STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
Cavanagh, P.J., Sawyer and Servitto, JJ

JOSHUA WADE,

Plaintiff-Appellant,

v

UNIVERSITY OF MICHIGAN,

Defendant-Appellee.
_____/

SC: 156150
COA: 330555
Ct of Claims: 15-000129-MZ

DEFENDANT-APPELLEE UNIVERSITY OF MICHIGAN'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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COUNTER-STATEMENT OF JURISDICTION

Plaintiff Joshua Wade sued Defendant the University of Michigan in the Court of Claims. On November 13, 2015, the Court of Claims granted the University's motion for summary disposition under MCR 2.116(C)(8). Wade appealed.

In a June 6, 2017 published opinion, the Court of Appeals affirmed the Court of Claims. *Wade v Univ of Michigan*, 320 Mich App 1; 905 NW2d 439 (2017). Wade timely applied for leave to appeal to this Court.

On December 20, 2017, the Court ordered that Wade's application for leave to appeal be held in abeyance pending decisions in *Michigan Gun Owners, Inc v Ann Arbor Public Schools* (Docket No. 155196) and *Michigan Open Carry, Inc v Clio Area School Dist* (Docket No. 155204). *Wade v Univ of Michigan*, 904 NW2d 422 (Mem) (2017).

Following the Court's resolution of *Michigan Gun Owners* and *Michigan Open Carry*, the Court ordered that Wade's application be held in abeyance pending the U.S. Supreme Court's resolution of *New York State Rifle & Pistol Ass'n, Inc v City of New York*, 590 US ___; 140 S Ct 1525; 206 L Ed 2d 798 (2020).

On November 6, 2020, following the U.S. Supreme Court's resolution of *New York State Rifle*, the Court granted Wade's application for leave to appeal. *Wade v Univ of Michigan*, 950 NW2d 55 (Mem) (2020).

The Court has jurisdiction over this case under MCR 7.303(B)(1).

QUESTIONS PRESENTED

1. Whether the two-part analysis applied by the Court of Appeals is consistent with *District of Columbia v Heller*, 554 US 570 (2008), and *McDonald v Chicago*, 561 US 742 (2010), cf. *Rogers v Grewal*, 140 S Ct 1865, 1867 (2020) (Thomas, J., dissenting)?

Wade answers:	No.
University of Michigan answers:	Yes.
The Court of Claims answered:	Yes.
The Court of Appeals answered:	Yes.
This Court should answer:	Yes.

2. If so, whether intermediate or strict judicial scrutiny applies in this case?

Wade answers:	Strict scrutiny applies.
University of Michigan answers:	It is not necessary to apply any level of scrutiny, because Article X restricts firearms at a "sensitive place" where Second Amendment rights are not implicated. If further scrutiny is necessary, however, then intermediate scrutiny applies.
The Court of Claims answered:	The Court of Claims did not address this issue.
The Court of Appeals answered:	It is not necessary to apply any level of scrutiny, because Article X restricts firearms at a "sensitive place" where Second Amendment rights are not implicated. If further scrutiny is necessary, however, then intermediate scrutiny applies.
This Court should answer:	It is not necessary to apply any level of scrutiny, because Article X restricts firearms at a "sensitive place" where Second Amendment rights are not implicated. If further scrutiny is necessary, however, then intermediate scrutiny applies.

3. Whether the University of Michigan's firearm policy is violative of the Second Amendment, considering among other factors whether this policy reflects historical or traditional firearm restrictions within a university setting and whether it is relevant to consider this policy in light of the University's geographic breadth within the city of Ann Arbor?

Wade answers:	Yes.
University of Michigan answers:	No.
The Court of Claims answered:	No.
The Court of Appeals answered:	No.
This Court should answer:	No.

I. INTRODUCTION

In March 2015, Joshua Wade ("Wade") achieved notoriety when he openly carried a pistol into an Ann Arbor high school choir concert attended by students and their understandably frightened families. Wade now asks this Court to empower him to engage in a similar performance at the University of Michigan (the "University"), where he does not work, reside, or go to school. Wade maintains that the Second Amendment renders the University powerless to prohibit such conduct on its property. His position defies common sense. And unsurprisingly, the law does not support it. The Court should affirm the Court of Appeals judgment.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Under the Michigan Constitution, the Board of Regents of the University is a branch of the State government, "a constitutional corporation of independent authority, which, within the scope of its functions, is coordinate with and equal to that of the legislature." *Bd of Regents of the Univ of Michigan v Auditor General*, 167 Mich 444, 450; 132 NW 1037 (1911). Under article VIII, § 5 of the 1963 Michigan Constitution, the Regents hold plenary "authority over 'the absolute management of the University.'" *Federated Publications, Inc v Bd of Trustees of Michigan State Univ*, 460 Mich 75, 87; 594 NW2d 491 (1999). More than one-hundred years ago, the Court noted the connection between the University's constitutionally conferred independence and its success. See *Sterling v Regents of the Univ of Michigan*, 110 Mich 369, 376; 68 NW 253 (1896).

Wade claims that the University refuses to recognize the right to bear arms "while [someone is] simply walking the public streets of Ann Arbor." (Wade's Brief on Appeal at 4.) This is false.[1] The University does not contend that it has the authority to manage firearms on

[1] See also Wade's Brief on Appeal at 18, falsely stating that the University has prohibited Wade from "possessing firearms while in the city limits of Ann Arbor."

municipal property. Rather, the University maintains that the Second Amendment does not prevent it from fulfilling its state constitutional duty to manage the institution in the exercise of its best judgment.

A. The University Welcomes Students, Faculty, Staff, and Visitors to its Academic, Athletic, Health Care, and Other Pursuits

Maintaining a safe environment on its property is a fundamental priority for the University. The University has campuses in Ann Arbor, Flint, and Dearborn, with 19 schools and colleges in Ann Arbor. (U of M Summary Disposition Brief ("UMSDB") at 1, App 16b.) Enrollment of undergraduate, graduate, and professional students exceeds 40,000 persons. (*Id.*) The University provides housing to almost 10,000 undergraduate students in 18 residence halls and apartment buildings. *Id.* At its Ann Arbor campus alone, the University employs almost 7,000 faculty and about 14,000 staff. (*Id.* at 2, App 17b.) The University's Health System includes three hospitals and 40 outpatient locations with more than 120 clinics, resulting in 1.9 million visits and 45,000 hospital stays each year. (*Id.*)[2]

Hundreds of thousands of visitors come to the University every year to attend athletic competitions, concerts, performances, and other events, and to see the collections at the University's many museums. (*Id.*) The University's visitors include many children, including those who attend daily child care centers and those who reside at the institution while attending one of its 25 youth sport camps. (*Id.*) To ensure the safety and security of the thousands of students, faculty, staff, and visitors who set foot on campus each day, the University has a Division of Public Safety and Security, which includes the University's Police Department, Health System Security Services Department, and Housing Security and Safety Services Department. (*Id.*)

[2] The University cited these background facts to the Court of Claims, and they reflect pre-pandemic numbers.

B. The University Enacted Article X to Protect the Safety of Its Students, Faculty, Staff, and Visitors

In April 2001, under its authority under the Michigan Constitution to manage the University and its property, protect the safety of the University's students, faculty, staff, and visitors, and ensure an open and supportive environment for learning, the Regents adopted an amended ordinance prohibiting individuals from possessing firearms on University property ("Article X").[3] (*Id.* at 3, App 18b.)

The history of Article X shows that the Regents adopted it based on the recommendations of the University's Campus Safety and Security Advisory Committee (comprised of faculty, staff, and students), its Department of Public Safety, the administration of its hospitals and health centers, its executive vice president and chief financial officer, and its academic leadership—including the deans, the provost, and the chancellors of its Flint and Dearborn campuses. (*Id.*) Thus, the University leaders charged with principal responsibility over safety, security, health, academics, pedagogical environment, and University property uniformly supported adoption of Article X. (*Id.*)

It is important to understand the context in which the Regents adopted Article X. First, they did so following changes in Michigan law making it much easier to secure a license to carry a concealed weapon. (*Id.* at 4, App 19b.) Second, they did so following a number of tragic school shootings, including the June 25, 1992 murder of Dr. John Kemink, a prominent otolaryngologist at the University who was shot dead by his patient in an examining room; a 1998 incident in which

[3] An Ordinance to Regulate Parking and Traffic, and to Regulate the Use and Protection of the Buildings and Property of the University of Michigan, Article X, § 2. The ordinance also forbids the possession of other weapons and includes a number of exceptions. *Id.* §§ 3,5. A copy of Article X in its entirety was attached as Exhibit A to the University's Brief in Support of Motion for Summary Disposition. For the Court's convenience, a copy of the current version of Article X, in its entirety, is attached to this brief. (See App 133b-138b.)

a Wayne State University student shot and killed his advisor; the 1999 shootings at Columbine High School, which left twelve students and one teacher dead and twenty-one other people wounded; and a 2000 incident in which a University of Arkansas student shot and killed a faculty member. (*Id.*) Nor did concerns about gun violence on the University's property begin with the Kemink shooting in 1992. In 1981, a senior at the University gunned down two of his classmates at the University's residential Bursley Hall.[4]

The Regents, based on the overwhelming recommendation of the University's academic and public safety leadership, concluded that the institution needed to respond to these developments. (*Id.*) They did so by, among other things, adopting Article X. As explained below, Article X was also adopted in the context of a long tradition and history of educational institutions experimenting with various forms of firearm regulation.

C. The Court of Claims Dismissed Wade's Threadbare Complaint

Thirteen years after the 2001 amendment of Article X, on September 4, 2014, Wade applied to the University's Director of Public Safety for a waiver of the ordinance's terms that prohibit him from carrying a firearm on University property. (Compl ¶ 9, App 6b.) The next day he sought the same waiver from the University's Chief of Police. (*Id.* ¶ 11) On September 24, 2014, his request was denied. (*Id.* ¶ 12) Wade responded about nine months later by filing this lawsuit.

Wade's terse four-page Complaint alleged that Article X violates the Second Amendment to the United States Constitution and article I, § 6 of the 1963 Michigan Constitution (Count I). He also claimed that Article X is preempted by MCL 123.1101 *et seq.*, which prohibits "local units

[4] See Bob Wojonowski, *Murder at Bursley Hall: This Week in Ann Arbor History* (April 19, 2011) <https://annarborscene.wordpress.com/2011/04/19/murder-at-bursley-hall-this-week-in-ann-arbor-history/> (accessed February 5, 2021).

of government" from establishing limitations on the purchase, sale, or possession of firearms (Count II). Wade pled these counts in conclusory terms; he pled no other claims.

