

IN THE SUPREME COURT OF OHIO

STATE OF OHIO	)	Supreme Court No. 2019-1215
	)	
Plaintiff / Appellee	)	Ohio Court of Appeals, Eighth Judicial
	)	District, No. CA-18-107374
vs.	)	
	)	Court of Common Pleas, Cuyahoga County
DELVONTE PHILPOTTS	)	No. CR-17-619945
	)	
Defendant / Appellant	)	

**APPELLEE STATE OF OHIO'S SUPPLEMENTAL BRIEF PER COURT ORDER OF
SEPTEMBER 8, 2022**

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STATEMENT OF REMAND

On September 8, 2022, this Court ordered the parties to file supplemental briefs addressing the impact, if any, that *N.Y. State Rifle & Pistol Ass'n v. Bruen* ___ U.S. ___, 142 S.Ct. 2111, 213 L.Ed.2d 387 (2022), has on the case at bar, with such briefs to be filed within 14 days of the order and not to exceed 20 pages. To summarize, while *Bruen* clarified the analysis for Second Amendment challenges, it does not undermine the state's position in this case; in fact, the *Bruen* opinion and the analysis it requires support finding R.C. 2923.13(A)(2) constitutional.

CONSTITUTIONAL AMENDMENT AT ISSUE

Second Amendment to the United States Constitution:

A well-regulated Militia, being necessary to the security of a free State, the right of people to keep and bear Arms, shall not be infringed.

ARGUMENT

In *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 213 L.Ed.2d 387 (2022), the United States Supreme Court found that the Second Amendment prohibited the State of New York from limiting the concealed carry of a firearm on one's person outside the home or workplace in the state if and only if the permit seeker shows "proper cause exists" for the need for the gun permit. *Id.*, at 2123, 402. In doing so, the Court refined the test for challenges to state action under the Second Amendment significantly. On this, the Court wrote:

In keeping with *Heller*, we hold that when the Second Amendment's plain text covered an individual's conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's 'unqualified command.' *Id.*, at 2126, 405, citing *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 50, n. 10, 81 S. Ct. 997, 6 L. Ed.2d 105 (1961).

The Court went on to address arguments regarding the tests used by the various lower courts of appeals since *Heller* and found that the two-step approach employed by nearly every court was not correct. The Court stated, “*Heller* and *McDonald* do not support applying means-end scrutiny in the Second Amendment context. Instead, 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 2127, 406. The Court was clear and concise on this point – in the context of the Second Amendment, there is no room for a “‘judge empowering’ interest balancing inquiry that asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute’s salutary effects upon other important governmental interests.” *Id.*, at 2129, 408, quoting *Heller*, 55 U.S., at 634, 128 S. Ct. 2783. This development is important in the case at bar since both parties spend much time in their briefs advocating for one particular type of scrutiny over another – all of which the *Bruen* now requires this Court to ignore.¹

1. *Bruen*’s Textual Analysis of the Second Amendment in Conjunction with its own Prior Case Law:

With regard to the text of the Second Amendment, the *Bruen* Court affirmed *Heller*’s new federal approach to the text of the Second Amendment, referring to “the right of the people to keep and bear Arms shall not be infringed” as the “operative clause” of the amendment that essentially, “guarantee[s] the individual right to possess and carry weapons in case of confrontation.” *Id.*, at 2127, 406, quoting *Heller*, 554 U.S. at 576-577, 578, 128 S. Ct. 2783, 171 L.Ed.2d 637. Furthermore, *Bruen* referred to “‘individual self-defense [a]s the central component of the Second Amendment right.’” *Id.*, at 2133, quoting *McDonald*, 561 U.S. at 767, 130 S.Ct.

¹ Justice DeWine sought to follow this approach in his concurrence in *State v. Weber*, 163 Ohio St.3d 125, 168 N.E.3d 468, 2020-Ohio-6832

3020, 177 L.Ed.2d 894, quoting *Heller*, *supra*, at 554 U.S. at 599. This new approach was, indeed, new, considering the history of the Supreme Court's Second Amendment jurisprudence from the date the Constitution was ratified in 1787 up to that point.

This history is best exemplified in the seminal case of *United State v. Miller*, 307 U.S. 174, 59 S. Ct. 816, 83 L. Ed 1206 (1939) in which the Court upheld the portion of the National Firearms Act of 1934 that prohibited transporting in interstate commerce unregistered shotguns having a barrel less than 18 inches in length; finding, “[i]n the absence of any evidence tending to show that possession or use of a ‘shotgun having a barrel of less than eighteen inches in length’ at this time has some reasonable relationship to the preservation or efficiency of a *well regulated militia*, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument.” *Id*, at 178. (Emphasis Added).

