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In the
Supreme Court of Ohio

STATE OF OHIO,	:	Case No. 2014-1557
	:	
Plaintiff-Appellant,	:	On Appeal from the
	:	Cuyahoga County
v.	:	Court of Appeals,
	:	Eighth Appellate District
DEAN M. KLEMBUS,	:	
	:	Court of Appeals
Defendant-Appellee.	:	Case No. 100068

BRIEF OF *AMICUS CURIAE* OHIO ATTORNEY GENERAL MICHAEL DEWINE IN SUPPORT OF APPELLANT STATE OF OHIO

TIMOTHY J. McGINTY (0024626)
Cuyahoga County Prosecutor
DANIEL T. VAN* (0084614)
Assistant Prosecuting Attorney
**Counsel of Record*
1200 Ontario Street, 8th Floor
Cleveland, Ohio 44113
216-443-7800
216-443-7602 fax
dvan@prosecutor.cuyahogacounty.us

Counsel for Appellant
State of Ohio

ROBERT L. TOBIK (0029286)
Cuyahoga County Public Defender
JOHN T. MARTIN* (0020606)
Assistant Public Defender
**Counsel of Record*
310 Lakeside Avenue, Suite 200
Cleveland, Ohio 44113
216-443-7583
216-443-3632 fax

Counsel for Appellee
Dean M. Klembus

MICHAEL DEWINE (0009181)
Attorney General of Ohio

ERIC E. MURPHY* (0083284)
State Solicitor
**Counsel of Record*
MICHAEL J. HENDERSHOT (0081842)
Chief Deputy Solicitor
HANNAH C. WILSON (0093100)
Deputy Solicitor
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax
eric.murphy@ohioattorneygeneral.gov

Counsel for *Amicus Curiae*
Ohio Attorney General Michael DeWine

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTRODUCTION 1

STATEMENT OF AMICUS INTEREST 2

STATEMENT OF THE CASE AND FACTS 3

A. The Ohio Revised Code allows for stricter penalties for recidivist drunk drivers. 3

B. Klembus, who had committed five OVI offenses within twenty years, pleaded no contest to two OVI violations. 4

ARGUMENT 6

***Amicus Curiae*'s Proposition of Law:**

R.C. 2941.1413(A) does not facially violate the Equal Protection Clauses of the United States or Ohio Constitutions. 6

A. Klembus's facial challenge should be analyzed by asking whether the law lacks legitimate application in all circumstances under rational-basis review. 6

B. The recidivism specification and the accompanying penalty enhancements are rationally related to the State's legitimate purpose of punishing serious repeat OVI offenders and protecting Ohio drivers. 8

C. *United States v. Batchelder* controls Klembus's federal claim and guides his state claim. 11

1. The Supreme Court's decision in *United States v. Batchelder* governs Klembus's federal equal-protection claim. 11

2. The principles in *Batchelder* also guide the analysis of Klembus's Ohio constitutional claims. 14

D. The arguments advanced by Klembus and the Eighth District do not support invalidation of Ohio's recidivism specification under rational-basis review. 18

CONCLUSION 22

CERTIFICATE OF SERVICE

APPENDIX:

Ohio Bureau of Motor Vehicles, OVI Count, Apr. 21, 2015..... Ex. 1

Hannah Capitol Connection, S. Comm. on Judiciary, Mar. 17, 2004 ..... Ex. 2

TABLE OF AUTHORITIES

Cases **Page(s)**

Am. Ass'n. of Univ. Professors v. Cent. State Univ.,
87 Ohio St. 3d 55 (1999) 15

Burnett v. Motorists Mut. Ins. Co.,
118 Ohio St. 3d 493, 2008-Ohio-2751.....15

City of Cleveland v. Huff,
14 Ohio App. 3d 207 (8th Dist. 1984) 17

City of Cleveland v. Trzebuckowski,
85 Ohio St. 3d 524 (1999) 8, 19

City of Kennewick v. Fountain,
802 P.2d 1371 (Wash. 1991).....16

Cleveland Gear Co. v. Limbach,
35 Ohio St. 3d 229 (1988) 7, 19

Eppley v. Tri-Valley Local Sch. Dist. Bd. of Educ.,
122 Ohio St. 3d 56, 2009-Ohio-1970.....7