On July 23, 2015, the University moved for summary disposition under MCR 2.116(C)(8). The University argued that Wade's Second Amendment claim failed because the U.S. Supreme Court, in *District of Columbia v Heller*, 554 US 570; 128 S Ct 2783; 171 L Ed 2d 637 (2008), held that there is no Second Amendment right to possess a firearm in sensitive places, including schools. Because no such right exists, a school prohibition on firearms possession cannot and does not violate the Second Amendment. Furthermore, the University argued that even if Second Amendment rights were implicated, Article X easily passes constitutional muster. This argument followed the two-step analysis that the overwhelming majority of lower courts adopted after *Heller*. The University also argued that Article X comports with the Michigan Constitution. (See UMSDB at 5-10, App 20b-25b.)

The University argued that Count II of Wade's Complaint fared no better. The University reasoned that the statute on which Wade based his preemption argument does not—by its express terms—apply to the University. Thus, the statute has no preemptive effect with respect to Article X. The University also argued that if the statute did apply, it would violate article VIII, § 5 of the Michigan Constitution. (See UMSDB at 11-14, App 26b-29b.)

The Court of Claims granted the University's motion for summary disposition, ruling that Article X is "presumptively lawful" under *Heller* and its progeny and that Wade's preemption argument "violates nearly every rule governing statutory construction." (Court of Claims Opinion, p 6, App 74b.)

Wade appealed. While the case was awaiting oral argument, the Court of Appeals decided two other cases that addressed related issues: *Michigan Gun Owners, Inc v Ann Arbor Public*

Schools, 318 Mich App 338; 897 NW2d 768 (2016), and *Michigan Open Carry Inc v Clio Area School District*, 318 Mich App 356; 897 NW2d 748 (2016). In those cases, the Court of Appeals rejected the same argument Wade raised in Count II of his Complaint, *i.e.*, that the Legislature completely preempted the field of firearms regulation by enacting MCL 123.1101 *et seq*. On February 27, 2017, the University filed a notice of supplemental authority bringing these cases to the attention of the panel assigned to this case.

D. The Court of Appeals Issued a Published Opinion Affirming the Court of Claims

The Court of Appeals rejected both of Wade's claims of error and affirmed the Court of Claims ruling dismissing Wade's complaint.

In analyzing Wade's Second Amendment claim, the Court of Appeals followed the two-part test adopted by the vast majority of courts after the U.S. Supreme Court issued *Heller*. See *Wade v Univ of Michigan*, 320 Mich App 1, 13; 905 NW2d 439 (2017). Under the Michigan Court Rules, a copy of the opinion is attached at App 112b-123b. The first part of that test goes to the scope of the right and asks whether the regulation implicates the Second Amendment at all. Under this analysis, a regulation does not do so if it limits firearm possession in a "sensitive place" like a government building or school, where by longstanding tradition guns have been prohibited. Finding that the University is a school, one of the sensitive places specifically identified in *Heller*, the Court of Appeals concluded that Wade had no Second Amendment claim based on Article X and that no further analysis was necessary.

The Court of Appeals also held that, under the plain language of MCL 123.1102, the Legislature did not completely preempt the field of firearm regulation. See *id.* at 21. The court therefore also rejected Wade's preemption argument. *Id.*

Judge Sawyer dissented. He would have held that the Legislature completely preempted the field of firearm regulation and he therefore would not have reached Wade's Second Amendment claim. See *id.* at 22.

E. The Court Granted Wade's Application for Leave to Appeal

Wade filed an Application for Leave to Appeal to this Court. On December 20, 2017, the Court ordered that Wade's application for leave to appeal be held in abeyance pending decisions in *Michigan Gun Owners, Inc v Ann Arbor Public Schools* (Docket No. 155196) and *Michigan Open Carry, Inc v Clio Area School Dist* (Docket No. 155204). *Wade v Univ of Michigan*, 904 NW2d 422 (Mem) (2017).

Following the Court's resolution of *Michigan Gun Owners* and *Michigan Open Carry*, it ordered that Wade's application again be held in abeyance pending the U.S. Supreme Court's resolution of *New York State Rifle & Pistol Ass'n, Inc v City of New York*, 590 US ___; 140 S Ct 1525; 206 L Ed 2d 798 (2020).

On November 6, 2020, following the U.S. Supreme Court's resolution of *New York State Rifle*, the Court granted Wade's application for leave to appeal. The Court directed the parties to address three questions: (1) whether the two-part analysis applied by the Court of Appeals is consistent with *District of Columbia v Heller*, 554 US 570 (2008), and *McDonald v Chicago*, 561 US 742 (2010), cf. *Rogers v Grewal*, 140 S Ct 1865, 1867 (2020) (Thomas, J., dissenting); (2) if so, whether intermediate or strict judicial scrutiny applies to this case; and (3) whether the University of Michigan's firearm policy is violative of the Second Amendment, considering among other factors whether this policy reflects historical or traditional firearm restrictions within a university setting and whether it is relevant to consider this policy in light of the University's geographic breadth within the city of Ann Arbor? *Wade v Univ of Michigan*, 950 NW2d 55 (Mem) (2020).

III. STANDARD OF REVIEW

The Court reviews de novo a trial court's grant of summary disposition under MCR 2.116(C)(8). *Johnson v Pastoriza*, 491 Mich 417, 428; 818 NW2d 279 (2012).

IV. SUMMARY OF ARGUMENT

The Court of Appeals' two-part analysis is consistent with *Heller* and *McDonald*. Indeed, the analysis followed by the Court of Appeals is so clearly correct that virtually every court in this country considering similar claims has adopted it. Applying that test here, the threshold question is whether the University is a "sensitive place" where the Second Amendment does not apply. If the University is a sensitive place, the inquiry ends, and Article X is constitutional. Here, the University qualifies as a sensitive place, and this Court need not consider the second prong of the analysis to uphold Article X.

Even if the University does not qualify as a sensitive place, then the second step is to ask which means-ends scrutiny applies and whether the regulation passes muster under that scrutiny. Under circumstances like these, where a governmental unit regulates its property and is not infringing on the right to possess firearms in a private home, intermediate scrutiny applies. Virtually every court in the country agrees on this point, too. Applying intermediate scrutiny here, the University's regulation passes muster.

Finally, the history of firearms regulations on college campuses, if relevant, supports these conclusions. Assuming the "geographical breadth" of the University is relevant as well, it further buttresses the Court of Appeals' judgment that Article X is constitutional.

The Court should affirm the Court of Appeals judgment.

V. ARGUMENT

A. The Court of Appeals' Two-Part Analysis Is Correct and Consistent with *Heller* and *McDonald*

The Court's first question is whether the Court of Appeals' two-part test is consistent with *Heller* and *McDonald*. The answer is "yes."

An overwhelming majority of courts has adopted the two-part test the Court of Appeals applied here. Under that test, the first step is to ask whether the University is a "sensitive place." If it is, then Wade's challenge to Article X fails.

For multiple reasons, including that it is a school and that its facilities are government buildings, the University qualifies under *Heller* and *McDonald* as a "sensitive place." The Court of Appeals so held. It therefore correctly applied the first part of the two-step inquiry.[5]

1. Heller *and* McDonald *held that laws forbidding the carrying of firearms in sensitive places such as schools and government buildings are presumptively valid*

The Second Amendment states that: "[a] well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed." US Const, Am II. For much of its history, the Second Amendment was left uninterpreted by the U.S. Supreme Court.

The Court's first significant interpretation of the Second Amendment came in *Heller*. There, a police officer who kept a handgun at home for self-defense challenged the constitutionality of two provisions of the District of Columbia Code—one that effectively banned the possession of handguns, and one that required firearms lawfully kept in the home to be

[5] The Court of Appeals also correctly understood the second step, although it properly found it did not need to conduct a full analysis of the issue because of its answer at the first step.

disassembled or rendered inoperable with a trigger lock. Unlike this case, *Heller* did not involve a challenge to a restriction on the right to possess firearms on government property.

Heller ruled that the District of Columbia's law was unconstitutional. Because of the dearth of Second Amendment authority, the Court devoted much of its opinion to addressing a foundational question: does the Second Amendment only confer a right upon states to maintain armed militias, or does it also confer a right upon individuals to "keep and bear arms?" The Court ultimately endorsed the latter interpretation.[6] But in doing so, it also explicitly held that the right to keep and bear arms is not absolute: "There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms. Of course the right was not unlimited, just as the First Amendment's right of free speech was not." *Id*. at 595.

The Court returned to its analogy to limitations on the scope of other constitutional amendments repeatedly throughout its analysis. For instance, the Court held that "[l]ike most rights, the right secured by the Second Amendment is not unlimited." *Id.* at 626. The Court observed that this is "not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Id*. And the Court recognized the propriety of limitations on firearms in sensitive locations, including schools and government buildings:

> [N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, ***or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings***, or laws imposing conditions and qualifications on the commercial sale of arms.

[6] The Court interpreted the Second Amendment's prefatory clause ("A well regulated Militia, being necessary to the security of a free State") as simply announcing the purpose behind the operative clause ("the right of the people to keep and bear Arms, shall not be infringed."). 554 US at 598-600.

Id. at 626–27 (emphasis added). The Court recognized that it "identif[ied] these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive." *Id.* at 627 n 26.

Despite its recognition of proper limitations on the Second Amendment, the Court held that the District of Columbia's regulation of firearms was unconstitutional. It reasoned that the law at issue "amount[ed] to a prohibition on an entire class of 'arms' that is overwhelmingly chosen by American society for [the] lawful purpose [of self-defense]." *Id*. at 628. Also supporting its conclusion, the Court held that the prohibition unlawfully extended "to the home, where the need for defense of self, family, and property is most acute." *Id*. The Court thus held that the regulation would fail "***any*** of the standards of scrutiny that [it has] applied to enumerated constitutional rights." *Id.* (emphasis added). The Court also struck down the District's law's requirement that firearms be rendered and kept inoperable. The Court opined, "[t]his makes it impossible for citizens to use them for the core lawful purpose of self-defense and is hence unconstitutional." *Id*. at 630. While acknowledging that the District could use "a variety of tools" to combat handgun violence, the Constitution took "off the table" the "absolute prohibition of handguns held and used for self-defense in the home." *Id*. at 636.

Two years later in *McDonald*, the Court addressed similar laws enacted by the City of Chicago and Village of Oak Park that restricted an individual's right to keep firearms at home. *McDonald* focused on an issue that *Heller* left unanswered: whether the Second Amendment applies to the states. The municipalities argued that it did not. The Court disagreed.

