IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
		Case No. 2024-1050
Appellant,	:	
		On Appeal from the Muskingum
v.	:	County Court of Appeals Fifth Appellate District
ELIJAH STRIBLIN,	:	
		Court of Appeals
Appellee.	:	Case No. CT2023-0027

MERIT BRIEF OF AMICUS CURIAE OFFICE OF THE OHIO PUBLIC DEFENDER IN SUPPORT OF APPELLEE ELIJAH STRIBLIN

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STATEMENT OF INTEREST OF AMICUS CURIAE, OFFICE OF THE OHIO PUBLIC DEFENDER

The Office of the Ohio Public Defender (OPD) is a state agency that represents indigent criminal defendants, coordinates criminal-defense efforts throughout Ohio, and contributes to the promulgation of Ohio law. The mission of the OPD is to protect and defend the rights of indigent persons by providing and supporting superior representation in the criminal and juvenile justice systems. The OPD has an interest in the present case because the right to bear arms in self-defense should be infringed by criminal statutes only in narrow circumstances, none of which exists here.

STATEMENT OF THE CASE AND FACTS

Amicus curiae adopts the statement of the case and facts set forth in the merit brief of Appellee Elijah Striblin.

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.

Importantly, early in its analysis, the majority below noted that "no facts in the indictment and thus admitted by the no contest plea" would lead to an inquiry regarding whether Mr. Striblin fell outside of the "people" protected by the Second Amendment. *State v. Striblin*, 2024-Ohio-2142, ¶ 22 (5th Dist.). Further, the majority noted that "the State did not make an argument here that Striblin falls outside of the 'people'" protected by the Second Amendment. *Id*.

And the OPD would simply make one point—a point that will be amplified by discussion herein of the remaining three propositions of law—relative to the State's contention that "its burden was not to show that all applications [of R.C. 2923.121(A)] could be justified. It just needed to justify one." (Merit Brief of Plaintiff-Appellant, p 12.) And that point is rather straightforward: although the majority opinion below does in fact consider, at ¶ 36, the varied types of

establishments that may hold Class D liquor permits, it never finds that *any one* of the types of establishments that can hold Class D liquor permits—if said places or equivalent places existed during the Founding Era—would have been a place where individuals would have been prohibited from carrying firearms when the Second Amendment was ratified. Put differently, the State's conclusion about its own burden here would have been persuasive if the majority opinion had identified *some* types of Class D liquor-permit establishments—or, yes, even just one—where firearms restrictions would be constitutional under the analysis required by *Bruen*. But because the majority below did not find that any of the various types of Class D facilities would have been one subject to firearms restrictions during the Founding Era, it did not err in finding that R.C. 2923.121(A) runs afoul of the Second Amendment.

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*.

This proposition is unobjectionable, particularly in light of *Rahimi*, the most recent United States Supreme Court case construing the Second Amendment. In *Rahimi*, the appellant made a Second Amendment challenge to a federal statute criminalizing firearm possession by individuals subject to restraining orders. *United States v. Rahimi*, 602 U.S. 680, 693 (2024). And the Court arrived at its holding 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" through a straightforward application of *Bruen* that found historical analogues for such a restriction. *Id*. at 702. *See also id*. at 692: "As we explained in *Bruen*, the appropriate analysis involves considering whether the challenged regulation is consistent with the principles that underpin our regulatory tradition." In short, the OPD cannot argue that *Bruen* does not control, with respect to the analytical framework that must be applied here.

And in Mr. Striblin's case, the majority below also explicitly recognized the same. While the Fifth District did not have the benefit of the gloss that *Rahimi* arguably puts on *Bruen*, due to the fact that *Rahimi* was released after the decision that the State now appeals from, the majority below observed that in "the framework required under *Bruen* . . . the state must 'identify a well-established and representative historical analogue.'" *Striblin* at ¶ 27, quoting *New York State Rifle & Pistol Assn., Inc. v. Bruen*, 597 U.S. 1, 30 (2022). Further, the majority below specifically acknowledged and accurately characterized the particular "historical analogue" language in *Bruen* that the *Rahimi* decision would emphasize two years later: "The Court also stated the challenged regulation had to be neither a 'twin' nor a 'dead ringer' to the 'representative historical analogue.' *Id*. So while some slack is permitted in the historical analysis, it must be a close match, i.e. 'representative.'" *Striblin* at ¶ 27. The OPD respectfully submits that the majority opinion below identified and applied the correct Second Amendment framework, as developed by the United States Supreme Court in *Bruen* and clarified in *Rahimi*.

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

Here, the OPD would agree that this proposition of law addresses a question that *Bruen* identified but did not clearly resolve.[1] And while the OPD would also agree that Reconstruction Era laws and regulations may under certain circumstances be relevant in analyzing Second Amendment claims, those circumstances are quite limited, and they are not present here.

