STATE OF MICHIGAN
IN THE SUPREME COURT

JOSHUA WADE,

Plaintiff-Appellant,

v.

THE BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN,

Defendant-Appellee.

MSC No. 156150
COA No. 330555
Court of Claims, No. 15-000129-MZ

_____/

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF GUN OWNERS OF AMERICA, INC., AND GUN OWNERS FOUNDATION

_____/

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THE APPEAL INVOLVES A RULING THAT A PROVISION OF THE CONSTITUTION, A STATUTE, RULE OR REGULATION, OR OTHER STATE GOVERNMENTAL ACTION IS INVALID

Gun Owners of America, Inc., and Gun Owners Foundation, through Counsel and pursuant to this Court's Order of November 6, 2020, moves this Court for leave to file a Brief as Amicus Curiae and states in support of its motion:

1. Gun Owners of America, Inc., (GOA) is a nonprofit organization, exempt from federal income taxation under sections 501(c)(4) of the Internal Revenue Code. ("IRC"). GOA is dedicated, *inter alia*, to the correct construction, interpretation, and application of state and federal constitutional protections guaranteeing the right to keep and to bear arms. Gun Owners Foundation is a nonprofit organization, exempt from federal income taxation under IRC section 501(c)(3), with the same mission as GOA.

2. Gun Owners of America, Inc., and Gun Owners Foundation have filed multiple Amicus Briefs critiquing the "two-step test" including a brief in New York State Rifle & Pistol Ass'n, Inc v City of New York, 590 U.S. (2020). See http://lawandfreedom.com/wordpress/wp-content/uploads/2019/05/NYSRP-Amicus-Brief.pdf GOA's expertise in this area would aid the Court's understanding in this case.

3. Michigan's judicial policy favors amicus filings. Grand Rapids v Consumers Power Co, 216 Mich 409, 414-415; 185 NW 852 (1921). ("This court is always desirous of having all the light it may have on the questions before it.)

WHEREFORE, Gun Owners of America, Inc., and Gun Owners Foundation request this Court enter an order granting this Motion for Leave to File Amicus Curiae Brief attached as Exhibit A.

Respectfully Submitted,

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Date: January 27, 2021

EXHIBIT A

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INTEREST OF THE *AMICI CURIAE*

Gun Owners of America, Inc. (GOA) is a nonprofit social welfare organization, exempt from federal income tax under section 501(c)(4) of the Internal Revenue Code ("IRC"). GOA was established, *inter alia*, for the purpose of participating in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law. Gun Owners Foundation is a nonprofit organization, exempt from federal income taxation under IRC section 501(c)(3), with the same mission as GOA.

GOA and GOF have filed *amicus* briefs in dozens of cases involving the Second Amendment, including:

• District of Columbia v. Heller, Brief *Amicus Curiae* of Gun Owners of America, Inc., *et al.* (Feb. 11, 2008);

• McDonald v. City of Chicago, (July 6, 2009), Brief *Amicus Curiae* of Gun Owners of America, Inc., *et al*. (July 6, 2009);

• New York State Rifle & Pistol Ass'n, Inc v City of New York, 590 US __(2020), Brief Amicus Curiae of Gun Owners of America, Inc. (May 14, 2019).

GOA and GOF believe their expertise in this area would aid the Court's understanding in this case.

It is hereby certified that no counsel for a party authored this brief in whole or in part; and that no person other than these amici curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

ARGUMENT

I. THE SECOND AMENDMENT AND MICHIGAN'S CONSTITUTION PROTECT AN INALIENABLE GOD-ENDOWED RIGHT, NOT MERELY A GOVERNMENT-GRANTED PRIVILEGE.

This Court's November 6, 2020, Order asked the parties to address, inter alia, "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)." Amicus address this question by first determining what *kind of right Heller* and *McDonald* actually describe.

A. The Right of Self Defense Is An Inalienable Rights And the Means Of Securing It By Keeping And Bearing Arms, Shall Not Be Infringed.

If the U.S. Constitution were erroneously viewed to be the source of the right protected in the Second Amendment, it would be in constant peril, for whatever the government gives, it can later take away. Fortunately, this is not the case with the right to keep and to bear arms. In McDonald v. City of Chicago, 561 U.S. 742 (2010), the Court described the Second Amendment as a "'*pre-existing* right.'" McDonald at 915. *Heller* too rejected the idea that the right "'is . . . in any manner dependent on [the Bill of Rights] for its existence.'" District of Columbia v. Heller, 554 U.S. 570, 592, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008).

