[Cite as *State v. Skaggs*, 2024-Ohio-4781.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
STATE OF OHIO	:	Hon. W. Scott Gwin, P.J.
	:	Hon. John W. Wise, J
Plaintiff-Appellee	:	Hon. Andrew J. King, J.
	:	
-vs-	:	
	:	Case No. 24 CAA 03 0018
MELVIN SKAGGS	:	
	:	*NUNC PRO TUNC*
Defendant-Appellant	:	OPINION

CHARACTER OF PROCEEDING:	Appeal from the Delaware County Court of Common Pleas, Case No. 23-CR-I-04-0186
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	October 11, 2024

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
MELISSA SCHIFFEL Delaware County Prosecutor BY KATHERYN MUNGER Assistant Prosecutor 140 N. Sandusky St. Delaware, OH 43015	PAUL SCARSELLA 511 S. High Street Columbus, OH 43215

Gwin, P.J.

{¶1} Appellant Melvin Skaggs appeals the judgment entered by the Delaware County Court of Common Pleas convicting him following his pleas of no contest to having weapons while under disability, and sentencing him to three years of community control. Appellee is the State of Ohio.

Facts & Procedural History

{¶2} On April 30, 2021, appellant was traveling at a high rate of speed on I-71. A traffic stop was conducted. When the trooper approached the vehicle, she smelled marijuana. In plain view of the center console was an ashtray with burnt marijuana cigarettes. Appellant was removed from the vehicle because he attempted to reach towards the door and under his legs, despite being told to keep his hands on the steering wheel. The trooper conducted a search of the vehicle, and located body armor, marijuana, and a loaded firearm in the vehicle. The investigation subsequently revealed that the firearm was stolen during "an incident in 2020 in Madison Township." The gun was test-fired, and proved to be operational.

{¶3} Appellant was under a disability for possession of a firearm by virtue of a prior conviction in Franklin County for possession of heroin.

{¶4} Appellant was indicted by the Delaware County Grand Jury with having weapons while under disability, in violation of R.C. 2913.13(A)(3). On August 9, 2023, appellant filed a motion to dismiss the charge on the basis the charge violated his Second Amendment right to bear arms. Specifically, appellant argued R.C. 2923.13(A)(3) is unconstitutional as applied to him. Appellee filed a response on August 21, 2023. The

trial court conducted an evidentiary hearing on appellant's motion on September 12, 2023.

{¶5} The trial court issued a judgment entry on February 9, 2024, denying appellant's motion to dismiss. The trial court noted that the overwhelming majority of courts to address the issue have concluded the ruling in *Bruen* did not alter the Supreme Court's prior holdings that restrictions of the right of a convicted felon to possess weapons are constitutional, and numerous courts have specifically found the federal felon-in-possession prohibition contained in 18 U.S.C. 922(g)(1) constitutional. The court noted the minority opinions of *Range* and *Bullock*, but found these opinions to be outliers. The trial court found prohibiting firearm possession by those who are not law-abiding citizens is consistent with the Nation's tradition of firearms regulation, including prohibiting the ownership of particularly dangerous weapons, forbidding the carrying of firearms in sensitive places, and forbidding the possession of firearms by dangerous individual such as felons or the mentally ill.

{¶6} The trial court also found that the majority of courts addressing the issue post-*Bruen* have found the parallel federal statute – 18 U.S.C. 922(g)(3), which is broader than the Ohio statute – to be constitutional. Further, the court rejected the minority opinion in *Daniels*, finding the *Daniels* court sought to find a "historical twin" to 922(g)(3), rather than the *Bruen*-required "historical analogue." The trial court concluded that since appellant has a prior felony conviction for possession of heroin, in violation of R.C. 2925.11, he cannot be characterized as a "law-abiding" citizen and has forfeited his rights secured by the Second Amendment. The trial court found R.C. 2923.13(A)(3) is constitutional as-applied to appellant.

{¶7} Appellant entered a plea of no contest to the charge, and was convicted. The trial court sentenced appellant to three years of community control, per a joint sentencing recommendation. The trial court issued a judgment entry of sentence on February 27, 2024.

{¶8} Appellant appeals the judgment entries of the Delaware County Court of Common Pleas, and assigns the following as error:

{¶9} "I. THE UNITED STATES SUPREME COURT'S DECISION IN *NEW YORK STATE RIFLE AND PISTOL ASSOCIATION V. BRUEN*, MAKES THE STATUTE IN QUESTION IN THIS CASE UNCONSTITUTIONAL, AND THE TRIAL COURT'S DECISION SHOULD BE OVERRULED, AND THE MATTER SENT BACK TO THE TRIAL COURT."

I.

{¶10} Appellant contends the trial court committed error in denying his motion to dismiss the indictment. "Generally, we review a trial court's decision on a motion to dismiss an indictment for [an] abuse of discretion." *State v. Hudson*, 2022-Ohio-1435 ¶ 19. However, "appellate courts conduct a de novo review of a trial court's decision concerning a defendant's motion to dismiss all or part of an indictment based upon a constitutional challenge to the statute under which the defendant stands indicted." *State v. Bronkar*, 2019-Ohio-1306 ¶12 (5th Dist.).

{¶11} A statute may be challenged as being facially unconstitutional, or unconstitutional as applied to the particular party. *Arbino v. Johnson & Johnson*, 2007-Ohio-6948 ¶26. In this case, appellant makes only as as-applied challenge, not a facial challenge. "An as-applied challenge * * * alleges that application of the statute in a

particular factual context is unconstitutional." *Id.* "A party raising an as-applied constitutional challenge must prove by clear and convincing evidence that the statute is unconstitutional when applied to an existing set of facts." *Groch v. GMC*, 2008-Ohio-546, ¶181.

{¶12} In this case, appellant made an as-applied constitutional challenge to R.C. 2923.13(A)(3), arguing it unconstitutionally infringes on his right to keep and bear arms under the Second Amendment to the U.S. Constitution. The Second Amendment to the U.S. Constitution provides, "[a] well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

{¶13} Appellant's as-applied challenge relies extensively on the new framework mandated by the United States Supreme Court in *New York State Rifle & Pistol Assn. v. Bruen*, 597 U.S. 1 (2022). In *Bruen*, the Supreme Court clarified the legal test required for assessing Second Amendment challenges. The Court held the correct test must be "rooted in the Second Amendment's text, as informed by history," and that 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 syllabus. Pursuant to *Bruen*, when a statute infringes on a person's Second Amendment right to bear arms, the burden is on the state to demonstrate the "regulation is consistent with this Nation's historical tradition of firearm regulation." *Id.* at syllabus.

{¶14} This Court has previously analyzed R.C. 2923.13(A)(3) post-*Bruen* and found it was not plain error for the trial court to find the statute constitutional as applied to the defendant, who had two prior convictions for possession of cocaine and a conviction for drug trafficking. *State v. Jenkins*, 2024-Ohio-1094 (5th Dist.); *see also State v.*

Johnson, 2024-Ohio-1163 (8th Dist.) (no plain error in finding R.C. 2923.13(A)(2), (3) constitutional as applied to defendant).