Harold v. Collier,
107 Ohio St. 3d 44, 2005-Ohio-5334.....6, 7

Heller v. Doe,
509 U.S. 312 (1993).....7

Kinney v. Kaiser Aluminum & Chem. Corp.,
41 Ohio St. 2d 120 (1975) 15

McCrone v. Bank One Corp.,
107 Ohio St. 3d 272, 2005-Ohio-6505.....15

McCullen v. Coakley,
573 U.S. __, 134 S. Ct. 2518 (2014).....8

Oyler v. Boyles,
368 U.S. 448 (1962).....8, 13, 19

Park Corp. v. Brook Park,
102 Ohio St. 3d 166, 2004-Ohio-2237.....15

Roush v. White,
389 F. Supp. 396 (N.D. Ohio 1975).....16, 17

State v. Brown,
117 Ohio App. 3d 6 (6th Dist. 1996) 17

State v. Chippendale,
52 Ohio St. 3d 118 (1990) 18

State v. Flynt,
63 Ohio St. 2d 132 (1980) 19

State v. Grosse,
2009-Ohio-5942 (9th Dist.) 1

State v. Hartsook,
21 N.E.3d 617, 2014-Ohio-4528 (12th Dist.) 1, 9, 19

State v. McDonald,
31 Ohio St. 3d 47 (1987) 7, 17, 18, 20

State v. Miles,
8 Ohio App. 3d 410 (8th Dist. 1983) 17

State v. Reddick,
2015-Ohio-1215 (11th Dist.) 1, 9

State v. Stephens,
2015-Ohio-1078 (3d Dist.).....9

State v. Stillwell,
2007-Ohio-3190 (11th Dist.) 1

State v. Thompkins,
75 Ohio St. 3d 558 (1996) 7, 22

State v. Wilson,
58 Ohio St. 2d 52 (1979) ..... *passim*

State v. Wogenstahl,
75 Ohio St. 3d 344 (1996) 15

State v. Worley,
46 Ohio St. 2d 316 (1976) 8

State v. Zornes,
469 P.2d 552 (Wash. 1970).....16, 17

United States v. Armstrong,
517 U.S. 456 (1996).....19

United States v. Batchelder,
442 U.S. 114 (1979) ..... *passim*

United States v. Percival,
727 F. Supp. 1015 (E.D. Va. 1990) 21

United States v. Salerno,
481 U.S. 739 (1987) 6

Statutes, Rules, and Constitutional Provisions

R.C. 2929.13(G)(1) 4

R.C. 2929.13(G)(1)-(2) 3

R.C. 2929.13(G)(2) 4

R.C. 2929.14(B)(4) 4

R.C. 2941.1413 ..... 1, 3

R.C. 2941.1413(A) 6

R.C. 4511.19(A)(1) 3

R.C. 4511.19(G)(1)(a)-(e) 3

R.C. 4511.19(G)(1)(d) 1, 3

R.C. 4511.19(G)(1)(d)(i)-(ii) 3, 4

Other Authorities

Hannah Capitol Connection, S. Comm. on Judiciary, Mar. 17, 2004 9

Ohio Bureau of Motor Vehicles, OVI Count (Apr. 21, 2015) 10

INTRODUCTION

In May 2012, appellee Dean M. Klembus was charged with two counts of operating a vehicle while intoxicated ("OVI"), his sixth such offense in 20 years. Ohio law enables harsher penalties for those, like Klembus, who have repeatedly endangered others' lives by driving while intoxicated. OVI offenders with five previous OVI-type convictions within 20 years of their current offense are guilty of a fourth-degree felony. *See* R.C. 4511.19(G)(1)(d). In addition, Ohio law authorizes a penalty-enhancement specification for habitual drunk drivers who have five or more OVI-type convictions within 20 years of their current offense. *See* R.C. 2941.1413. When a prosecutor includes a specification indicating a defendant's prior offenses in an indictment, the defendant becomes eligible for an increased mandatory prison term. The indictment against Klembus included the specification. He pleaded no contest to the charges against him, including the specifications, and was sentenced to one year in prison on the underlying felony and one year in prison for the specification.

On appeal, the Eighth District invalidated the recidivism specification on Ohio and federal equal-protection grounds because it viewed the enhanced penalty as lacking any additional proof beyond that required for the fourth-degree felony. Its decision stands in contrast to the judgments of other Ohio appellate courts, which have repeatedly upheld the specification in R.C. 2941.1413. *See, e.g.*, *State v. Reddick*, 2015-Ohio-1215 ¶ 11 (11th Dist.) (rejecting an equal-protection and due-process challenge to Ohio's recidivism specification); *State v. Hartsook*, 21 N.E.3d 617, 2014-Ohio-4528 ¶¶ 39-53 (12th Dist.) (same); *State v. Grosse*, 2009-Ohio-5942 (9th Dist.) (holding that the recidivism specification does not violate double jeopardy and is not unconstitutionally vague); *State v. Stillwell*, 2007-Ohio-3190 ¶¶ 9-27 (11th Dist.) (holding that the recidivism specification does not violate double jeopardy). These decisions

correctly recognize the legitimate purpose served by the recidivism specification. For the following reasons, this Court should reverse the Eighth District.

First, the Eighth District misapplied the standards for facial challenges and rational-basis review, straying from well-known limits to both standards. Upending the rules for facial challenges, the court thought that a mere potential for discriminatory enforcement invalidated the law. That improperly incorporated elements of a selective-prosecution analysis into its facial review, which should have considered the law only as it is written. The court likewise erred in its rational-basis review because it failed to consider the legitimate reasons for providing a prosecutor with the discretion to charge or withhold the recidivism specification. As a result, habitual drunk drivers in Cuyahoga County are able to escape the full range of penalties enabled by the Revised Code.

Second, the Eighth District erred when it rooted its decision in *State v. Wilson*, 58 Ohio St. 2d 52 (1979), which said in dicta that it would violate the federal Equal Protection Clause for two statutes to prohibit identical conduct while imposing different penalties. The suggested rule in *Wilson*, which addressed only federal claims, conflicts with subsequent U.S. Supreme Court precedent. *See United States v. Batchelder*, 442 U.S. 114 (1979). Therefore, the Eighth District erred when it relied on *Wilson* for the purposes of Klembus's federal equal-protection claim. Because Ohio's Equal Protection Clause tracks the Fourteenth Amendment, this Court should look to *Batchelder* to hold that Klembus's Ohio claim should likewise fail.

STATEMENT OF AMICUS INTEREST

As Ohio's chief law officer, the Attorney General has a strong interest in defending laws that promote the health and safety of Ohioans. He is particularly concerned with laws intended to protect Ohio drivers and their passengers by keeping drunk-drivers off the roads. In this case a majority of the Eighth District incorrectly applied the standards for a rational-basis review

facial challenge and invalidated a law designed to target the worst drunk-driving offenders. The lower court has thus deprived Cuyahoga County law enforcement of an important tool in the fight against drunk driving. The Attorney General asks the Court to reverse the decision below and reinstate Klembus's conviction.

STATEMENT OF THE CASE AND FACTS

A. The Ohio Revised Code allows for stricter penalties for recidivist drunk drivers.

Ohio law prohibits the operation of a vehicle while under the influence of alcohol or drugs, R.C. 4511.19(A)(1), and provides for penalties that correspond with an offender's prior offense history, *see* R.C. 4511.19(G)(1)(a)-(e). Under R.C. 4511.19(G)(1)(d), "an offender who, within twenty years of the offense, previously has been convicted of or pleaded guilty to five or more [OVI violations] is guilty of a felony of the fourth degree." Thus, a defendant facing charges for his sixth OVI offense in twenty years will be guilty of a fourth-degree felony.

The potential sentence of a repeat offender with five or more previous violations will depend on whether that offender "also is convicted of or also pleads guilty to a specification" as described by R.C. 2941.1413. *See* R.C. 4511.19(G)(1)(d)(i)-(ii). That provision provides that, for a defendant to be eligible for a penalty enhancement, the indictment must contain a specification indicating the defendant's five prior offenses within the last twenty years. *See* R.C. 2941.1413 ("Imposition of a mandatory additional prison term . . . is precluded unless the indictment . . . specifies that the offender, within twenty years of the offense, previously has been convicted of or pleaded guilty to five or more equivalent offenses."). The inclusion of a specification indicating that the defendant is a five-time repeat offender will thereby enable the sentencing judge to increase the penalty for the present offense. *See id.*; R.C. 4511.19(G)(1)(d)(i)-(ii); R.C. 2929.13(G)(1)-(2). It is within the prosecutor's discretion to include the specification in an indictment.

