

IN THE
SUPREME COURT OF OHIO

STATE OF OHIO,	:	Ohio Supreme Court Case No.
	:	2019-1215
Plaintiff-Appellee,	:	
	:	
v.	:	
	:	On Appeal from the Cuyahoga County
DELVONTE PHILPOTTS,	:	Court of Appeals, Eighth Appellate
	:	District, Case No. CA-18-107374
Defendant-Appellant.	:	

SUPPLEMENTAL BRIEF OF APPELLANT DELVONTE PHILPOTTS

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SUPPLEMENTAL BRIEF OF APPELLANT

On September 8, 2022, this Court directed the parties to file supplemental briefs addressing the impact on this case of *New York State Rifle Assn., Inc., v. Bruen*, 597 U.S. ___, 142 S.Ct. 2111, 213 L.Ed.2d 387 (2022).

The supplemental brief of the appellant, Mr. Delvonte Philpotts, follows.

I. LAW AND ARGUMENT

In *Bruen*, the United States Supreme Court considered the constitutionality of a New York state law that purported to make it a crime to possess a firearm without a license, whether inside or outside the home. *Id.* at 2-3.¹ The licensing scheme permitted an applicant to obtain an “unrestricted” license only if the applicant could prove that “proper cause” existed, meaning that the applicant had a “special need” for self-protection distinguishable from that of the general community. *Id.* at 3. The United States Supreme Court held that the law’s “proper cause” requirement violated the Fourteenth Amendment by preventing law-abiding citizens with ordinary self-defense needs from exercising their Second Amendment right to keep and bear arms in public for self-defense. *Id.* at 1-2.

As to Mr. Philpotts’ first proposition of law — that R.C. 2923.13(A) violates the right to keep and bear arms at home for self-defense as protected by both the Second

¹ All citations to *Bruen* herein use the pagination of the slip opinion.

Amendment to the United States Constitution and Article I, Section 4, of the Ohio Constitution—*Bruen* is virtually dispositive. Here is why.

A. *Bruen* rejected the “two-step” framework that proliferated after *Heller*.

In the years between *Heller*² and *Bruen*, in the absence of concrete direction from the United States Supreme Court, courts “coalesced around a ‘two-step’ framework for analyzing Second Amendment challenges that combine[d] history with means-end scrutiny.” *Id.* at 8. That framework proceeded as follows. In the first step, the government needed to justify the challenged regulation by “‘establishing that the challenged law regulate[d] activity falling outside the scope of the [Second Amendment] right as originally understood.’” *Id.* at 9, quoting *Kanter v. Barr*, 919 F.3d 437, 441 (7th Cir.2019). A reviewing court then would “ascertain the original scope of the right based on its historical meaning.” *Id.* If the conduct at issue was outside the scope of the right as historically understood, then the analysis was over: the conduct was considered “categorically unprotected” and the regulation was allowed. *Id.* But if the historical evidence was “inconclusive” or “suggest[ed] that the regulated activity [wa]s *not* categorically unprotected,” then courts proceeded to step two. *Id.* (emphasis in original).

The second step involved a means-end balancing test that considered whether the regulated activity came “close” to the “core of the Second Amendment right” and

² *District of Columbia v. Heller*, 554 U.S. 570, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008).

whether the burden was “sever[e].” *Id.* Depending on the answers to these questions, either strict scrutiny or intermediate scrutiny would apply. *Id.* at 9-10.

In *Bruen*, the Supreme Court “decline[d] to adopt that approach” on the grounds that it had “one step too many.” *Id.* at 8, 10. Instead, the Court wrote that “[s]tep one of the predominant framework is broadly consistent with *Heller*, which demand[ed] a test rooted in the Second Amendment’s text, as informed by history.” *Id.* “But *Heller* and *McDonald* do not support applying means-end scrutiny in the Second Amendment context.” *Id.*

Bruen thus resolves a crucial preliminary question in the present case, namely: What is the test to be applied to Mr. Philpotts’ challenge to the constitutionality of R.C. 2923.13(A)’s absolute prohibition on the continued possession of firearms at home by mere indictees?³ We now know that “the standard for applying the Second Amendment is as follows: When the Second Amendment’s plain text covers an individual’s conduct, the Constitution presumptively protects that conduct.” *Id.* at 15.