{¶15} During the pendency of this case, the United States Supreme Court again addressed the issue of the Second Amendment in *United States v. Rahimi*, 602 U.S. ---, 144 S.Ct. 1889 (2024). *Rahimi* was a *Bruen*-based challenge to 18 U.S.C. § 922(g)(8), which prohibits an individual subject to a domestic violence restraining order from possessing a firearm.

{¶16} The U.S. Supreme Court reversed the Fifth Circuit Court of Appeals in *Rahimi*, and found Section 922(g)(8) constitutional, holding it was analogous to founding-era "surety" and "going armed" laws. *Id.* at syllabus. Unlike in *Bruen*, the majority in *Rahimi* once again identified prohibitions on the possession of firearms by "felons and the mentally ill" as "presumptively lawful." *Id.* at *1902 citing *District of Columbia v. Heller*, 554 U.S. 570 (2008). Accordingly, *Rahimi* reaffirmed the notion that the Supreme Court's previous case of *Heller* was not undermined by *Bruen*, and that when the prohibition relates to a convicted felon or someone who is otherwise deemed a danger to others, the Second Amendment is not a bar to disarming such a person. *Id.*

{¶17} The Court reaffirmed its holding in *Bruen* that the appropriate analysis involves considering whether the challenged regulation is consistent with the principles that underpin the Nation's regulatory tradition and that when a firearm regulation is challenged under the Second Amendment, the government must show the restriction is "consistent with the Nation's historical traditions of firearm regulation," and a court must "ascertain whether the new law is 'relevantly similar' to laws that our tradition is understood to permit. *Id.* at *1898. However, the Court found the Fifth Circuit "erred in

reading *Bruen* to require a 'historical twin' rather than a 'historical analogue,'" and "misapplied the Court's precedents when evaluating Rahimi's facial challenge." *Id.* at *1891. The Court stated, "some courts have misunderstood the methodology of our recent Second Amendment cases. These precedents were not meant to suggest a law trapped in amber." *Id.* at *1897. The Court continued, "if laws at the founding regulated firearm use to address particular problems, that will be a strong indicator that contemporary laws imposing similar restrictions for similar reasons fall within a permissible category of regulations." *Id.*

{¶18} The Court noted that, unlike the regulation it struck down in *Bruen*, a broad licensing regime, Section 922(g)(8) does not broadly restrict arms use by the public generally. *Id.* at syllabus. Similarly, R.C. 2923.13(A)(3) does not broadly restrict arms use by the public generally. It only restricts use by a specifically defined category of people.

{¶19} In both its written argument and during its oral argument, appellee argued R.C. 2923.13(A)(3) is "relevantly similar" to two separate historical traditions: (1) the historical tradition of restricting the right of habitual drugs users, alcoholics, or the mentally ill to possess or carry firearms and (2) the historical tradition of disarming those the legislature deems dangerous. The trial court agreed with appellee. We concur with the trial court's determination, and find, pursuant to *Bruen*, giving due consideration to the instructions in *Rahimi* that a "historical twin" is not required and prohibitions on the possession of firearms by felons are "presumptively lawful," the appellee met its burden.

{¶20} Rather than attempt to rehash the historical traditions that are relevantly similar, we adopt and incorporate the reasoning and detailed description of the "historical

traditions" contained in two separate opinions. In *State v. Weber*, Justice DeWine issued an extensive concurrence. 2020-Ohio-6832, ¶57-109 (DeWine, J., concurring). In this concurrence, Justice DeWine reviewed the "historical evidence" as to how and why the right of alcoholics and the mentally ill to possess or carry firearms was restricted. *Id.* We incorporate the detailed historical analysis done by Justice DeWine, and find the historical tradition of keeping guns from those the government fairly views as dangerous, like alcoholics and the mentally ill, is sufficiently analogous or "relevantly similar" to R.C. 2923.13(A)(3), which keeps guns from felons convicted or under indictment for illegal possession of drugs.

{¶21} As to the historical tradition of disarming those the legislature deems dangerous, we adopt and incorporate the detailed historical analysis completed by the Sixth Circuit in *United States v. Williams*, 2024 WL 3912894 (6th Cir. Aug. 23, 2024); *see also analysis in U.S. v.* Goins, 647 F.Supp.3d 538 (E.D. Kentucky 2022) (thorough analysis detailing historical tradition of disarming anyone judged to be dangerous). Writing for the majority, Judge Thapar reviewed and explained historical evidence from the early English kings, Parliament, common law surety regimes, and statutory law dating back to 1328 demonstrating the history and tradition of disarming individuals that were deemed dangerous. *Id.* at *6-*13. We find this detailed analysis to be persuasive. The Sixth Circuit concluded, the "nation's history and tradition demonstrate Congress may disarm individuals they believe are dangerous," and Section 922(g)(1) "is an attempt to do just that." *Id.* at *17.

{¶22} While appellant contends R.C. 2923.13(A)(3) is unconstitutional as applied to him because his previous offense was for possession of heroin, we find appellant's

argument unavailing. “Possession, use, and distribution of illegal drugs represent ‘one of the greatest problems affecting the health and welfare of our population.’” *Harmelin v. Michigan*, 501 U.S. 957, 1002 (1991), quoting *Treasury Emp. v. Von Rabb*, 489 U.S. 656, 668 (1989). “Drug crimes thus threaten to cause great harm to society.” *U.S. v. Biery*, 2024 WL 3540989, *8 (M.D. Pennsylvania July 25, 2024). The “dangerous connection between illegal drugs and firearms is well-known and has been recognized by Congress” and the United States Supreme Court. *United States v. Levasseur*, 2023 WL 6623165 (D. Mass. October 11, 2023), *9, *citing* 18 U.S.C. § 924(c)(1)(A) and *Smith v. United States*, 508 U.S. 223, 240 (1993). As noted by one court in its analysis, though a conviction may only be for possession of drugs, “they flag [a defendant] as having an above average chance of committing future crimes * * * marking him as the sort of threat to public safety that Congress can permissibly seek to eliminate by stripping him of his Second Amendment rights.” *U.S. v. Goins*, 647 F.Supp.3d 538, 554 (E.D. Ken. Dec. 21, 2022) (citing study that 17% of state and 18% of federal prisoners say they committed their offenses to obtain money for drugs and a study of drug court participants re-offending with one or two years). Additionally, “[m]ental impairments associated with unlawful drug use are akin to similar impairments that justified disarmament of those whose mental facilities were impaired by alcohol or mental illness.” *United States v. Vangdy*, 2024 WL 3400255, *1 (D. Kansas July 12, 2024). Appellant’s drug offense indicates he is more likely than the average person to commit a future felony, marking him as the sort of threat to public safety that the Ohio legislature can permissibly seek to eliminate by stripping him of his Second Amendment rights. *U.S. v. Goins*, 647 F.Supp.3d 538, 555 (E.D. Ken. Dec. 21, 2022).

{¶23} Numerous federal courts have examined and considered the constitutionality of United States Code provisions similar to R.C. 2923.13. Although 18 U.S.C. § 922 does not have a provision which prohibits possession by a person convicted of a felony drug offense, it does prohibit possession of a firearm by a person who has been convicted of a felony drug offense, it does prohibit possession of a firearm by a person who has been convicted of a crime punishable by more than a year in prison, and also prohibits a possession of a firearm by a person who is an unlawful user or addicted to any controlled substance. 18 U.S.C. § 922(g)(1),(3).