As the right pre-exists the Constitution, what or who then is its source? The right to keep and bear arms was previously recognized in nascent form in the English Bill of Rights, but with three limitations — protecting only firearms "suitable to their conditions," that the right of self-defense applied only for Protestants, and only "as allowed by law."[1] The Second Amendment removed those qualifiers, acknowledging that a much broader right belonged to all the People,

[1] See Richard Perry, ed., Sources of Our Liberties (American Bar Foundation: Chicago, Ill., 1978) 246.

and employing the categorical prohibition limiting all governments found in the words "shall not be infringed."

The Amendment thus reflected the change from the English tradition, wherein the King was sovereign, to a uniquely American system premised on the sovereignty of the People — and the necessity of preserving an armed citizenry in order to protect that sovereignty. [2] Thus, *Heller* explained that the English Bill of Rights was only "the predecessor to our Second Amendment" (*id*. at 593) — but not its source.

The ultimate source of the rights to be protected by the Second Amendment is not 17th-century English law; rather, the right of self-defense is one with which we were "endowed by [our] Creator." *See* Declaration of Independence. "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain *unalienable rights*, that among these are life, liberty, and the pursuit of happiness. That, to secure these rights, governments are instituted among men, …" *McDonald* accurately characterized the right to keep and bear arms as "an inalienable right that pre-existed the Constitution's adoption." McDonald at 809. Inalienable rights come from God as the Declaration affirms, and can neither be taken away by government nor surrendered by individuals. Inalienable rights exist independent of any government, law, judicial decision, written guarantee -- or even an ordinance adopted by the University of Michigan.

As *Heller* noted, English jurist Sir William Blackstone called it "'the natural right of resistance and self-preservation.'" Heller at 594. And, putting it perhaps even more specifically, McDonald "understood the Bill of Rights to declare inalienable rights that pre-existed all

[2] Thomas Cooley explained that "The [Second] amendment . . . was adopted with some modification and enlargement from the English Bill of Rights of 168[9]." T. Cooley, The General Principles of Constitutional Law in the United States of America at 298 (Little Brown & Company, Boston: 1898).

government . . . it declared rights that no legitimate government could abridge." McDonald at 842.[3] If such rights are abridged it is only by the illegitimate act of a government.

In sum, judges must understand that the right protected by the Second Amendment is beyond the authority of civil government to compromise, and thus whenever that right is "infringed," it is the sacred duty of the judiciary to constrain the offending government entity, whether it is a Township, City, public school or public university. The same holds true regarding application of the preexisting right recognized in Michigan's Constitution which guarantees that "Every person has a right to keep and bear arms for the defense of himself and the state." (Mich. Const., Art. 1, Sec. 6). The source of both rights is the same.

B. The Declaration of Independence Recognized that Inalienable Rights Are Binding as a Matter of Law, Not Merely Nice Quotations For Public Speeches.

Even, if they admit that the Declaration of Independence has legal effect, many attorneys and judges refuse to apply its principles in resolving cases on the assumption that the Constitution alone provides the superior legal authority in this and other state. Yet, the Declaration is part of the organic law of every state in the Union. When the Declaration of Independence states that mankind is "endowed by their Creator with certain unalienable rights" it is not making any gender based assertion. Nor is it merely a rhetorical flourish. Rather, it is laying down the foundational truth of American Law- that people are born free according to the will of our Maker, that they have certain inalienable rights arising from that free state - including the natural right of self-defense and the liberty to determine or select the means to effectuate that defense.

[3] See, e.g., L. Pratt, Safeguarding Liberty: The Constitution and Citizen Militias (Legacy Communications: 1995); L. Pratt, "What Does the Bible Say About Gun Control?" Gun Owners of America).