If a five-time repeat offender is convicted of or pleads guilty to the specification, the court shall sentence him to "a mandatory prison term of one, two, three, four, or five years." *See* R.C. 4511.19(G)(1)(d)(i)-(ii); R.C. 2929.13(G)(2). In addition, the court "also may sentence the offender to a definite prison term" of between six and thirty months, which may be followed by community control sanctions. *Id.*; *see also* R.C. 2929.14(B)(4).

If a five-time repeat offender is *not* convicted of or does *not* plead guilty to the specification, the court shall, in its discretion, sentence him to either a 60- or 120-day mandatory term of local incarceration, *see* R.C. 2929.13(G)(1), or a 60- or 120-day mandatory term of imprisonment, R.C. 2929.13(G)(2). (The difference of 60 or 120 days depends on the particular OVI offense with which the offender is charged.) If the court imposes a mandatory term of local incarceration, it may also impose a jail term, with the cumulative total of both terms not to exceed one year. R.C. 4511.19(G)(1)(d)(i)-(ii). If the court imposes a mandatory term of imprisonment, it may also sentence the offender to a definite prison term of between six and thirty months, to be reduced by an amount of time equal to the mandatory prison term, along with community control sanctions. *Id.*; R.C. 2929.14(B)(4).

B. Klembus, who had committed five OVI offenses within twenty years, pleaded no contest to two OVI violations.

Before being arrested in May 2012, Klembus had been convicted of or pleaded guilty to OVI-type violations in 1992, 1997, 2000, 2004, and 2008. *See State v. Klembus*, 2014-Ohio-3227 ¶ 5 (8th Dist.) (hereinafter "App. Op."). In this case, Klembus was charged with two counts of OVI—driving while under the influence of alcohol and driving with an excessive blood alcohol content. Each count contained a specification alleging that Klembus, "within twenty years of committing the offense, previously had been convicted of or pleaded guilty to five or more equivalent offenses." *See* Indictment 1-2.

Klembus moved to dismiss the specification enhancements on the grounds that they violated the Equal Protection Clauses of the United States and Ohio Constitutions. *Id.* ¶ 6. The trial court denied the motion, and Klembus then pleaded no contest to the charges. *Id.* The charges against Klembus merged for sentencing. *Id.* In addition to imposing a lifetime suspension of driving privileges and ordering the forfeiture of Klembus's vehicle, the court sentenced Klembus to one year in prison for the underlying OVI charge and one year in prison for the specification, to be served consecutively. *Id.*

On appeal, Klembus lodged a facial challenge against Ohio's repeat-OVI-offender specification on due-process and equal-protection grounds. *Id.* ¶ 7. He argued that "the specification is based upon the same information or proof required to establish a fourth-degree felony" under Ohio's OVI statute, and that the statute "allows the prosecutor to arbitrarily obtain a greater prison sentence for the underlying offense without proof of any additional element, fact, or circumstance." *Id.*

A divided panel of the Eighth District agreed, holding that the specification failed rational-basis review and thus violated the Equal Protection Clauses of the Ohio and United States Constitutions. (The court did not specifically address due process, noting instead that "[a]n argument based on equal protection in this context duplicates an argument based on due process." *Id.* ¶ 9.) It relied on language in *State v. Wilson*, 58 Ohio St. 2d 52 (1979), in which this Court observed that the federal Constitution would prohibit sentencing an offender under one statute when two "statutes 'prohibit identical activity, require identical proof, and yet impose different penalties.'" *Id.* ¶¶ 20-21 (quoting *Wilson*, 58 Ohio St. 2d at 55-56). The Eighth District found particular fault that the statute has "no requirement that the specification be applied with uniformity," and concluded that "there is no logical rationale for the increased penalty imposed

on some repeat OVI offenders and not others without requiring proof of some additional element to justify an enhancement, especially since the class is composed of offenders with similar histories of OVI convictions." *Id.* ¶ 23. The dissenting judge distinguished *Wilson* and found no constitutional violation. *See id.* ¶¶ 28-45 (McCormack, J., dissenting). "Recognizing the sound judgment of the General Assembly, and in deference to its justifiable intent in authorizing this type of punishment, [he] would not find the penalty enhancement . . . to be unconstitutional." *Id.* ¶ 45. The State appealed, and this Court accepted jurisdiction.

ARGUMENT

***Amicus Curiae*'s Proposition of Law:**

> *R.C. 2941.1413(A) does not facially violate the Equal Protection Clauses of the United States or Ohio Constitutions.*

The Eighth District majority committed two missteps that require reversal. First, although purporting to analyze Klembus's claim as a facial challenge, the court's analysis was not faithful to the standards such a review requires. Instead of restricting its analysis to the law as it is written, the court considered the law as it might be enforced. And second, once it imagined a scenario in which the law could be improperly applied, it misapplied rational-basis review by failing to consider scenarios in which the law is rationally related to the state's legitimate purpose of punishing recidivist drunk drivers and protecting Ohioans.

A. Klembus's facial challenge should be analyzed by asking whether the law lacks legitimate application in all circumstances under rational-basis review.

The lower court acknowledged that Klembus brings a facial challenge to the recidivism specification, *see* App. Op. ¶ 7, but did not adhere to the strictures required of such a review. "A facial challenge to a statute is the most difficult to bring successfully because the challenger must establish that there exists no set of circumstances under which the statute would be valid." *Harold v. Collier*, 107 Ohio St. 3d 44, 2005-Ohio-5334 ¶ 37 (citing *United States v. Salerno*, 481

U.S. 739 (1987)); *see also Heller v. Doe*, 509 U.S. 312, 319-20 (1993) ("[T]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.") (internal quotation marks omitted). Unlike an applied challenge, a facial challenge to the constitutionality of a statute "is to be decided by considering the Act itself without regard to extrinsic facts." *Cleveland Gear Co. v. Limbach*, 35 Ohio St. 3d 229, 231 (1988). It is not enough for a petitioner to show that the law could violate the Constitution "under some plausible set of circumstances." *Collier*, 2005-Ohio-5334 ¶ 37. Instead, Klembus must show that the recidivism specification violates equal protection in every conceivable scenario. *See State v. McDonald*, 31 Ohio St. 3d 47, 48 (1987).