Critical to the Court's opinion was its historical analysis of the term “militia” within the Second Amendment's express language stating, “The signification attributed to the term militia appears from the debates in the Convention, the history and legislation of Colonies and States, and the writings of approved commentators. These show plainly enough that the militia comprised all males physically capable of acting in concert for the common defense. ‘A body of citizens enrolled for military discipline.’ And further, that ordinarily when called for service these men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time.” *Id*, at 179. The Court went on to consider Blackstone's Commentaries and other contemporary writings, including laws passed in Massachusetts in 1784; Virginia in 1785; New York in 1786, showing that it was the common thought in the time of the ratification of the Second Amendment that citizens needed to band together and have arms and ammunition for the time when their service in the militia would be needed for the common defense. *Id*, at

181-182. It was not, at the time, considered a personal right.²

2. Bruen's View of Historical Firearm Regulations Leaves in Place *Heller's* Presumptively Lawful Regulations:

Bruen stands as a refinement of the Court's pronouncement in *Heller* that the Second Amendment neither creates a right nor grants a qualified right, rather, it guarantees a right that existed prior to the creation of the amendment itself. *Id.* at 2126. On this, the *Heller* Court stated, "[p]utting all these textual elements together, we find that they guarantee the individual right to possess and carry weapons in case of confrontation. This meaning is strongly confirmed by the historical background of the Second Amendment. We look to this because it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a pre-existing right. The very text of the Second Amendment implicitly recognizes the pre-

² *Miller* was precisely followed by the various United States Courts of Appeals for decades, until 2008 when the Court decided *Heller*. This is best exemplified by two cases from the Sixth Circuit Court of Appeals involving the same defendant. In *United State v. Warin*, 530 F.2d 103, *cert. denied*, 426 U.S. 948, 96 S.Ct. 3168, 49 L.Ed.2d 1185 (1976), the Sixth Circuit held that the National Firearms Act of 1934, as amended by the Gun Control Act of 1968, prohibition on knowing possession of an unregistered 9mm prototype submachine gun measuring approximately 21 inches overall length, with a barrel length of approximately 7 ½ inches, was constitutional, in part because the Second Amendment "guarantees a collective rather than an individual right." *Id.* at 106 citing *Cases v. United States*, 131 F.2d 916 (1st Cir., 1942) and *Stevens v. United States*, 440 F.2d 144, 149 (6th Cir. 1971) wherein it held, "Since the Second Amendment right 'to keep and bear Arms' applies only to the right of the State to maintain a militia and not to the individual's right to bear arms, there can be no serious claim to any express constitutional right of an individual to possess a firearm." And also stating, "It is also established that the collective right of the militia is limited to keeping and bearing arms, the possession or use of which 'at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia.'" *Warin*, at 106, quoting *United State v. Miller*, 307 U.S. at 178, citing also *Uniter States v. Johnson*, 497 F.2d 548, 550 (4th Cir, 1974), *Cody v. United States*, 460 F.2d 34, 37 (8th Cir.), *cert. denied*, 409 U.S. 1010, 34 L.Ed.2d 303, 93 S.Ct. 454 (1972). The Sixth Circuit again followed *Miller* and its own reasoning when, in 2006, Warin again violated the same statute. See *United State v. Warin*, 163 Fed. Appx., 390 (6th Cir.), *cert denied*, 547 U.S. 1157, 126 S.Ct. 2311, 164 L.Ed.2d 830 (2006), stating again, "This circuit has repeatedly held that the right to bear arms is a collective one, and accordingly, 'there can be no serious claim to any express constitutional right of an individual to possess a firearm.'" *Id.* at 393, citing *United States v. Bournes*, 339 F.3d 396, 397 (6th Cir, 2003), quoting *Warin*, *supra*, 530 F.2d at 106.

existence of the right and declares only that 'it shall not be infringed.'" *Heller*, at 592. Yet, *Heller's* discussion of the history of firearm regulations included the following qualification:

Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *Heller*, at 626-627.

Bruen confirms these caveats as it repeatedly mentions that the Second Amendment right of armed self-defense belongs to the ordinary, law-abiding, responsible citizen, as “[t]he Second Amendment ‘is the very product of an interest balancing by the people’ and it ‘surely elevates above all other interests the right of law-abiding, responsible citizens to use arms’ for self-defense.” *Bruen*, at 2131, quoting *Heller*, 554 U.S. at 635.