{¶24} The overwhelming weight of federal authority upheld federal prohibitions on possession of weapons by felons and/or persons using controlled substances as constitutional under *Bruen*. *See, e.g., Fried v. Garland*, 640 F.Supp.3d 1252, 1263 (N.D. Florida 2022) (holding the historical tradition of keeping guns from those the government fairly views as dangerous – like alcoholics and the mentally ill – is sufficiently analogous to modern laws keeping guns from habitual users of controlled substances); *United States v. Ledvina,* 2023 WL 5279470 (N.D. Iowa August 16, 2023) (holding Section 922(g)(3) does not violate the Second Amendment); *United States v. Walker*, 2023 WL 393 (D. Nebraska, June 9, 2023) (rejecting post-*Bruen* challenge to Section 922(g)(3); *United States v. Posey*, 655 F.Supp.3d 762 (N.D. Ind. 2023) (denying as-applied and facial challenge to Section 922(g)(3)); *United States v. Sanchez*, 646 F.Supp.3d 825 (W.D. Texas 2022) (holding that Section 922(g)(3) is "consistent with this Nation's historical tradition of firearm regulation"); *United States v. Seiwert*, 2022 WL 4534605 (N.D. Ill. Sept. 22, 2022) (holding Section 922(g)(3) is "relevantly similar to regulations aimed at preventing dangerous or untrustworthy persons from possessing and using firearm, such

as individuals convicted of felonies or suffering from mental illness"); *United States v. Jackson*, 2024 WL 3711155 (8th Cir. 2024) (finding Congress acted within historical tradition when it enacted 922(g)(1) to address modern conditions); *United States v. Langston*, 2024 WL 3633233 (1st Cir.) (holding Section 922(g)(1) not unconstitutional as applied to defendant, who had previously convictions for theft and drug trafficking).

{¶25} Further, federal courts that have specifically considered whether Section 922(g)(1) and (3) are unconstitutional as-applied to defendants convicted of possession of drugs have rejected these as-applied challenges. *United States v. Levasseur*, 2023 WL 6623165 (D. Mass. October 11, 2023) (finding Section 922(g)(1) sufficiently analogous to historical practices of disarming dangerous persons and stating "prior felony conviction for the possession of methamphetamine makes him sufficiently dangerous that he may constitutionally be disarmed"); *United States. v. Biery*, 2024 WL 3540989 (M.D. Pennsylvania July 25, 2024) (holding prior convictions of possession of methamphetamine sufficient to suggest appellant poses a credible threat to public safety; "although methamphetamine possession did not concern legislatures at the time of the founding or after the Civil War, individuals like defendant were disarmed under historical analogues sufficient to withstand his as-applied challenge to Section 922(g)(1)"); *U.S. v. Goins*, 647 F.Supp.3d 538 (E.D. Ken. Dec. 21, 2022) (Section 922(g)(1) not unconstitutional as applied to defendant even though his previous felony was for drug possession; the possession offense indicates he is more likely than the average person to commit a future felony); *United States v. Youngblood*, 2024 WL 3449554 (D. Montana July 17, 2024) (Section 922(g)(3) not unconstitutional as applied to defendant who previously was shown to possess methamphetamine and fentanyl).

{¶26} The legislative history of R.C. 2923.13 is also instructive in this case. When enacted in 1974, the Ohio Legislative Services Commission's analysis of the statute specifically provided, "[t]his section is similar to a former prohibition against weapons in the hands of bad risks, including fugitives, certain felons, drug dependent persons, alcoholics, and mental incompetents." Legislative Service Commission, *Section 2923*, https://codes.ohio.gov/ohio-revised-code/section-2923.13 (accessed August 28, 2024). Thus, in enacting the statute, the Ohio Legislature grouped drug dependent persons in the "bad risk" category with alcoholics and "mental incompetents."

{¶27} Additionally, the state's "narrowly tailored purpose" is demonstrated by the fact that, prior to 2011, minor misdemeanor drug offenses under R.C. 2925.11 qualified as drug-related offenses subject to the weapons-under-disability statute. In 2011, the legislature eliminated the application of the weapons prohibition to those convicted of minor misdemeanor drug offenses. 2011 Ohio H.B. 54 Analysis. https://www.legislature.ohio.gov/legisation (accessed August 28, 2024). The prohibition, as modified by 2011 Ohio H.B. 54, applies to any *felony* offense involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse. *Id*. This more narrow scope of the rule further demonstrates the current version of the statute is "relevantly similar to laws that our tradition is understood to permit." *U.S. v. Rahimi*, 602 U.S. ----, 144 S.Ct. 1889 (2024).

{¶28} As noted by the trial court, we similarly note that Ohio's ban on possession of a firearm by a person convicted of a felony drug offense is not necessarily a lifetime ban, as R.C. 2923.14 allows a person to seek relief from weapons disability under certain circumstances. Thus, pursuant to R.C. 2923.14, appellant is entitled to make an

individualized showing of his qualification to bear arms. *See State v. Windland*, 2024-Ohio-1827 (5th Dist.).

{¶29} Appellant in this case relies primarily on the federal cases of *Range*, *Rahimi,* and *Daniels* to support his argument. In *Daniels*, the Fifth Circuit Court of Appeals found the federal ban on firearm possession unconstitutional in a case where the defendant admitted to using marijuana multiple times per month. *U.S. v. Daniels*, 77 F.4th 337 (5th Cir. 2023). The Fifth Circuit held a federal statute prohibiting firearm possession by a person subject to a domestic violence restraining order was unconstitutional in *U.S. v. Rahimi*, 61 F.4th 443 (5th Cir. 2023). In *Range,* the Third Circuit Court of Appeals found a provision prohibiting a felon from possessing a weapon unconstitutional as applied to a person convicted of making false statements to obtain food stamps, but noted the decision was narrow, and only applied to the defendant given his specific violation. *Range v. Atty. Gen. United States of America*, 69 F.4th 96 (3rd Cir. 2023).

{¶30} However, as noted above, in *Rahimi,* the U.S. Supreme Court reversed the Fifth Circuit, finding the federal statute prohibiting firearm possession by a person subject to a domestic violence restraining order constitutional under the Second Amendment. 602 U.S. ----, 144 S.Ct. 1889 (2024). The U.S. Supreme Court vacated and remanded both the *Range* and *Daniels* cases to the Fifth and Third Circuits, "for further consideration in light of *United States v. Rahimi.*" *U.S. v. Daniels*, 2024 WL 3259662 (July 2, 2024); *Garland v. Range*, 2024 WL 3259661 (July 2, 2024). Further, post-*Rahmini*, the Third Circuit found § 922(g)(1) constitutional as applied to a defendant who was previously convicted of drug trafficking. *United States v. Rodriguez*, 2024 WL 3518307 (3rd Cir.). Finally, the Sixth Circuit has found Section 922(g)(1) constitutional on its face, and

constitutional as-applied to crimes that pose a significant threat of danger, including drug trafficking. *United States v. Williams*, 2024 WL 3912894 (6th Cir. Aug. 23, 2024). In this case, appellant's previous criminal conviction was for possession of heroin, not mail fraud or making false statements.