To begin, it is instructive to look to what the Court has done in prior cases involving some of the other federal constitutional amendments that were ratified as part of the Bill of Rights. For

[1] As *Rahimi* involved a federal statute, not a state-law question, that case did not afford the Court an opportunity to clarify the analytical weight to be afforded to state laws in place when the Fourteenth Amendment was ratified.

example, in *Crawford v. Washington*, the Court assessed what the Confrontation Clause meant at the time the Sixth Amendment was ratified, not when the Fourteenth Amendment was ratified. *Crawford v. Washington*, 541 U.S. 36, 54 (2004) ("the 'right . . . to be confronted with the witnesses against him,' Amdt. 6, is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding."). Similarly, when construing the Fourth Amendment as applied to the states, the Court has stated that "[i]In determining whether a search or seizure is unreasonable, we begin with history. We look to the statutes and common law of the founding era to determine the norms that the Fourth Amendment was meant to preserve." *Virginia v. Moore*, 553 U.S. 164, 168 (2008).

Further, the Court in *Bruen* notes that in the Second Amendment context "not all history is created equal." *Bruen*, 597 U.S. at 34. In the first of the "modern" United States Supreme Court cases involving the Second Amendment, it was noted that constitutional rights "are enshrined with the scope they were understood to have when the people adopted them." *District of Columbia v. Heller*, 554 U.S. 570, 634–635 (2008). Accordingly, laws and regulations from the time "surrounding the ratification of the text" are generally considered to be "the history that matters most." *Rahimi*, 602 U.S. at 737-738 (Barrett, J., concurring).

Ultimately, here, just as was true in a recent First Amendment case decided by the United States Supreme Court, state laws reflecting a particular view that "arose in the second half of the 19th century . . . of course, cannot by [themselves] establish an early American tradition." *Espinoza v. Montana Dep't of Revenue*, 591 U.S. 464, 482 (2020). In the State's merit-brief argument concerning the fourth proposition of law herein (which proposition is addressed separately below), the State directs this court's attention, at pages 28-30 of its brief, to a handful of state and territorial laws from the mid-to-late 1800s, restricting the carriage of firearms under various circumstances.

Those laws no more inform the meaning of the Second Amendment when it was ratified in 1791 than the scholarship-funding laws that "more than 30 States" enacted in the 1800s informed the meaning of the First Amendment when it was ratified in 1791. *Espinoza* at 482. Just as the United States Supreme Court in *Espinoza* declined to construe the First Amendment in light of post-ratification state legislative developments that postdated the Bill of Rights by almost a century, so too should this court decline to consider enactments that occurred well after the 1791 ratification of the Second Amendment, when assessing whether the sensitive-place restrictions found in R.C. 2923.121(A) are constitutional.

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

As the court of appeals noted, this appeal concerns Count 2 of the indictment issued against Mr. Striblin. *See Striblin* at ¶ 12. That count reads as follows:

> Illegal Possession of a Firearm in Liquor Permit Premises.
>
> The grand jurors further find and present that:
>
> Elijah M. Striblin on or about August 14, 2022, at the county of Muskingum aforesaid, did recklessly possess a firearm in any room in which liquor is being dispensed in premises for which a D permit has been issued under Chapter 4303 of the Revised Code, to wit: Lazy River Lounge, Permit Number 62129850001, or in an open air arena for which a permit of this nature has been issued in violation of Ohio Revised Code 2923.12l(A), 2923.121(E), Illegal Possession of a Firearm in Liquor Permit Premises, a felony of the third degree.
>
> FURTHERMORE, and the offender committed the violation by knowingly carrying or having the firearm concealed on the offender's person or concealed ready at hand.

(Indictment, Sept. 21, 2022.)

What is particularly noteworthy about the language used in Count 2 is that there is no allegation that that Mr. Striblin was intoxicated at the time in question. Thus, because the State did not allege that Mr. Striblin was intoxicated, this case presents only a question about sensitive-place regulations.

And it is important, when analyzing such Second Amendment challenges, to remain "mindful of the Supreme Court's caution against construing too broadly the category of 'sensitive places such as schools and government buildings,' as it would 'eviscerate the general right to publicly carry arms for self-defense.'" *Reese v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 127 F.4th 583, 597 (5th Cir. 2025), quoting *Bruen*, 597 U.S. at 30–31. Further, in *Bruen* the Court also observed that "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." *Bruen* at 30.

With those general precepts in mind, applying *Bruen*'s analytical framework here is not overly complicated. First, an individual's right to carry a firearm in their daily activities outside of the home is now clearly established. *See Bruen* at 33 ("the Second Amendment guarantees an 'individual right to possess and carry weapons in case of confrontation,' *Heller*, 554 U.S. at 592, 128 S.Ct. 2783, and confrontation can surely take place outside the home."). Thus, because R.C. 2923.121 plainly limits that right, and because there has been no argument that Mr. Striblin is not one of "the people" whom the Second Amendment protects, that statute is presumptively unconstitutional, and it becomes necessary to move to the second step of *Bruen*. See *Rahimi*, 602 U.S. at 691, quoting *Bruen* at 24 ("when the Government regulates arms-bearing conduct, as when the Government regulates other constitutional rights, it bears the burden to 'justify its regulation.'").