The *Bruen* Court found that when a regulation burdens the right of law-abiding citizens from armed self-defense, courts must look to historical analogs of the regulation. However, as the Court cautioned in *Bruen*, “[t]o be clear, analogically reasoning under the Second Amendment is neither a regulatory straitjacket nor a regulatory blank check. On the one hand, court should not ‘uphold every modern law that remotely resembles a historical analogue’ because doing so ‘risk[s] endorsing outliers that our ancestors would never have accepted. On the other hand, analogical reasoning requires only that the government identify a well-established and representative historical analogue, not a historical twin. So even if modern day regulation is not a dead ringer for historical precursors, it still may be analogous enough to pass constitutional muster.” *Id.*, at 2133 citing *Drummond v. Robinson*, 9 F 4th 217, 226 (3d Cir.2021). Justice Kavanaugh specifically cited to this “regulatory straitjacket” quote as it was related in *Heller* and its dicta regarding presumptively lawful regulations in his concurrence in *Bruen* which was joined by Chief Justice Roberts. *Bruen*, at 2161.

Justice Barrett concurred in separate opinion to question how long after 1791 we may continue to look at sources in order to determine public attitude toward firearm regulation. *Id.*, at 2162-2163. Justice Barrett questioned whether any history after the ratification of the Bill of Rights, specifically including Reconstruction history since that is when the Fourteenth Amendment was ratified, is relevant to the inquiry, writing, “today’s decision should not be understood to endorse freewheeling reliance on historical practice from the mid-to-late 19th century to establish the original meaning of the Bill of Rights.” *Id.*, at 2163.

However, Justice Barrett’s dissent in *Kanter v. Barr*, 919 F.3d 437 (7th Cir. 2019) wherein the Seventh Circuit Court of Appeals affirmed a non-violent felon’s bar to possessing firearms under federal and Wisconsin law is also instructive. *Id.*, at 451. Justice Barrett dissented from the affirmance of a blanket prohibition of firearm possession of all felons everywhere without a showing that they are actually dangerous because, “In 1791 – and for well more than a century afterward – legislatures disqualified categories of people from the right to bear arms only when they judged that doing so was necessary to protect the public safety.” *Id.* She further explained, “The historical evidence does, however, support...that the legislature may disarm those who have demonstrated a proclivity for violence or whose possession of guns would otherwise threaten the public safety. This is a category simultaneously broader and narrower than ‘felons’ – it includes dangerous people who have not been convicted of felonies but not felons lacking the indicia of dangerousness.” *Id.*, at 454. In support of this, Justice Barrett pointed to the English Militia Act of 1662 giving officers of the crown “the power to disarm anyone they judged to be ‘dangerous to the Peace of the Kingdom’” as well as the English common law ban on people “who went armed to terrify the King’s subjects.” *Id.*, at 456. She noted that in the colonies, the danger cited for dispossession of firearms was lack of allegiance to the State, which

is why those who swore an oath to the state could in some cases still possess a firearm, although some classes of persons were inherently suspect, Catholics being a good example in some colonies. *Id.*, at 456-457.

In summary, Justice Barrett found that, “[History] does support the proposition that the state can take the right to bear arms away from a category of people that it deems dangerous...And it may do so based on present-day judgments about categories of people whose possession of guns would endanger the public safety; as we said in *Skoien*, ‘exclusions need not mirror limits that were on the books in 1791. Such restrictions are ‘lineal descendants’ of historical laws banning dangerous people from possessing guns.” *Id.*, at 464-465, quoting *United States v. Skoien*, 614 F.3d 638 at 641 (7th Cir. 2010) and Transcript of Oral Argument at 77, *Heller*, 554 U.S. 570, 128 S.Ct. 2783, 171 L.Ed.2d 637 (No. 07-290).

Therefore, we begin from the standpoint of looking at whether the conduct is covered by the text of the Second Amendment, as defined in *Heller* to protect firearm possession for self-defense in and out of the home, and then whether the regulation is consistent with the historical tradition of firearm regulation.

3. Other Courts’ Application of *Bruen* to Federal Gun Laws:

Although *Bruen* was decided less than three months ago, there have been several federal courts that have considered challenges to portions of the federal firearms criminal statutes, two of which have considered the federal analogue of R.C. 2923.13(A)(2), and the courts have very different views of the history of the Second Amendment.