{¶31} The history and tradition relevant to the Second Amendment support the legislature's power to restrict the Second Amendment right of drug users, alcoholics, or the mentally ill to carry firearms, and/or the history and tradition relevant to the Second Amendment support the legislature's power to disarm those the legislature deems dangerous. In this case, appellant was previously convicted of possession of heroin, a fifth-degree felony. We find appellee met its burden to point to historical precedent demonstrating R.C. 2923.13(A)(3) is consistent with the Nation's historical tradition of firearms regulation, as applied to appellant.

{¶32} Based on the foregoing, appellant's assignment of error is overruled. The judgment entries of the Delaware County Court of Common Pleas are affirmed.

By Gwin, P.J., and

Wise J., concur;

King, J., dissents

King, J. dissents,

{¶ 33} The Second Amendment of the United States Constitution requires the State of Ohio to demonstrate that R.C. 2923.13(A)(3) is consistent with the historical tradition of firearm regulations. *State v. Striblin*, 2024-Ohio-2142 (5th Dist.), citing *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1, 17 (2022). If the state cannot meet its burden, then the court has an obligation to hold the statute unconstitutional. *Striblin* at ¶ 38. Any court that relieves the state of this burden does so outside the bounds of the constitution itself. Because I find the state did not meet this burden in this case, I conclude we must find the statute unconstitutional as applied to Skaggs. Because this court failed to do so, I dissent.

A Brief History of This Court's Precedent Post-*Bruen*

{¶ 34} In *Striblin*, this court was faced with a Second Amendment challenge following a plea of no contest. The defendant pleaded no contest to R.C. 2923.121(A), which prohibited anyone from possessing "a firearm in any room in which any person is consuming beer or intoxicating liquor in a premise for which a D permit has been issued . . . ." *Id*. at ¶ 13-15. We held the state failed to show there was a historical tradition that would support depriving someone of their constitutional right in a private establishment where liquor was consumed by any person. *Id*. at ¶ 37-38.

{¶ 35} In *State v. Parker*, 2023-Ohio-2127 (5th Dist.), this court was asked to consider whether R.C. 2923.13(A)(1) was consistent with the Second Amendment. *Id.* at ¶ 24-26. The defendant had an active warrant while possessing a firearm. We held because the state pointed to no authority allowing us to sustain the act in that circumstance, the trial court was correct in dismissing the indictment. *Id.* at ¶ 36. Although

the court was not required to analyze the history and tradition of firearm regulations in *Parker*, it, like *Striblin*, properly held the state to its constitutional burden.

{¶ 36} While this court found neither defendant could be properly prosecuted in *Striblin* or *Parker*, we have not sustained every challenge. This court also has reviewed at least one post-*Bruen* challenge of R.C. 2923.13(A)(2). *State v. Winland*, 2024-Ohio-1827 (5th Dist). There, we overruled the defendant's challenge to the statute; we also overruled a Second Amendment challenge to the charged firearm specification. *Id.* at ¶ 31. We also previously upheld R.C. 2923.13(A)(3) against a plain error challenge. *State v. Jenkins*, 2024-Ohio-1094 (5th Dist.). In *Jenkins*, I wrote separately to discuss some of the issues that would likely be implicated in a challenge brought before us that were properly preserved. *Id*. at ¶ 57-74. I turn to those issues now as they are relevant to the disposition of the case before us.

Skaggs is a "Person" Under the Text of the Second Amendment and Thus Entitled to its Protection

{¶ 37} In order to meet its burden, the state first argues that Skaggs is not a person under the Second Amendment and thus is outside the scope of protection. Appellee's Brief at 10. In *Striblin*, this court acknowledged there was an open question whether categories of individuals could be disarmed without consideration of the history and tradition of firearm regulations. *Striblin* at ¶ 22. That line of reasoning was primarily born from the Supreme Court's repeated statements suggesting that felons might be properly disarmed (more on that below) in conjunction with *Bruen's* command to analyze the text of the Second Amendment as the first step. Whatever viability that argument had previously, it is no longer the case after *United States v. Rahimi*, 602 U.S. ___, 144 S.Ct.

1889 (2024). Two aspects of *Rahimi* require us to proceed to the history and tradition analysis. First, the Supreme Court explicitly rejected the argument the state makes here. In *Rahimi*, the United States argued the defendant could be disarmed because he was not responsible. *Id.* at 1903. The Court held that "responsible" was a vague term and it did not derive from any precedent. *Id*.

{¶ 38} Second, this statement cannot be argued away as dicta because in *Rahimi,* the Court proceeded to the history and tradition analysis. *Id*. at 1897-1898. If the text of the Second Amendment allowed the legislature to establish categories of irresponsible individuals who could be properly disarmed, then there would have been no need for the Court to have proceeded with the extensive consideration of history and tradition. Thus, the natural conclusion is that Mr. Rahimi was a "person" protected under the Second Amendment.

{¶ 39} Here too, we must likewise hold Skaggs to be a person covered by the text and proceed to a consideration of analogous history and tradition of firearm restrictions. The reason for that conclusion is as follows. The Court's opinion noted that Mr. Rahimi threatened and assaulted one woman, threatened another with a handgun, and was connected to at least five shootings. *Id*. at 1895. Understandably, the state court adjudicated Mr. Rahimi as a person who represents "a credible threat to physical safety." *Id*. at 1896. As a consequence of this finding, he was prohibited from possessing a firearm under 18 U.S.C. 922(g)(8), which is the federal statutory analogue to Ohio's weapons under a disability statute.

{¶ 40} In contrast here, the subject of R.C. 2923.13(A)(3) is to disarm an exceptionally broad swath of drug offenders. This subsection statute requires no finding

of any threat of physical safety to another, let alone a present and credible threat. Here, Skaggs is a non-violent offender whose predicate conviction was six years ago and for only drug possession under R.C. 2925.11. It would be highly discordant to treat a presently dangerous and violent person such as Mr. Rahimi as "law abiding enough" to be covered by the text of the Second Amendment, but not Melvin Skaggs. I therefore conclude we should proceed to the second step in accord with *Rahimi*. *See also United States v. Connelly*, ___ F.4th ___, 2024 WL 3963874 (5th Cir. 2024) (holding a marijuana user is a person under the text of the Second Amendment).

The Second Amendment Does Not Allow a Prohibition on Possession of a Firearm Merely Because the Person Has Been Convicted for the Possession of a Controlled Substance

{¶ 41} The state argues alternatively that the history and tradition of firearm regulations support Skaggs's conviction under R.C. 2923.13(A)(3). Its argument takes three forms. First, the state makes a broad argument that "controlled substances users [can be prohibited] from possessing firearms." Appellee's Brief at 14. I find this argument unavailing because it conflates a state's historical authority to prohibit the possession of a firearm while a person is under the present influence of drugs or alcohol with the question of its authority to do the same because of past consumption.

