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Ohioans for Concealed Carry, Inc. v. City of Columbus2020-Ohio-6724

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Ohioans for Concealed Carry, Inc. v. City of Columbus 2020-Ohio-6724

I. INTRODUCTION

"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."[1] When The Supreme Court analyzed syntax and debated semantics,[2] the majority concluded that the District of Columbia's ban on handgun possession in the home was a violation of the Second Amendment because the ban prohibited having an operable, lawful firearm in the home for immediate self-defense.[3] The controversy in this case focused on the purpose of the Second Amendment, which Justice Stevens, in his dissent, concluded was a right strictly limited because one could not use a gun to facilitate a crime, and "it is equally clear that it does encompass the right to use weapons for certain military purposes. Whether it also protects the right to possess and use guns for nonmilitary purposes like hunting and personal self-defense is the question presented by this case."[4] While the Justices did not agree on the outcome in this case, they did agree that the Second Amendment was not without its limitations.[5]

The city of Columbus enacted regulations to limit this Second Amendment right, and it became the central controversy in *Ohioans for Concealed Carry, Inc v. City of Columbus*.[6] Unlike the court in *Heller*, however, the majority dismissed the case for Appellants' lack of standing and failed to analyze or make a decision on the constitutionality of Columbus's ordinance.[7] While the Court should refrain from an advisory opinion,[8] because "the cardinal principle of judicial restraint—if it is not necessary to decide more, it is necessary not to decide more—counsels us to go no further."[9] The controversy between the majority and the dissent in this

1. U.S. Const. amend. II.
2. *District of Columbia v. Heller*, 554 U.S. 570, 578, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008).
3. *Id.* at 635.
4. *Id.* at 637, (Stevens, J., dissenting).
5. *Id.* at 628.
6. *Ohioans for Concealed Carry, Inc v. City of Columbus*, 2020-Ohio-6724, 2, (2020).
7. *Id.* at 25-26.
8. *State ex rel. LetOhioVote.org v. Brunner*, 123 Ohio St.3d 322, 335, 2009-Ohio-4900, 916 N.E.2d 462, "declining to address a legal issue not squarely before us is consistent with our reluctance to issue advisory opinions, the principle of judicial restraint. . ."
9. *PDK Laboratories Inc. v. United States DEA*, 360 U.S.App.D.C. 344, 357, 362 F.3d 786 (2004) (Roberts, J., concurring).

decision regarded whether Appellants had standing,[10] so the Court could have and should have settled the dispute without the possibility of hearing a similar case in the future.

II. STATEMENT OF FACTUAL AND PROCEDURAL HISTORY

Columbus's City Council passed an ordinance in the Columbus City Code ("C.C.C.") in May 2018, which enacted two provisions relevant to this case, C.C.C. 2323.13 and 2323.171.[11] "C.C.C. 2323.13 is the city's weapons-under-disability ordinance and prohibits individuals who have been previously convicted of a misdemeanor domestic-violence offense from possessing a firearm, C.C.C. 2323.13(A)(3)."[12] Notable in the code is that "[u]nless relieved from disability under operation of law or the legal process, no person shall knowingly acquire, have, carry, or use any firearm or dangerous ordnance."[13] The code defines "disability" as persons "under indictment for, has been convicted of, or has been adjudicated a delinquent child for the commission of an offense that, if committed by an adult, would have been . . . punishable by imprisonment for a term exceeding one year."[14] The code enumerates offenses: homicide, assault, sex offenses, terrorism offenses, domestic violence (a misdemeanor offense), and others.[15]

The other provision, directed at an accessory to firearms known as a "bump-stock", was C.C.C. 2323.171, which made it a misdemeanor for a "person to 'knowingly acquire, have, carry, or use an illegal rate-of-fire-acceleration firearm accessory,' C.C.C. 2323.171(A)."[16] However, while the trial court "ultimately found C.C.C. 2323.171 to be unconstitutional and granted a permanent injunction enjoining,"[17] the city repealed C.C.C. 2323.171 because "the United States Bureau of Alcohol, Tobacco, Firearms, and Explosives had issued a rule stating that a firearm with a bump-stock accessory was a "machinegun," the possession of which is already a felony under federal and state law."[18]

Ohioans for Concealed Carry (OCC), a not-for-profit corporation composed of taxpaying, firearm owners in Ohio, and member, Gary Witt (Witt), alleged that these ordinances were unconstitutional and filed a complaint against the presiding city, Columbus, and sought an injunction.[19]

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10. *Ohioans*, 2020-Ohio-6724 at 25-26.
11. *Id.* at 2.
12. *Id.*
13. C.C.C. 2323.13(A).
14. C.C.C. 2323.13(A)(1).
15. *See generally: Id.*
16. *Ohioans*, 2020-Ohio-6724 at 2.
17. *Id.* at 5.
18. *Id.* at 6.
19. *Id.* at 2-3.