Klembus grounds his claim in the Equal Protection Clauses of both the Ohio and United States Constitutions. Ohio's equal protection standard is "essentially the same" as the federal standard. *See State v. Thompkins*, 75 Ohio St. 3d 558, 561 (1996) (internal quotation marks omitted). Klembus concedes that he is not a member of a suspect class, and that the recidivism specification does not implicate a fundamental right. *See* App. Op. ¶ 16. Accordingly, rational-basis review is the applicable standard. *Heller*, 509 U.S. at 319-20; *Thompkins*, 75 Ohio St. 3d at 560-61.

Rational-basis review incorporates the premise that all provisions of the Revised Code "are presumed constitutional" and that it is Klembus's burden to prove otherwise. *See Thompkins*, 75 Ohio St. 3d at 560; *see also Heller*, 509 U.S. at 319-20. When applying rational-basis review, a court must uphold a law if it "is rationally related to a legitimate government interest." *See Eppley v. Tri-Valley Local Sch. Dist. Bd. of Educ.*, 122 Ohio St. 3d 56, 2009-Ohio-1970 ¶ 15. This exercise "is not a license for courts to judge the wisdom, fairness or logic of legislative choices." *Heller*, 509 U.S. at 319 (internal quotation marks omitted). So long as the

statute bears a rational relationship to a legitimate government interest, the reviewing court must uphold the law.

Importantly for this Court's review, Klembus has *not* alleged that the recidivism specification is selectively or discriminatorily applied. To show selective prosecution, a defendant must first prove that he has been singled out for prosecution while others similarly situated have not been. *City of Cleveland v. Trzebuckowski*, 85 Ohio St. 3d 524, 531 (1999). In addition, he must prove that the government's decision to prosecute him and not others "is 'deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.'" *State v. Worley*, 46 Ohio St. 2d 316, 358 (1976) (quoting *Oyler v. Boyles*, 368 U.S. 448, 456 (1962)). This Court has recognized the distinction between traditional equal-protection claims, which examine the law as written, and claims of selective prosecution, which examine the law as it is enforced. "Because application of this [selective-prosecution] analysis necessarily involves judicial review of law enforcement and prosecutorial discretion, the analysis is different from that of traditional equal-protection analysis, which is used for classifications established by statute." *Trzebuckowski*, 85 Ohio St. 3d at 530 n.2; *see also McCullen v. Coakley*, 573 U.S. __, 134 S. Ct. 2518, 2533-34 (2014) (observing that allegations of selective enforcement "would not go to the validity of" a statute).

B. The recidivism specification and the accompanying penalty enhancements are rationally related to the State's legitimate purpose of punishing serious repeat OVI offenders and protecting Ohio drivers.

The Eighth District erred in its execution of rational-basis review when it determined that Ohio's recidivism specification is facially unconstitutional. The court correctly recognized that the specification was passed for the legitimate purpose of keeping Ohio's roads safe and punishing those who have demonstrated an inability to follow the law. *See* App. Op. ¶ 24 ("We share the legislature's desire to punish repeat OVI offenders and to protect the public from the

serious threat posed by habitual drunk drivers."). Thus, the sole question for this Court's review is whether the specification is rationally related to this purpose.

The penalty enhancement enabled by the recidivism specification advances the State's goal of reducing drunk driving by allowing increased punishment for the worst drunk drivers. Thus far, the Eighth District is alone among the courts of appeals in concluding otherwise. *See State v. Reddick*, 2015-Ohio-1215 ¶ 11 (11th Dist.) (rejecting an equal-protection and due-process challenge to Ohio's recidivism specification); *State v. Hartsook*, 21 N.E.3d 617, 2014-Ohio-4528 ¶¶ 39-53 (12th Dist.) (same). The Third District, though not reaching the equal-protection question, has stated its "view that the *Klembus* opinion is based upon a fundamental misconstruction of" the specification. *State v. Stephens*, 2015-Ohio-1078 ¶ 11 (3d Dist.). The Eighth District thus stands apart from other Ohio appellate courts in finding that "there is no logical rationale for the increased penalty imposed on some repeat OVI offenders and not others without requiring proof of some additional element to justify the enhancement, especially since the class is composed of offenders with similar histories of OVI convictions." App. Op. ¶ 23.

The Eighth District assumed that all repeat offenders are alike. That assumption was wrong. At the time that the General Assembly was considering the increased penalty for recidivist drunk drivers in 2004, it heard that more than 28,000 Ohioans had five or more prior OVI convictions. *See* Hannah Capitol Connection, S. Comm. on Judiciary, Mar. 17, 2004 (attached as Exhibit 2) (noting statistics provided by the Ohio Department of Public Safety). Of those repeat offenders, *over seven hundred fifty* had ten or more prior OVI convictions. *Id.* The current landscape, though improved from 2004, is similar. According to data compiled by the Ohio Bureau of Motor Vehicles, in April 2015 over 23,000 Ohioans had received five OVI

convictions. *See* Ohio Bureau of Motor Vehicles, OVI Count (Apr. 21, 2015) (attached as Exhibit 1). Over eight hundred had received ten, and two had received twenty. *Id.*

These numbers make it easy to imagine the circumstances in which it is rational for prosecutors to exercise discretion when charging (or not) the enhancement specification. A prosecutor, for example, could rationally conclude that the enhancement specification would be appropriate for an eligible offender who had ten violations in the last five years, but that it would not be appropriate for an offender who had five violations, each of which is over 15 years old, with no violations in the intervening period. Or, a prosecutor could rationally conclude that an enhancement would be inappropriate for an eligible offender who was 85 years old and infirm, but that it would be appropriate for an eligible offender who was 40 years old and healthy. Perhaps a prosecutor might conclude that it would be appropriate to withhold the specification from a five-time offender whose blood alcohol content barely exceeded the legal limit, whereas it should be charged where a twelve-time offender's thirteenth violation occurred in a school zone. To do so would not be an "arbitrary exercise of power," but rather a defensible application of judgment in finding that two offenders are not identically situated. The General Assembly acted rationally when it empowered prosecutors to use this kind of discretion.

These examples show that, even among repeat OVI offenders with five or more violations in the last twenty years, the nature of the offenders and the circumstances of their crimes can vary widely. And they debunk the Eighth District's conclusion that it was irrational for the General Assembly to create a penalty enhancement that could be imposed on some repeat offenders in this broadly drawn class, but not others. While reasonable people may disagree about when a greater penalty is warranted, it was not *irrational* for the General Assembly to

empower prosecutors with the discretion to undertake a case-by-case assessment concerning when to charge the enhancement linked to the recidivism specification.