{¶ 42} In *Striblin*, this court held there was such a distinction and followed the general reasoning of Justice DeWine in *State v. Weber,* 2020-Ohio-6832. *Striblin,* 2024-Ohio-2142, at ¶ 32 (5th Dist.) ("Precedent from the Supreme Court of Ohio suggests that intoxication is a narrow prohibition, rather than one from which a court can analogize broad prohibitions"). We additionally considered the history and tradition of regulating

possession of firearms while intoxicated, particularly the work done by the United States Court of Appeals in *United States v. Daniels*, 77 F.4th 337, 339 (5th Cir. 2023). *See also Jenkins*, 2024-Ohio-1094, at ¶ 68 (5th Dist.) (King, J., concurring). We ultimately reached the same conclusion as the Fifth Circuit, finding that history and tradition supported only prohibiting possession of firearms while intoxicated, and found the historical analogues were limited in both scope and duration of disarmament. *Striblin* at ¶ 33-34.

{¶ 43} Accordingly, our own precedent, analyzing the history and tradition of firearm restrictions related to intoxication, does not support the state's position. Here, there is no claim of intoxication at the time of arrest, nor is this a prosecution under either R.C. 2923.15 or R.C. 2923.13(A)(4). In this case, six years had elapsed between the two events, which attenuates the two acts. Thus, there is a lack of a proper constitutional nexus to criminalize firearm possession when an individual possessed a controlled substance at one point and the firearm possession charge occurred years later.

{¶ 44} Without consideration of our own precedent on the historical intersection of firearms and intoxicants, the majority instead purports to adopt the reasoning of Justice DeWine's concurrence in *Weber* and the Sixth Circuit's decision in *United States v. Williams,* 113 F.4th 637, 2024 WL 3912894 (6th Cir. 2024). But neither case dealt with R.C. 2923.13; *Weber* predates *Bruen* and *Rahimi*, thus Justice DeWine had no opportunity to analyze those cases; and the federal statute at issue in *Williams* dealt with the federal ban on felons in possession of firearms under 18 U.S.C. 922(g)(1). To conclude that these cases are controlling relieves the state of its burden to show the lawfulness of the restriction at issue. I cannot join this analysis because showing our work is not an optional step in evaluating constitutional rights.

{¶ 45} Rather, our approach here should be the same as our approach in *Striblin* and what the Sixth Circuit itself did in *Williams*: follow the Supreme Court's mandate and review the text, history, and tradition of the Second Amendment. Were there a case already addressing all the issues before us, ditto marks might suffice, but it is not sufficient for a matter of first impression.

{¶ 46} The majority finds the "overwhelming weight of federal authority" supports its conclusion. But in my review of the Second Amendment and *Bruen,* I find nothing supporting this appeal to authority.[1] Rather, the Supreme Court of the United States made our charge clear; we are to ensure the state carried its burden that the firearm restriction at issue is consistent with this nation's history and tradition of firearm regulations.

{¶ 47} The only history offered by the majority is to conclude that a conviction for drug possession deems the person the equivalent of "mental incompetent," "drug dependent," or a "bad risk." But we may not assume a conclusion. Instead, we are required to demand that the state show us how imposing a functional lifetime ban on someone for a drug possession conviction that happened years ago and then convicting the same person for violating that ban is consistent with the history and tradition of firearm regulations. While it is surely easier to quickly label the defendant as dangerous and conclude our work is done, the process of deciding whether this defendant can be disarmed is more exacting. And neither of the cases adopted by the majority helps explain how it reached its conclusion.

[1]For example, *Williams* itself discusses how some circuits rely on *pre-Bruen* precedent to sustain *post-Bruen* challenges. We are not likewise bound by this rule of horizontal precedent.

{¶ 48} In *Williams*, the Sixth Circuit attempts to tease out the various categories of dangerousness. While it does suggest drug trafficking might lend itself to a determination the person is dangerous, notably absent from its opinion is any discussion about drug possession or drug use. So, we are left to wonder how *Williams* leads us to the conclusion that Skaggs is indeed dangerous. In addition, it remains possible that the application of *Williams* is modest because of a defendant's constitutional right, under the Sixth Amendment, to have elements of the offense determined by a jury. *United States v. O'Brien*, 560 U.S. 218 (2010). Although the principal first announced in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), allows a trial court to consider the fact of prior conviction, certain aspects of the Sixth Circuit's approach in *Williams* appear to suggest a court can determine dangerousness by inferring facts from prior convictions, which would seem in some cases to present a Sixth Amendment problem. Thus, the Sixth Circuit's opinion is of limited utility here as we consider a single possession offense that occurred six years ago.

{¶ 49} In *Weber* (which we largely followed in *Striblin*), Justice DeWine was clear that what made the person dangerous was being under the influence while handling a firearm. It was the close temporal nexus of being in the altered state and handling the firearm that made the person dangerous. Here there is no such temporal nexus.

{¶ 50} In the absence of historical considerations, the majority instead turns to consider the "narrowly tailored" purpose of the statute. But judicial policymaking under the guise of tiers of review is expressly forbidden by Second Amendment jurisprudence. The absence of historical evidence to support the restriction is not now a gap that we can

fill by the exercise of judicial judgment. Our mandate on this is clear, when the state cannot prove the restriction, it cannot be allowed to stand.

{¶ 51} Although the majority cites district court opinions that agree with its chosen outcome, it omits discussion of the federal appellate cases adverse to its position, finding because they were vacated, they are no longer significant. As discussed below, not all of them were vacated and a judicial determination about their legal status does not blot from existence the historical evidence they discuss. That historical evidence is adverse to the majority's conclusion; and that evidence exists and must be considered irrespective of whether the underlying opinion is binding authority on anyone.

{¶ 52} An example of adverse authority that was ignored is the very recent *Connelly* case from the Fifth Circuit regarding whether a user of a controlled substance can be barred from possession of a firearm under 18 U.S.C. 922(g)(3). *Connelly*, ___ F.4th ___, 2024 WL 3963874. It held that the statute was unconstitutional as applied to Connelly. In reaching that conclusion, the Fifth Circuit first considered whether laws disarming the mentally ill were sufficiently analogous to support the restriction; the court found they were not. Second, they turned to the question whether a non-violent marijuana user could be considered dangerous and thus might be disarmed under *Rahimi's* approach. After considering the history, there too it concluded that history was insufficiently analogous.

{¶ 53} Finally, the Fifth Circuit considered how laws regarding intoxication and possession of firearms impacted the right of a drug user to be armed. As we found in *Striblin*, they too found mere consumption (or use) of an intoxicating substance to be insufficient basis for abridging a person's constitutional rights; instead, the Fifth Circuit

found active intoxication while in possession of firearms was historically required under the Second Amendment. The Fifth Circuit then considered the breadth of the statute, finding that it "restricts [the defendant's] rights more than would any of the historical and traditional laws highlighted by the government." In sustaining the as applied challenge it held: "The history and tradition before us support, at most, a ban on carrying firearms while an individual is presently under the influence. By regulating [Connelly] based on habitual or occasional drug use, § 922(g)(3) imposes a far greater burden on her Second Amendment rights than our history and tradition of firearms regulation can support."

{¶ 54} I too conclude, upon the review of the history and tradition of firearm regulations, that the denial of right to possess, carry, and use firearms over a single possession offense that occurred years ago under R. C. 2923.13(A)(3) imposes an unconstitutional restriction on Skaggs. Thus, R.C. 2923.13(A)(3) is unconstitutional as applied to Skaggs.