Witt and OCC sought declaratory judgment and argued that these ordinances were "preempted by R.C. 9.68—a statute pertaining to ensuring that the laws throughout Ohio regarding the right to bear arms are uniform," and therefore violated R.C. 9.68.[20]

Their complaint asserted two causes of action: statutory-taxpayer action for injunctive relief against enforcement as permitted by R.C. 733.59 and pursuant to R.C. 9.68, a "declaration that the ordinances are unlawful."[21] OCC and Witt alleged that implementing these ordinances would "result[] in, or is imminently likely to result in, the misapplication (and an inappropriate and unlawful expenditure) of funds . . . by virtue of efforts . . . to advertise and promote the Ordinances, enforce . . . implement . . . and defend the Ordinances."[22] Ever the patriots, OCC and Witt claimed they sought "to enforce the public right of the people to keep and bear arms and all peripheral rights guaranteed to them by the Constitution of Ohio, the Constitution of the United States of America and R.C. 9.68."[23] Concurrently with the injunction, OCC and Witt moved for a temporary restraining order (TRO) to stop the city from enforcing these ordinances.[24]

The city argued that because OCC and Witt lacked standing, they were unlikely to succeed on the merits of their claims, but the trial court granted the TRO and enjoined any enforcement activity regarding these ordinances.[25] Despite the city's claims that OCC and Witt lacked standing, the trial court held otherwise: "because the city's ordinances 'directly impact the rights' of appellants' members, the trial court also found that appellants had organizational standing," in addition to Witt having established taxpayer standing.[26]

The city appealed and the Tenth District concluded that while Witt had taxpayer standing, OCC "failed to establish that they had standing under R.C. 733.59, R.C. 9.68, or R.C. Chapter 2721, Ohio's Declaratory Judgment

20. *Ohioans*, 2020-Ohio-6724 at 2-3.
21. *Id.* at 4-5.
22. *Ohioans*, 2020-Ohio-6724 at 4-5.
23. *Ohioans*, 2020-Ohio-6724 at 4-5.
24. *Id.*
25. *Id.* at 5.
26. *Id.*

Act."[27] OCC and Witt, collectively, (Appellants) sought discretionary review, and the Supreme Court of Ohio accepted.[28]

III. THE COURT'S DECISION AND RATIONALE

A. The Plurality Opinion

Justice O'Connor delivered the opinion of the Court with Justices French, Donnelly, and Stewart concurring.[29] Before addressing Appellants' standing, the Court held that though C.C.C. 2323.171, the bump-stock ordinance, was repealed, there was a "reasonable probability that the city will attempt to enact a similar ordinance to the bump-stock ordinance in the future, this appeal is not moot." [30] As a result, Appellants argued that R.C. 9.68(B)[31] entitled them to attorney fees, and the Court held it "remains relevant to the resolution of attorney fees related to appellants' challenge to C.C.C. 2323.171. Thus, we proceed to determine the question of standing."[32]

The Court acknowledged the well-established precedent that before an Ohio court may consider a legal claim and its merits, "the person or entity seeking relief must establish standing to sue."[33] To have standing, a litigant

27. *Id.* See also: R.C. § 733.59 (If the village solicitor or city director of law fails, upon the written request of any taxpayer of the municipal corporation, to make any application provided for in sections 733.56 to 733.58 of the Revised Code, the taxpayer may institute suit in his own name, on behalf of the municipal corporation. Any taxpayer of any municipal corporation in which there is no village solicitor or city director of law may bring such suit on behalf of the municipal corporation. No such suit or proceeding shall be entertained by any court until the taxpayer gives security for the cost of the proceeding.) See also: R.C. § 9.68 (The individual right to keep and bear arms, being a fundamental individual right. . .being a constitutionally protected right in every part of Ohio, . . . need to provide uniform laws throughout the state regulating the ownership, possession. . .of firearms, their components, and their ammunition . . . . Except as specifically provided by the United States Constitution, Ohio Constitution, . . . permission, restriction, . . . including by any ordinance, . . . Any such further license, permission, restriction, . . . interferes with the fundamental individual right described in this division and unduly inhibits law-abiding people from protecting themselves . . . the state by this section preempts, supersedes, and declares null and void any such further license, permission, restriction, delay, or process. (B) A person, group, or entity adversely affected by any manner of ordinance, . . . may bring a civil action against the political subdivision seeking damages from the political subdivision, declaratory relief, injunctive relief, or a combination of those remedies.)

28. *Ohioans*, 2020-Ohio-6724 at 5.

29. *Ohioans*, 2020-Ohio-6724 at 1.

30. *Ohioans*, 2020-Ohio-6724 at 6-7.

31. *See also* R.C. § 9.68(B) (Any damages awarded shall be awarded against, and paid by, the political subdivision. In addition to any actual damages awarded against the political subdivision and other relief provided with respect to such an action, the court shall award reasonable expenses to any person, group, or entity that brings the action, to be paid by the political subdivision, if either of the following applies: (1) The person, group, or entity prevails in a challenge to the ordinance, rule, regulation, resolution, practice, or action as being in conflict with division (A) of this section. (2) The ordinance, rule, regulation, resolution, practice, or action or the manner of its enforcement is repealed or rescinded after the civil action was filed but prior to a final court determination of the action.).

32. *Ohioans*, 2020-Ohio-6724 at 6-7.

33. *Id.* at 7, quoting Ohio Pyro, Inc v. Ohio Dept. of Commerce, Div. of State Fire Marshal, 115 Ohio St.3d 375, 2007-Ohio-5024, 875 N.E.2d 550.

must demonstrate: "(1) an injury (2) that is fairly traceable to the defendant's allegedly unlawful conduct and (3) is likely to be redressed by the requested relief."[34] The Court analyzed, not only the merits, but "whether the plaintiffs have alleged such a personal stake in the outcome of the controversy that they are entitled to have a court hear their case."[35] An issue of standing must be reviewed de novo because it is a question of law.[36]

Appellants needed to show standing for both claims in their complaint and the sought after relief:[37] "(1) a statutory-taxpayer action for injunctive relief under R.C. 733.59 and (2) a declaratory-judgment action based on the argument that R.C. 9.68 provides them the right to challenge the ordinances."[38] Rather than establish "standing through traditional common-law principles," Appellants asserted that because the municipal ordinances violated R.C. 9.68, they had standing as an associate or in the alternative, three "statutory means: (1) statutory standing under R.C. 9.68, (2) taxpayer standing under R.C. 733.59, and (3) statutory standing under the Declaratory Judgment Act."[39] The Court addressed and dismissed standing to each alternative respectively.[40]