In so holding, the Court restated *Heller*'s core holding that an individual's right to bear arms is not absolute:

> We made it clear in *Heller* that our holding did not cast doubt on such longstanding regulatory measures as 'prohibitions on the

> possession of firearms by felons and the mentally ill,' '***laws forbidding the carrying of firearms in sensitive places such as schools and government buildings***, or laws imposing conditions and qualifications on the commercial sale of arms.' We repeat those assurances here.

McDonald, 561 US at 786, quoting *Heller*, 554 US at 626-627 (internal citations omitted) (emphasis added).[7]

Heller and *McDonald* broke no new constitutional ground in holding that Second Amendment rights are not absolute and that those rights do not apply with equal force in all circumstances. First Amendment jurisprudence, to which *Heller* expressly referred, is analogous. The First Amendment broadly states that "Congress shall make no law abridging the freedom of speech" and does not signal that laws limiting speech may be subject to different standards. Yet the Supreme Court has recognized that in some circumstances, speech restrictions are presumptively unconstitutional and are subject to strict scrutiny,[8] that in other situations speech restrictions are subject to a reasonableness test,[9] and that some speech—even on issues of

[7] Parties have on occasion tried to argue that these statements in *Heller* are dicta that lower courts can ignore. But as the Tenth Circuit observed in *Bonidy v United States Postal Service*, 790 F3d 1121, 1125 (CA 10, 2015), there are at least three reasons to reject this argument: first, lower courts should view themselves as bound by Supreme Court dicta almost as firmly as by outright holdings, particularly when the statement is recent and not enfeebled by later declarations; second, this language squarely relates to the holding itself, and so was not gratuitous; and, third, the Court repeated this language and "reendorsed" its content several years later in *McDonald.*

[8] See, e.g., *Boos v Barry*, 485 US 312; 108 S Ct 1157; 99 L Ed 2d 333 (1988) (holding that content-based restrictions on speech are subject to strict scrutiny).

[9] See, e.g., *Ward v Rock Against Racism*, 491 US 781; 109 S Ct 2746; 105 L Ed 2d 661 (1989) (holding that the government can impose reasonable content-neutral time, place, and manner restrictions on speech).

significant public importance—lies outside the First Amendment and receives no presumptive constitutional protection at all.[10]

2. Relying on Heller *and* McDonald*, the U.S. Court of Appeals for the Third Circuit adopted the seminal test for analyzing the constitutionality of firearms regulations*

Almost every court that has considered a firearms regulation has endorsed some form of two-part analysis to address Second Amendment challenges. Though some disagreements may exist about exactly how each part of the test should work, there is one version of the two-part test that emerged early, has the strongest arguments in its favor, and has proved persuasive to the most courts. It is the version followed by the Court of Appeals here.

The two-part test followed by most courts came just two years after *Heller* and was first articulated in *United States v Marzzarella*, 614 F3d 85, 89 (CA 3, 2010). In *Marzzarella*, the Third Circuit read *Heller* to suggest "a two-pronged approach to Second Amendment challenges":

> First, we ask whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee. *Cf. United States v Stevens*, 533 F3d 218, 233 (3d Cir. 2008), *aff'd* ___ U.S. ___, 130 S.Ct. 1577, 176 L.Ed.2d 435 (recognizing the preliminary issue in a First Amendment challenge is whether the speech at issue is protected or unprotected). If it does not, our inquiry is complete. If it does, we evaluate the law under some form of means-end scrutiny. If the law passes muster under that standard, it is constitutional. If it fails, it is invalid.

Id. Although *Marzzarella* found this approach to be suggested by *Heller*, it also justified the two-part analysis by analogy to First Amendment law. *Id*. at 89 n 4.

[10] See, e.g., *Garcetti v Ceballos*, 547 US 410; 126 S Ct 1951; 164 L Ed 2d 689 (2006) (holding that government employee speech receives no First Amendment protection when made in the course of official duties). In *Ezell v Chicago*, 651 F3d 684, 702 (CA 7, 2011), the Seventh Circuit drew this same parallel to the First Amendment. It noted that "some categories of speech are unprotected as a matter of history and legal tradition. So too with the Second Amendment. *Heller* suggests that some federal gun laws will survive Second Amendment challenge because they regulate activity falling outside the terms of the right." *Id*.

Marzzarella also addressed *Heller*'s pronouncement that certain regulations are "presumptively lawful." The court recognized that "the phrase 'presumptively lawful' could have different meanings under newly enunciated Second Amendment doctrine." *Id.* at 91. "On the one hand, this language could be read to suggest the identified restrictions are presumptively lawful because they regulate conduct outside the scope of the Second Amendment." *Id.* "On the other hand, it may suggest the restrictions are presumptively lawful because they pass muster under any standard of scrutiny." *Id.* The court found both readings reasonable. *Id.* But *Marzzarella* held that "the better reading, based on the text and the structure of *Heller*, is the former—in other words, that these longstanding limitations are exceptions to the right to bear arms." *Id.*

Marzzarella's careful reading of *Heller* is informative here. *Marzzarella* found that *Heller* treated laws regarding "sensitive places" like "restrictions on the possession of dangerous and unusual weapons," which the Supreme Court recognized were "not constitutionally suspect because these weapons are outside the ambit of the [Second] amendment." *Id.* *Marzzarella* aptly reasoned that *Heller*, by "equating the list of presumptively lawful regulations with restrictions on dangerous and unusual weapons," showed the Court's intention "to treat them equivalently—as exceptions to the Second Amendment guarantee." *Id.*

The Third Circuit justified its reading of *Heller* by noting the historical framework the Supreme Court recognized in that case:

> This reading is also consistent with the historical approach *Heller* used to define the scope of the right. If the Second Amendment codified a pre-existing right to bear arms, *id.* at 2797, it codified the pre-ratification understanding of that right, *id.* at 2821 ("Constitutional rights are enshrined with the scope they were understood to have when the people adopted them. . . ."). Therefore, if the right to bear arms as commonly understood at the time of ratification did not bar restrictions on possession by felons or the mentally ill, it follows that by constitutionalizing this understanding, the Second Amendment carved out these limitations from the right.

> Moreover, the specific language chosen by the Court refers to "prohibitions" on the possession of firearms by felons and the mentally ill. *Id*. at 2816–17. The endorsement of prohibitions as opposed to regulations, whose validity would turn on the presence or absence of certain circumstances, suggests felons and the mentally ill are disqualified from exercising their Second Amendment rights. . . . The same is true for "laws forbidding the carrying of firearms in sensitive places." *Heller*, 128 S. Ct. at 2817.

Id. at 91-92.

Marzzarella's analysis of the first prong finds support not just in the language and structure of *Heller*, but also in common sense. An ordinary citizen has no Second Amendment right to carry a loaded firearm into the chamber of the United States Supreme Court or on a tour of the White House. There is no need to assess matters like the weight of the government's interest or the narrowness of the specific rule.

3. The majority of courts have followed Marzzarella*'s two-pronged analysis*

Almost every federal circuit court of appeals has adopted *Marzzarella*'s two-pronged approach,[11] as have the high courts in many states.[12] Most courts also agree with *Marzzarella* that when *Heller* and *McDonald* said they did not cast doubt on certain regulations, they listed places

[11] See *Gould v Morgan*, 907 F3d 659, 669 (CA 1, 2018); *NY State Rifle & Pistol Ass'n, Inc v Cuomo*, 804 F3d 242, 254 (CA 2, 2015); *United States v Chester*, 628 F3d 673, 680 (CA 4, 2010); *Nat'l Rifle Ass'n of Am, Inc v Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F3d 185, 194, 206 (CA 5, 2012); *United States v Greeno*, 679 F3d 510, 518 (CA 6, 2012); *Ezell v City of Chi*, 651 F3d 684, 701-04 (CA 7, 2011), aff'd in part, rev'd in part, 846 F3d 888 (CA 7, 2017), *mandamus denied*, 678 F Appx 430 (CA 7, 2017); *United States v Chovan*, 735 F3d 1127, 1136 (CA 9, 2013); *United States v. Reese*, 627 F3d 792, 800-01 (CA 10, 2010); *GeorgiaCarry.Org, Inc v Georgia*, 687 F3d 1244, 1260 n 34 (CA 11, 2012); *Heller v District of Columbia*, 670 F3d 1244, 1252 (CA DC, 2011), aff'd in part, rev'd in part, 801 F3d 264 (CA DC, 2015). Only the Eighth Circuit and the Federal Circuit, which has a limited docket, have yet to adopt the test.

[12] See *State v Roundtree*, ___ Wis ___; 952 NW2d 765; 2021 WL 56175 (Wis 2021); *State v Weber*, ___ Ohio St 3d ___, ; 2020-Ohio-6832; ___ NE3d ___; 2020 WL 7635472 (Ohio 2020) (lead opinion); *Norman v State*, 215 So3d 18, 35 (Fla 2017); *State v DeCiccio*, 315 Conn 79, 111; 105 A3d 165, 187 (2014); *In re Jordan G*, 33 NE3d 162, 167 (Ill 2015): *Hertz v Bennett*, 294 Ga 62, 64; 751 SE2d 90, 93 (2013); *Pohlabel v State*, 128 Nev 1, 7; 268 P3d 1264, 1267 (2012).

and circumstances outside the scope of the Second Amendment. See, e.g., *United States v Bena*, 664 F3d 1180, 1183 (CA 8, 2011) ("It seems most likely that . . . the regulatory measures listed in *Heller* . . . do not infringe on the Second Amendment right."); *New York State Rifle & Pistol Ass'n, Inc. v Cuomo*, 804 F.3d 242, 258 (CA 2, 2015) (viewing *Heller*'s list as defining the right's scope); *Nat'l Rifle Ass'n of Am, Inc v Bureau of Alcohol, Tobacco, Firearms & Explosives*, 700 F3d 185, 194 (CA 5, 2012) (similar); *Mai v United States*, 952 F3d 1106, 1114 (CA 9, 2020); *Bonidy v US Postal Service*, 790 F3d 1121 (CA 10, 2015) (similar); *Heller v District of Columbia (Heller II)*, 670 F3d 1244, 1253 (CA DC, 2011) (similar); *GeorgiaCarry.Org, Inc v US Army Corps of Engineers*, 38 F Supp 3d 1365, 1373 (ND Ga, 2014) aff'd, 788 F3d 1318 (CA 11, 2015) (similar); *Com v McGowan*, 464 Mass 232, 239; 982 NE2d 495, 500 (2013) (similar); *Pohlabel v State*, 128 Nev 1, 6; 268 P3d 1264, 1267 (2012) (similar).[13]

