ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, Plaintiff-Appellee, v. ANTHONY CARNES, Defendant-Appellant.	:	Case No. 2017-87 On Appeal from the Hamilton County Court of Appeals, First Appellate District, Case No. C-150752

BUCKEYE FIREARMS ASSOCIATION'S AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANT ANTHONY CARNES

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INTRODUCTION

Because a juvenile adjudication in Ohio is not a criminal conviction, Ohio is prohibited from criminalizing otherwise legal firearm possession and use based upon a juvenile adjudication. Second and Fourteenth Amendments, United States Constitution; Article I, Section 4, Ohio Constitution; R.C. 2923.13; *District of Columbia v. Heller*, 554 U.S. 570, 582, 634-635, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008); *McDonald v. City of Chicago*, 561 U.S. 742, 778, 791, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010); *Arnold v. City of Cleveland*, 67 Ohio St.3d 35, 43, 616 N.E.2d 163 (1993); *Klein v. Leis*, 99 Ohio St.3d 537, 2003-Ohio-4779, 795 N.E.2d 633, ¶ 5-8; *State v. Hand*, 149 Ohio St.3d 94, 2016-Ohio-5504, 73 N.E.3d 448, ¶ 38.

STATEMENT OF THE CASE AND FACTS

The Buckeye Firearms Association offers no statement of the case or facts.

STATEMENT OF INTEREST OF AMICUS CURIAE

Buckeye Firearms Association (BFA) is a 501(c)(4) social welfare organization that, through grassroots efforts, aims to defend and advance the right of more than 4 million Ohio citizens to own and use firearms for all legal activities, including self-defense, hunting, competition, and recreation. Accordingly, BFA has an interest in ensuring the proper application of the Second Amendment to the United States Constitution, and Article I, Section 4 of the Ohio Constitution, in Ohio's courts. A hypothetical illustrates that interest. Consider an adolescent boy or girl of fourteen who, in addition to being an avid hunter with family members, happened to have a one-time indiscretion—in support of a family member or friend—during a physical

conflict that resulted in a juvenile adjudication for the equivalent of felonious assault. As is, under the law in Ohio, that adolescent is prevented from legally hunting for the remainder of their life due to the adolescent indiscretion.

ARGUMENT

AMICUS CURIAE PROPOSITION OF LAW

Because a juvenile adjudication in Ohio is not a criminal conviction, Ohio is prohibited from criminalizing otherwise legal firearm possession and use based upon a juvenile adjudication. Second and Fourteenth Amendments, United States Constitution; Article I, Section 4, Ohio Constitution; R.C. 2923.13; *District of Columbia v. Heller*, 554 U.S. 570, 582, 634-635, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008); *McDonald v. City of Chicago*, 561 U.S. 742, 778, 791, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010); *Arnold v. City of Cleveland*, 67 Ohio St.3d 35, 43, 616 N.E.2d 163 (1993); *Klein v. Leis*, 99 Ohio St.3d 537, 2003-Ohio-4779, 795 N.E.2d 633, ¶ 5-8; *State v. Hand*, 149 Ohio St.3d 94, 2016-Ohio-5504, 73 N.E.3d 448, ¶ 38.

Given that this Court has determined that "a juvenile adjudication is not a conviction of a crime and should not be treated as one," precedent from the United States Supreme Court prohibits Ohio from criminalizing otherwise legal firearm possession and use based upon a juvenile adjudication.[1] *Hand*, 2016-Ohio-5504, ¶

[1] BFA recognizes that no Second Amendment challenge was presented in the lower courts, and also acknowledges this Court's general prohibition against addressing forfeited constitutional challenges that were not presented in the lower courts but for plain error. *See State v. Quarterman*, 140 Ohio St.3d 464, 2014-Ohio-4034, 19 N.E.3d 900, ¶ 15-16. That said, BFA urges this Court to exercise its discretion and review the Second Amendment challenge presented herein because "the rights and interests involved * * * warrant it." *In re M.D.*, 38 Ohio St.3d 149, 527 N.E.2d 286 (1988), syllabus.

38; *see also Heller*, 554 U.S. at 582, 634-635; *McDonald*, 561 U.S. at 778, 791; *Arnold*, 67 Ohio St.3d at 43; *Klein*, 2003-Ohio-4779, at ¶ 5-8.

I. The Second Amendment to the United States Constitution.

A. The text.

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 could be rephrased, 'Because a well regulated Militia is necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed.'" *Heller*, 554 U.S. at 577.