In Part B, the Court addressed statutory standing under R.C. 9.68.[41] Appellants asserted that because R.C. 9.68 "provides Plaintiffs a private right of action to challenge any ordinance, rule or regulation in conflict with it," they had standing.[42] In defense of this assertion, Appellants relied on R.C. 9.68(B): "any person, group, or entity that prevails in a challenge to an ordinance," and alleged that this section meant not only may anyone challenge the conflict presented by an ordinance, but that "the statute thereby confers standing."[43] The Court agreed with the Tenth District in its rejection of this argument because "R.C. 9.68 is silent regarding standing or creating a cause of action."[44]

The Court clarified that "a statute's silence 'as to who has standing to maintain a constitutional challenge to the legislation does not render the

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34. *Ohioans*, 2020-Ohio-6724 at 7, quoting Moore v. Middletown, 133 Ohio St.3d 55, 2012-Ohio-3897, 975 N.E.2d 977.

35. *Ohioans*, 2020-Ohio-6724 at 7, quoting ProgressOhio.org, Inc. v. JobsOhio, 139 Ohio St.3d 520, 2014-Ohio-2382, 13 N.E.3d 1101.

36. *Ohioans*, 2020-Ohio-6724 at 7.

37. *Id.* at 7, "Standing 'is not dispensed in gross,' it must be demonstrated for each claim and each form of relief." Quoting Preterm-Cleveland, Inc. v. Kasich, 153 Ohio St.3d 157, 2018-Ohio-441, 102 N.E.3d 461, ¶ 30, quoting Davis v. Fed. Election Comm., 554 U.S. 724, 734, 128 S.Ct. 2759, 171 L.E.2d 737 (2008), quoting Lewis v. Casey, 518 U.S. 343, 358, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996), fn. 6.

38. *Ohioans*, 2020-Ohio-6724 at 7-8.

39. *Id.* at 8.

40. *Id* at 8-21.

41. *Id.* at 8.

42. *Ohioans*, 2020-Ohio-6724 at 8.

43. *Ohioans*, 2020-Ohio-6724 at 9.

44. *Id.*

statute ambiguous,' nor 'will we read the statutory silence as clearly expressing an intention to abrogate the common-law requirements for standing.'"[45] The Court further clarified that the need to establish standing would not be rescinded even if R.C. 9.68(B) allowed a cause of action to challenge an ordinance.[46] Appellants relied on past cases where they successfully established standing when challenging other ordinances under R.C. 9.68, but the Court rejected their argument because that decision[47] had "no bearing on the standing analysis in this case."[48]

The Court held that a Plaintiff who successfully established standing "in a prior case does not establish the party's standing in every case . . . standing depends on whether the plaintiffs have alleged some basis—grounded in common or statutory law—that entitles them to have a court hear their case . . . standing must be determined on the allegations presented in each case."[49]

Appellants had the unwarranted belief that they had standing because the city "undid what the General Assembly did in enacting statewide preemption," but the Court clarified that standing required a plaintiff to allege a personal stake in the controversy such that they were entitled to be heard in a court of law.[50] Thus, the Court found "no basis under former R.C. 9.68, which was in effect at the time this case was filed, to conclude that appellants have established standing in this case."[51]

In Part C, the Court addressed taxpayer standing under R.C. 733.59.[52] The Court first addressed statutory judicial review with regard to standing[53] and held that 'Taxpayer,' as used in R.C. 733.59, contemplates and includes "'any person who, in a private capacity as a citizen, elector, freeholder or taxpayer, volunteers to enforce a right of action on behalf of and for the

45. *Id*., quoting ProgressOhio.org, Inc. v. JobsOhio, 139 Ohio St.3d 520, 2014-Ohio-2382, 13 N.E.3d 1101.

46. *Ohioans*, 2020-Ohio-6724 at 9.

47. *See also:* Ohioans for Concealed Carry, Inc. v. Clyde, 120 Ohio St.3d 96, 2008-Ohio-4605, 896 N.E.2d 967.

48. *Ohioans*, 2020-Ohio-6724 at 10-11.

49. *Id.* See also: State ex rel. Dallman v. Franklin Cty. Court of Common Pleas, 35 Ohio St.2d 176, 178-179, 298 N.E.2d 515 (1973), quoting Sierra Club v. Morton, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636, 641 (1972) ("'Where the party does not rely on any specific statute authorizing invocation of the judicial process, the question of standing depends upon whether the party has alleged such a "personal stake in the outcome of the controversy," Baker v. Carr, 369 U.S. 186, 204, 82 S.Ct. 691, 7 L.Ed.2d 663 [1962], as to ensure that "the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as a capable of judicial resolution," Flast v. Cohen, 392 U.S. 83, 101, 88 S.Ct. 1942, 20 L.Ed.2d 947 [1968] " [ellipses added in Dallman]).

50. *Ohioans*, 2020-Ohio-6724 at 11-12.

51. *Id.* at 12.