C. *United States v. Batchelder* controls Klembus's federal claim and guides his state claim.

The Eighth District relied on this Court's decision in *State v. Wilson*, 58 Ohio St. 2d 52 (1979), to invalidate the recidivism specification. *See* App. Op. ¶¶ 20-21. This was error. *Wilson* analyzed an equal-protection claim *only* under the Fourteenth Amendment to the United States Constitution, and did not address Ohio's equivalent Equal Protection Clause. *See Wilson*, 58 Ohio St. 2d at 53. In *Wilson*, the Court stated in dictum that it would violate the federal Constitution if two statutes prohibited identical conduct and yet provided different penalties. *Id.* at 55-56. Because the United States Supreme Court's subsequent decision in *United States v. Batchelder*, 442 U.S. 114 (1979), takes a contrary position on the federal equal-protection analysis, *Wilson*'s suggestion is no longer good law. Guided by *Batchelder*, the Court should hold that, absent a showing of discriminatory enforcement, the Equal Protection Clauses of the Ohio and United States Constitutions are not offended where the Revised Code enables different penalties for identical conduct.

1. The Supreme Court's decision in *United States v. Batchelder* governs Klembus's federal equal-protection claim.

The analysis of Klembus's Fourteenth Amendment claim is controlled by the United States Supreme Court's decision in *Batchelder*. The rule suggested in *Wilson*, which rests solely on federal grounds, conflicts with *Batchelder* and does not govern Klembus's claims insofar as they are rooted in the federal Constitution.

As relevant here, this Court was asked in *Wilson* whether Ohio's aggravated-burglary statute violated the Fourteenth Amendment because that provision purportedly prohibited the same activity as Ohio's burglary statute, while carrying a harsher penalty. *See* 58 Ohio St. 2d at

53. Finding the two statutes to be different and thus inoffensive to the Constitution, this Court nevertheless suggested in dicta that "*if* the statutes prohibit identical activity, require identical proof, and yet impose different penalties, *then* sentencing a person under the statute with the higher penalty violates the Equal Protection Clause." *Id.* at 55-56 (emphases added).

Less than two months after *Wilson*, Justice Marshall wrote a decision for a unanimous U.S. Supreme Court that was directly contrary to the *Wilson* dicta cited by the Eighth District here. *See Batchelder*, 442 U.S. at 122-26 (finding no equal-protection violation where, as applied to the defendant, two statutes prohibited identical conduct yet carried different punishments). The defendant in *Batchelder* had been convicted and sentenced to five years' imprisonment under a statute that prohibited convicted felons from receiving a firearm. *Id*. at 116-17. Another provision in the same Act also forbade felons from receiving a firearm, but provided for a sentence of only two years. *Id*. The federal appeals court affirmed the defendant's conviction but remanded for resentencing under the provision that carried the lesser penalty. *Id*. at 117. Echoing the Eighth District's reasoning in this case, the lower court in *Batchelder* found that "the 'prosecutor's power to select one of two statutes that are identical except for their penalty provisions' implicated 'important constitutional protections.'" *Id*. (quoting lower court).

The unanimous Supreme Court found no constitutional violation and reversed. It rejected the due-process argument that the statutory provisions were unconstitutionally vague because they created uncertainty about the ultimate consequences of criminal behavior. *Id.* at 123. Noting that both statutes were "unambiguous[]" about "the activity proscribed and the penalties available," it went on to say that "[a]lthough the statutes create uncertainty as to which crime

may be charged and therefore what penalties may be imposed, they do so to no greater extent than would a single statute authorizing various alternative punishments." *Id.*

The Supreme Court also reversed the lower court's holding that the statute violated equal protection. The Court first observed that "a prosecutor's discretion to choose between" two statutes "is not 'unfettered.' Selectivity in enforcement of criminal laws is, of course, subject to constitutional restraints." *Id*. at 124-25 & n.9. One of those "constitutional restraints" is the prohibition against enforcement based on a prohibited or arbitrary classification, or an improper motivation. *Id.* at 125 n.9 (quoting *Oyler*, 368 U.S. at 456). It therefore found "no appreciable difference between the discretion a prosecutor exercises when deciding whether to charge under one of two statutes with *different* elements and the discretion he exercises when choosing one of two statutes with *identical* elements." *Id*. at 125 (emphases added). Accordingly, the Equal Protection and Due Process Clauses of the Fourteenth Amendment are not offended where identical activity is, in the abstract, subject to different penalties.

Although both *Batchelder* and *Wilson* involved two purportedly identical criminal statutes, whereas the present case involves one statute and a penalty enhancement, the analysis is the same. In each case, the defendant contends that the prosecutor is able to obtain a higher penalty for identical conduct without any additional proof. The statutes in *Batchelder* created two penalties for receipt of a firearm by a convicted felon. That is the same as Ohio's repeat-OVI-offender-specification framework, which also provides varying penalties for offenders with five or more violations in the last twenty years. *See id.* at 123 ("Although the statutes create uncertainty as to what crime may be charged and therefore what penalties may be imposed, they do so to no greater extent than would a single statute authorizing various alternative

punishments.”). Klembus’s argument against Ohio’s OVI repeat-offender penalty scheme is no different from the one rejected in *Batchelder*, and must meet the same fate.

The holding in *Batchelder* therefore controls Klembus’s claims under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Yet the Eighth District departed from *Batchelder* when it reasoned that the recidivism specification, which does not require any proof above that needed for the underlying felony, “allows the prosecutor to arbitrarily subject some individual defendants, such as Klembus, to increased penalties that others are not subject to.” App. Op. ¶ 21. It declared an equal-protection violation because it believed “there is no logical rationale for the increased penalty imposed on some repeat OVI offenders and not others without requiring proof of some additional element to justify the enhancement, especially since the class is composed of offenders with similar histories of OVI convictions.” *Id.* ¶ 23. That reasoning is invalid under *Batchelder*. The same could have been said about convicted felons receiving firearms—namely, that it makes no logical sense to make some eligible for a two-year sentence but others subject to a five-year sentence, with no additional requirement of proof or aggravating circumstance. Without a showing of improper selective enforcement, *see Batchelder*, 442 U.S. at 125 n.9, the fact that a penalty enhancement shares the same elements as the underlying offense does not violate the federal Equal Protection Clause.