[13] Some courts have viewed the list of regulations differently, suggesting that this passage from *Heller* means only that these regulations generally pass means-ends scrutiny. These courts have held that, in appropriate cases, an "as applied" challenge to a listed regulation could remain available. See, e.g., *United States v Chester*, 628 F3d 673, 679 (CA 4, 2010); *Tyler v Hillsdale Cty Sheriff's Dep't*, 837 F3d 678, 690 (CA 6, 2016). The different approach of these courts is of no consequence here, however, because Wade brought a facial—and not as-applied—challenge to the University's ordinance. See *United States v Moore*, 666 F3d 313, 318 (CA 4, 2012) ("Whichever meaning the Supreme Court had in mind negates a facial challenge to a felon in possession statute like § 922(g)(1). . . . Under the well recognized standard for assessing a facial challenge to the constitutionality of a statute, the Supreme Court has long declared that a statute cannot be held unconstitutional if it has constitutional application."). Some courts have also read *Heller*'s language about "presumptive" validity to allow a party to rebut the presumption. See, e.g., *Heller v D.C.*, 670 F3d 1244, 1252 (CA DC, 2011); *Binderup v Attorney Gen United States of Am*, 836 F3d 336, 347 (CA 3, 2016) (en banc). But this reading, if it makes sense at all, only does so in relation to certain as-applied challenges. See *Binderup*, 836 F3d at 347 (allowing a defendant mounting an as-applied challenge to rebut the "presumption" that a statute barring those who had served more than a year in prison for an offense was lawful, but saying it would be "impossible" to rebut any presumption of lawfulness "in cases where a statute by its terms only burdens matters . . . outside the scope of the right to arms"); *id*. at 360 n 6 (Hardiman, J., concurring in part) (reasoning that a presumption of validity would preclude a facial but not as-applied challenge).

4. The Court of Appeals faithfully applied Marzzarella*'s two-part test to the University's regulation*

The Court of Appeals in this case followed and correctly applied *Marzzarella*'s widely adopted two-part test. See *Wade*, 320 Mich App at 6, 13. The Court of Appeals properly recognized that the "threshold inquiry is whether the challenged regulation 'regulates conduct that falls within the scope of the Second Amendment right as historically understood.'" *Id*., citing *People v Wilder*, 307 Mich App 546, 556; 861 NW2d 645 (2014). If conduct does not fall within the Second Amendment's scope, the analysis ends there. *Id*. If the regulation does address conduct within the Second Amendment's scope, the court would apply intermediate scrutiny to determine its constitutionality. *Id*.

Employing this framework, the Court of Appeals held that Article X prohibits firearms possession at a "sensitive place" and so falls outside the scope of the Second Amendment. *Id*. at 13-15. Citing dictionary definitions from the time of the Fourteenth Amendment's ratification,[14] the Court of Appeals concluded that universities have long been understood to be "schools." *Id*. A prohibition on carrying a firearm on the University's property therefore does not implicate the right to bear arms. *Id*. Given this holding, the Court of Appeals did not engage in further analysis.

[14] The Court of Appeals defined the relevant question as "whether Article X regulates conduct that was historically understood to be protected by the Second Amendment at the time of the Fourteenth Amendment's ratification, i.e., 1868," following the approach taken by the Seventh Circuit. *Wade*, 320 Mich App at 14, citing *Ezell v City of Chicago*, 651 F3d 684, 702 (CA 7, 2011). Whether one looks at 1868 or 1791, the year of the Second Amendment's ratification, the "universities" were considered "schools" as they are today. The dictionary the Court of Appeals cited was cited in *Heller* to illuminate the Founding Era understanding. See *Heller*, 554 US at 581 (citing, like the Court of Appeals, Webster's 1828 dictionary). Another prominent dictionary in use at the Founding confirms that universities were considered "schools." See Samuel Johnson, *A Dictionary of the English Language* (London, J.F. & C. Rivington, et al., 10th ed. 1792) (defining "University" as a "school where all the arts and faculties are taught and studied"). At any rate, even apart from being a "school," the University today plainly qualifies as a "sensitive place." See *DiGiacinto*, 281 Va 127, 704 SE2d 365; *infra*, Section V.A.5. History supports a continued understanding that universities may prohibit firearms on their property. See *infra*, Section V.C.

Other courts have reached the same unremarkable conclusion that universities are schools and that their property is a sensitive place. See, e.g., *DiGiacinto v Rector and Visitors of George Mason Univ*, 281 Va 127, 134-137; 704 SE2d 365 (2011) (holding that university buildings are "sensitive places as contemplated by *Heller*"); *Florida Carry, Inc v Univ of Florida*, 180 So 3d 137 (Fl App, 2015) (citing *DiGiacinto* with approval). In *DiGiacinto*, the Virginia Supreme Court cited a number of facts about the George Mason University campus that supported its decision in this respect, including its large of number of students, large number of employees, elementary and high school visitors; that it housed a preschool; and that numerous family activities occur on campus like sporting events and high school graduations. *Id*. at 132-135.

The Court of Appeals recognized that many of those same facts apply to the University of Michigan. Under *Heller*, this determination—that the University is a school and thus a sensitive place—ends the legal inquiry. There is no need for further analysis, and the Court of Appeals correctly affirmed the Court of Claims' ruling that no factual development could change this result. Wade has not made a cognizable Second Amendment Claim. Summary disposition under MCR 2.116(C)(8) was proper.

5. Wade's argument that the two-part test does not apply lacks merit

Wade has not cited any authority suggesting that the two-part test endorsed by *Marzzarella* and its progeny does not apply here. To the contrary, Wade acknowledges that most courts have applied that test. (Wade's Brief on Appeal, pp 8-9.) Instead, Wade raises three arguments in support of his claim that that the Court of Appeals erred. Each lacks merit.

First, with no explanation for why it should do so, Wade urges the Court to decide this case based on remarks made by Justice Thomas in his dissenting statement from the denial of certiorari in *Rogers v Grewal*, 590 US ___; 140 S Ct 1865 (Mem); 207 L Ed 2d 1059 (2020). Putting aside that Wade offers no reason why a dissenting statement to an order denying certiorari should be

treated as persuasive authority, Wade's argument reflects confusion about what Justice Thomas said.

In his dissenting statement, Justice Thomas did not object to the idea that, in some circumstances, the Second Amendment simply does not apply at all—the point of the *Marzzarella*'s first prong. To the contrary, Justice Thomas stated, "The protections enumerated in the Second Amendment are not absolute prohibitions against government regulation . . . . States can impose restrictions on an individual's right to bear arms that are consistent with historical limitations." *Id*. at 1874. Rather, Justice Thomas's argument addressed how courts should analyze Second Amendment rights in circumstances when they do attach—the question addressed in *Marzzarella*'s second prong. And even as to that issue, the thrust of Justice Thomas's statement was simply that the Court should have granted certiorari to clarify matters. See *id.* at 1868 ("Whatever one may think about the proper approach to analyzing Second Amendment challenges, it is clearly time for us to resolve the issue."). Justice Thomas's dissent does not control—or even provide much insight—here.

Second, Wade argues that the Court of Appeals erred in applying the first part of this test because it viewed Article X as a geographic restriction and did not consider "[his] conduct." (Wade's Brief on Appeal, p 10.) Wade then cites cases upholding the enforcement of firearms restrictions against intoxicated people and argues that he must have a right to carry a gun wherever he wants because he is sober and law-abiding. (*Id.*) This argument ignores *Heller* and *McDonald*, which hold that some "longstanding prohibitions on the possession of firearms" have been based on geography—including "sensitive places such as schools and government buildings." That additional valid restrictions have been based on other factors, like a person's criminal record, insobriety, or mental health, is irrelevant.

Third, Wade argues that the Court of Appeals erred in applying the first prong because the University is not a "school." Throughout this litigation, Wade's efforts to advance this argument have led him into endless confusions and inconsistencies. Before the Court of Claims, Wade seemed to argue that there was no sense in which the University was a school. (See Wade's Resp to the University's Mot for Summ Disp at p 7, App 57b.)

In the Court of Appeals, Wade shifted position to argue that the *Heller* exceptions only applied to "academics" and only to buildings. (Wade's Court of Appeals Brief at 5, App 92b.) Of course, Wade's focus on academics and buildings has nothing to do with the actual language or analysis of *Heller*, which refers simply to "schools." Nor, for that matter, do those distinctions make sense. For example, under Wade's argument, a government regulation could prohibit the possession of a firearm in a classroom (because "academics" are happening there) but not in a school cafeteria (because "academics" are not happening there), and could prohibit the possession of a firearm in a parking structure (because it is a building) but not in a parking lot (because it is not a building).[15] Furthermore, the distinction ignores the reality that "academics"—that is, learning and teaching—happen in many places other than classrooms (such as dormitories) and other than in buildings (such as on a quadrangle or in an open-air performance venue). In sum, Wade reads *Heller* to say something that it does not—and could not rationally—say.

In his Application to this Court, Wade shifted positions yet again. A University cannot be a "school," Wade argued, because if it were then it would be lawful for a citizen to possess a firearm on one side of the street but not the other. (Wade's App for Leave to Appeal, p 2.) Of course, that is true of all schools, not just universities. If, for example, an elementary school has a

[15] This untenable distinction is belied not just by logic, but by the case law. See, e.g., *Bonidy v US Postal Service*, 790 F3d 1121 (CA 10, 2015) (including a government building parking lot as a sensitive place to which Second Amendment rights do not extend).

"no firearms" policy then it would be impermissible to possess a gun there even though it might be allowed across the street. Nothing in *Heller* suggests that a school stops being a school simply because it is permissible to have a firearm on the other side of the street. And the same principle applies to government buildings; this Court can ban firearms from its premises, even if it is lawful for someone in the residential neighborhood across the street to have one in their home.