52. *Id.*

53. *Id.* at 12, "'the inquiry as to standing must begin with a determination of whether the statute in question authorizes review at the behest of the plaintiff.'" Quoting Middletown, 25 Ohio St.3d at 75-76, 495 N.E.2d 380, quoting Sierra Club, 405 U.S. at 732, 92 S.Ct. 1361.

benefit of the public.'"[54] OCC, however, failed to allege in the complaint that they fit said definition, and argued instead that Witt's standing as a taxpayer would encompass them as well.[55] Witt and OCC initiated taxpayer actions separately; OCC did not initiate for Witt, which meant that the association was not representing a member, so Witt's taxpayer standing would not encompass OCC.[56]

The Court held that OCC did not fit the definition of taxpayer and did not establish standing to bring a taxpayer action under R.C. 733.59 because Witt initiated a separate taxpayer action, his action was proceeding, and OCC initiated "the taxpayer action 'on behalf of themselves.'"[57] Despite allegations that such a holding would reverse precedent, the Court's conclusion was based on precedent:

> "Ohio courts have implicitly recognized the standing of organizations in taxpayer actions did not "directly address standing nor inform what the associations alleged in their complaints, i.e., did they allege they met the definition of taxpayer,"[58] [n]or did the cases address associational standing."[59]

In Part D, the Court addressed statutory standing under the Declaratory Judgment Act.[60] This theory relied upon standing under R.C. 2721.03, but the Court clarified that section "pertains only to 'person[s] whose rights, status, or other legal relations are affected by a constitutional provision, statute, [or] municipal ordinance.'"[61] Appellants alleged that they need not show nor wait for an injury, one of the prerequisites for relief, because the ordinance was unconstitutional.[62] While the Court conceded that an action for declaratory-judgment typically precedes injury-in-fact, the claimant was still required to "demonstrate 'actual present harm or a significant possibility of future harm to justify pre-enforcement relief[,]'" because the claimant may demonstrate an impending injury without suffering an actual injury.[63]

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54. *Ohioans*, 2020-Ohio-6724 at 12, quoting State ex rel. White v. Cleveland, 34 Ohio St.2d 37, 40, 295 N.E.2d 665 (1973), quoting State ex rel. Nimon v. Springdale, 6 Ohio St.2d 1, 215 N.E.2d 592 (1966).

55. *Ohioans*, 2020-Ohio-6724 at 12.

56. *Id.*

57. *Ohioans*, 2020-Ohio-6724 at 15-16.

58. *Id.* at 14-15, quoting Ohioans v. City of Columbus, 2019-Ohio-3105, 140 N.E.3d 1215, at ¶ 37.

59. *Ohioans*, 2020-Ohio-6724 at 14-15, See Ohioans v. City of Columbus, 2019-Ohio-3105, 140 N.E.3d 1215., citing State ex rel. Jones v. Hamilton Cty. Bd. of Commrs., 124 Ohio App.3d 184, 187, 705 N.E.2d 1247 (1st Dist.1997); Natl. Elec. Contrs. Assn. v. Mentor, 108 Ohio App.3d 373, 380, 670 N.E.2d 1042 (11th Dist.1995).

60. *Ohioans*, 2020-Ohio-6724 at 16.

61. *Id.*

62. *Id.* at 17.

63. *Id*. quoting Peoples Rights Org., Inc. v. Columbus, 152 F.3d 522, 527 (6th Cir.1998).

Neither Witt nor OCC alleged in the complaint that the ordinance regarding disability would preclude the possibility of procuring a firearm or that they owned a prohibited bump-stock; thus, there was no "allegation on which we could conclude the significant possibility of future injury."[64] The Court clarified that Appellants failed to allege a predicament but still alleged that they were entitled to a declaration that any ordinance with the purpose of regulating the right to possess a firearm was unlawful.[65] The Court held that standing was insufficient when based on such an "idealistic opposition."[66]

The Court determined that OCC failed to establish standing in both the complaint and the allegations and reiterated "standing depends on 'whether the plaintiffs have alleged such a personal stake in the outcome of the controversy that they are entitled to have a court hear their case.'"[67] The Court concluded "appellants have not established standing under R.C. 9.68, R.C. 733.58, or R.C. Chapter 2721 to challenge the ordinances. Therefore, we affirm the court of appeals' judgment."[68]

B. The Dissenting Opinion of Justice Kennedy

Justice Kennedy dissented because in her view, the city could not "demonstrate beyond doubt that appellants . . . can prove no set of facts establishing that they have standing to sue on behalf of their members."[69] She would not, however, grant Appellants standing, but she would "reverse the judgment of the Tenth District Court of Appeals dismissing the associations from this litigation and would remand this matter for a trial on the merits of the request for a permanent injunction."[70]

Justice Kennedy reasoned that because the trial court concluded Appellants established standing and enjoined enforcement of C.C.C. 2323.171 and denied enjoining the enforcement of C.C.C. 2323.13, when the Tenth District Court of Appeals reversed and remanded the case, the court of appeals' conclusion that OCC lacked standing and "had not adequately alleged that their members would have had standing to sue in their own right," was only based on the complaint.[71] Such a determination failed to acknowledge that the standard of review must be determined by the stage of the proceeding because "standing is established 'in the same way as any other

64. *Ohioans*, 2020-Ohio-6724 at 19.
65. *Ohioans*, 2020-Ohio-6724 at 19-20.
66. *Id.*at 20, quoting ProgressOhio.org, Inc. v. JobsOhio, 139 Ohio St.3d 520, 2014-Ohio-2382, 13 N.E.3d 1101, at ¶ 19.
67. *Ohioans*, 2020-Ohio-6724 at 20-21, quoting ProgressOhio.org, Inc. v. JobsOhio, 139 Ohio St.3d 520, 2014-Ohio-2382, 13 N.E.3d 1101, at ¶ 7.
68. *Ohioans*, 2020-Ohio-6724 at 26.
69. *Ohioans*, 2020-Ohio-6724 at 26 (Kennedy, J. dissenting).
70. *Id.*
71. *Ohioans*, 2020-Ohio-6724 at 29 (Kennedy, J. dissenting).

matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation.'"[72]

The Court of Appeals did not determine the correct standard of review when it concluded the complaint's allegations were insufficient to establish standing because the court must construe the allegations in the complaint as true if the adequacy of the complaint was challenged after the close of pleadings, and in doing so, must "draw[] all reasonable inferences from them in favor of the nonmoving party and decide[] whether it is beyond doubt that the plaintiff can prove no set of facts entitling it to relief."[73] An association, on behalf of its members, will have standing under three circumstances: "(1) its members would otherwise have standing to sue in their own right, (2) the interests the association seeks to protect are germane to its purpose, and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."[74]

The burden would shift to the city to prove an OCC member would not have been injured by the ordinances because association standing can be established when "at least one member with standing to present, in his or her own right, the claim (or the type of claim) pleaded by the association."[75] Justice Kennedy reasoned that OCC met the burden of establishing the possibility that a member would be harmed by the ordinances through either the prohibition of possessing a bump-stock or the prohibition of possession through a domestic violence conviction, but OCC was "not required to prove his or her case at the pleading stage and need only give reasonable notice of the claim."[76]

C. The Dissenting Opinion of Justice DeWine

Justice DeWine, joined by Justice Fischer, dissented because he reasoned that it was premature to determine OCC lacked standing.[77] While the trial court determined that parties lacked standing for injunctive relief, the city did not "move to dismiss the gun-rights groups or Witt from the lawsuit for lack of standing."[78] While the city never challenged whether Witt established

72. *Id.* quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

73. *Ohioans*, 2020-Ohio-6724 at 29 (Kennedy, J. dissenting). See also: State ex rel. Midwest Pride IV, Inc. v. Pontious, 75 Ohio St.3d 565, 569-570, 664 N.E.2d 931 (1996).

74. *Ohioans*, 2020-Ohio-6724 at 29-30 (Kennedy, J. dissenting). See also: State ex rel. Food & Water Watch v. State, 153 Ohio St.3d 1, 2018-Ohio-555, 100 N.E.3d 391, ¶ 18.

75. *Ohioans*, 2020-Ohio-6724 at 30 (Kennedy, J. dissenting), quoting United Food & Commercial Workers Union Local 751 v. Brown Group, Inc., 517 U.S. 544, 555, 116 S.Ct. 1529, 134 L.Ed.2d 758 (1996).

76. *Ohioans*, 2020-Ohio-6724 at 30 (Kennedy, J. dissenting), quoting State ex rel. Harris v. Toledo, 74 Ohio St.3d 36, 37, 656 N.E.2d 334 (1995).

77. *Ohioans*, 2020-Ohio-6724 at 33 (DeWine, J. dissenting).

78. *Id.*

standing and the Court of Appeals concluded OCC did not have standing, only one plaintiff needed to establish standing for a claim for injunctive relief.[79] Justice DeWine further clarified that because of "the determination by the court of appeals that Witt had standing, the trial court had the authority to issue injunctive relief. So there was no need for the court of appeals to decide whether the gun-rights groups possessed standing."[80]

Justice DeWine reasoned that dismissing OCC for lack of standing was problematic because they "were never individually put to the burden of proving standing in the proceeding below."[81] When the majority concluded that these claims lacked justiciability because of a lack of standing, the majority neglected to see that "'justiciability' is not the issue here. Because we must assume that Witt had standing, the claim is justiciable."[82]

Justice DeWine conceded that "a court may still dismiss parties without a personal stake in the outcome,"[83] but also reasoned that the city failed to file a motion to dismiss for lack of standing, failed to move for summary judgment and only argued "that the court lacked jurisdiction to grant injunctive relief because all three of the plaintiffs lacked standing, but all that was necessary to defeat this argument was a showing that any one plaintiff had standing."[84] He concluded that both the city and OCC deserved the opportunity to present evidence and would remand the matter to the trial court.[85]

IV. ANALYSIS

A. Introduction

Justice Scalia wrote, "[o]ver the years, our cases have established that the irreducible constitutional minimum of standing contains three elements."[86] These three elements are an injury-in-fact, (an actual, imminent, concrete, and particularized invasion of a plaintiff's legal interest), with a traceable connection between the defendant's action and said injury, which the law is likely to redress through a favorable decision.[87] Justice Scalia further clarified,

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79. *Id.* at 34.
80. *Id.*
81. *Id.*
82. *Ohioans*, 2020-Ohio-6724 at 36 (DeWine, J. dissenting).
83. *Id.* at 35.
84. *Id.* at 36.
85. *Id.* at 36-37.
86. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).
87. *Id.* at 560-561.