The Second Amendment Does Not Allow a State to Disarm an Individual Based Solely Upon its Own Authority to Classify an Offense as a Felony

{¶ 55} The state's second argument is that commission of any felony is sufficient for the state to bar that person from possession of a firearm. Appellee's Brief at 10-15. The legal basis for this argument traces its origins to *District of Columbia v. Heller*, 554 U.S. 570 (2008), where the Supreme Court of the United States stated that restrictions on felons in possession are presumptively lawful. *Id*. at 627. But the Supreme Court's holdings in *Bruen* and *Rahimi* do not support broad disarmament regimes based on any felony convictions. With regard to *Bruen*, a number of federal appellate courts questioned

disarming non-violent felons that presented no threat of danger. *See Jenkins* at ¶ 57-74 (King, J., concurring).

{¶ 56} In addition to those cases, the Ninth Circuit also found such prohibitions unconstitutional. *United States v. Duarte*, 101 F.4th 657 (9th Cir. 2024), *rehearing in banc granted,* 108 F.4th 786 (9th Cir. 2024). All of these cases reviewed the history and tradition of firearm regulations and found the state failed to meet its burden. In these cases that found the federal analogue to R.C. 2923.13(A) unconstitutional, there was a recognition that our modern understanding of what constitutes felonious conduct has drifted far from the serious types of offenses found in the colonial period and the Founding Era (more on that below).

{¶ 57} While there was plenty of reason to doubt any and all felons could be properly disarmed after *Bruen*, that proposition was substantially weakened after *Rahimi*. After reviewing the history and tradition of disarming people presenting danger or causing alarm, the Court held as follows: "[A]n individual found by a court to pose a credible threat to the physical safety of another may be temporarily disarmed consistent with the Second Amendment." *Rahimi*, 144 S.Ct. at 1903. R.C. 2923.13(A)(3) does indeed relate to a judicial act, i.e., a judgment of conviction, but the remainder of this holding does not permit the state to disarm Skaggs.

{¶ 58} A six-year old conviction for possession of a controlled substance does not manifestly lend itself to a conclusion that the offender poses a credible, present threat to others. Outside of possession, some other aspects of the statute such as drug trafficking may, consistent with *Rahimi*, allow for disarmament, but those questions are not before us today. To be sure, the Court did not hold that a credible threat of physical safety to

others was the only criterion allowing for lawful disarmament. For example, the relevant history and tradition of firearm regulations might support the disarmament (at least for some duration) of violent, dangerous people and possibly for other serious criminal offenders. But possession of a controlled substance fits within none of those categories. The fact that Ohio has declared it a felony does not change this outcome either.

{¶ 59} A subsidiary issue within this particular argument from the state revolves around its authority to make and classify felony offenses. Appellee's Brief at 12. A similar issue was reviewed and discussed in the Ninth Circuit *Duarte* case. *Duarte,* 101 F.4th at 690. That court held the state was required to produce distinctly similar analogues to the offense charged from the Founding Era of crimes that were punished by death, lifetime imprisonment, or permanent forfeiture of property. *Id.* The Fifth Circuit recently also reached a similar conclusion, holding this: "Simply classifying a crime as a felony does not meet the level of historical rigor required by *Bruen* and its progeny." *United States v. Diaz,* ___ F.4th ___, 2024 WL 4223684 (5th Cir. 2024).

{¶ 60} The need for a definition of a felony grounded in the federal constitution is even more acute when considering the entire constitutional structure. The federal right of all persons to keep and bear arms that is secured by the Second Amendment would quickly become a highly irregular national right without defining what is a felony by the constitution. It is helpful to remember that the right to keep and bear arms serves an important purpose of furthering a person's right to self-defense. But beyond that, the Second Amendment is also thought to secure the right of the people to be free of tyranny. *Heller*, 554 U.S. at 598. *See also Silveira v. Lockyer*, 328 F.3d 567, 570 (9th Cir. 2003) (Kozinski, J., dissenting) (describing the Second Amendment as a doomsday provision).

In light of the critical rights and protections secured by the Second Amendment, the scope of protections cannot hinge on a hodgepodge of differing state policy preferences. Like the rest of the Second Amendment, we are obliged to consider the history and tradition of felony offenses to determine which modern-day offenses are sufficient analogues.

{¶ 61} In his commentaries, Sir William Blackstone observed that felonies were serious offenses and usually carried with them complete forfeiture of real and personal property and, at the time of his writings, the death penalty. Blackstone, *1723-1780 Commentaries on the Laws of England,* Book 4, Chapter 7, at 54-56 (Lonang Press Electronic Ed. 2005). As deleterious as possessing and even using a controlled substance might be, even to this day we do not think of it as so severe as to warrant death or complete forfeiture of all property. So, if we were to consider the historical support of declaring the possession of a controlled substance to be like a felony under common law, we would find an absence of such support.

{¶ 62} Moreover, a state-by-state standard (rather than one grounded in history and tradition) for evaluating whether a state can eliminate a federal right would also undermine other federal provisions such as Section 1 of the Fourteenth Amendment and Article VI of the United States Constitution.[2] Instead, we should apply the general federal constitution method of construction when the text is indeterminate and turn to history and tradition to inform the text. *See, e.g., Bruen*, 597 U.S. 1; *Dobbs v. Jackson Women's*

[2]Convictions that irregularly deprive a person of their right to bear arms while in the several states might also violate Article IV, Section 2. *See Corfield v. Coryell*, 6 F.Cas. 546 (1823) (discussing the natural right to obtain safety). *See also* Randy E. Barnett, *Three Keys to the Original Meaning of the Privileges or Immunities Clause, Georgetown Law Faculty Publications and Other Works* (2020), https://scholarship.law.georgetown.edu/facpub/2221.

Health, 597 U.S. 215 (2022); *Kennedy v. Bremerton School District*, 597 U.S. 507 (2022). In his concurrence in *Rahimi*, Justice Kavanaugh remarked that history, not policy, is the proper guidance for ascertaining the meaning of vague constitutional text. *Rahimi*, 144 S.Ct. at 1912. Thus, whether an offense permits a state to disarm a citizen turns on the history and tradition of disarming in similar offenses–not state policy preferences. And as discussed above and again below, when examining Ohio's history of firearm regulations, there is no such history and tradition to support disarming and then convicting Skaggs.

The Rights Secured by the Second Amendment Cannot be Circumscribed Merely Because R.C. 2923.14 Would Restore the Right to Keep and Bear Arms in Some Instances

{¶ 63} The state's third argument to sustain the conviction is that Ohio's relief from disability statute (R.C. 2923.14) should factor into our analysis of the constitutionality of the weapons under a disability statute. As I explained above, the history and tradition of firearm regulations do not allow Skaggs to be disarmed six years after a conviction for possession. It follows then that the obvious reason R.C. 2923.14 does not operate to limit the unconstitutional overreach of R.C. 2923.13(A)(3) is because it is discretionary post-deprivation relief. The question at the bar is not whether Ohio may restore rights it may constitutionally take away, but rather whether it may take them away for six years in the first instance, which it cannot.