Wade's latest argument goes like this: a university is not a school because "[b]oth students and non-students may live on, work in, and otherwise enjoy the property of a university in ways that a school does not make available." (Wade's Brief on Appeal, p 2.) Every part of this argument is wrong: People work in K-12 schools and students sometimes live there. The general public regularly enters K-12 school buildings and grounds. Millions of people attend K-12 athletic events every week.[16] And each year millions attend K-12 theatrical and musical performances.[17]

In common parlance today, it is understood that universities are schools. To decide whether that same understanding would have held when the Fourteenth Amendment was ratified and the Second Amendment was thus incorporated against the states, the Court of Appeals looked

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[16] See, e.g., Karissa Niehoff, The NFHS Voice: High School Football is Thriving, Not Dying, National Federation of State High School Associations (Sept 25, 2019), <https://www.nfhs.org/articles/the-nfhs-voice-high-school-football-is-thriving-not-dying/> ("With approximately 7,123 games every Friday night (14,247 divided by 2), and with a conservative estimate of 1,000 fans per game, there are more than 7 million fans in high school football stadiums every week. An unofficial attendance survey conducted by the NFHS in 2011 indicated about 165 million fans attended high school football games during that season, which included up to five weeks of playoffs and a weekly average of 11 million fans.") (accessed February 5, 2021).

[17] See Educational Theatre Association, *2020 Play Survey* (July 30, 2020), <https://www.schooltheatre.org/blogs/edta-news/2020/07/30/2020-play-survey> ("This year, survey respondents reported a total audience of 3.6 million for their school theatre programs with an estimated 2.6 million additional audience members lost to COVID-19 cancellations. Extrapolating these averages to all theatre programs in the U.S. yields a potential audience of more than 49 million for school theatre performances, consistent with what the survey has found during the three years this data has been gathered[.]") (accessed February 5, 2021).

to dictionaries then in use. Having done so, it reached the unremarkable conclusion that universities were thought to be schools during that era as well. See *Wade*, 320 Mich App at 14-15.

Wade responds by raising an argument that does not make sense and, indeed, likely would have appalled Justice Scalia, the author of *Heller*. Wade points out that the word "schools" does not appear in the Second Amendment. (Wade's Brief on Appeal, p 12.) Therefore, he suggests, the real question is what Justice Scalia thought the word "schools" meant at the time he wrote the *Heller* majority opinion. For insight into that issue, Wade turns to the 1993 edition of American Jurisprudence and a current Michigan statute. Enough said. It is hard to imagine an approach more disconnected from the Second Amendment's original meaning.

Finally, Wade fails to understand why universities and other schools qualify as "sensitive places" in the first place. As Second Amendment scholar Darrell A. H. Miller has observed, what makes certain places "sensitive" is not simply that they implicate heightened safety concerns, although, this is undoubtedly true. Darrell A. H. Miller, *Constitutional Conflict and Sensitive Places*, 28 William & Mary Bill of Rights Journal 459, 461 (2019). Rather, their particular sensitivity arises from their historically unique place in our democracy.

As Miller points out, these places are sensitive because of their distinctive character in facilitating the exercise of ***other*** constitutional rights. Sensitive places, like government buildings, have traditionally been and remain "sites of conflict between constitutional values." *Id*. at 461. The presence of guns chills the exercise of those rights and undermines that essential role. A graphic and tragic confirmation of Miller's observation came on January 6, 2021, when the United States Capitol was transformed from a citadel of democratic debate into the site of an armed and violent siege.

Miller notes that schools prepare their students "for citizenship in the Republic" and vigilant protection of First Amendment freedoms in educational settings "is essential because the classroom is peculiarly the marketplace of ideas." *Id*. at 471. Such institutions therefore adopt measures that seek to improve and enhance, "not limit, the free flow of information and ideas." *Id*.[18] In order "[t]o effectuate that goal there is a long history of forbidding firearms in educational institutions," including universities. *Id*. Recent studies confirm what educational institutions have historically recognized and common sense tells us: the presence of firearms on university property works against these important goals. *Id*. at 472.

Of course, this is not to say that ***every*** institution of higher education has made exactly the ***same*** judgment—a particular school may have had good reasons to depart from this tradition. Even a school that closely restricts firearms possession can implement exceptions. But the point holds that, because schools are sensitive places, they have traditionally been given the latitude to make those judgments for themselves.

In sum, the Court of Appeals followed the two-part test that the clear majority of courts have used in deciding Second Amendment claims. It applied the first prong of that test in a manner consistent with *Heller*, consistent with the approach most courts have taken following *Heller*, and consistent with those cases that have applied *Heller* in the higher education context. It tested that

[18] The common law tradition recognized in *Heller* treated prohibitions on firearms in places where important social activities occur as entirely consistent with the right to bear arms. See Joseph Blocher & Reva Siegel, *When Guns Threaten the Public Sphere: Recovering the Common Law Approach to Public Safety*¸115 Nw L Rev at 26–27 (*forthcoming* 2021) (explaining how the "sensitive places" identified in *Heller* relate to the broader common law tradition discussed in that case), citing *Hill v State*, 53 Ga. 472, 475 (1874) ("The practice of carrying arms at courts, elections and places of worship, etc., is a thing so improper in itself, so shocking to all sense of propriety, so wholly useless and full of evil, that it would be strange if the framers of the constitution have used words broad enough to give it a constitutional guarantee.").

application against the language and understanding that existed at the time of the Second Amendment's application to the states. The Court should affirm its decision.

B. Intermediate Scrutiny Applies to Laws That Do Not Restrict Core Second Amendment Rights

Given the University's status as a "sensitive place" where the Second Amendment does not apply, it is unnecessary to reach the question of which standard of scrutiny applies to Article X. Even if the Court addresses this question, intermediate scrutiny applies. Article X easily survives intermediate scrutiny and is thus constitutional.

1. The great weight of authority applies intermediate scrutiny to non-"core" Second Amendment rights

As with the Court's first question to the parties, *Marzzarella* is instructive here as well. Although the Third Circuit thought the law before it (which regulated unmarked guns) was likely constitutional under the first step in its analysis, the court nevertheless assumed some infringement for the sake of argument and proceeded to step two. *Marzzarella*, 614 F3d at 95. The court therefore needed to determine the appropriate level of scrutiny to apply.

Marzzarella rejected the defendant's argument that it had to "apply strict scrutiny because the right to bear arms is an enumerated fundamental constitutional right." *Id*. at 96. Again drawing on an analogy to First Amendment law, the court reasoned that, although strict scrutiny might apply in some Second Amendment cases, it does not apply in all of them:

> Strict scrutiny does not apply automatically any time an enumerated right is involved. We do not treat First Amendment challenges that way. Strict scrutiny is triggered by content-based restrictions on speech in a public forum, . . . but content-neutral time, place, and manner restrictions in a public forum trigger a form of intermediate scrutiny. . . . Regulations on nonmisleading commercial speech trigger another form of intermediate scrutiny, . . . whereas disclosure requirements for commercial speech trigger a rational basis test. . . . In sum, the right to free speech, an undeniably enumerated fundamental right, . . . is susceptible to several standards of scrutiny, depending upon the type of law challenged and the type of speech

> at issue. We see no reason why the Second Amendment would be any different.

Id. at 96-97 (citations omitted). The court concluded that a "less stringent standard than the one that would have applied to the District of Columbia's handgun ban" should apply to the law at issue. *Id*. at 97.

This conclusion makes perfect sense. As discussed above, the District of Columbia law in *Heller* imposed a complete ban on possessing handguns or other operative firearms in private homes. It infringed on rights at the core of the Second Amendment.

In contrast, *Marzzarella* characterized the law before it as "a regulation of the manner in which persons may lawfully exercise their Second Amendment rights." *Id*. at 97. The court cited the distinctions in First Amendment law between "limitations on the exercise of protected conduct and regulation of the form in which that conduct occurs[.]" *Id*. Borrowing this distinction from First Amendment jurisprudence, the court applied intermediate scrutiny. *Id*.

In defining intermediate scrutiny, *Marzzarella* considered the various ways in which the U.S. Supreme Court has described it in First Amendment cases:

> In the First Amendment speech context, intermediate scrutiny is articulated in several different forms . . . . Although these standards differ in precise terminology, they essentially share the same substantive requirements. They all require the asserted governmental end to be more than just legitimate, either "significant," "substantial," or "important." . . . [And they] generally require the fit between the challenged regulation and the asserted objective be reasonable, not perfect.

Id. at 97-98 (citations omitted). *Marzzarella* concluded that the law at issue there survived intermediate scrutiny, noting that it would have survived strict scrutiny too. *Id.* at 98-99.

Most federal circuit courts of appeal to address laws that do not burden the core Second Amendment right of possessing firearms at home for self-defense have applied intermediate scrutiny in step two of the analysis. Those courts include:

- The First Circuit, *Gould v Morgan*, 907 F3d 659, 669 (CA 1, 2018) (recognizing that strict scrutiny does not apply in all cases to enumerated rights, holding that the public carriage of firearms falls outside the Second Amendment's core, and applying intermediate scrutiny);
- The Second Circuit, *Kachalsky v Cty of Westchester*, 701 F3d 81, 96 (CA 2, 2012) (recognizing that the level of scrutiny may vary as it would in First Amendment cases, applying intermediate scrutiny, and reasoning that the "historical prevalence of the regulation of firearms in public demonstrates that while the Second Amendment's core concerns are strongest inside hearth and home, states have long recognized a countervailing and competing set of concerns with regard to handgun ownership and use in public");
- The Third Circuit, *Drake v Filko*, 724 F3d 426, 436 (CA 3, 2013) (identifying the core Second Amendment right as the "right to possess usable handguns ***in the home*** for self-defense" and applying intermediate scrutiny to public carry law);
- The Fourth Circuit, *United States v Masciandaro*, 638 F3d 458, 471 (CA 4, 2011) (concluding that "a lesser showing" than strict scrutiny "is necessary with respect to laws that burden the right to keep and bear arms outside of the home");
- The Fifth Circuit, *Nat'l Rifle Ass'n of Am., Inc v McCraw*, 719 F3d 338, 348 (CA 5, 2013) (reasoning that intermediate scrutiny applied in part because law restricted 18 to 21 year old's "ability to carry handguns in public," and it did "not prevent those under 21 from using guns in defense of hearth and home"); and
- The Tenth Circuit, *Bonidy v US Postal Service*, 790 F3d 1121 (CA 10, 2015) (discussed below).

When intermediate scrutiny has been applied, the law in question has generally been upheld.

The Tenth Circuit's opinion in *Bonidy* explains some of the many reasons why intermediate scrutiny is the correct standard when considering regulations that apply outside the home:

> Intermediate scrutiny makes sense in the Second Amendment context. The right to carry weapons in public for self-defense poses inherent risks to others. Firearms may create or exacerbate accidents or deadly encounters, as the longstanding bans on private firearms in airports and courthouses illustrate. The risk inherent in firearms and other weapons distinguishes the Second Amendment right from other fundamental rights that have been held to be evaluated under a strict scrutiny test, such as the right to marry and the right to be free from viewpoint discrimination, which can be exercised without creating a direct risk to others. Intermediate scrutiny appropriately places the burden on the government to justify its restrictions, while also giving governments considerable flexibility to regulate gun safety.