> "[E]ach element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation . . . . general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we "presum[e] that general allegations embrace those specific facts that are necessary to support the claim." National Wildlife Federation, *supra*, 497 U.S., at 889, 110 S.Ct., at 3189. In response . . . the plaintiff can no longer rest on such "mere allegations," but must "set forth" by affidavit or other evidence "specific facts," Fed.Rule Civ.Proc. 56(e), which for purposes of the summary judgment motion will be taken to be true."[88]

The crux of the controversy in *Ohioans for Concealed Carry, Inc v. City of Columbus*, was this issue of standing because the majority criticized the dissenting opinions' suggestion "that appellants could demonstrate standing based on harm . . . In doing so though . . . implicitly acknowledges that appellants have not alleged or proved a basis for standing in this case at this time."[89]

Concurrently, but less discussed was the constitutionality of the ordinance, which the majority dismissed by concluding, "their theory is incorrect in this case, we cannot remedy it here."[90] The idea that "the cardinal principle of judicial restraint—if it is not necessary to decide more, it is necessary not to decide more—counsels us to go no further[.]"[91] seems like the legal version of "since brevity is the soul of wit and tediousness the limbs and outward flourishes, I will be brief,"[92] which in this case was a missed opportunity to conclude on the constitutionality of the ordinances in question and will allow Appellants "another opportunity to seek relief from the city ordinances . . . they will have the benefit of this court's decision today as well as the dissenting opinions' observations on how to properly establish standing."[93]

B. Standing

In 1994, the Supreme Court of Ohio faced a similar controversy where an association brought suit on behalf of its members, and the Court held,

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88. *Lujan,* 504 U.S. at 561.
89. *Ohioans*, 2020-Ohio-6724 at 21.
90. *Id.* at 26.
91. *PDK Laboratories Inc. v. United States DEA*, 360 U.S.App.D.C. 344, 357, 362 F.3d 786 (2004) (Roberts, J., concurring).
92. WILLIAM SHAKESPEARE, HAMLET, act II, scene II.
93. *Ohioans*, 2020-Ohio-6724 at 25-26.

> "The evidence clearly shows that no outside bids were ever submitted on this project. The only contractor to testify on behalf of OCA neither submitted a bid nor intended to submit a bid. Thus, no aggrieved contractor exists. OCA has failed to prove that any of its members have suffered actual injury. Clearly, under the facts of this case, where no bid was submitted and there was consequently no concrete injury suffered by any private contractor, OCA does not have the standing to challenge the legality of the village's bidding procedure. We hold that a contractor's association lacks standing to pursue a cause of action in a representative capacity where its members fail to bid on the project in question."[94]

The Court in *Bicking* concluded that no bid meant no aggrieved contractor, no aggrieved meant no injury, and no injury meant no standing,[95] but if the court were to apply that logic to *Ohioans*, would not the outcome be the opposite? While the injury is debatable for both Witt and OCC, as discussed by the Court,[96] they did file a complaint with the city to acknowledge "aggrievance."[97] The injury, as stated in the complaint, would be more likely to fall outside of the

> "prudential limitations on the courts' role in resolving disputes involving 'generalized grievances' or third parties' legal rights or interests, none of the petitioners has met the threshold requirement of such rules that to have standing a complainant must clearly allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute . . . ."[98]

The Court in *Warth* went on to clarify that "[w]ithout such limitations . . . the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights."[99] But when it is a question of the constitutionality of the right to bear arms, is it not "emphatically the province and duty of the judicial department to say what the law is[]"?[100]

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94. *Ohio Contrs. Assn. v. Bicking*, 71 Ohio St.3d 318, 320-321, 1994-Ohio-183, 643 N.E.2d 1088.
95. *Id.*
96. *Ohioans*, 2020-Ohio-6724 at 19.
97. *Id.* at 3.
98. *Warth v. Seldin*, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975).
99. *Id.* at 500.
100. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803).

Though precedent shows the importance of standing and a personal stake,[101] Appellants, Witt specifically, tried to establish standing under R.C. 733.59, which

> "allows a taxpayer to institute suit in his own name . . . for a taxpayer to maintain an action under R.C. 733.59, the 'aim must be to enforce a public right, regardless of any personal or private motive or advantage . . . .'appellants argue that the facts of the instant case are closely allied with those of Caspar, in which several Dayton police officers sought redress under a taxpayer action for the denial of certain fringe benefits. This court held that an action seeking to compel fringe benefits for the relators' personal benefit does not represent a public aim, nor is it seeking to enforce a public right . . . however, we reach a different result from that in Caspar and conclude that although the tax records are sought within the employment relationship, the rights to the records and implications thereof do affect a public right.[102]

If tax records are to be considered a public right, and in *Heller*, Justice Scalia concluded, "[n]owhere else in the Constitution does a 'right' attributed to 'the people' refer to anything other than an individual right[,]"[103] then C.C.C. 2323.13 as an ordinance by the city for weapons-under-disability to prohibit individuals "who have been previously convicted of a misdemeanor domestic-violence offense from possessing a firearm, C.C.C. 2323.13(A)(3)[,]" would surely concern a public right as well.[104]

The majority opinion, while making a contrapositive conclusion, pointed out that "[b]oth dissenting opinions suggest that appellants *could* demonstrate standing based on harm to one of their members by the city ordinances."[105] When determining a public right or a constitutional right, surely the Court should construe the allegations made by the plaintiff in the complaint as true, and if the adequacy of the complaint is challenged the Court should "draw[] all reasonable inferences from them in favor of the nonmoving party and

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101. *See* Warth 422 U.S. 490 at 502, ("But the fact that these petitioners share attributes common to persons who may have been excluded from residence in the town is an insufficient predicate for the conclusion that petitioners themselves have been excluded, or that the respondents' assertedly illegal actions have violated their rights. Petitioners must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong . . .") *See also*: Flast v. Cohen, 392 U.S. 83, 99-100, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968) ("when standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable . . .").

102. *State ex rel. Fisher v. City of Cleveland*, 109 Ohio St.3d 33, 36 2006-Ohio-1827, 845 N.E.2d 500, quoting *State ex rel. Caspar v. Dayton*, 53 Ohio St.3d at 20, 558 N.E.2d 49.

103. *Heller*, 554 U.S. 570 at 580.

104. *Ohioans*, 2020-Ohio-6724 at 2.