In *United State v. Kays*, CR-22-40-D, 2022 U.S. Dist. LEXIS 154929 (W.D. Oklahoma, August 29, 2022), the District Court for the Western District of Oklahoma found that 18 U.S.C. 922(n) did not violate the Second Amendment. *Id.* The Court stated the test from *Bruen* as,

“[w]hen the Second Amendment’s plain text covers an individual’s conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with this Nation’s historical tradition of firearm regulation.” *Id.* The Court answered the first question in the affirmative, taking little time to find that the act of possessing a firearm, even by a person to whom the statute applied (i.e. being indicted with a felony), is protected activity under the Second Amendment. *Id.* Next, the Court looked to historical tradition and found that the surety laws from colonial America were sufficient analogues to the prohibition of indicted persons from possessing a firearm. *Id.* The Court wrote, “The surety laws restricted an individual’s carrying of arms ‘only when attended with circumstances giving just reason to fear that he purposes to make an unlawful use of them.’” *Id.*, quoting *Bruen*, quoting William Rawle, *A View of the Constitution of the United States of America* 126 (2d. ed. 1829). The Court also pointed out that 922(n) is narrow in that it only applies during the pendency of an indictment, which is “a volatile period during which the stakes and stresses of pending criminal charges often motivate defendants to do violence to themselves or others.” *Id.*, quoting *United States v. Khatib*, No. 12-CR-190, 2012 U.S. Dist. LEXIS 173143, 2012 WL 608682, at 4 (E.D. Wis. Dec. 6, 2012)

However, we have the opposite result on the same statute in *United States v. Gomez-Quiroz*, 4:22-cr-00104 (W.D. Texas, Sept. 19, 2022). Here, the District Court for the Western District of Texas applied *Bruen* and found that 18 U.S.C. 922(n)’s prohibition on indicted persons purchasing guns (“receiving” them under the text of the statute) violates the Second Amendment. Notably, the court began with the question of whether the act of possessing the gun while under indictment was protected conduct and answered in the affirmative. *Id.*, 5-6. When looking at whether the history of firearm regulations included prohibitions on indicted persons

possessing firearms, the court acknowledged that federal law first prohibited persons under indictment with crimes of violence from shipping or transporting firearms in 1938. *Id.*, at 8. Congress passed this law to “‘eliminate guns from the crooks hands’ while interfering as little as possible with the law abiding citizen. In Congress’ eyes, those under indictment for, or convicted of, a crime of violence had already ‘demonstrated their unfitness to be entrusted with such dangerous instrumentalities.’” *Id.*, 8-9. However, in 1961, Congress expanded this to cover all persons under indictment with crimes punishable by imprisonment exceeding one year, and then in 1968 Congress expanded the under-indictment provision to cover anyone under indictment in state court as well. *Id.*, 9. The Court found that since these provisions were only enacted in the 1960’s, they could hardly qualify as “long-standing” despite any dicta in *Heller* that seemed to say otherwise. *Id.*, 10.

The court then turned to its own historical analysis and found that while English authority to disarm person who were “dangerous to the peace of the Kingdom” was clear, in the court’s opinion, the colonists view on that same idea was less so. *Id.*, 11-12. Then the court found that colonial surety laws were not a good analogy to indicted person, citing Justice Thomas’ finding that “there’s little evidence that such laws were regularly enforced” and that under 18 U.S.C. 922(n), indicted persons could not post a bond and restore their rights as they could in colonial Massachusetts. *Id.*, 14-15.³

³ R.C. 2923.14 provides a method for a person to obtain relief from the disability when the disability was imposed solely under R.C. 2923.13(A)(2) or (A)(3) (that is, when the disability attached solely due to the fact of a previous indictment or adjudication of delinquency on certain specified offenses), by applying to the common pleas court in the county of residence. Inasmuch as the General Assembly has clearly provided a method for an individual who is under indictment to have a weapon legally, the intent is obvious that if relief is not obtained, R.C. 2923.13 is violated.” *State v. Taniguchi*, 74 Ohio St.3d 154, 157 1995-Ohio-163, 656 N.E.2d 1286. Additionally, an indicted person is protected from immediate criminalization of prior

However, the court acknowledged a problem with *Bruen* in that for the government to attempt to take firearms out of the hands of categories of dangerous person, it cannot be required to find a historical tradition for each grouping, to require such would, “create an almost insurmountable hurdle” noting, “finding similar historical analogues is an uphill battle because of how much this Nation has changed. Society, population density, and modern technologies are all examples of change that would make something unthinkable in 1791 a valid societal concern in 2022. But the only framework courts now have is *Bruen*’s two step analysis.” *Id.* 16. The court then concluded its analysis with a discussion of grand jury proceedings, casting disfavor toward the constitutionally protected right to be indicted for crimes, arguing that the government could “indict a burrito” if it wanted to, and then analogized the treatment of rights of indicted persons under 922(n) to the treatment of black Americans in the 1800’s. *Id.* at 20, 22-23.

It is worth noting that several federal district courts have also upheld the constitutionality of other sections of the federal firearm laws.

