming alcohol in a liquor permit premises during sober

periods. In both instances, there is a risk of impaired judgment which increases the likelihood of violent or reckless behavior in a public space.

To the extent someone asserts they were possessing a firearm during a period of lucidity – either because they were not presently suffering from mental illness or not intoxicated – that would be appropriate for an as applied challenge, which this is not.

c. Analogues disarming intoxicated individuals

It should be clear now that the founders valued public safety and understood the need to restrict firearms in situations where individuals presented a threat to the physical safety of others. This included restrictions on alcohol and firearms. In fact, as Justice DeWine has proclaimed, "drunkenness was understood to have adverse effects on society, and those viewed as dangerous with alcohol were either prohibited from consuming it or were restricted from partaking in other activities once intoxicated.[4] Thus, members of the founding generation would have found nothing incongruent about regulating one's alcohol use while using a gun." *Weber*, 2020-Ohio-6832, at ¶ 106 (DeWine, J., concurring).

Governments regulated guns and alcohol in all manner of ways, for example, by (1) prohibiting retailers of liquor from keeping gunpowder, (2) prohibiting the carrying and use of firearms while intoxicated, (3) separating the militia from alcohol; (4) prohibiting use on holidays

[4] As early as 1803, Ohio regulated taverns. As one would expect, tavern keepers were taxed and required to obtain a license. *Acts of the State of Ohio, 1st General Assembly, Vol. 1*, Chapter XXVI, Sec. 2. at p. 95 and Sec. 4. at p. 96 (1803); *Acts of the State of Ohio Passed at the 3rd General Assembly, Vol. 3*, Chapter VIII, Sec. 3. at p. 98 (1805). It was a crime for tavern keepers to permit "rioting" and "revellings or drunkenness" among other specific behavior. *Id*. at Sec. 5. at p. 99. The State of Ohio also punished drunkenness making it a crime to be "intoxicated" and "found making or exciting an noise, contention or disturbance, at any tavern, court, election or other meetings of the citizens[.]" *Acts of the State of Ohio Passed at the 3rd General Assembly, Vol. 3,* Chapter XLIII, Sec. 4. at p. 219 (1805).

like the New Year, and (5), as discussed above, by prohibiting guns at taverns, ballrooms and at social gatherings. *Weber*, 2020-Ohio-6832, at ¶ 102-108 (DeWine, J., concurring). Some of these regulations are listed below.

Kansas, Missouri, and Wisconsin banned intoxicated people from bearing arms. 1867 Kan. Sess. Laws ch. 12, § 1 at 25; Mo. Rev. Stat. ch. 24, § 1274 (1879); 1883 Wis. Sess. Laws ch. 329, § 3 at 290. Mississippi banned the sale of arms to any intoxicated person. 1878 Miss. Laws ch. 46, § 2 at 175.

New York City and Brooklyn prohibited selling or otherwise providing arms to persons that posed "any danger to life," such as intoxicated persons. New York, N.Y., Health Ordinances § 147 at 52 (1866); Brooklyn, N.Y., Sanitary Code § 174 (July 15, 1873). Recall that Chief Justice Roberts, writing for the majority in *Rahimi*, cited "regulations ranging from rules about firearm storage to restrictions on gun use by drunken New Year's Eve revelers. Act of Mar. 1, 1783, 1783 Mass. Acts and Laws ch.13, pp. 218-219; 5 Colonial Laws of New York ch. 1501, pp. 244-246 (1894)." *Rahimi*, 144 S. Ct. at 1897.

Further, "[a] 1746 New Jersey law prohibited the sale of liquor to members of the militia while on duty; a 1756 Delaware law prohibited the militia from meeting within half a mile from a tavern and prohibited the sale of liquor at any militia meeting; and a 1756 Maryland law prohibited the sale of liquor within five miles of a training exercise for the militia." *Lopez*, 116 F.4th at 985 (9th Cir. 2024).

Throughout American history, guns and alcohol were regulated in a manner that provided for public safety. R.C. §2923.121 is consistent with these historical regulations.

CONLUSION

For these reasons, this Court should vacate the court of appeals' judgment and hold that R.C. §2923.121 is constitutional under the Second Amendment.

Respectfully submitted,

MICHAEL C. O'MALLEY (0059592)
Cuyahoga County Prosecuting Attorney

/s/ Tasha L. Forchione
TASHA L. FORCHIONE (0085814)
ANTHONY T. MIRANDA (0090759)
Assistant Prosecuting Attorneys
1200 Ontario Street, 8th Floor
Cleveland, Ohio 44113
Phone: (216) 443-5771
Fax: (216) 443-7602
tforchione@prosecutor.cuyahogacounty.us
amiranda@prosecutor.cuyahogacounty.us

CERTIFICATE OF SERVICE

I certify that a copy of this Brief of Amicus Curiae was sent by electronic mail on December 16, 2024 to counsel for appellee, Elizabeth N. Gaba, gabalaw@aol.com, and counsel for appellant, John Connor Dever, jcdever@muskingumcounty.org.

/s/ Tasha L. Forchione
Tasha L. Forchione (0085814)
Assistant Prosecuting Attorney