105. *Ohioans*, 2020-Ohio-6724 at 21.

decide[] whether it is beyond doubt that the plaintiff can prove no set of facts entitling it to relief."[106] The majority asserted that the

> "second dissenting opinion fashions a newly minted argument that offers appellants an opportunity to reargue their standing case with the benefit of the court's collective agreement that they have not alleged a proper basis for standing. This approach not only would relieve appellants of their well-established burden to establish standing and present the court with a justiciable claim, but also would provide appellants with an unprecedented belief that even if they cannot establish standing on their asserted theory, they can try again on remand."[107]

The majority concluded that the view of the "dissenting opinions assert that the city missed the boat for not challenging standing via the proper procedural vehicle or failing to "show beyond doubt," appellants lacked standing when it is the plaintiff's burden to allege a basis for standing."[108] But, if the trial court found plaintiffs established standing, Witt established standing as a taxpayer, an associate may establish standing on behalf of its members, and the city never procedurally challenged this through a motion, should the Court dismiss a case sua sponte instead of deciding a constitutional issue?

While the burden surely is and should be on the plaintiff to establish standing, because it was at least arguable that the Court could conceive of, determine, and assume a set of facts that would establish standing, rather than dismiss the case, the Court should have discussed, even as dicta, the constitutionality of the ordinance in light of the *Heller* decision to prevent cases similar in nature.

C. Limitations on The Second Amendment

Writing for the majority, Justice Scalia professed in the prolific *Heller* decision, "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 . . . or laws imposing conditions and qualifications on the commercial sale of arms."[109]

When examining the language of the code, "C.C.C. 2323.13 is the city's weapons-under-disability ordinance and prohibits individuals who have been

106. *Ohioans*, 2020-Ohio-6724 at 29 (Kennedy, J. dissenting). See also: State ex rel. Midwest Pride IV, Inc. v. Pontious, 75 Ohio St.3d 565, 569-570, 664 N.E.2d 931 (1996).

107. *Ohioans*, 2020-Ohio-6724 at 21.

108. *Id* at 23.

109. *Heller*, 554 U.S. 570 at 626-627.

previously convicted of a misdemeanor domestic-violence offense from possessing a firearm, C.C.C. 2323.13(A)(3)[,]"[110] it would seem that the purpose of the code follows Justice Scalia's noted language in *Heller*. Notable in the code, "[u]nless relieved from disability under operation of law or legal process, no person shall knowingly acquire, have, carry, or use any firearm or dangerous ordnance,"[111] and "disability" is defined as persons "under indictment for, has been convicted of, or has been adjudicated a delinquent child for the commission of an offense that, if committed by an adult, would have been . . . punishable by imprisonment for a term exceeding one year."[112] This noted language again seems concurrent with the language in *Heller* and the concern of those who irresponsibly commit *serious* criminal offenses are able to possess a firearm. C.C.C. 2323.13 enumerates offenses: homicide, assault, sex offenses, terrorism offenses, domestic violence (a misdemeanor offense), and others.[113] These offenses, once again, seem to logically fit into the majority's decision in *Heller* as "longstanding prohibitions on the possession of firearms by felons . . . or laws imposing conditions and qualifications on the commercial sale of arms."[114] As further proof that this ordinance would likely fall under the blanket of this statement, Justice Scalia clarified in a footnote, "[w]e identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive."[115]

Similar such prohibitions to C.C.C. 2323.13 have been federally codified:

> "It shall be unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person . . . (1) is under indictment for, or has been convicted in any court of, a crime *punishable by imprisonment for a term exceeding one year*; . . . (4) has been *adjudicated as a mental defective* or has been committed to any mental institution; . . . (8) is subject to a court order that restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child, except that this paragraph shall only apply to a court order that—(A) was issued after a hearing of which such person received actual notice, and at

110. *Id.*
111. C.C.C. 2323.13(A).
112. C.C.C. 2323.13(A)(1).
113. *See generally: Id.*
114. *Heller*, 554 U.S. 570 at 626-627.
115. *Heller*, 554 U.S. 570 at 626-627, fn 26.

> which such person had the opportunity to participate; and (B)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or (9) *has been convicted in any court of a misdemeanor crime of domestic violence.*"[116] (Emphasis added).

This section of the code is not without controversy in state courts because some courts have clarified certain sections were unconstitutional when applied to a specific set of facts when "not sufficiently tailored to further the government's compelling interest of preventing armed mayhem."[117] Nothing in C.C.C. 2323.13 references driving under the influence,[118] or window tint, and both would likely be considered unconstitutional because they are not serious convictions of crimes nor serve the "interest in protecting the community from crime."[119]

The Supreme Court has yet to decide on this issue, but the Fourth Circuit held they could not conclude the government established a rationale that was sufficient to show how "reducing domestic gun violence and § 922(g)(9)'s permanent disarmament of all domestic-violence misdemeanants[,]" were connected.[120] Though they proposed several connections between disarming domestic violence perpetrators and the goal of the code, the court remanded "to afford the government an opportunity to shoulder its burden and Chester an opportunity to respond. Both sides should have an opportunity to present their evidence and their arguments to the district court in the first instance."[121] Why should OCC, Witt, and the city of Columbus not be granted the same? The Court in *Ohioans* would not entertain a discussion of the issue, which the district court in *Chester*, reasoned was:

> "like the felon dispossession provision set forth in § 922(g)(1), the prohibition of firearm possession by domestic violence misdemeanants is a danger-reducing regulation designed "to protect

116. 18 U.S.C.A. § 922(d).