In *United States v. Nutter*, 2:21-cr-00142, 2022 WL 3718518 (S.D. West Vir., August 29, 2022), the District Court for the Southern District of West Virginia upheld 18 U.S.C. 922(g)(9)’s ban on persons with misdemeanor domestic violence convictions, finding “[t]o suggest that only people convicted of crimes with an exact historical analogue can be subject to gun restrictions would lead to absurd results. The core question presented is whether the prohibition at issue would have been viewed as consistent with the Second Amendment in the founding era.” See also, *United States v. Jackson*, CR-22-59-D, 2022 WL 3582504 (W.D. Oklahoma, August 19, 2022), upholding 922(g)(9) after *Bruen*.

In *United States v. Daniels*, 1:22-car-58, 2022 WL 2654232 (S.D. Miss., July 8, 2022),

firearm possession by R.C. 2923.23, which grants immunity from prosecution when firearms are surrendered within 10 days of service of the indictment.

the District Court for the Southern District of Mississippi held that 18 U.S.C. 922(g)(3)'s ban on firearm possession by drug dependent persons was constitutional, citing the Seventh Circuit's discussion of historical efforts to disarm "unvirtuous citizens" in *United States v. Yancey*, 621 F.3d 681 (7th Cir. 2010), which specifically mentioned this Court's decision in *State v. Hogan*, 63 Ohio St. 202, 58 N.E. 572 (1900) affirming Ohio's legislative ban on "tramps" from possessing of firearms as proof that, "these prohibitions 'are merely the latest incarnation of the states' unbroken history of regulating the possession and use of firearms dating back to the time of the amendment's ratification. *Id.*, citing *Yancey*, at 684. The Court went on to find that even in a post-*Bruen* world, "it suffices to show that analogous statutes which purport to disarm persons considered a risk to society – whether felons or alcoholics – were known to the American legal tradition. *Id.*, citing *United States v. Carter*, 669 F.3d 411, 415 (4th Cir. 2012).

4. Application of *Bruen* to R.C. 2923.13(A)(2):

Applying *Bruen* to R.C. 2923.13(A)(2), it is clear that the statute does not violate the Second Amendment. Under the first prong of *Bruen*, this Court must consider whether the conduct at issue is protected. Based on *Bruen* and the cases that have applied it, it appears that the firearm possession in this case is likely protected under the Second Amendment. Therefore, this Court must continue to the historical analysis.

a. Historical Efforts to Disarm Dangerous Persons at the Time of the Ratification of the Bill of Rights

Under the second prong of *Bruen*, this Court must determine whether R.C. 2923.13(A)(2) is "consistent with this Nation's historical tradition of firearm regulation." *Bruen*, at 2123. By enacting this statute, the Ohio General Assembly has classified persons indicted with violent offenses as one category of individuals who are too dangerous to possess firearms. Other sections of this same statute seek to keep firearms from fugitives from justice, persons convicted

of violent offenses, persons under indictment or convicted of drug offenses, persons who are drug dependent, and mentally incompetent persons. See R.C. 2923.13(A)(1)-(5). The General Assembly's classification of persons indicted with violent felony charges hinges on the due process required for such offenses by another section of the United States Constitution – the right to grand jury presentation guaranteed by the Fifth Amendment to the United States Constitution – ratified at the same time as the Second Amendment. Thus, when we look for historical analogues, we must look at historical efforts to keep firearms from the hands of persons deemed to be too dangerous to have them at the time the enactments were made as Ohio has done with the entirety of R.C. 2923.13(A), much of which is presumptively reasonable under dicta from *Heller* itself, and the federal equivalent of which have recently been affirmed (see above). See *Heller*, at 626-627.

There is no question that 17th century English common law is the origin of early American legal principles, so that is where we begin in our required search for justification for Ohio's decision to keep firearms out of the hands of persons indicted with rape and murder. Indeed, beginning in 602 A.D., the Laws of King Aethelbirht made it unlawful to “furnish weapons to another where there is strife.” See Joseph G.S. Greenlee, *The Historical Justification for Prohibiting Dangerous Persons from Possessing Guns*, Wyoming Law Review Vol. 20, No. 2, Art. 7, 249-286, at 258 (hereinafter “Greenlee”) (<https://scholarship.law.uwyo.edu/wlr/vol20/iss2/7>). Wales banned armour during the Welsh Revolt from 1400-1415. *Id.* In the 1580's, Catholics were banned from firearm possession because they were seen as “potentially disloyal and seditious.” *Id.* England's 1662 Militia Act allowed the King's agents to, “search for and seize all arms in the custody or possession of any person or persons whom the said lieutenants or any two or more of their deputies shall judge

dangerous to the peace of the kingdom.” *Id.*, at 259. In 1684, King Charles ordered lieutenants to seize arms from “dangerous and disaffected persons,” with disaffected persons being, “those being disloyal to the current government, who might want to overthrow it. *Id.*

In 1689, the English Bill of Rights was issued by the Lords at Westminster to King William III and Queen Mary II. Within this declaration, which is largely seen as the precursor to the American Declaration of Independence, demands were made of the King which included, “That the subjects which are Protestants may have arms for their defence suitable to their conditions and as allowed by law.” See English Bill of Rights (https://avalon.law.yale.edu/17th_century/england.asp). Importantly, the Lords only wanted Protestants to have arms but even within this demand they recognized the propriety for legislative restrictions upon that right, qualifying the requested right “as allowed by law.”