2. The principles in *Batchelder* also guide the analysis of Klembus’s Ohio constitutional claims.

The reasons for rejecting Klembus’s claim under the federal Equal Protection Clause also support rejecting his claim under Ohio’s Equal Protection Clause. The rule in *Batchelder* should also govern this Court’s analysis of Klembus’s Ohio claim.

First, as this Court has repeatedly said, “[t]he limitations placed upon governmental action by the Equal Protection Clauses of the Ohio and United States constitutions are essentially

identical." *Kinney v. Kaiser Aluminum & Chem. Corp.*, 41 Ohio St. 2d 120, 123 (1975); *see also Burnett v. Motorists Mut. Ins. Co.*, 118 Ohio St. 3d 493, 2008-Ohio-2751 ¶ 30; *McCrone v. Bank One Corp.*, 107 Ohio St. 3d 272, 2005-Ohio-6505 ¶ 7; *Park Corp. v. Brook Park*, 102 Ohio St. 3d 166, 2004-Ohio-2237 ¶ 18. As recently as 1999, this Court refused an invitation to construe Ohio's Equal Protection Clause differently from its federal counterpart, and affirmed that the two "are to be construed and analyzed identically." *See Am. Ass'n. of Univ. Professors v. Cent. State Univ.*, 87 Ohio St. 3d 55, 60 (1999) (*AAUP II*). Klembus cannot provide a compelling reason to depart from that long-held premise.

Sound reasons support continued harmony between the state and federal Equal Protection Clauses. Generally speaking, this Court has declined to interpret the Ohio Constitution more expansively than the federal Constitution where an "appellant has presented . . . no compelling reasons why Ohio constitutional law should differ from the federal law" on a particular issue. *See State v. Wogenstahl*, 75 Ohio St. 3d 344, 363 (1996). And in this context specifically, this Court noted in *AAUP II* that federal equal-protection doctrine has been developed over many years and has achieved a "carefully conceived structure." *AAUP II*, 87 Ohio St. 3d at 60. There is "no reason to create such a disturbance when the existing federal standard is workable and exceedingly well reasoned." *Id.*

Second, *Wilson* is not a roadblock to applying *Batchelder* to the Ohio Constitution. *Wilson* was decided on federal grounds only, and did not involve any Ohio constitutional claims. *See Wilson*, 58 Ohio St. 2d at 53 ("[A]ppellant contends that [the statute] violates the Equal Protection and Due Process Clauses of the United States Constitution."). Additionally, the relevant passage in *Wilson* is dictum. *Wilson* did not actually find an equal-protection violation because Ohio's aggravated burglary statute differed from the burglary statute. *See id.* at 59. It

was thus unnecessary for the Court to decide how the federal Equal Protection Clause (or Ohio's, for that matter) applies in cases of identical or overlapping criminal statutes. *Wilson* should instead be read as proposing a rule that might have applied had the facts of the case been different. *See id.* at 55-56 ("Therefore, *if* the statutes prohibit identical activity, require identical proof, and yet impose different penalties, *then* sentencing a person under the statute with the higher penalty violates the Equal Protection Clause.") (emphases added).

Third, adopting *Batchelder* as the rule for the Ohio Equal Protection Clause does no violence to this Court's precedents. As an initial matter, the *Wilson* dicta does not rest on strong doctrinal ground. For the key proposition at issue here, the *Wilson* Court cited only the majority of the court of appeals below. *See Wilson*, 58 Ohio St. 2d at 55-56. The lower court, in turn, rested on a pre-*Batchelder* federal district court decision, *Roush v. White*, 389 F. Supp. 396 (N.D. Ohio 1975). The petitioner in *Roush* had challenged Ohio's marijuana laws as violating the United States Constitution "in that [they] confer[] unfettered discretion upon the prosecutor to choose among three different statutes which proscribe the identical act but which carry vastly different sentences." 389 F. Supp. 396 at 399. Finding for the government, the *Roush* court stated (again, without citation), that "[o]nly when [a prosecutor's] discretion is unfettered, when it is the prosecutor, not the legislature, enacting the laws, is the Constitution offended." *Id*. at 402.

Roush—essentially the root of *Wilson*—is now of questionable validity. To begin with, *Roush* involved a federal equal-protection claim; to the extent its reasoning conflicts with *Batchelder*, it is no longer sound for purposes of federal law. In addition, the *Roush* petitioner relied on a Washington Supreme Court decision, *State v. Zornes*, 469 P.2d 552 (Wash. 1970), which was later overruled in light of *Batchelder*. *See City of Kennewick v. Fountain*, 802 P.2d

1371, 1373 (Wash. 1991) (recognizing that *Zornes* was overruled by *Batchelder* as to its analysis under the Fourteenth Amendment). Finally, as with *Wilson*, the *Roush* court found that the statutes there were not identical and thus did not actually apply the rule for which it is cited. The rule cited in *Wilson* is of questionable origin and merits little weight.

Furthermore, the *Wilson* rule has not figured prominently in this Court's subsequent cases. It is true that various courts—including this one, but particularly the courts of appeals—have discussed *Wilson*. *See, e.g.*, *McDonald*, 31 Ohio St. 3d at 59 n.11 (H. Brown, J., dissenting) (noting conflict); *State v. Brown*, 117 Ohio App. 3d 6, 15 (6th Dist. 1996) (same); *City of Cleveland v. Huff*, 14 Ohio App. 3d 207 (8th Dist. 1984) (invalidating the sentencing provision of a city ordinance pursuant to *Wilson*); *but see State v. Miles*, 8 Ohio App. 3d 410 (8th Dist. 1983) (relying on *Batchelder* to hold that "where two statutes proscribe the same criminal conduct, in the absence of proof that the prosecution is based upon an impermissible criterion such as race, religion, or other arbitrary classification, a defendant may be charged and convicted under the statute providing the greater penalty"). Nevertheless, this Court has revisited *Wilson* only once for the proposition involved here. *See McDonald*, 31 Ohio St. 3d at 49-50. And that decision reinforces the State's position in this case.