B. Individual Ohio citizens have a fundamental right to keep and bear arms.

In *Heller*, the Supreme Court of the United States invalidated a law that "totally ban[ned] handgun possession in the home" and "require[d] that any lawful firearm in the home be disassembled or bound by a trigger lock at all times, rendering it inoperable." *Id.* at 628. In so doing, the Court held the Second Amendment protects an individual's right to possess a firearm "unconnected with militia service." *Id.* at 582. At the "core" of the Second Amendment is the right of "law-abiding, responsible citizens to use arms in defense of hearth and home." *Id.* at 634-635. Two years after *Heller*, in *McDonald*, the Court held that the Fourteenth Amendment "incorporates the Second Amendment right recognized in *Heller*" because the right is "fundamental" to "our system of ordered liberty." *McDonald*, 561 U.S. at 778.

This individual right is "not unlimited," as demonstrated in *Heller* when the Court catalogued a non-exhaustive list of "presumptively lawful regulatory measures" that have historically constrained the scope of the right. *Heller* at 626-627; *see also id.* at 627, fn. 26. That list includes "longstanding prohibitions on the possession of firearms by felons and the mentally ill, * * * laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, [and] laws imposing conditions and qualifications on the commercial sale of arms." *Id.* at 626-627; *see also McDonald* at 786. These measures comport with the Second Amendment because they affect individuals or conduct unprotected by the right to keep and bear arms. *See Heller* at 631, 635. For example, bans on "weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns," are permissible because those weapons fall outside the historical "scope of the right." *Id.* at 625.

C. The crux of this case is whether the applicability of the longstanding prohibition on the possession of firearms by felons applies equally to juvenile adjudications in Ohio.

This case concerns whether Ohio may ban the possession of firearms by individuals whose sole prohibiting conduct or class is that they received a prohibition-qualifying juvenile adjudication under R.C. 2923.13(A)(2) or (3). *See State v. Carnes*, 1st Dist. Hamilton No. C-150752, 2016-Ohio-8019, ¶ 1.

II. Article I, Section 4 of the Ohio Constitution.

A. The text.

Article I, Section 4 provides: "The people have the right to bear arms for their defense and security; but standing armies in time of peace, are dangerous to liberty, and shall not be kept up; and the military shall be in strict subordination to the civil power."

B. Individual Ohio citizen's fundamental right to keep and bear arms is protected equally by the federal and Ohio Constitutions.

The first "independent clause" of Article I, Section 4 —"[t]he people have the right to bear arms for their defense and security"—demonstrates that it is concomitant with the elevated status of the Second Amendment as delineated in *Heller* and *McDonald*.[2] *See Arnold*, 67 Ohio St.3d at 43; *Klein*, 2003-Ohio-4779, at ¶ 5-8; *see also Heller*, 554 U.S. at 582, 626-627, 627, fn. 26, 628, fn. 27, 629-631, 634-635; *McDonald*, 561 U.S. at 778. Indeed, this Court has long held the right to keep and bear arms to be a fundamental, core, individual right in Ohio. *See Arnold*, 67 Ohio St.3d at 43; *Klein*, 2003-Ohio-4779, at ¶ 5-8. Ohio's legislature conclusively reinforced that reality. *See* R.C. 9.68 ("The individual right to bear arms, being a fundamental individual right that predates the United States and Ohio Constitution, [is] a constitutionally protected right in every part of Ohio * * *."). It

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[2] For this reason, the term Second Amendment will be used throughout the remainder of this amicus brief to articulate the rights protected by both the Second Amendment to the United States Constitution, and Article I, Section 4 of the Ohio Constitution.

is, therefore, governed by the elevated constitutional protections highlighted and signaled by *Heller* and *McDonald* as detailed below. *See* Part III, *infra.*

III. Because juvenile adjudications are not criminal convictions in Ohio, individuals with such adjudications are not felons so the longstanding prohibition on the possession of firearms by felons—R.C. 2923.13(A)(2) and (3) here—is not applicable.

As to cases involving burdens on Second Amendment rights, *Heller* did not explicitly announce which level of scrutiny applies but cautioned that challenges based on those rights are not beaten back by the Government supplying a rational basis for limiting them. *Heller* at 628, fn. 27 ("If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect.").

Even so, *Heller* did implicitly signal that means-end scrutiny[3] may be unnecessary in certain contexts. The pressing question is one of scope—whether the Second Amendment protects the person, the weapon, or the activity in the first place. *See Heller* at 629-630. Arguably then:

> When [as in this case] it comes to an as-applied challenge to a * * * regulation that *entirely bars* the challenger from exercising the core Second Amendment right, any resort to means-end scrutiny is inappropriate once it has been determined that the challenger's circumstances distinguish him from the historical justification supporting the regulation.