From 1695 to the 1750’s there were several laws and regulations issued with the purpose to keep firearms from the hands of Catholics or to forfeit those they already possessed. These laws were recognized by William Blackstone who acknowledged that governments fearing insurrection would often times use the hunting and gaming laws for that purpose rather than actual regulation of the sport. See William Blackstone, *Commentaries on the Laws of England*, 412 (Edward Christian ed. 12th ed. 1794).

In the colonies, firearm regulations sought to disarm persons who were considered dangerous and were more akin to the 1328 Statute of Northampton that prohibited carrying firearms in an aggressive and terrifying manner. *Greenlee* at 262. Massachusetts Bay, New Hampshire, Massachusetts, and Virginia all had similar laws in which, according to Virginia’s law of 1736 “‘the constable may take away Arms from such who ride, or go, offensively armed, in Terror of the People’ and may bring the person and their arms before the Justice of the Peace.”

Id. Quoting George Webb, *The Office of Authority of a Justice of the Peace* 92-93 (1736). But colonial regulation was not limited to “terror” laws; they too sought to disarm persons seen as a threat to the governmental authority. Maryland and Virginia disarmed Catholics in 1756 followed by Pennsylvania in 1759. *Id.* at 263. Maryland disarmed anyone unwilling to take an oath of allegiance to the King while Virginia disarmed those who would take such an oath. *Id.*

However, concern over the brewing discontent in the colonies caused the British to regulate commercial sale and delivery of gunpowder and arms to the colonies, confiscation of which was the reason for the British advance and the colonial resistance at Lexington and Concord, which became the first battle of the Revolution. *Id.* And once the war began, the colonies responded in kind. In 1776, the Continental Congress recommended the colonies “disarm persons ‘who are notoriously disaffected to the cause of America, or who have not associated, and shall refuse to associate, to defend, by arms, these United Colonies.’” *Id.* quoting 1 Journals of the Continental Congress, 1774-1789, 285 (1906). Within two years, New Jersey, North Carolina, Virginia, and Pennsylvania enacted similar regulations. *Id.*

All of these regulations at the time of the beginning of the American Revolution show that while firearms were undoubtedly a major part of American life, regulation of their possession was also a part of life, largely to ensure that people seen by the government as dangerous had limited or, in most cases, no access to them.

Once the Bill of Rights was ratified, and the rights to grand jury indictment and the right to bear arms were enacted, it is worth considering what rights a person who stood indicted with the types of crimes listed as “violent crimes” in Ohio’s statute would likely have had at that time. As the Justice Thomas noted in his concurring opinion in *Baez v. Rees*, 553 U.S. 35, 95 (2008), “[t]he Eighth Amendment’s prohibition on the ‘infliction of cruel and unusual punishments’

must be understood in light of the historical practices that led the Framers to include it in the Bill of Rights...it is clear that the Eighth Amendment does not prohibit the death penalty. That is evident both from the ubiquity of the death penalty in the founding era, see S. Banner, *The Death Penalty: An American History* 23 (2002) (noting that, in the late 18th century, the death penalty was ‘the standard penalty for **all serious crimes**’).” *Id.* (Emphasis added). Justice Thomas went on to discuss particularly gruesome forms of capital punishment that were employed at the time such as burning at the stake and gibbeting, which he noted, were used for the purpose of terrorizing the criminal and thereby deterring further crime from others. *Id.* With death as the likely punishment that awaited one formally indicted by a grand jury with rape and/or murder (two of the “violent offenses” to which R.C. 2923.13(A)(2) applies) it is hard to imagine that such an individual would be both free from mandatory pretrial detention and allowed to have free access to firearms leading up to his trial, yet that is the reality that must be true in order for Ohio’s statute to possibly fail under *Bruen*. As Justice Barrett noted in *Kanter* – Ohio’s bar on firearm possession by persons indicted with violent felonies are is lineal descendant of these initial laws aimed a disarming persons seen as dangerous to the common good at the time of their enactment.⁴

b. Post-Ratification Efforts to Disarm Dangerous Persons:

Consistent with the history of firearms regulations, in the 1800’s state legislatures disarmed groups of individuals who were seen as dangerous at the time; one such group were

⁴ *Bruen* also considered surety laws from the 1800’s, noting Massachusetts’ 1836 law requiring persons to post a bond in order to carry weapons if they have been accused by someone who has reasonable cause to fear injury or breach of the peace. While these types of laws serve as another example of states disarming persons who were seen as dangerous, because they do not predate the ratification of the Second Amendment, the State of Ohio will note them here and focus on *Bruen*’s requirement to find analogues at the time of ratification.