Bonidy, 790 F3d at 1126. *Bonidy* thus embraced the common sense proposition that the public possession of firearms carries with it risks that other activities do not and that the level of scrutiny applied should consider that fact.

Even if it could be argued that the core Second Amendment right extends to some places outside the home, that does not mean strict scrutiny applies here. A clear distinction exists between government interference on private property, on the one hand, and the government's management of its buildings and property, on the other. *Bonidy* recognized this distinction as well.

Bonidy addressed a firearms prohibition at a U.S. Postal Office building and its adjoining parking lot. Unlike the laws at issue in *Heller* and *McDonald*, the court noted, "the regulation challenged here applies only to discrete parcels of land owned by the U.S. Postal Service, and affects private citizens only insofar as they are doing business with the USPS on USPS property. And the regulation is directly relevant to the USPS's business objectives, which include providing a safe environment for its patrons and employees." *Id*. 1127. In short, *Bonidy* distinguished the

government acting as regulator of private conduct (as in *Heller* and *McDonald*) from the government acting as property owner (as in that case and this one).

Other courts have similarly emphasized this distinction. See *United States v Class*, 442 US App DC 257, 261; 930 F3d 460 (2019) ("Finally, as the owner of the Maryland Avenue lot, the government—like private property owners—has the power to regulate conduct on its property."), citing *Adderley v Florida*, 385 US 39, 47; 87 S Ct 242; 17 L Ed 2d 149 (1966) (observing in the free-speech context that the government, "no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated"); *GeorgiaCarry.org, Inc v US Army Corps of Engineers*, 212 FSupp3d 1348, 1367 (ND Ga, 2016) ("[T]he Court finds that the lowest possible level of scrutiny applies because Defendant Army Corps' issuance of the Firearms Regulation was not an act of governance—it was a managerial action affecting only government owned lands."); *United States v Dorosan*, 350 F Appx 874, 875 (CA 5, 2009) ("[T]he Postal Service owned the parking lot where Dorosan's handgun was found, and its restrictions on guns stemmed from its constitutional authority as the property owner.").

Here, the Court of Appeals followed this clear majority view. In light of its conclusion in step one that the University is a "sensitive place" it conducted no further analysis. But it did note that if "the challenged conduct falls within the scope of the Second Amendment, an intermediate level of constitutional scrutiny is applicable and requires the showing of 'a reasonable fit between the asserted interest or objective and the burden placed on an individual's Second Amendment right.'" *Wade*, 320 Mich App at 13, quoting *Wilder*, 307 Mich App at 556-57.

2. Wade's argument that strict scrutiny applies to Article X lacks merit

Wade's position on the level of scrutiny that applies here is difficult to discern. In his Application, he argued that the second step in the constitutional analysis applies a reasonableness

standard. (See Wade's App for Leave to Appeal at p x.) Before this Court, Wade again concedes that "most courts afford intermediate scrutiny." (Wade's Brief on Appeal, p 15.) Elsewhere, he claims that strict scrutiny applies. (*Id*. at p 13.)

Wade's argument that strict scrutiny applies rests on a conspicuous error. He argues that Article X is "like the complete prohibition on handguns struck down in *Heller*" except "even more burdensome." (*Id*. at 13-14.) This is wrong. To apply the distinction emphasized in *Bonidy* and other cases, Article X applies only to the University's operations, management, and property. Unlike the laws at issue in *Heller* and *McDonald*, Article X does not reach out into the world and restrict the possession of firearms in private homes—the core Second Amendment right that those cases recognized. In the relevant constitutional sense, Article X is therefore ***unlike*** the laws at issue in *Heller* and *McDonald* and is significantly ***less*** burdensome.

Apparently suspecting that his argument in favor of applying strict scrutiny does not hold up, Wade alternatively argues that Article X fails intermediate scrutiny, anyway. He is mistaken.

3. Article X serves a number of important University interests

Article X serves a number of University interests that are at a minimum "significant, substantial, and important." The University believes them to be compelling and critical. Those interests include the institution's desire to maintain a safe environment for thousands of students, faculty, staff, and hundreds of thousands of visitors. Many courts have recognized that a university has a substantial interest in doing so. See, e.g., *Healy v James*, 408 US 169, 184; 92 S Ct 2338; 33 L Ed 2d 266 (1972) ("[A] college has a legitimate interest in preventing disruption on the campus."); *DiGiacinto*, 281 Va at 132 (finding a "compelling State interest" in the "safety concerns on a public university campus"); *Bloedorn v Grube*, No 609CV055, 2009 WL 4110204, at *7-8 (SD Ga, Nov 24, 2009), aff'd 631 F3d 1218 (CA 11, 2011) ("Maintaining safety, efficiency, and order on campus are crucial to the furtherance of the University's mission of providing a proper

educational environment . . . . [T]he University has an interest in maintaining campus safety in order to support its educational mission."); *Rock for Life-UMBC v Hrabowski*, 643 F Supp 2d 729, 747 (D Md, 2009), aff'd 411 F Appx 541 (CA 4, 2010) ("Safety and security are legitimate interests of a university."). Safety concerns are elevated at a higher education institution like the University, whose properties include spaces like hospitals, counseling offices, mental health clinics, legal clinics, laboratories, and childcare centers.

Data and the views of experts support the University's judgment that its environment is safer without the presence of firearms on its property. As an initial matter, "gun violence is much less common on college campuses than it is elsewhere in the country." Somers & Valentine, *Campus Carry: Confronting a Loaded Issue in Higher Education* (Cambridge, Massachusetts: Harvard Education Press, 2020), p 14. One major study concludes that college campuses "are among the safest sanctuaries from violent crimes leading to homicide." *Id*. The argument that members of campus communities need to carry firearms for self-defense is accordingly diminished in this context.

Even in those rare cases in which shootings do occur on college campuses, experts have indicated that the presence of additional firearms on the scene is likely to do more harm than good. In a 2015 article, a Virginia public college safety officer detailed no fewer than eleven reasons why administrators "should have significant concerns" about allowing firearms on campus—even when those weapons are carried by trained holders of concealed pistol licenses. See Lt. John M. Weinstein, *Should We Allow Armed CCP Holders on Campus? 11 Reservations of a 'Gun Guy,'* Campus Safety (November/December 2015) at 12-14.

<http://www.campussafetymagazine.com/article/should_we_allow_armed_ccp_holders_on_campus_11_reservations_of_a_gun_guy> (accessed February 5, 2021).[19]

Suicide statistically presents a much greater risk of death by firearm than do individual homicides or mass shootings. Experts on the subject have declared that "[a]llowing firearms on campus increases the risk of suicide." Van Brunt, Murphy, and Solomon, in *Campus Carry*, *supra*, at 98. These experts posit: "The central question is, Are we inadvertently contributing to the tens of thousands (22,938 in 2016 alone) of annual firearms suicides when we allow students to have access to guns on campus? The data would suggest that we are." *Id*. at 99. Surely, the University has a "significant, substantial, and important" interest in reducing that risk, which is a particular concern given the populations that the University serves. See Centers for Disease Control and Prevention, Web-based Injury Statistics Query and Reporting System (WISQARS), Leading Cause of Death Reports <https://webappa.cdc.gov/sasweb/ncipc/leadcause.html> (showing that suicide accounts for a higher percentage of deaths for 15-to-24-year-olds than for any other age group and is the second-most common cause of death among 18-to-24-year-olds) (accessed February 5, 2021); Curtin, S. C. & Heron, M., *Death Rates Due to Suicide and Homicide Among Persons Aged 10-24: United States, 2000-2017*, National Center for Health Statistics Data Brief No. 352 <https://www.cdc.gov/nchs/data/databriefs/db352-h.pdf> (reflecting that the suicide rate among persons aged 10–24 increased 56% between 2007 (6.8 per 100,000) and 2017 (10.6 per 100,000) with the pace of increase for suicide from 2013 to 2017 increasing 7% annually) (accessed February 5, 2021).

[19] Access to this article requires a free subscription. For the Court's convenience, a copy is attached at App 139b – 143b.

To be sure, experts have concluded that universities have demographics and dynamics that greatly aggravate many risks that firearm possession presents. A 2016 study from Johns Hopkins University concluded: "While the net effect of right-to-carry gun policies have negatively impacted public safety broadly, their effects are likely to be far more deleterious when extended to college campuses. Risks for violence, suicide attempts, alcohol abuse, and risky behavior are greatly elevated among college-age youth and in the campus environment. The presence of firearms greatly increases the risk of lethal and near-lethal outcomes from these behaviors and in this context." Webster, et al., *Firearms on College Campuses: Research Evidence and Policy Implications*, Johns Hopkins Bloomberg School of Public Health, (October 15, 2016) p 23. See also Matthew Miller et al., *Guns and Gun Threats at College*, 51 J Am Coll Health 57, 64 (2002) ("[O]ur findings also suggest that students who report having guns at college disproportionately engage in behaviors that put themselves and others at risk for injury."); OJJDP Statistical Briefing Book. Online <https://www.ojjdp.gov/ojstatbb/victims/qa02601.asp?qaDate=2018> (reflecting that young adult ages 18 to 24 were more likely to be victims of serious violence than juveniles ages 12 to 17 or adults ages 25 & over) (accessed February 5, 2021).

Safety is not the only important concern supporting Article X. The University also has a vital interest in fostering an environment in which members of its community can freely and openly exchange ideas—even controversial, unsettling, and emotionally provocative ones. The U.S. Supreme Court has recognized a university's interest in cultivating such an open "marketplace of ideas" as one of constitutional magnitude under the First Amendment. See, e.g., *Keyishian v Bd of Regents of the Univ of the State of New York*, 385 US 589, 603; 87 S Ct 675; 17 L Ed 2d 629 (1967) (noting that a university's "academic freedom" is a "special concern of the First Amendment" and that "[t]he classroom is peculiarly the 'marketplace of ideas'"). Article X

reflects the University's judgment that the presence of firearms creates risks of fear, intimidation, and self-censorship that are wholly inconsistent with this important interest.

The presence of weapons undermines the environment the University seeks to cultivate, which is a "special concern of the First Amendment":

> Transforming a campus into a place "in which everyone carries a potential gun" . . . [creates] a constant buzzing in the background. This unease seeps into the minds of faculty and students. It changes us. It changes the way we teach. It changes the way we learn. . . . Campus carry creates an environment where every student is potentially an armed student, a place where . . . "no one knows precisely what is threatening to whom, and how."