[3] A general term to collectively refer to rational basis, intermediate, and strict scrutiny as a whole. *See generally Tyler v. Hillsdale Cnty. Sherriff's Dep't*, 837 F.3d 678, 690 (6th Cir.2016).

Binderup v. AG of United States, 836 F.3d 336, 363 (3d Cir.2016) (Hardiman, C.J., concurring in part and concurring in the judgments). "This is because such laws are categorically invalid as applied to persons entitled to Second Amendment protection—a matter of scope." *Id.*; *see also Heller* at 629-630 (holding the District ban to be unconstitutional without regard to governmental interests supporting the law or their overall "fit" with the regulation).

If not a per se matter, then strict scrutiny should apply. *See Klein*, 2003-Ohio-4779, at ¶ 22 (O'Connor, J., dissenting). Because of the Second Amendment's elevated status as detailed in *Heller* and *McDonald*, core rights under it—like those in the First Amendment—should be protected by the highest classification of means-end scrutiny available. *See* Part III, Section B, *infra*.

At minimum, as is standard in the federal circuit courts of appeals, intermediate scrutiny must apply. *See United States v. Marzzarella*, 614 F.3d 85 (3d Cir.2010); *see also Binderup*, 836 F.3d at 345-346 (explaining that *Marzzarella* "has escaped disparagement by any circuit court"); *Tyler*, 837 F.3d at 685 (embracing *Marzzarella*); *see also Klein* at ¶ 23-24 (O'Connor, J., dissenting).

The constitutional inquiry here, then, is either one of per se unconstitutionality, strict scrutiny, or intermediate scrutiny. In this context, where juvenile adjudications simply are not criminal convictions, and are "designed to shield children from stigmatization based upon the bad acts of their youth," R.C. 2923.13(A)(2) and (3) do not survive any of those tests. *In re C.P.*, 131 Ohio St.3d 513, 2012-Ohio-1446, 967 N.E.2d 729, ¶ 63; *see also Hand*, 2016-Ohio-5504, at ¶ 38.

A. Ohio's juvenile-adjudication prohibition in R.C. 2923.13(A)(2) and (3) is per se unconstitutional.

Although the Supreme Court of the United States has never expressly held that laws burdening Second Amendment rights evade constitutional scrutiny, the issue presented in this case is wholly unique due to this Court's holding that "a juvenile adjudication is not a conviction of a crime and should not be treated as one." *Hand* at ¶ 38. Individuals with Ohio juvenile adjudications do not fit into the long standing prohibition on the possession of firearms by felons because they simply are not felons by definition. *See id.*; *see also Heller*, 554 U.S. at 631, 635. Accordingly, no means-end scrutiny is necessary,[4] and—as written—R.C. 2923.13(A)(2) and (3), by treating an Ohio juvenile adjudication as a criminal conviction,[5] are per se unconstitutional. *See Heller* at 629-631, 635; *McDonald*, 561 U.S. at 778; *Binderup*, 836 F.3d at 363 (Hardiman, C.J., concurring in part and concurring in the judgments) (declaring a federal ban for decades-old, non-violent misdemeanors per se unconstitutional); *Tyler*, 837 F.3d at 707-714 (Sutton, C.J., concurring in most of the judgment) (determining a federal ban that equates a one-time, thirty-year-old, mental-illness classification or hospitalization, to lifetime mental illness prohibiting the individual from possessing a firearm to be per se unconstitutional); *see also Hand*, 2016-Ohio-5504, at ¶ 38.

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[4] This operates in the way a facial constitutional challenge to R.C. 2923.13(A)(2) and (3) would. *See Simpkins v. Grace Brethren Church of Del.*, 149 Ohio St.3d 307, 2016-Ohio-8118, 75 N.E.3d 122, ¶ 20.

[5] Particularly in the context of a decades-old juvenile adjudication, as is at issue here.

B. If not per se unconstitutional, Ohio's juvenile-adjudication prohibition in R.C. 2923.13(A)(2) and (3) does not survive strict scrutiny.