117. Holloway v. Sessions, 349 F. Supp. 3d 451, 463 (M.D.Pa.2018), (922(g)(1) is unconstitutional as applied to Holloway. Holloway's disqualifying conviction was not sufficiently serious to warrant deprivation of his Second Amendment rights, and disarmament of individuals such as Holloway is not sufficiently tailored to further the government's compelling interest of preventing armed mayhem. The court will grant summary judgment, declaratory judgment, and permanent injunctive relief to Holloway. An appropriate order shall issue.).

118. *See generally id.*

119. Miller v. Sessions, 356 F. Supp. 3d 472, 485 (E.D.Pa.2019).

120. *United States v. Chester*, 628 F.3d 673, 683. (4th Cir.2010).

121. *Id.*

> family members and society in general from potential [violence]." *Id.* In fact, the district court believed that, if anything, "the need to bar possession of firearms by domestic violence misdemeanants" is "often far greater than that of the similar prohibition of § 922(g)(1) on those who commit nonviolent felonies."[122]

In Ohio, the Third District recognized that the "legislature does have an interest in keeping weapons out of the hands of certain individuals," and this prevention from possession need not be permanent, but must follow protocols when the "legislature created a process wherein an individual could seek relief from disability under R.C. 2923.14(A)(1). Similar to Carnes, it does not appear Johnson availed himself of this process to have his second amendment rights restored."[123] Most notably, the Ohio court reasoned, "as courts have held, "[I]t remains permissible to seek to keep firearms out of the hands of irresponsible persons."[124]

In the same year as *Ohioans*, the Court held that the right to bear arms did not extend to a person while intoxicated,[125] which shows the Court is willing to concede that the Second Amendment requires limitation. The Court clarified that,

> "When an intoxicated person carries or uses a gun, either at home or outside the home, the impairment of cognitive functions and motor skills can result in harm to anyone around the intoxicated person and even to the intoxicated person himself or herself. The facts here create a case in point in which such harm might have occurred. Weber picked up a shotgun while heavily intoxicated, which caused his wife to call 9-1-1. Whether due to Weber's reduced inhibitions or impaired motor skills, Weber's wife perceived a great enough risk to herself or to Weber to make an emergency call."[126]

Weber's wife perceived a risk of harm from her husband's intoxication, would not a wife or husband whose spouse committed an act of domestic violence perceive that same risk? Is this not a regulation to reduce danger? The intoxication created the danger in *Weber*,[127] and does not the act of domestic violence create a danger that should limit the ability of the abuser to commit further acts of violence or, god-forbid, a possibly deadly act?

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122. *Id.* at 677, quoting (United States v. Chester, No. 2:08–00105, 2008 WL 4534210, at *2 (S.D.W.Va. Oct.7, 2008)).
123. *State v. Johnson*, 2019-Ohio-5386, 139 N.E.3d 963, 973 (3d Dist.).
124. *Id.* at 973, quoting Catucci v. Benedetti, 27 Mass.L.Rptr. 385, 2010 WL 4072790.
125. State v. Weber, 2020-Ohio-6832 at 1.
126. *Id.* at 7.
127. *See generally id.*

V. CONCLUSION

The Court has recognized "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[,]"[128] is not without limitation, "longstanding prohibitions . . . or laws imposing conditions and qualifications on the commercial sale of arms."[129] Courts have held, "[I]t remains permissible to seek to keep firearms out of the hands of irresponsible persons."[130] According to the National Coalition Against Domestic Violence, "the presence of a gun in a domestic violence situation increases the risk of homicide by 500%."[131] Sarah Mervosh, *New York Times* writer, showed a startling connection, "A recent study found that intimate partner homicides are also on the rise, fueled primarily by gun violence. In 2017, 926 of 1,527 women murdered by partners were killed with guns, the study found. Overall, gun-related domestic killings increased by 26 percent from 2010 to 2017."[132] It should not be a great logical leap to understand that since the Second Amendment's protection of responsible citizens' ability for self-defense was not an unlimited right and may be limited based on irresponsible and criminal acts that the Supreme Court of Ohio in *Ohioans for Concealed Carry* should have made a determination about the ordinance meant to protect the public. If the Court assumed the facts in the complaint as true, this would have made the issue debatable enough to establish standing and would have prevented the plaintiffs from an opportunity to fight another day for an unwarranted cause.

What injury would it take for OCC and Witt to establish standing? Should they truly seek out a member that has committed an act of domestic violence and help that person gain possession of a firearm? Surely the Court would not promote or condone such extremes. Would not allowing persons described in the ordinance: under a disability, a year of incarceration after conviction, or other such offenses in the ordinance, to seek a firearm be better on a case-by-case basis, and only unconstitutional as it applied to the facts as in *Chester* and *Johnson*? If the legislature enacts a law or ordinance, should not the Court decide the controversy if standing is at least arguable between

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128. U.S. Const. amend. II.

129. *Heller*, 554 U.S. 570 at 626-627.

130. State v. Johnson, 2019-Ohio-5386, at 973, quoting Catucci v. Benedetti, 27 Mass.L.Rptr. 385, 2010 WL 4072790.

131. National Coalition Against Domestic Violence, https://ncadv.org/STATISTICS, citing https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1447915/.

132. Sarah Mervosh, *Gun Ownership Rates Tied to Domestic Homicides, but Not Other Killings, Study Finds*, THE NEW YORK TIMES, (July 22, 2019), https://www.nytimes.com/2019/07/22/us/gun-ownership-violence-statistics.html#:~:text=A%20recent%20study%20found%20that,percent%20from%202010%20to%202017.

the plurality of judges when it is "emphatically the province and duty of the judicial department to say what the law is"?[133]

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133. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803).