Nel, in *Campus Carry*, *supra*, at 32-33. The University has the latitude to conclude that the sort of "uninhibited, robust, and wide-open" debate that we hope for in a higher education environment is likely to be chilled by the knowledge that some or all of the disputants may be armed.[20]

Relatedly, precisely because of their role as "peculiarly the marketplace of ideas," universities are the sites of vigorous, and sometimes disruptive, protests. See, e.g., Katie Reilly, "How Violent Protests at Middlebury and Berkeley Became a Warning for Other Schools," Time (March 13, 2017) <http://time.com/4697066/campus-protests-controversial-speakers> (accessed February 5, 2021). A university can reasonably conclude that an ordinance that prohibits firearms on its property reduces the likelihood that such a protest will turn from disorderly to tragic.

4. Article X reasonably promotes these important interests

A substantial and reasonable—indeed, obvious—relationship exists between all of the various concerns just catalogued and Article X. Certainly, the University acted reasonably in

[20] For a recent example of how the presence of firearms can chill uninhibited and open discourse, consider the events that unfolded last summer after armed protestors flooded Michigan's capitol building. See generally *When Guns Threaten the Public Sphere: Recovering the Common Law Approach to Public Safety*, *supra* n 18, at Part I.

concluding that Article X would promote safety.[21] And, just as certainly, the University acted reasonably in concluding that Article X would help cultivate an academic, athletics, and patient-care environment that is welcoming, open, expressive, experimental, and free from intimidation. Wade may disagree with those judgments, but they are the University's—not his—to make, and courts traditionally defer to institutional views on matters of pedagogy, academic atmosphere, and educational environment. See, e.g., *Christian Legal Soc Chapter of the Univ of California, Hastings Coll of the Law v Martinez*, 561 US 661, 686; 130 S Ct 2971, 2988; 177 L Ed 2d 838 (2010) ("[W]e have cautioned courts in various contexts to resist substituting their own notions of sound educational policy for those of the school authorities which they review."); *Grutter v Bollinger*, 539 US 306, 328-329; 123 S Ct 2325; 156 L Ed 2d 304 (2003) ("The Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer.") (collecting cases). See *Smith v Tarrant Co Coll Dist*, 694 F Supp 2d 610, 627 (ND Tex, 2010) ("[T]he federal judiciary has never denied a university's authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities."), quoting *Widmar v Vincent*, 454 US 263, 268 n 5; 102 S Ct 269; 70 L Ed 2d 440 (1981).

At some points in this litigation, Wade has argued that Article X is not reasonably related to these important goals because it applies to all University property, subject to only a few exceptions. As noted above, Wade has suggested that the University should limit Article X to

[21] A number of courts have acknowledged the connection between promoting public safety and regulating the possession of weapons. See, e.g., *Kachalsky v Cty of Westchester*, 701 F3d 81, 98 (CA 2, 2012) ("The connection between promoting public safety and regulating handgun possession in public is not just a conclusion reached by New York. It has served as the basis for other states' handgun regulations, as recognized by various lower courts.") (collecting cases); *Nat'l Rifle Ass'n of Am, Inc v McCraw*, 719 F3d 338, 348 (CA 5, 2013) ("Texas's handgun carriage scheme is substantially related to this important government interest in public safety through crime prevention.").

buildings or to places where "academics" take place. Wade's arguments are neither sensible nor supported by the law.

As a practical matter, chopping the University up into "gun free" and "carry" spaces would be unworkable. For example, the University cannot address its important concerns by prohibiting guns in the classroom but allowing them in the adjoining halls, common areas, and meeting rooms. It cannot do so by allowing guns on walkways but prohibiting them in the outdoor spaces through which those passages run and that are used for demonstrations, instruction, and performances. It cannot do so by prohibiting guns in hospitals, clinics, and counseling centers, but allowing them in the parking lots and structures that serve those facilities, mere feet from their front doors.

Furthermore, such an approach would leave those who have the right to carry outside the home with less clarity about where firearms are permitted rather than more. A comprehensive rule is easier to understand and navigate than a piecemeal and fragmented one.[22]

But Wade does not just misunderstand the realities of university administration; he also misunderstands the law. Nothing in the nature of intermediate scrutiny suggests that it precludes comprehensive regulations. Courts repeatedly stress that intermediate scrutiny requires a "reasonable" fit, not a "perfect" fit, between the government's means and its ends. See, e.g., *Kolbe v Hogan*, 849 F3d 114, 140–41 (CA 4, 2017) (en banc) ("Simply put, the State has shown all that is required: a reasonable, if not perfect, fit between the FSA and Maryland's interest in protecting

[22] The public knows that the University applies different rules to its property than may otherwise apply in the City of Ann Arbor. For example, under University of Michigan Standard Practice Guide 601.04 <https://spg.umich.edu/policy/601.04> (accessed February 5, 2021), smoking is completely prohibited in all University buildings, facilities, grounds, and University-owned vehicles. In addition, the sale of tobacco products is prohibited in all University buildings, facilities, and grounds. By contrast, tobacco products can be purchased at multiple locations in Ann Arbor and smoking is permitted in many places within city limits, including private residences.

public safety"). A comprehensive rule can be a perfectly permissible way for a governmental unit to address its concerns. See *Bonidy*, 790 F3d at 1127 ("[T]he USPS is not required to tailor its safety regulations to the unique circumstances of each customer, or to craft different rules for each of its more than 31,000 post offices, or to fashion one set of rules for its parking lots and another for its buildings and perhaps another for the steps leading up to the building. Intermediate scrutiny does not require a perfect fit between a rule's objectives and the circumstances of each individual subject to the rule."); *United States v Staten*, 666 F3d 154, 167 (CA 4, 2011) (recognizing that a categorical ban on firearm possession by domestic violence misdemeanants might be "over-inclusive" but passed intermediate scrutiny). And intermediate scrutiny requires substantial deference to the judgments of universities about how best to fulfill their missions. Cf *Grutter*, 539 US at 328 (showing deference to the "Law School's educational judgment that such diversity is essential to its educational mission" under strict scrutiny).[23]

For the reasons set forth above, the Court need not address the second prong of the two-part analysis. If the Court finds that it must do so, then intermediate scrutiny applies to Article X. Article X easily survives that standard.[24]

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[23] See also *Schrader v Holder*, 704 F3d 980, 990 (CA DC, 2013) ("In assessing this 'fit,' we afford 'substantial deference to the predictive judgments of Congress.'") (citation omitted); *Gould*, 907 F3d at 673 (stating that intermediate scrutiny requires "substantial deference to the predictive judgments" of the legislature); *Kolbe*, 849 F3d at 140 (stating that intermediate scrutiny requires "substantial deference to the predictive judgments of [the legislature]").

[24] Of course, even if this Court finds that strict scrutiny is appropriate—and it is not—Article X withstands such scrutiny. As described above, the University has a number of compelling interests to support Article X, and Article X is narrowly tailored to serve that interest. Many courts have upheld firearms regulations, including categorical prohibitions, applying this level of scrutiny. See *Marzzarella*, 614 F3d at 99-101 (stating that law prohibiting possession of firearms with "removed, obliterated, or altered" serial numbers would pass strict scrutiny); *United States v Reese*, 627 F3d 792, 804 (CA 10, 2010) (holding that firearm prohibition before it would pass strict scrutiny); *Kwong v Bloomberg*, 723 F3d 160, 175 (CA 2, 2013) (Walker, J., concurring) (stating that even if strict scrutiny applied, he would find the law at issue passed muster). See also Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*,

C. Article X Does Not Violate the Second Amendment

The third question the Court posed to the parties is "whether the University of Michigan's firearms policy is violative of the Second Amendment." For the reasons discussed above, the answer is "no." The University is a "sensitive place" to which the Second Amendment does not apply. Even if the Second Amendment did apply to Article X, then it would trigger only intermediate scrutiny, which the regulation easily passes.

The Court then asks (a) "whether this policy reflects historical or traditional firearm restrictions within a university setting" and (b) "whether it is relevant to consider this policy in light of the University's geographic breadth within the city of Ann Arbor." It is not certain that either of these questions is relevant in the context of the controlling legal principles applicable here. But if they are relevant, then the answers to both questions favor the University.

1. Historical Restrictions on Firearms at Universities

Nothing in *Heller* suggests that the proper frame of reference with respect to the validity of Article X is the history of ***universities in particular*** in prohibiting firearms. *Heller* (and, later, *McDonald*) expressly declared their holdings cast no doubt on "longstanding prohibitions . . . forbidding the carrying of firearms in sensitive places such as schools and government buildings." *Heller*, 554 US at 626; *McDonald*, 561 US at 786. This language does not invite an approach of historical particularization, where the question becomes whether a specific type of school has traditionally prohibited guns on its campus.

Such an approach would make little sense if it were applied to the other category of sensitive places identified in *Heller*: government buildings. The analysis here does not depend on

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59 Vand L Rev 793, 815 (2006) (finding that approximately 30 percent of all applications of strict scrutiny lead to the challenged law being upheld).

whether, for example, a specific type of government building existed in 1791 when the Second Amendment was ratified. The headquarters of the Federal Bureau of Investigation and the Central Intelligence Agency, municipal power and water processing plants, the Federal Reserve banks, and the Supreme Court building itself—none of these existed in 1791. But they undoubtedly qualify as sensitive places. See, e.g., *Bonidy*, *supra* (applying sensitive place analysis to a parking lot, a concept which clearly did not exist at the time of the Founding).

By the same token, in 1791, the different types of schools into which we now commonly divide K-12 education (kindergarten, elementary school, middle school, and high school) did not exist.[25] It would not make sense to say that contemporary schools only have a tradition of restricting firearms if they closely resemble the Boston Latin School, which was founded in 1635. If this case involved a middle school or a vocational adjunct to a high school this Court would not analyze the history of those discrete institutions. To the contrary, consistent with *Heller*, it would instead look to the history of schools writ large. All of these contemporary educational units are sensitive places, including colleges and universities; for the reasons discussed above, colleges and universities are uniquely so in the relevant constitutional sense because of their distinctive role within our democracy.