{¶ 64} Even if we assume for the sake of argument that such a conviction allowed the state to prohibit firearm possession at the first instance, the statutory scheme still runs afoul of the Second Amendment. The state argues any disability imposed is not permanent because of R.C. 2923.14, which provides a mechanism for relief from

disability. Appellee's Brief at 14-15. Even if that is technically correct, the disability continues indefinitely and any relief requires the offender to request it; the court maintains complete discretion whether to restore the right; and even after the right is restored, it may be later revoked for good cause. This regime is not consistent with either the Supreme Court's precedent or the history and tradition of prohibitions.

{¶ 65} We are first faced with *Rahimi's* holding that emphasized the prohibition on the possession of firearms was temporary. Beyond that holding, a theme that can be discerned from the history and tradition analyzed in cases like *Connelly* and *Daniels*, is that when the conduct giving rise to the lawful prohibition abates, so too does the prohibition. And the examination of history and tradition in *Duarte*, *Range v. Attorney General United States of America*, 69 F.4th 96, 98 (3d Cir. 2023), *Diaz*, and even *Williams* supports the conclusion that not every felony conviction is constitutionally sufficient to permanently disarm a person such as Skaggs.

{¶ 66} At least one instance from our history would suggest permanent prohibitions on firearm possession for serious crimes are not a part of the American history and tradition of firearm regulations. On August 29, 1786, Shays's Rebellion began with the seizure of the Northampton Courthouse. Other courts were then seized in an apparent effort to forestall foreclosures. Then on January 26, 1787, Captain Daniel Shays and about 1,500 men planned to raid the Springfield Armory. A militia responded and the event ended on February 4th with the mob dispersed. In that same month, the Massachusetts legislature passed the Disqualification Act. Massachusetts Acts and Session Laws, January 1787, at 555-558. This act barred the participants from bearing arms for three years and required them to temporarily surrender their firearms.

{¶ 67} At the time, it was well understood that treason and rebellion were among the most serious felonies. Blackstone, Book 4, Chapter 6, at 44-45. Yet these men only suffered a temporary loss of their firearms and their right to bear them. While only one historical event, it does suggest that even if after a final release that prohibition on possession like R.C. 2923.13 is permissible, the extended period of disarmament must be a relatively brief and fixed timeframe.

{¶ 68} So, even if it is true that some convictions allow the state to lawfully extend a prohibition on the possession of firearms for some period of time beyond a felon's completed sentence, R.C. 2923.14 is insufficient to lawfully make that work. I see at least two reasons as to why that is the case.

{¶ 69} The first reason is R.C. 2923.14(D) vests the court with complete and unguided discretion on whether to relieve the offender from a weapons disability. One of the key aspects of *Bruen* was finding that the standard New York used to further an individual's right to bear arms via a permit was too discretionary. *Bruen,* 597 U.S. at 5. Although here it is the judiciary branch rather than the executive branch making the decision, the underlying concern, logic, and history suggests it applies with equal force to the judiciary.

{¶ 70} Beyond that issue is the greater issue of R.C. 2923.14(F)(3) that allows the rights to be revoked upon a finding of good cause by the court. Even if we were to assume an indefinite ban, relieved only by discretionary action by a trial court, was constitutional, it cannot be the case that the restored right is terminable for any reason that would not have permitted termination in the first instance. Put differently, the only way a restoration regime could be proper in these circumstances is if a subsequent disability is found by no

less than the same process and standards that would allow disarmament in any other case.

{¶ 71} Of course, a state may enact a statutory scheme that allows individuals to receive their right to keep and bear arms back after a type of conviction that may constitutionally allow lengthy bans; nothing stops a state from giving broader rights than secured by the Second Amendment. But that regime does not and cannot allow for the diminution of the scope of rights secured by the federal constitution.

{¶ 72} Thus, I conclude even if the state could disarm Skaggs prior to his final release and even for some fixed period afterwards, the discretionary nature of R.C. 2923.14 offers no boon to the state in disarming and then charging Skaggs over a conviction for possession of a controlled substance.

The History and Tradition of Article IV, Section 4 of the Ohio Constitution Also Supports Finding R.C. 2923.13 Unconstitutional

{¶ 73} In addition to the history and tradition reviewed in the federal cases under consideration here, Ohio's history and tradition also supports the conclusion that R.C. 2923.13(A)(3) is unconstitutional as applied to Skaggs. Moreover, the text, history, and tradition of our own constitution may serve as an independent basis to strike down the restriction here on Skaggs.

{¶ 74} At the threshold, we should observe that there is a reasonably close temporal proximity between when the Second Amendment was first passed by Congress (September 25, 1789) and when it became law (December 15, 1791) and when the state's first constitution was drafted (November 29, 1802). In consideration of the timing of the drafting of our constitution, it is fair to assume that the drafters of Ohio's constitution were

familiar with the public meaning of the Second Amendment and the history and tradition that informed it. And if they understood that, they would have carried that understanding with them into the drafting of that document.

{¶ 75} In that first constitution, we entered the union with an individual right to bear arms. Ohio's 1802 constitution, art VIII, § 20 said this: "That the people have the right to bear arms for the defense of themselves and the state; and as standing armies in time of peace are dangerous to liberty, they shall not be kept: and that the military shall be kept under strict subordination to the civil power."

{¶ 76} We also know that the drafters of that constitution turned to recently enacted state constitutions: namely the 1790 Pennsylvania Constitution, the 1796 Tennessee Constitution, and the 1799 Kentucky Constitution. John D. Barnhart, *Valley of Democracy: The Frontier versus the Plantation in the Ohio Valley, 1775-1818,* at 157-158 (Bloomington: Indiana University Press, 1953). In fact, 87 of the 106 sections of Ohio's Constitution bear a strong similarity to those three constitutions, with over half of those borrowed provisions coming from Tennessee. *Id*.

{¶ 77} All three of those constitutions contained text protecting the right to bear arms. In comparing Ohio's Constitution to those three other states, our provision protecting the right to bear arms is similar to all three, but it is strikingly similar to the 1780 Massachusetts Constitution with two changes. The first was to make explicit our constitution was protecting an individual right to bear arms. *Compare Commonwealth v. Davis*, 369 Mass. 886 (1976). The second change was to prohibit the creation of standing armies altogether, not just subject its creation to legislative authority.

{¶ 78} When Ohio adopted its second constitution in 1851, this provision was modified; it now reads: "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." Ohio Const., art I, § 4. The textual change was to remove the right to bear arms for the protection of the state and seemingly expand a citizen's individual right to bear arms for security in addition to defense. This constitutionally secured right continues to this day and is understood as a fundamental right. *Klein v. Leis*, 2003-Ohio-4779, ¶ 7.

{¶ 79} A hundred years ago, the Supreme Court of Ohio had the opportunity to consider the meaning of that text. *State v. Hogan*, 63 Ohio St. 202 (1900). In considering whether a "tramp" could be properly disarmed, the Court held the following at 218-219:

> The constitutional right to bear arms is intended to guaranty to the people, in support of just government, such right, and to afford the citizen means for defense of self and property. While this 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. If he employs those arms which he ought to wield for the safety and protection of his country, his person, and his property, to the annoyance and terror and danger of its citizens, his acts find no vindication in the bill of rights. That guaranty 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. A man may carry a gun for any lawful purpose, for business or amusement, but he cannot go about with that or any other dangerous weapon to terrify and alarm a peaceful people.