The Declaration continually affirms that every civil government to be established as state after 1776 must respect this legal proposition and inalienable rights including the State of Michigan, its judicial branch and established universities.[4]

The federal Constitution also reaffirmed the binding legal force and necessary application of the Declaration. Article I, Section 2, for instance, stipulates that representatives must have been "seven years a *citizen* of the United States" prior to holding office. It would not have been possible for the first House of Representatives to convene in 1789 if the Declaration lost its legally binding authority after the Constitution was adopted. The framers would have looked silly had they established a national government in which no one could serve until seven years after 1789. This same proposition holds true for Senators who are required by Article I, Section 3 to have been "nine years a citizen of the United States." Americans became citizens in 1776 on the strength of the Declaration, not by virtue of the Constitution.[5]

Article VII of the federal Constitution also reaffirms the binding characteristics of the Declaration's principle of government by consent. This Article recognizes that the unanimous consent of those in the Constitutional convention was recorded in the year of "the independence

[4] For an extensive analysis of the legally binding nature of the principles of the Declaration of Independence on state governments admitted to the Union on equal footing with the original 13 states, see Kerry L. Morgan, The Laws of Nature and of Nature's God: The Legal Framework For A Nation. https://lonang.com/commentaries/conlaw/organizing/legal-framework-for-a-nation/

[5] Article II, Section 1 of the Constitution places a similar requirement upon the office of President. To be eligible for the office of President a person must have been "fourteen years a resident within the United States." The Constitution emphasizes a residency requirement in addition to a native born citizenship requirement. Such a residency requirement dates to 1775 and refers to the United States not so much as a government or legal entity, but more as a geographical place. Thus, the requirement is that the President be "fourteen years a resident within the United States." This is contrasted with the seven and nine year "citizen of the United States" requirement.

of the United States of America the twelfth." This Article reaffirms that the United States began in 1776 -- not 1787 -- and that the Constitution and the Declaration are inseparable as a matter of law and legal principle.[6]

C. Michigan's Admission to the Union on Equal Footing with the Original States Carries with It the Requirement that Its Constitution and Laws Shall Not Infringe Inalienable Rights.

The Declaration's principles apply to states newly admitted into the Union as well as the original 13 states. One precedent for this rule is evidenced by Virginia's pre-constitutional cession of its land claims northwest of the Ohio river. Virginia stipulated that states formed within that territory would have to be "distinct republican states, and admitted members of the federal Union, having the same rights of sovereignty, freedom and independence as the other states." The Northwest Compact subsequently crystallized the agreement between the states and national government and provided for the formation of future states including Michigan out of the Northwest Territory under certain conditions.[7]

The subsequent admission statutes for Louisiana, Mississippi, Alabama, and Tennessee refer to the Articles of the Northwest Ordinance as authoritative even though those states are clearly south of the Ohio river. The Articles declared that all such states "shall be republican, and in conformity to the principles contained in these articles," and furthermore, shall stand on

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[6] See, Monongahela Navigation Co. v. United States, 148 U.S. 312, 324 (1893) in which the U.S. Supreme Court observed that the Bill of Rights to the Constitution was adopted to protect "those rights of persons and property which by the Declaration of Independence were affirmed to be unalienable rights." The second Amendment protects one of those inalienable rights.

[7] The states of Michigan, Ohio, Indiana, Illinois and Wisconsin are required to continually acknowledge: "the fundamental principles of civil and religious liberty, which form the basis whereon these republics, their laws and constitutions are erected; to fix and establish those principles as the basis of all laws, constitutions and governments, which forever hereafter shall be formed . . . and for their admission . . . on equal footing with the original states." The Northwest Ordinance of 1787, quoted in Perry, Sources.

"equal footing" with the original states. As a matter of fact, all admission statutes contain the words "equal footing" or, to identical effect, "same footing."

By affirming "equal footing with the original states" in subsequent admission statutes, the framers intended to bind new states to the principles of the Declaration as the original 13 signatory states. The admission statutes of several states expressly provide that their respective state Constitutions shall be both republican in form and "not repugnant to the principles of the Declaration of Independence." These states include Nevada (1864), Nebraska (1867), Colorado (1876), Washington (1889), Montana (1889), Utah (1896), North and South Dakota (1899), Arizona, New Mexico (1912), Alaska (1958) and Hawaii (1959).[8] It is undisputed that the "principles of the Declaration" identify "unalienable rights" as warranting the security of each state, not their infringement, or through criminalization of the right by the University.

D. *Heller's* Textual One Step Test Provides the Analytical Framework To Secure The Inalienable and Constitutional Right Ignored By The Court Of Appeals.