Assuming, however, that the specific history of colleges and universities is relevant, then that history supports the University's position. As two leading scholars in the field observe:

> In 1824, the University of Virginia Board of Visitors addressed the issue of guns on campus by dictate: "No Student shall, within the

[25] For example, the first kindergarten did not open in the United States until 1856 and the concepts of a middle school or junior high school did not exist until the twentieth century. See Elizabeth Jenkins, *How the Kindergarten Found Its Way to America*, Wisconsin Magazine of History, Vol 14, No 1 at 48 (Sept 1930) (noting the founding of the first kindergarten in America); John H. Lounsbury, *Deferred but Not Deterred: A Middle School Manifesto*, Middle School Journal, Vol 40, No 5, at 31-36 (May 2009) (noting that the first junior high school was established in 1909 and that the term middle school was first advanced in 1963).

> precincts of the University . . . keep or use weapons of any kind, or gunpowder." The six-member board included University of Virginia founder Thomas Jefferson, as well as his colleague James Madison, the principal author of the Bill of Rights.
>
> Any gun rights advocate asserting a constitutional prerogative to bear arms on campus should be duly humbled by the fact that the founding fathers banned firearms at the colleges they chartered.

Campus Carry, *supra*, at 10. Second Amendment scholar Darrell A. H. Miller similarly writes that "there is a long history of forbidding firearms in educational institutions," *Constitutional Conflict and Sensitive Places*, *supra* p 22, at 471, citing the University of Virginia and Harvard as examples.[26]

Indeed, the struggle to allow guns on the University of Virginia campus began early, with tragic results. In the 1830s, a group of students calling themselves the "University Volunteers" protested that they had the right to carry arms on campus. The University initially allowed them to do so, subject to certain terms, which they soon violated. Students were disciplined, tensions escalated, and the Volunteers opened fire on faculty residences. Law professor John A. G. Davis, who served as faculty chair, suffered the brunt of the aggression. Law enforcement restored order, but a second riot erupted in 1840. During that disruption, Davis was murdered outside his campus residence. *Campus Carry*, *supra* at 11-13. These events validated the judgment of Jefferson and Madison that firearms did not belong at the school.

Wade does not respond at all to this Court's question about the history and tradition of firearms regulation on university campuses. Where a party has failed to address an issue or to cite

[26] That these universities and the regulations that they chose to adopt might look different from the University and Article X does not render the historical support for Article X's constitutionality any less impactful. A "historical analysis has to involve more than simply looking for founding-era equivalents" to the law at issue. See *State v Weber*, ___ Ohio St 3d ___; 2020-Ohio-6832; ___ NE3d ___; 2020 WL 7635472, at *18 (Ohio 2020) (DeWine, J., concurring).

any authority in support of their position with respect to it, they are deemed to have abandoned the argument. See, e.g., *People v McGraw*, 484 Mich 120, 131 n 36; 771 NW2d 655 (2009) ("Failure to brief an issue on appeal constitutes abandonment."); *In re Certified Question from United States Court of Appeals for Ninth Circuit (Deacon v Pandora Media, Inc)*, 499 Mich 477, 485 n 12; 885 NW2d 628 (2016) ("We conclude that this argument has been abandoned because plaintiff has provided no support for it.").[27] Even without Wade's waiver, Article X reflects the historical and traditional restrictions imposed in the university setting.

2. The Ann Arbor Campus and the City of Ann Arbor

The final question posed by the Court's November 6 Order is "whether it is relevant to consider [Article X] in light of the University's geographic breadth within the city of Ann Arbor." The answer is "no." The University's geographic breadth does not make it any less of a sensitive place. Indeed, some K-12 systems occupy multiple buildings, facilities, and athletic fields that have significant geographic breadth within a community. Furthermore, the University's geographic breadth does not make its concerns any less "substantial, significant, and important" or make its response to those concerns any less reasonable.

[27] The Court explicitly ordered Wade to address the issue. He did not do so and should bear the consequences. He cannot circumvent orderly appellate review by trying to address it for the first time in his reply. See, e.g., *Lake Erie Land Co v Chilinski*, 197 Mich 214, 226; 163 NW 929 (1917) ("In a reply brief, filed by plaintiffs after the case was submitted in this court, it is urged for the first time that Stuart is not entitled to affirmative relief . . . . It is not necessary for us to determine whether this is a case for the application of this statute; the question was not raised in the court below, or in the original brief; under numerous authorities, it is too late now to raise it."); *Kinder Morgan Michigan, LLC v City of Jackson*, 277 Mich App 159, 174; 744 NW2d 184 (2007) ("Reply briefs must be confined to rebuttal, and a party may not raise new or additional arguments in its reply brief."), citing MCR 7.212(G); see also *Wright v Holbrook*, 794 F2d 1152, 1156 (CA 6, 1986) ("Plaintiff's argument on this issue was raised for the first time in his reply brief. Accordingly, it will not be considered on appeal . . . . The reason for this rule is clear: It is impermissible to mention an issue for the first time in a reply brief, because the appellee then has no opportunity to respond.").

It is also not clear why the City of Ann Arbor is the proper measure by which to gauge the University's breadth. The laws that apply outside of University property apply generally throughout the State of Michigan. But the University's breadth within the state taken as a whole is obviously small. In addition, the University has campuses to which Article X applies in Flint and Dearborn. Those campuses are located not only in different cities, but in different counties. Indeed, the Ann Arbor and Flint campuses are more than fifty miles apart. For these reasons as well, the University's breadth within Ann Arbor is not a relevant consideration.

Furthermore, if the University's geographic breadth within Ann Arbor were relevant, then it would support the validity of the University's policy. A smaller and simpler campus, made up of more tidily distinguishable spaces, might conceivably lend itself to the sort of patchwork approach Wade seems to contemplate. For the reasons discussed above, this is not a strategy that is workable on a campus like that of the University.

Wade again fails to precisely address this question, instead raising an entirely different argument. He suggests that the University's breadth within the City of Ann Arbor is problematic because someone might not know when they were on institutional, as opposed to municipal, property. (Wade's Brief on Appeal, p 19.) He argues that this renders Article X unconstitutional for two reasons: first, because Article X violates his right to due process; and, second, because the University operates as a "company town." Neither argument has merit.

a. Article X does not violate Wade's Due Process rights

Wade argues that, because someone could be uncertain about whether they were on University property, Article X violates the constitutional right to due process. This argument is mistaken for several reasons.

First, Wade's sparse four-page complaint does not include a claim under the Due Process Clause of the Fourteenth Amendment. Nor did he raise such a claim when responding to the

University's motion for summary disposition. A party cannot advance on appeal an argument, let alone a claim, they did not raise in the trial court. See *Walters v Nadell*, 481 Mich 377, 387; 751 NW2d 431 (2008) ("Michigan generally follows the 'raise or waive' rule of appellate review. Under our jurisprudence, a litigant must preserve an issue for appellate review by raising it in the trial court. Although this Court has inherent power to review an issue not raised in the trial court to prevent a miscarriage of justice, generally a failure to timely raise an issue waives review of that issue on appeal.").

Second, as the cases Wade cites show, the question for Due Process purposes is whether the law at issue is so vague that it does not provide fair notice of what is and is not prohibited. (Wade's Brief on Appeal, p 20.) The law here is anything but vague. Article X clearly states that firearms are prohibited on University property, subject to certain enumerated exceptions.

That a party may need to do some investigation to determine whether they are allowed to carry a firearm onto property does not render a law unconstitutionally vague under the Due Process clause. That argument was raised and dismissed in *Class*. *Class* involved a federal statute that prohibits the possession of firearms on the grounds of the U.S. Capitol. See 40 USC § 5104(e). The defendant parked roughly 1,000 feet from the Capitol entrance. When he returned to his car, police questioned him and discovered that he had weapons in his vehicle. He was arrested, prosecuted, and convicted of violating the statute. The U.S. Court of Appeals for the D.C. Circuit rejected his Second Amendment challenge because the Capitol grounds are a "sensitive place." 442 US App DC at 261. The court also noted that as the owners of the lot where the defendant had parked, "the government—like private property owners—has the power to regulate conduct on its property." *Id*.

Unlike Wade, the defendant in *Class* actually raised a challenge under the Due Process Clause. He argued that the law was unconstitutional because it was difficult to determine the boundaries of the Capitol Grounds. The court rejected the argument, finding that even though identifying the parking lot as Capitol Grounds required several steps, the law provided sufficient notice. "[W]ith a map of the city and appropriate legal references, it can be determined with certainty that [the location in question] is subject to the ban." *Id.* at 263. The court acknowledged that "determining that the ban applies [to the lot] is not completely straightforward," but concluded that it could not "say that the law is so difficult to understand that it violates the Constitution." *Id.* at 264.[28]

As *Class* observed, "citizens are charged with generally knowing the law." *Id.* That simply means that an individual may have to find out who owns a piece of property before they walk onto it or into it while carrying a loaded firearm.[29] Individuals who carry firearms have this obligation under Michigan's concealed carry law.[30] This is not an unreasonable burden, let alone an unconstitutional one.

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[28] The example that Wade cites—of an individual violating Article X by entering a University hospital with a firearm—is a curious one. The incident is not part of the record in this case. In any event, it seems clear that this person would have known that they were on University property when they entered a University of Michigan Hospital System building.

[29] Much like in *Class*, the boundaries of the University can be ascertained by reference to any number of available maps and other documents, including an interactive campus map that can be accessed on any smart phone. See University of Michigan Interactive Campus Map <https://ssd.umich.edu/article/university-michigan-interactive-campus-map> (accessed February 5, 2021).

[30] See MCL 28.425o. Under this law, a person carrying a concealed weapon must determine when he or she is on school property, on the property of a day care center, on the premises of a business "where the primary source of income of the business is the sale of alcoholic liquor," on property owned *or* operated by a religious institution, at an entertainment facility that seats more than 2,500 people, and so on.

b. The University is not a "company town"

Wade also argues that Article X is unconstitutional because the University of Michigan is a "company town," citing *Marsh v Alabama*, 326 US 501; 66 S Ct 276; 90 L Ed 265 (1946). The University does not attempt to avoid the application of the Constitution by arguing that it is a private entity, as the property owner did there. *Marsh* has no bearing on this case.

VI. CONCLUSION

After thoughtful consideration, the University concluded that the possession of firearms on its property is inconsistent with its goals of maintaining an environment that is safe and that fosters the sort of open and vigorous exchange of ideas and opinions essential to education in a democratic society. Wade asks this Court to upset those judgments. He has provided this Court with no authority, argument, or reason to do so. The judgment of the Court of Appeals should be affirmed.

Dated: February 8, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on February 8, 2021, I electronically filed the foregoing using the TrueFiling/MiFile System, which will send notification of this filing to all registered counsel of record.

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