In such a circumstance, “[t]he government must * * * justify its regulation by demonstrating that it is consistent with the Nation’s historical tradition of firearm regulation.” *Id.* Naturally, this aspect of the *Bruen* decision is directly relevant to resolution of Mr. Philpotts’ first proposition of law. In the briefing, Mr. Philpotts

³ As noted elsewhere in the briefing, by “indictees” Mr. Philpotts does not mean literally *all* indictees, but rather the broad class of indictees to which R.C. 2923.13(A) applies—those indicted with a felony “of violence” or involving illegal drugs.

presented arguments under both approaches—the historical alone, and the two-step framework’s means-end balancing. *See* Appellant’s Opening Brief at 6-32. The government, meanwhile, relied entirely on means-end balancing in its analysis. *See* Government’s Brief at 27-28.

The implications of the *Bruen* test, already adopted pre-*Bruen* by a majority of this Court in *State v. Weber*, 163 Ohio St.3d 125, 2020-Ohio-6832, 168 N.E.3d 468, are explored in the following section.

B. The government has not and cannot meet its burden under *Bruen* to justify R.C. 2923.13(A) by demonstrating that it is consistent with the Nation’s (or Ohio’s) historical traditions of firearm regulation.

As noted in the previous section, *Bruen* made clear that as long as the conduct in question is protected by the plain text of the Second Amendment, then the burden is on the government to “justify its regulation by demonstrating that it is consistent with the Nation’s historical tradition of firearm regulation.” *Id.* at 15. In other words, the government must “*affirmatively prove* that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms.” *Id.* at 10 (emphasis supplied). This the government cannot do. Indeed, at least one federal court has found 18 U.S.C. § 922(n), the federal analogue to R.C. 2923.13(A), unconstitutional after *Bruen* based on the lack of historical analogues for disarming indictees. *See United States v. Quiroz*, 22-CR-00104-DC, 2022 U.S. Dist. LEXIS 168329 (W.D. Tex., Sept. 19, 2022); *see also Firearms Policy Coal., Inc. v. McCraw*, 4:21-cv-1245-P, 2022 U.S. Dist. LEXIS

152834 (N.D. Tex., Aug. 25, 2022) (same outcome regarding possession of firearms by 18-21 year-olds).

First, and as explained in Mr. Philpotts' opening brief on the merits before this Court, the plain text of the Second Amendment makes no reference to indictees specifically or even to crimes generally. Opening Br. at 17. It simply states that "[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." Article I, Section 4, of the Ohio Constitution similarly states that "[t]he 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." Mr. Philpotts is, like every other indictee, part of "the people." And as we know from *Heller* and *McDonald*, the Second Amendment confers an individual right to keep and bear arms, not necessarily connected to formal militia service and not, in its text, limited to any particular set of "the people." His *conduct* here—possessing a firearm, is plainly covered by the plain text of the Second Amendment—whether he was under indictment or not while possessing a weapon is part of the *second* step.

The next question is thus whether the government can justify R.C. 2923.13(A)'s ban on continued possession of firearms by indictees by demonstrating that it is supported by the history and tradition of firearm regulation. It bears noting that Mr. Philpotts has undertaken extensive analyses of the relevant history of the Second

Amendment at virtually every stage of the lengthy litigation of this case. *See* Appellant's Eighth District Opening Brief at 4-8; Appellant's Eighth District Reply Brief at 7-8; Appellant's Memorandum in Support of Jurisdiction at 6-7; Appellant's Supreme Court Opening Brief at 9-17; Appellant's Supreme Court Reply Brief at 8-11. These analyses were accompanied by direct sources, most of which appeared in the indices to the briefs and virtually all of which constituted primary historical sources of the same general sort that the United States Supreme Court relied on when reaching its decision in *Bruen*. It is not necessary to reiterate everything here; suffice it to say that the historical record amply supports Mr. Philpotts' position. *See, e.g.*, Supreme Court Opening Brief at 9-18 (citing and analyzing sources from the 14th century to today).

In particular, it shows that while the disarmament of *convicted* felons is ancient, there is no discernible satisfactory precedent in Anglo-American jurisprudence for the preemptive, pre-conviction disarmament of mere *indictees* solely on the basis of indictment. Further, as noted elsewhere in the briefing, what quasi-analogues do exist are appalling—*e.g.*, the blanket disarmament of black people, *see* Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 Geo. L.J. 309, 338 (1991), citing Act of Feb. 17, 1833, ch. 671, §§ 15, 17, 1833 Fla. Laws 26, 29; S. Exec. Doc. No. 43, 39th Cong., 1st Sess., 8 (1866) (comparing the blanket disarmament of black people to the blanket disarmament of “lunatics”), suspected “papists,” *see* “An Act for the Better Securing the Government by Disarming

Papists and reputed Papists,” 1 William and Mary, c. 15 (1688), people of mixed race, and “Indians,” see Adam Winkler, *Heller’s Catch-22*, 56 UCLA L. Rev. 1551, 1562-1563 (2009). These are hardly satisfactory analogues and deserve to be left where they can be found—in the rubbish-bin of history.