By virtue of the "equal footing" doctrine, the legal principles of the Declaration of Independence must be acknowledged and observed by every state government including Michigan and its Universities. The right to self-defense and its natural expression through the right to keep and bear arms for defense, being affirmed by the Declaration as "unalienable", acknowledged as inalienable according to *McDonald*, affirmed as protected by the Second Amendment in *Monongahela*, obligating every state government including Michigan and the University of Michigan *to secure* according to the Declaration, and further binding on all states according to the equal footing doctrine as a material condition of admission to the Union, cannot

[8] For instance, the requirement that a state Constitution shall be republican and "not repugnant to the principles of the Declaration of Independence" is found at 72 Stat. 339 (P.L. 85-508 July 7, 1958) for Alaska and at 73 Stat. 4 (P.L. 86-3, March 18, 1959) for Hawaii. See Edward Dumbald, The Declaration of Independence and What it Means Today (Norman: University of Oklahoma Press, 1950), p. 63.

be cast aside by assertion of any state interest, compelling or rational, or balanced against any state interest either intermediately or strictly.

Notably, then D.C. Circuit Court Judge Brett Kavanaugh wrote in 2011 about *Heller* that "the Supreme Court was not silent about "the constitutional test we should employ" in Second Amendment cases. Heller v. District of Columbia, 670 F.3d 1244, 1271 (D.C. Cir. 2011) (Heller II). (Kavanaugh, Circuit Judge, dissenting). Rather, he concluded that "Heller and McDonald leave little doubt that courts are to assess gun bans and regulations based on text, history, and tradition, not by a balancing test such as strict or intermediate scrutiny." *Id*. But if, as Judge Kavanaugh opined, the Court had provided such an "up-front" and "clear message" (*id*. at 1271, 1285), why have the lower courts almost universally concluded the opposite? Writing for the Court in 2008, Justice Scalia warned as to what might happen when he wrote: "future legislatures [and] (yes) even future judges think th[e] scope [of the Second Amendment] too broad." Heller at 634-35.

At the end of the day, the Michigan Court of Appeals thinks the Plaintiff's inalienable and constitutional rights are just too broad. The court paid no attention to the actual *Heller* majority opinion, declaring instead that: "The holdings in *Heller* and *McDonald* have led to the application of a two-part test with respect to Second Amendment challenges to firearm regulations." Opinion, p. 6. That is where the Appeals Court goes wrong in a reversible way. This Court's November 6, 2020, Order asked "whether the two-part analysis applied by the Court of Appeals is consistent" with *Heller*, et al. The answer is that the two-part test is not consistent, as *Heller* provides for a simple categorical test to protect inalienable rights from infringement so long as the plaintiff is part of "the People," the weapon is an "arm," and the activity regulated falls in the "keep and bear" category.

Judge Kavanaugh further explained that "'[r]ather than adopting one of the First Amendment's many Frankfurter-inspired balancing approaches, the [Heller] majority endorsed a categorical test under which some types of "Arms" and arms-usage are protected absolutely from bans and some types of "Arms" and people are excluded entirely from constitutional coverage.'" Heller II at 1273. Judge Kavanaugh explained further that "Heller was resolved in favor of categoricalism — with the categories defined by text, history, and tradition—and *against balancing tests* such as strict or intermediate scrutiny or reasonableness." Id. at 1282 (emphasis added).

Providentially, now-Justice Kavanaugh's view does not stand alone. Two months after his dissent in *Heller II*, the U.S. Court of Appeals for the Eighth Circuit concluded that "[i]t seems most likely that the Supreme Court viewed the regulatory measures listed in Heller as presumptively lawful because they do not infringe on the Second Amendment right . . . . That the Supreme Court contemplated such a historical justification for the presumptively lawful regulations is indicated by the Court's reference to the 'historical tradition' that supported a related limitation on the types of weapons protected by the Second Amendment . . . . and by the Court's assurance that it would 'expound upon the historical justifications for the exceptions' mentioned, including categories of prohibited persons, if and when those exceptions come before the Court." United States v. Bena, 664 F.3d 1180, 1183 (8th Cir. 2011). [9]

The Michigan Court of Appeals ignored this understanding (as discussed in the next section). It simply declared that *Heller* mentioned a presumption of constitutionality for bans on firearms in sensitive places. The Court then jumped through hoops to get the university to