In *McDonald*, the Court was asked to decide whether a statute that prohibited the possession of criminal tools was facially constitutional. *See id.* at 49-50. The trial court had invalidated the law in part because the statute purportedly left too much discretion to prosecutors. *Id.* at 49. The Court rejected that conclusion, noting that the concern about prosecutorial discretion was not rooted in any case law. *Id.* at 50. Although the Court acknowledged "hypothetical circumstances" in which the statute could be abused, it was "simply not inclined to engage in the exercise of imagining highly speculative and hypothetical

circumstances invalidating a legislative enactment prohibiting conduct which the General Assembly clearly has the power to prohibit." *Id.* It cited *Wilson* for the "general rule . . . that prosecutorial discretion as to what offense is charged when two statutes proscribe the same conduct is not unconstitutional unless exercised to discriminate against a particular class of defendants." *Id.* (citing *Wilson*, 58 Ohio St. 2d at 55). This refusal to invalidate a statute on purely speculative grounds in rational-basis review is consistent with the result now urged by the *amicus* and the State.

Moreover, this Court has subsequently cited the logic of *Batchelder* approvingly, albeit not in the context of an equal-protection challenge. *See State v. Chippendale*, 52 Ohio St. 3d 118, 122-23 (1990) (citing *Batchelder* as support for its holding that certain general and special offenses could be prosecuted coextensively, and that a defendant could be sentenced under the offense carrying a greater penalty). Accordingly, it would not disrupt this Court's cases to interpret the Ohio Constitution as following the United States Constitution on this question.

Finally, adherence to *Batchelder* is sound from a practical perspective. To reject *Batchelder* in favor of the framework suggested in *Wilson* would invite challenges to prosecutions or convictions where the same criminal activity happens to be (or is alleged to be) proscribed by more than one provision in the Revised Code. Given the breadth of the Revised Code, rejecting *Batchelder* means creating a new class of challenges for convictions that sweeps across the whole of the criminal code.

D. The arguments advanced by Klembus and the Eighth District do not support invalidation of Ohio's recidivism specification under rational-basis review.

The purported problems identified by the Eighth District are not grounds for holding the recidivism specification unconstitutional. It is no stumbling block, as the lower court suggested, that "a repeat OVI offender charged with the specification *may* be treated differently from other

members of his class, who are not subject to the repeat OVI offender specification." *Id*. ¶ 21 (emphasis added). First of all, concern about the mere *potential* for selective enforcement has no place in a facial challenge, which is limited to considering the statue "without regard to extrinsic facts." *Limbach*, 35 Ohio St. 3d at 231. Matters concerning the actual exercise of prosecutorial discretion, such as discriminatory motive, are extrinsic facts; not only are they inappropriate in this type of review, but they have not actually been introduced by Klembus in this case. *See Trzebuckowski*, 85 Ohio St. 3d at 530 n.2 (noting the distinction between a selective-enforcement claim and a traditional equal-protection claim); *see also Oyler*, 368 U.S. at 456 (rejecting a selective-enforcement claim where evidence did not show that "the selection was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification"). As the Twelfth District recently stated when it rejected a similar challenge to the recidivism specification, "[i]t will not be presumed that a prosecutor's decision to prosecute has been invidious or in bad faith, and [defendant] has offered no argument that would call into question the rationale for the discretion that our legal system traditionally affords the prosecutor." *Hartsook*, 2014-Ohio-4528 ¶ 47.

Furthermore, it is not fatal that the statute "provides no requirement that the specification be applied with uniformity." App. Op. ¶ 23. A statute need not articulate what the Constitution already requires. "Of course, a prosecutor's discretion is 'subject to constitutional restraints.'" *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (quoting *Batchelder*, 442 U.S. at 125); *see also State v. Flynt*, 63 Ohio St. 2d 132, 134 (1980) (per curiam). This includes the requirement that "the decision whether to prosecute may not be based on 'an unjustifiable standard such as race, religion, or other arbitrary classification.'" *Armstrong*, 517 U.S. at 464 (quoting *Oyler*, 368 U.S. at 456). Indeed, this Court has stated that a nebulous concern that a "statute grants too

much discretion to a prosecutor in charging a crime is not supported by any case law." *McDonald*, 31 Ohio St. 3d at 50. The prohibition against selective enforcement is implicit within any criminal statute in the Revised Code, and the failure of the General Assembly to make that explicit with respect to Ohio's repeat-OVI-offender specification is not grounds to invalidate the law.

Klembus's counterarguments that *Batchelder* is inapplicable, set forth in his Opposition to Jurisdiction, are also unavailing. *See* Opp. Jur. at 3-4. He first argues that *Batchelder*'s holding rests on an assumption that "the prosecution would not be able to 'predetermine ultimate criminal sanctions.'" *Id.* at 3 (quoting *Batchelder*, 442 U.S. at 124-25). He contends that here, the penalties with the specification are "radically different" from those without, and that this distinguishes *Batchelder*. Klembus ignores the fact that, although a defendant who pleads guilty to the recidivism specification is eligible for a longer term of imprisonment, the relevant sentencing provisions grant the sentencing judge considerable discretion to tailor and impose an appropriate sentence. In fact, a defendant who is not charged with the recidivism specification could theoretically receive a longer prison sentence than a defendant who is so charged. In this very case, the Eighth District observed that "the trial court could have imposed the same two-year sentence on Klembus without the repeat OVI specification because the court had discretion to impose up to 30 months in prison on the underlying fourth-degree felony." App. Op. ¶ 25. A prosecutor that charges the specification is not stepping into the shoes of the sentencing judge.

Klembus next argues that *Batchelder* is distinguishable because the elements of proof of the two statutes "were not identical," whereas here the requirements for the fourth-degree felony and penalty enhancement are the same. Opp. Jur. 4. But Klembus concedes (correctly) that the Supreme Court "went on to evaluate the Equal Protection claim as if the statutes were identical

in their proof requirements." *Id.* This is because the elements of the two statutes *were* identical as applied to the defendant. *See Batchelder*, 442 U.S. at 116, 119 (observing that "the substantive elements of [the statutes were] identical as applied to a convicted felon who unlawfully receives a firearm"). *Batchelder* is on point in every way that matters.