Unlike a facial challenge, an as-applied challenge does not contend that a law is unconstitutional as written but that its application to a particular person under particular circumstances deprived that person of a constitutional right. *See Simpkins*, 2016-Ohio-8118, at ¶ 20. In as-applied Second Amendment challenges, therefore, some form of heightened scrutiny is appropriate, and the constitutional inquiry here, then, is either one of strict scrutiny or intermediate scrutiny. *See Heller*, 554 U.S. at 628, fn. 27. Strict scrutiny should apply because for individuals with juvenile adjudications, which are not criminal convictions, R.C. 2923.13(A)(2) and (3) strike at the very heart of a fundamental, enumerated constitutional right. *See Hand*, 2016-Ohio-5504, at ¶ 38; *see also Heller* at 582, 634-635; *Klein*, 2003-Ohio-4779, at ¶ 22 (O'Connor, J., dissenting).

To avoid treating the Second Amendment as a "second-class" right, *McDonald*, 561 U.S. at 780 (Alito, J., opinion), such a ban at a minimum must be reviewed under strict scrutiny. *See, e.g., Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 546, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993) (applying strict scrutiny to law targeting practices of particular religion); *Brown v. Entertainment Merch. Ass'n*, 564 U.S. 786, 799, 131 S.Ct. 2729, 180 L.Ed.2d 708 (2011) (applying strict scrutiny to law targeting content of protected speech); *see also Heller*, 554 U.S. at 579, 582, 591, 595, 606, 626, 635 (repeatedly invoking the First Amendment in establishing principles governing the Second Amendment).

Under strict scrutiny, a regulation "will be upheld only if it is narrowly tailored to achieve a compelling governmental interest and it is the least restrictive means of doing so." *State v. Batista*, Slip Opinion No. 2017-Ohio-8304, ¶ 32 (DeWine, J., concurring). The fact that "a juvenile adjudication is not a conviction of a crime and should not be treated as one," and that Ohio's juvenile-justice system is "designed to shield children from stigmatization based upon the bad acts of their youth," R.C. 2923.13(A)(2) and (3) are not narrowly tailored to achieve a compelling government interest. *Hand*, 2016-Ohio-5504, at ¶ 38; *In re C.P.*, 2012-Ohio-1446, at ¶ 63; *see also Tyler*, 837 F.3d at 703 (Boggs, C.J., concurring in most of the judgment) (applying strict scrutiny to determine that a federal ban that equates a one-time, thirty-year-old, mental-illness classification or hospitalization, to lifetime mental illness prohibiting the individual from possessing a firearm is unconstitutional); *Klein*, 2003-Ohio-4779, at ¶ 22 (O'Connor, J., dissenting).

C. If strict scrutiny is not required, Ohio's juvenile-adjudication prohibition in R.C. 2923.13(A)(2) and (3) does not survive intermediate scrutiny.

Intermediate scrutiny requires a regulation to be narrowly tailored, its purpose to be important, and the means to achieve it substantially related. *See generally City of Cleveland v. McCardle*, 139 Ohio St.3d 414, 2014-Ohio-2140, 12 N.E.3d 1169, ¶ 13; *see also Klein*, 2003-Ohio-4779, at ¶ 24 (O'Connor, J., dissenting).

Again, the Supreme Court of the United States has taught that "longstanding prohibitions on the possession of firearms by felons" are "presumptively lawful." *Heller*, 554 U.S. 626-627; *see also id.* at 627, fn. 26. Traditionally, "felons" are

people who have been *convicted* of any crime "that is punishable by death or imprisonment for more than one year." 1 Wayne R. LaFave, *Substantive Criminal Law* § 1.6 (2d Ed.2015). The classic justification for prohibiting felons from firearm possession is tied to the idea of a virtuous citizenry, thereby allowing the government to disarm unvirtuous citizens. *See Binderup*, 836 F.3d at 348-349.

Although unvirtuous citizens as a class may be categorically broader than the class of felons, a Second Amendment challenger may nonetheless "show that he never lost his Second Amendment rights because he was not convicted of a serious crime." *See id.* at 349. In Ohio, those with juvenile adjudications as defined in R.C. 2923.13(A)(2) and (3) have never been *convicted* of a serious crime. *See Hand*, 2016-Ohio-5504, at ¶ 38. Moreover, Ohio's juvenile justice-system is "designed to shield children from stigmatization based upon the bad acts of their youth." *In re C.P.*, 2012-Ohio-1446, at ¶ 63. The application is mandatory here "because Ohio's juvenile system has three built-in mechanisms—mandatory bindover, discretionary bindover, and serious-youthful-offender blended sentences—to bridge the most egregious and dangerous juvenile offenders to the adult system." Anthony Carnes's Merit Brief, at 5, fn.5; *see also* R.C. 2152.10; R.C. 2152.11; R.C. 2152.12; R.C. 2152.13; R.C. 2152.14; Juv.R. 30; *State v. Aalim*, 150 Ohio St.3d 463, 2016-Ohio-8278, ___ N.E.3d ___, ¶ 7 (*Aalim I*); *State v. Aalim*, 150 Ohio St.3d 489, 2017-Ohio-2956, ___ N.E.3d ___, ¶ 38 (*Aalim II*); *In re M.P.*, 124 Ohio St.3d 445, 2010-Ohio-599, 923 N.E.2d 584, ¶ 11-12, 15.