“tramps,” commonly defined as men who travelled to a neighboring county and begged for money. Ohio had a law that made it a felony for a “tramp” to possess a firearm or dangerous weapon. This Court considered the constitutionality of the statute in *State v. Hogan*, 63 Ohio St. 202 (1900). Speaking of tramps in general, this Court stated “[h]e is numerous and he is dangerous. He is a nomad, a wanderer on the face of the earth, with his hand against every honest man, woman and child in so far as they do not promptly and fully, supply his demands. He is a thief, a robber, often a murderer, and always a nuisance.” *Id.* at 215. This Court found that the Ohio Constitution allowed for the grouping of tramps as a class for their legislative suppression and further found that said class has no constitutional right to bear arms, stating, “[t]he constitutional right to bear arms is intended to guarantee to the people in support of just government such right and to afford the citizen means for defense of self and property. While this right secures to him a right of which he cannot be deprived, it enjoins a duty in execution of which that right is to be exercised...That guarantee was never intended as a warrant for vicious persons to carry weapons with which to terrorize others.” *Id.*, at 216-219. This Court noted that Ohio’s law disarming tramps is not unlike those from Vermont, New Hampshire, Massachusetts, Rhode Island, Pennsylvania, Indiana, Iowa, and Wisconsin, which clearly shows that several states have seen fit to address a larger societal problem. *Id.*, at 219.

It appears that it was not until the 1920’s when jurisdictions began to legislatively disarm persons charged with and convicted of violent offenses. In 1923, New Hampshire enacted a law that prohibited any “unnaturalized foreign born person and no person who has been convicted of a felony against the person or property of another shall own or have in his possession or under his control a pistol or revolver.” *Greenlee* at 25 citing 1923 N.H. Laws 138, ch. 118. That same year, North Dakota and California passed similar laws, California amending its law in 1931 to

include drug dependent persons. *Id.* citing 1923 N.D. Laws 380, 1923 Ca. Laws 696, 1931 Cal. Laws 2316, ch. 1098. Rhode Island’s law in 1927 stated, “[n]o person who has been convicted in this state or elsewhere of a crime of violence shall purchase own, carry or have in his possession or under his control any firearm” defining crime of violence as, “any of the following crimes or any attempt to commit any of the same, viz.: murder, manslaughter, rape, mayhem, assault or battery involving grave bodily injury, robbery, burglary, and breaking and entering.” *Id.* citing 1927 R.I. Pub. Laws 256-257.

Federally, this prohibition came in 1938 when Congress expanded the 1934 National Firearms Act to include the following language:

It shall be unlawful for any person to ship, transport, or cause to be shipped or transported in interstate or foreign commerce any firearm or ammunition to any person knowing or having reasonable cause to believe that such person in under indictment or has been convicted in any court of the United States, the several States, Territories, possession (including the Philippine Islands), or the District of Columbia of a crime of violence or is a fugitive from justice.” See, 52 Stat. 1251 (1938)

Thus, the prohibition of those indicted with and convicted of violent crimes was enacted federally contemporaneously with state regulations barring those convicted of the same. These are the “long-standing” regulations favorably mentioned in *Heller* and codified in R.C. 2923.13(A). It is noteworthy that simultaneous with some jurisdictions barring people with violent felony convictions from firearm possession, the federal government included those indicted with such crimes as well. By enacting such regulations at that time, the Federal government was consistent with historical regulation of dangerous individuals, treating indicted persons as posing a similar danger to those who were convicted of such crimes.

5. Ohio’s Constitutional Guarantee of the Right to Bear Arms:

The Ohio statute remains sound under the Ohio Constitution post-*Bruen*. However, it is

unnecessary for this Court to even address that issue as Appellant did not properly preserve the issue below. While Appellant cited the Ohio Constitution, he did not make any substantive argument and, instead, treated the right as coextensive with the Second Amendment. Faced with a similar situation, this Court declined to apply the Ohio Constitution in *State v. Weber*, 163 Ohio St.3d 125, 168 N.E.3d 468, 2020-Ohio-6832 (2020), where Weber made “no attempt to discuss how this provision differs from the Second Amendment. He does not discuss the text or history of Article I, Section 4, nor does he discuss this court’s precedent on that provision or otherwise argue why this provision protects his conduct in this case beyond the Second Amendment.” *Id.* at 138 see also *State v. Brinkman*, 2022-Ohio-2550, ¶ 74 (“Brinkman has failed to advance any argument based on the unique text, structure, and history of the Ohio Constitution to establish that his sentence violates Article I, Section 9. Thus, we overrule Brinkman's seventh proposition of law.”)