That second *Bruen* step places a considerable burden on the State, both in general and in this case. Here, the State must demonstrate that when the Second Amendment was ratified, there was a history and tradition of restricting the carriage of firearms in establishments that served alcohol.

In attempting to meet this burden, the State cites several extrajurisdictional laws, none of which is from the Founding Era. As indicated in the arguments made above in addressing the State's third proposition of law, which proposition concerns the relevant timeframe for analyzing historical analogues, the OPD respectfully contends that the State has failed to meet to burden under *Bruen*, because it has presented this Court with no analogues to R.C. 2923.121 that existed when the Second Amendment was ratified.

But even if colonial provisions and/or post-ratification laws and regulations enacted decades after adoption of the Second Amendment were to be afforded significant weight—despite the fact that here they cannot be shown to reflect Founding Era restrictions on the right to bear arms—the authorities cited by the State still do not satisfy the *Bruen* "historical analogue" test.

Before discussing the ostensibly analogical laws and regulations presented to this court in the State's merit brief, it must be noted that only one of those authorities can be found in the December 27, 2023, merit brief filed in the court of appeals by the State. And that lone authority, a 1655 Virginia enactment that predated the Second Amendment by well over 100 years, is inapt as to the question presented here. That is because—by the State's own characterization—the Virginia law cited dealt only with intoxicated individuals, and not with sensitive places. (*See* State's Merit Brief at 26: "in 1655, Virginians enacted a restriction on firing guns while intoxicated.")

And reviewing the sensitive-place authorities cited by the State—again, authorities raised for the first time in the instant discretionary appeal—only two dealt with establishments that served alcohol. One of those authorities was an 1852 New Mexico regulation, and the other was an 1890 Oklahoma statute. First, both were territorial laws, a type of regulation that the *Bruen* Court afforded little weight. *See Bruen* at 67 (noting that the "very transitional" nature of United States

territories, which allowed for regulatory "improvisations."). And second, there's no evidence that the two cited territorial restrictions reflected a widespread practice in place at the time the Second Amendment was ratified. Again, *Bruen* provides analytical guidance suggesting that this court need only afford minimal, if any, weight to the 1852 and 1890 territorial laws cited by the State. *See id*. at 66-68 ("[L]ate-19th-century evidence cannot provide much insight into the meaning of the Second Amendment when it contradicts earlier evidence."; "[W]e will not stake our interpretation on a handful of temporary territorial laws that were enacted nearly a century after the Second Amendment's adoption, governed less than 1% of the American population, and also 'contradic[t] the overwhelming weight' of other, more contemporaneous historical evidence." (quoting *Heller*, 554 U.S. at 632)).

In sum, the two territorial alcohol-related sensitive-place enactments from 1852 and 1890 cited by the State—even if they were to be considered relevant by this court—cannot fairly be said to constitute a "history and tradition" of restricting firearm carriage in establishments that serve alcohol. Accordingly, the Fifth District's finding that "[w]e conclude that the state did not meet its burden to show this regulation is consistent with the historical tradition of firearms regulation" should not be disturbed. *Striblin* at ¶ 38; *accord Kipke v. Moore*, 2024 WL 3638025, * 5 (D.Md. Aug. 2, 2024) (appeals and cross-appeals pending, 4th Cir. Case Nos. 24-1799, -1827, -1834, & -1836 (consolidated)) (applying *Bruen*, finding a lack of historical analogues, and permanently enjoining the State of Maryland from enforcing a statute prohibiting the carrying of firearms in "locations selling alcohol for onsite consumption."). *Contrast Rahimi*, 602 U.S. at 693, 700 (after observing that "the Government offers ample evidence that the Second Amendment permits the disarmament of individuals who pose a credible threat to the physical safety of others," the Court

concluded that such individuals "may be temporarily disarmed consistent with the Second Amendment.")

CONCLUSION

For the foregoing reasons, and, ultimately, because the Fifth District properly applied *Bruen,* Amicus Curiae Office of the Ohio Public Defender respectfully urges this court to reject the State's propositions of law and affirm the ruling of the court below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Merit Brief of Amicus Curiae Office of the Ohio Public Defender in Support of Appellee Elijah Striblin was forwarded by e-mail to John Connor Dever, Counsel for Appellant, jcdever@muskingumcounty.org, and Elizabeth Gaba, Counsel for Appellee, gabalaw@aol.com, on this 24th day of February, 2025.

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