{¶ 80} The Court's analysis of the common law rule against going armed so as to terrify others and Sir John Knight's case is quite similar to the lengthy analysis done by the Supreme Court of the United States in *Bruen* and its shorter analysis in *Rahimi*. Thus, it can be fairly said we have understood that relatively narrow restriction grounded in the common law tradition to inform our state right to bear arms. That tradition that may support a narrow restriction on the right to carry or bear arms does not include complete and permanent prohibitions on bearing arms for nonviolent criminal offenses. My view on the narrowness arising from that tradition finds support in a later Supreme Court case too.

{¶ 81} Twenty years later, the Supreme Court of Ohio returned to Article I, Section 4 to determine if the state could criminalize concealed carry. *State v. Nieto*, 101 Ohio St. 409 (1920). The Court held this: "The statute does not operate as a prohibition against carrying weapons, but as a regulation of the manner of carrying them. The gist of the offense is the concealment." *Id*. at 413. Ultimately, the Court upheld the statute because there was an alternative to concealed carry. While it did suggest the constitution might allow the statute to operate inside someone's home, that part of the case was dicta. *Id*. at 418. But I pause to consider Justice Wanamaker's dissent on this point.

{¶ 82} He was understandably concerned about the Court's dicta on this matter. And as it turns out, his (correct) view on this matter was later vindicated by the

Supreme Court of the United States in *Heller*. But he was also concerned about the ill motives giving rise to such laws and decision, which he stated this way at 430:

> I desire to give some special attention to some of the authorities cited, Supreme Court decisions from Alabama, Georgia, Arkansas, Kentucky, and one or two inferior court decisions from New York, which are given in support of the doctrines upheld by this court. The Southern States have very largely furnished the precedents. It is only necessary to observe that the race issue there has extremely intensified a decisive purpose to entirely disarm the negro, and this policy is evident upon reading the opinions.

{¶ 83} This court has expressed similar concerns about the use of laws and precedents rooted in racist motives to disarm our fellow citizens. *Striblin*, 2024-Ohio-2142, at ¶ 25. *See also* *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 772-776 (2010) (The Court reviewed the history of the local disarmament of freed slaves in the Reconstruction). From time to time there will be disfavored groups of people and protecting the rights of those least favored among us is not only required by our society's commitment to equal protection of the laws, but serves to protect the rights of us all. We would do well to remember that when considering the scope of the constitutional rights bequeathed to us from our ancestors.

{¶ 84} Returning to the application of the Court's opinion in *Nieto* to the issue before this court, the Court was explicit that the statute was not a prohibition on bearing

arms altogether, rather it was a regulation on how firearms should be properly carried. Based on the review of our own state's history and tradition in regulating firearms, there is, at this point, grave doubt that Article I, Section 4 suffers R.C. 2923.13(A)(3) for a person like Mr. Skaggs. The next time the Supreme Court of Ohio took up this statute is further instructive.

{¶ 85} About 90 years after Justice Wanamaker's dissent, the Supreme Court of Ohio returned to the question of criminalizing concealed carry in the *Klein* case. The Court held that while the right is fundamental under our constitution, it followed the general reasoning of *Nieto*, i.e., the state can regulate the manner of carrying firearms. *Klein,* 2003-Ohio-4779, at ¶ 13. The Court also observed that the concealed carry prohibition had been in place since 1859. *Id*. at ¶ 9. In a single paragraph, the Court curtly upheld the statute under a reasonableness standard. In response, then-Justice O'Connor dissented, joined by Justice Lundburg Stratton. In her dissent, Justice O'Conner took the Court to task for using a rational basis standard. *Id.* at ¶ 22. She also found that the statute was infirm because it required a fundamental right to be asserted as an affirmative defense. *Id*. at ¶ 30.

{¶ 86} Like Justice Wanamaker before her, Justice O'Conner was later vindicated. Shortly after the Court's opinion was announced, the legislature implemented the shall issue concealed carry regime now in place. And the Supreme Court of the United States later agreed with her in large measure in both *Heller* and the *McDonald* case.

{¶ 87} Despite a very similar history and tradition informing both amendments, the text of Ohio's amendment plainly supports an individual right to bear arms for personal defense and security. We should not read out of our own history and tradition a key textual

difference that would appear to support something in addition to what the Second Amendment protects.

{¶ 88} One final aspect of *Klein* is relevant to the analysis here. As stated above, in upholding R.C. 2923.12, the Court gave great weight to the fact the statute had been in effect in one form or another since 1859. This aspect of the holding is understandable. The statute was enacted less than a decade after the ratification of the Constitution of 1851 and went apparently unchallenged until 1920. It is not wholly unreasonable to treat that as evidence of absence and infer from it. But that is not the case with R.C. 2923.13. It appears the statute was first enacted in 1969 by H.B. 484. When it was enacted, it did include within its scope a person who was addicted to or used either a "narcotic drug, hallucinogen, or other dangerous drug," but it did not include simple possession. The relevant section seems aimed at preventing possession of a firearm while under the influence of one substance or another.

{¶ 89} In 1972, as part of a larger recodification in H.B. 511, R.C. 2923.56 was re-codified as R.C. 2923.13, taking effect on January 1, 1974. This version of the statute included subsection (A)(3) as we largely know it today, which included a broader range of offenses other than use of controlled substances. Misdemeanor convictions also fell under the statute until 1995 when it became limited to felonies. So, unlike the concealed carry statute in *Klein*, R.C. 2923.13(A)(3) is a relatively recent statute, without passage close in time to when Article I, Section 4 was ratified.[3] Thus, it does not enjoy any presumed constitutionality the Court seemingly gave R.C. 2923.12.

[3]The Sixth Circuit analyzed state and federal efforts to statutorily disarm felons and concluded that "felon disarmament has broadened over the years." *Williams,* 113 F.4th at 659. This analysis and conclusion is in step with the one I offer here.

{¶ 90} Like Justice Wanamaker and Chief Justice O'Connor, I find myself dissenting from the decision of my court implicating Article I, Section 4.[4] While the class of people disarmed by R.C. 2923.13(A)(3) is quite possibly smaller than the number of our fellow citizens whose right to bear arms was frustrated for nearly 150 years by the statutes at issue in *Nieto* and *Klein*, it makes it no less significant.

{¶ 91} As the judiciary, it is our duty to say what the law is. *See Marbury v. Madison*, 5 U.S. 137 (1803). Our oath is to the constitution. And that duty requires us to sometimes say a statute cannot stand against a constitution. *Id.* at 178. The purpose of Article I, Section 4 was to further a person's inherent right to self-defense and to place those rights beyond the reach of ordinary legislation. To permit constitutional rights to be legislatively abrogated with ease cheapens any liberty secured by a constitution.

{¶ 92} Chief Justice Marshall said to permit to the legislature that which is forbidden would "subvert the very foundation of all written Constitutions." *Id*. For all these reasons, I dissent.

[4]Judge Hoffman of our court, while sitting by assignment on the Supreme Court of Ohio, similarly dissented from the Court's opinion because he found the standard it used for reviewing a fundamental right was too lax. *See Arnold v. City of Cleveland,* 67 Ohio St.3d 35, 53 (1993).