In his opening brief before this Court, Appellant described the right secured in Ohio’s constitution as an “identical right” and noted that he would refer to both liberties “collectively as ‘the Second Amendment.’” App. Merit Br. p. 1 fn. 1. Appellant therefore identified the rights as identical and failed to explain or even suggest any increased right under the Ohio Constitution.

Even if Appellant had preserved the argument, his claim would fail. In 1803, Ohio’s Constitution was ratified and accepted by Congress. Ohio treated the right to bear arms similarly as the other States from 1776 to that time. The states that mentioned the right to bear arms, did so within the same treatment as other important colonial principles regarding governmental military action at the time – mentioning the right along with the prohibition of standing armies, the subordination of military authority to the civil authority, the prohibition of the quartering of

soldiers, and the preference for citizen militias as the defense of the State.⁵ Article VIII, Section 20 stated, “That the people have a right to bear arms for the defense of themselves and the State; and as standing armies in the time of peace are dangerous to liberty, they shall not be kept up; and that the military shall be kept under strict subordination to the civil power.” See [https://ohiohistorycentral.org/w/Ohio_Constitution_of_1803_\(Transcript\)](https://ohiohistorycentral.org/w/Ohio_Constitution_of_1803_(Transcript))). That language has since been altered slightly in the present text of Article I, Section 4, which states, “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.” Changing the words “for the defense of themselves and the State” to “for their defense and security” makes Ohio’s text far more personal to the bearer to the weapon than does the text of the Second Amendment, which still has the militia clause and no mention of self-defense or a personal right.

This Court has previously reviewed an ordinance prohibiting the possession and sale of “assault weapons” in the City of Cleveland and determined it did not violate the Ohio Constitution. *Arnold v. City of Cleveland*, 67 Ohio St.3d 35, 49, 616 N.E.2d 163 (1993). In *Arnold*, this Court held that “Section 4, Article I of the Ohio Constitution confers upon the people of Ohio the fundamental right to bear arms. However, this right is not absolute.” *Id.* 46. This Court also included “There is no question that the drafters of both the federal and state Bill

⁵ The grouping of the right to bear arms (for states that codified it, some did not) with these other concerns regarding standing armies, quartering of soldiers, preference for militia for State defense, and subordination of military authority to the civil authority is further proof that the right to bear arms was seen **at the time of ratification of the Bill of Rights** as a collective right to be armed in order for citizens to be part of the militia to defend the State. We see this grouping in the declarations of rights and various state constitutions enacted from 1776 to 1790, some mentioning the right to bear arms, some not, some mentioning a right to personal defense, some not, but almost all discussing the right to bear arms in the context of militia service and alongside these other principles regarding military power.

of Rights intended to grant to the people broad protections in many areas. These protections are imperative to the existence and continuance of our democratic society. Nevertheless, we must be cognizant that these freedoms, if made absolute, might result in the creation of public safety problems. Hence, we must be able to draw a line when certain rights have foreseeable consequences of causing harm to others.” *Arnold v. City of Cleveland*, 67 Ohio St.3d 35, 45-46, 616 N.E.2d 163 (1993). This is consistent with *Bruen*.

Long before, this Court, in affirming Ohio’s legislative ban on “tramps” from possessing of firearms, recognized that the constitutional right to bear arms “was never intended as a warrant for vicious persons to carry weapons with which to terrorize others. Going armed with unusual and dangerous weapons to the terror of the people is an offense at common law.” *State v. Hogan*, 63 Ohio St. 202, 219, 58 N.E. 572 (1900). This decision also conforms to *Bruen*’s focus on historical tradition. *New York State Rifle & Pistol Assn. v. Bruen*, ___U.S.____, 142 S.Ct. 2111, 2127, 213 L.Ed.2d 387 (2022)

For these reasons, this Court should decline to address the issue under the Ohio Constitution. Should it choose to do so, however, it should determine that R.C. 2923.13(A) does not violate the state’s Constitution.

CERTIFICATE OF SERVICE

A copy of the foregoing Supplemental Brief has been delivered by regular U.S. mail or electronic service to ROBERT B. MCCAULEB Attorney of Record, 310 Lakeside Avenue, Suite 200 Cleveland, OH 44113 on this 22nd day of September 2022.

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