For its part, at each stage the government had every opportunity to raise similar arguments. But the government has not done so. In fact, at no point in the entire litigation of this case, which stretches over nearly half a decade, has the government *ever* really examined the historical context of the right to bear arms as it relates to R.C. 2923.13(A)’s absolute ban on the possession of firearms in the home by mere indictees. Separate from *Bruen*, it has been clear since this Court’s decision in *Weber* that the historical aspects of the problem would at least be of very high importance. Certainly there is no reason to give the government another chance now—outside whatever historical evidence it might offer in its forthcoming supplement—to present historical support when it has had ample opportunity over the last five years. Nor should this Court shy away from ruling on the merits because it would require an analysis of historical sources, as these were precisely the sort of materials the United States Supreme Court relied on in resolving *Bruen* and that appellate courts have routinely used to interpret and analyze statutes and regulations since *Marbury*.

At bottom, what was true before *Bruen* is just as true now—Ohio’s absolute, indiscriminate ban on the continued possession of firearms at home by mere indictees is

bereft of historical precedent and violates both the United States and Ohio Constitutions.

C. The regulation in *Bruen* was far less invasive than R.C. 2923.13(A). If New York’s law was unconstitutional, then so is R.C. 2923.13(A).

The regulation in *Bruen* was not an absolute ban on possession. *Id.* at 2. It was merely a licensing scheme. *Id.* Nor did it as deeply affect the right to keep arms at home. *Id.* at 3. Rather, it was primarily aimed at, and primarily burdened, the right to bear them out of doors. *Id.* Nor indeed was it indiscriminate, for it permitted, at least in theory, an applicant to make his case to the licensing authority. *Id.* In other words, it was not particularly draconian, even if ultimately unconstitutional, nor was it particularly unique. *Id.* at 4 n.1, 5 (listing state laws similar or virtually identical to New York’s).

The regulation at issue in the present case is far more invasive. It is not part of a mere regulatory scheme but rather creates a complete prohibition. It directly burdens the right to armed self-defense of the home—the “core,” as it were, of the Second Amendment’s protection. It is also highly unusual, indeed unprecedented, as discussed in detail in Mr. Philpotts’ main brief. Perhaps worst of all, R.C. 2923.13(A)’s ban is blanket and indiscriminate, wholly prohibiting any indictee from having any firearms at home for any purpose, without any individual consideration or process and despite the fact that the Second Amendment confers a personal, fundamental constitutional

right to keep and bear arms.⁴ At bottom, it is nearly impossible to imagine how, if the law in *Bruen* was not constitutional, R.C. 2923.13(A) could be.

II. CONCLUSION

Bruen has clarified the test for restrictions on the right to keep and bear arms. As a majority of this Court felt in *Weber*, the relevant test looks only at the history and tradition of the right in question, without conducting a subsequent means-end analysis. *Bruen* also clarified that the burden of justifying a restriction of the right to keep and bear arms lies with the government. The government has not met its burden here. Finally, there is little doubt that the text of the Second Amendment covers Mr. Philpotts' conduct, and that the historical record demonstrates little if any precedent for the burdens created by R.C. 2923.13(A) on mere indictees.

Although Mr. Philpotts maintains that his position was meritorious prior to the United States Supreme Court's decision in *Bruen*, that decision—and its confirmation that only the history, and not means-end balancing, matters in this context—would seem only to strengthen the merits of his argument while eroding the government's. This Court should reverse.

⁴ The government's reliance on R.C. 2923.14 is as unavailing after *Bruen* as it was before. As the Court said in *Bruen*, "[w]e know of no other constitutional right that an individual may exercise only after demonstrating to government officers some special need." *Id.* at 62-63. The same is true here as to mere indictees. No other incident of indictment works to strip fundamental, individual constitutional rights from the indictee *automatically*, without a *pre*-deprivation hearing and without any individualized consideration of the particular indictee in question.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing **Supplemental Brief of Appellant Delvonte Philpotts** was served upon counsel for Appellee via the Court's electronic filing platform. Additionally, a hard copy was sent to counsel for Appellee at the address on the cover of this brief via ordinary U.S. Mail on September 22, 2022, and a courtesy electronic copy was emailed to counsel for Appellee on the same day.

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