Accordingly, R.C. 2923.13(A)(2) and (3) do not survive intermediate scrutiny because their purpose is not important in either the historical, or contemporary, sense. *See Binderup*, 836 F.3d at 356 (applying intermediate scrutiny to hold that "isolated, decades-old, non-violent misdemeanors do not permit the inference that disarming people like them will promote the responsible use of firearms"); *Tyler* 837 F.3d at 697-698 (applying intermediate scrutiny to determine that a federal ban that equates a one-time, thirty-year-old, mental-illness classification or hospitalization, to lifetime mental illness prohibiting the individual from possessing a firearm is unconstitutional). The statutes also are not narrowly tailored and the means are not substantially related because Ohio's juvenile system carved out exceptions for Ohio's most dangerous juvenile offenders that results in their prosecution in the adult system, or includes a sentence from the adult system. *See* R.C. 2152.10; R.C. 2152.11; R.C. 2152.12; R.C. 2152.13; R.C. 2152.14; Juv.R. 30; *Aalim I* at ¶ 7; *Aalim II* at ¶ 38; *In re M.P.* at ¶ 11-12, 15.

IV. It is plain error for Ohio juvenile adjudications to criminalize otherwise legal firearm possession and use as required by R.C. 2923.13(A)(2) and (3).

Because R.C. 2923.13(A)(2) and (3) are unconstitutional under all applicable standards, it is plain error for Ohio to permit juvenile adjudications to criminalize otherwise legal firearm possession and use. *See* Part III, Sections A, B, and C, *supra*; *see also* Crim.R. 52(B).

Plain error is defined in Crim.R. 52(B), which provides: "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought

to the attention of the court." This Court recently explained the three limitations of the rule: (1) "an error, '*i.e.* a deviation from a legal rule,' must have occurred," (2) the alleged error must be plain, which means it was "an 'obvious' defect in the trial proceedings," and (3) substantial rights had to be affected by the error, which means that the error "affected the outcome of the trial." *State v. Morgan*, Slip Opinion No. 2017-Ohio-7565, ¶ 35, quoting *State v. Barnes*, 94 Ohio St.3d 21, 27, 759 N.E.2d 1240 (2002), and *United States v. Olano*, 507 U.S. 725, 732, 113 S.Ct. 1170, 123 L.Ed.2d 508 (1993). Finally, established plain errors should be remedied only "under exceptional circumstances," and "to prevent a manifest miscarriage of justice." (Citations omitted.) *Morgan* at ¶ 36.

As set forth above, R.C. 2923.13(A)(2) and (3) violate the Second Amendment under all potential review standards. *See* Part III, Sections A, B, and C, *supra*. As detailed in *Heller* and *McDonald*, the Supreme Court of the United States has elevated the Second Amendment. This Court, additionally, has established that "a juvenile adjudication is not a conviction of a crime and should not be treated as one," and that Ohio's juvenile-justice system is "designed to shield children from stigmatization based upon the bad acts of their youth." *Hand*, 2016-Ohio-5504, at ¶ 38; *In re C.P.*, 2012-Ohio-1446, at ¶ 63. Given each of those realities, the use of Ohio juvenile adjudications to criminalize otherwise legal firearm possession and use is error, which constitutes an obvious defect, and which affects substantial rights meaning the outcome of the trial. *See Morgan* at ¶ 35. Accordingly, this case

presents exceptional circumstances requiring plain-error recognition to prevent a manifest miscarriage of justice. *See id.* at ¶ 36.

CONCLUSION

Because a juvenile adjudication in Ohio is not a criminal conviction, Ohio is prohibited from criminalizing otherwise legal firearm possession and use based upon a juvenile adjudication under the Second Amendment, and all violations of that constitutional prohibition constitute plain error under this Court's precedent.

Respectfully submitted,

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CERTIFICATION OF SERVICE

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