Klembus also contends that *Batchelder* is distinguishable because it concerns two statutes, as opposed to one. Opp. Jur. 4. This argument also fails because the distinction between one and two statutes is immaterial. Whether one statute or two, the question is the same: may the criminal law leave to prosecutors the choice to charge (or not) when the same conduct is prohibited under two parts of the Code that trigger different penalties? Klembus's reliance on *United States v. Percival*, 727 F. Supp. 1015 (E.D. Va. 1990) is therefore misplaced. *Percival* involved a question of statutory interpretation, not an equal-protection claim, and its reasoning is inapplicable here. In that case, the district court found *Batchelder* inapplicable when attempting to resolve an ambiguity concerning two penalty provisions within a single statute. *Percival*, 727 F. Supp. at 1017-18. That court had to decide which of two penalty provisions applied to the defendant's offense, not whether the constitution prohibited the prosecutor from selecting the greater of two equally applicable penalties. *See id.* at 1017. Furthermore, *Wilson*, which Klembus cited in his brief before the court of appeals, also analyzed two statutes. If cases analyzing two statutes really are distinguishable, then *Wilson* would be equally inapplicable. And without *Wilson*, the Eighth District's opinion is unmoored from any legal authority.

Finally, Klembus argues that *Batchelder* is inapplicable because it did not address state constitutional arguments. Opp. Jur. 4. While this is true, neither did *Wilson*. *See Wilson*, 58 Ohio St. 2d at syllabus. In any event, this Court has repeatedly held that analysis under Ohio's

Equal Protection Clause is the same as the federal equal protection analysis. *See Thompkins*, 75 Ohio St. 3d at 561. Klembus's attack on *Batchelder* would equally pull the plug on *Wilson*, and *Wilson* is the only thing between Klembus and reversal.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed.

Respectfully submitted,

MICHAEL DEWINE (0009181)
Attorney General of Ohio

/s Eric E. Murphy
ERIC E. MURPHY* (0083284)
State Solicitor
**Counsel of Record*
MICHAEL J. HENDERSHOT (0081842)
Chief Deputy Solicitor
HANNAH C. WILSON (0093100)
Deputy Solicitor
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax
eric.murphy@ohioattorneygeneral.gov

Counsel for *Amicus Curiae*
Ohio Attorney General Michael DeWine

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief of *Amicus Curiae* Ohio Attorney General Michael DeWine in Support of Appellant State of Ohio was served on May 11, 2015, by U.S. mail on the following:

Robert L. Tobik
Cuyahoga County Public Defender
John T. Martin
Assistant Public Defender
310 Lakeside Avenue, Suite 200
Cleveland, Ohio 44113

Counsel for Appellee
Dean M. Klembus

Timothy J. McGinty
Cuyahoga County Prosecutor
Daniel T. Van
Assistant Prosecuting Attorney
1200 Ontario Street, 9th Floor
Cleveland, Ohio 44113
216-443-7800

Counsel for Appellant
State of Ohio

/s Eric E. Murphy
Eric E. Murphy
State Solicitor

APPENDIX

OVI COUNT	INDIVIDUALS
1	809334
2	244107
3	103572
4	47757
5	23893
6	12046
7	6193
8	3261
9	1603
10	835
11	408
12	233
13	114
14	59
15	39
16	21
17	10
18	5
19	6
20	2

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EXHIBIT 1

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SENATE COMMITTEE ON JUDICIARY
Wed., March 17, 2004, 9 a.m., North HR
Sen. Austria: 466-3780

SB160 VESSELS--CHILD ENTICEMENT (WACHTMANN L) Include vessels as places within offense of child enticement. Third hearing/POSSIBLE VOTE.

REPORTED OUT. No witnesses.

HB252 PROSECUTING ATTORNEY REMOVAL (CATES G) Regarding actions to remove a prosecuting attorney. Third hearing/POSSIBLE VOTE.

REPORTED OUT. No witnesses.

SB66 COUNTY CHILDREN'S ADVOCATE CENTERS - ASSESS ABUSE (SCHURING K) Counties establish Children's Advocacy Centers. Fourth hearing/AMENDMENTS.

SUBSTITUTE BILL ACCEPTED. Sen. Schuring said the substitute bill includes seed money for the creation of the centers from the Children's Trust Fund. The sub bill also give the Children's Trust Fund more authority to approve county plans.

SB197 FALSE CLAIMS WITH THE STATE (GOODMAN D) Ohio False Claims Act. Second hearing.

Ann Lugbill, an attorney specializing in the area of false claims litigation, gave proponent testimony.

Lugbill said the bill would allow Ohio to "piggyback" on other cases and allow the attorney general to collect funds on behalf of the Ohio treasury in those False Claims Act and qui tam actions that include state claims, such as recent federal lawsuit actions against Medicaid providers and pharmaceutical companies.

She said California, New York, Illinois, Virginia, Florida, Delaware, Hawaii, Nevada, Massachusetts, Tennessee and the District of Columbia have state False Claims Acts.

Lugbill said suits filed by the government would proceed as any other case would, However, qui tam suits (those brought by individuals) would be filed under seal so that the government, through subpoena powers, decides whether it will intervene in the action and prosecute.

She also said that proof of a False Claim Act violation is by a simple preponderance of the evidence. Proof of fraud is not required -- a knowing violation is enough.

HB52 VEHICULAR HOMICIDE/ASSAULT PENALTIES (HUGHES J) Expand offenses of vehicular homicide/assault. Second hearing.

Proponent testimony was given by Public Safety Director Kenneth Morckel; John Germovsek, Great Lakes Construction Co.; Angela Van Fossen, Ohio Contractors Association; Alex Cappel, private citizen; written testimony by the Fraternal Order of Police; and, Mark Potman, International Union of Operating Engineers.

Potman said of the 1500 work zone injuries last year, 24 of these accidents caused death. Potman also said with the federal allocation of transportation dollars to Ohio, construction zones will increasing.

Morckel supported the mandatory sentence of one to five years in addition to

EXHIBIT 2

the basic felony sentence for a person having five or more convictions for DUI.

Van Fossen said between 1995 and 2002, work zone fatalities have doubled. She also pointed out that if there is no sign posted then there is no penalty.

HB163 REPEAT OMVI OFFENDERS (OELSLAGER W) Regarding prison term for repeat OMVI offenders. Second hearing.

Donna Maines and Tilde Bricker, representing MADD, gave proponent testimony. Bricker said that one-third of those arrested for OMVI are repeat offenders. said increasing the time for the retention of records is a positive step.

In written testimony from Sen. Zurz, she said the Summit County prosecutor has collected signatures from 12,000 citizens who support the bill. She said according to statistics provided by the Department of Public Safety, there are 28,515 Ohioans that have five or more prior DUI convictions. There are 767 offenders with 10 or more prior conviction for DUI.

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21 West Broad Street, Suite 1000 (10th Floor) Columbus, OH 43215

614.227.5820 phone - 614.228.5897 fax