[9] Several years later, the Eighth Circuit was more explicit: "[o]ther courts seem to favor a so-called 'two-step approach.' . . . We have not adopted this approach and decline to do so here." United States v. Hughley, 691 Fed. Appx. 278, 279 n.3 (8th Cir. 2017).

qualify as a sensitive place (like a grade school) and affirmed summary judgment based on that approach alone. No analysis, no review, no expounding was present. The lower courts mistakenly treated the *Heller* reference to "presumptions" as being "conclusive" -- an absolute rule of constitutional law -- when from the context is clear that, at most, it is nothing more than *a rebuttable* presumption. Indeed, all laws carry with them a rebuttable presumption of constitutionality.

Thus, according to the Eighth Circuit, Second Amendment challenges do not revolve around whether a government has good reasons for its restrictions, or whether those restrictions appear reasonable to judges. Rather, at issue is whether a given law applies to protected persons, conduct, and weapons. This is a bright-line "is or isn't" test — not a malleable standard for judges to shape as they see fit.

Even so, the inalienable right to keep and bear arms cannot be criminalized and buried in a University parking ordinance or made exercisable only by leave pursuant to a grant of University beneficence. The kind of right that is recognized by *Heller* at issue in the instant case deserves better treatment.

II. THE COURT OF APPEALS MAJORITY OPINION MADE NUMEROUS LEGAL ERRORS.

The Court of Appeal's majority made five legal points -- none of them consistent with the recognition of the right to keep and bear arms as an inalienable right, or with the "simple Heller test." See Duncan v. Becerra, 366 F. Supp. 3d 1131 (S.D. Ca. 2019). First, the court perfunctorily recited passages from *Heller* and *McDonald*. Having checked that of its list, nothing more of the substance of the right to keep and bear arms was to be found or analyzed in relation to the facts or in the court's decision.

The Court examined *Heller's* observation regarding the *presumption* (not rule of law) that bans on firearms in sensitive places such as schools were not disturbed by Heller's decision, ignoring the fact that schools were not at issue in *Heller* and that the sensitive places concept was only a *presumption* that invited further analysis and a chance to rebut.

Third, the court determined that the sensitive places "exception" for schools included a university based on an 1828 dictionary definition that was in place in 1868 when the Fourteenth Amendment was ratified and according to *McDonald*, was then "incorporated" and thereby made applicable to the states. It concluded that a university was a "school" based on the sensitive places exception in the *Heller* opinion.

Fourth, the majority concluded "as a matter of law that Article X [of the University's Ordinance] does not burden conduct protected by the Second Amendment. Therefore, no further analysis is required." (See Majority Opinion, p. 7).

Fifth, the majority determined that the "Board of Regents of the University of Michigan has a unique legal character as a constitutional corporation possessing broad institutional powers" and as such is not subject to state preemption under MCL 123.1101 et seq. (Sawyer, J. dissenting).

A. Public Colleges Were Exceeding Rare at the Founding of The United States.

The Court asks about "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 . . . ." See Order of November 6, 2020. A historical understanding, however, cannot be archived by convenient reference to a dictionary, or by assuming colleges in 1791 are basically the same as today.

A historical understanding of the place of arms on college campuses must be understood in historical context. The Court of Appeals use of 1868 being the date the fourteenth amendment was adopted, is entirely incorrect. The relevant date is 1791 when the Second Amendment was ratified. Nor is historical understanding achieved by pulling out an 1828 dictionary to find a definition of a school.

When the Constitution was adopted in 1787, there were only nine private colleges in the United States, all religiously based. The University of North Carolina, however, ushered in a new generation of public universities. Chartered in 1789, it held its first classes in 1795, making it the first public university to begin instruction in the United States. It had one professor and 40 students the first year. The University of Georgia opened for students six years later in 1801, even though it had been chartered in 1785. South Carolina College was established on December 19, 1801, and its first classes took place in 1805. The University of Virginia began offering courses in March 1825.[10]

Given the memory of the recent revolutionary war and the fact that all these states had active state mandated militias established by their respective state constitutions; and that militia ages were sometimes as low as 16 years, it is extremely likely that these newly created public colleges never mentioned, contemplated or adopted any ordinance even addressing firearms during their early existence. Moreover, President George Washington's proposal for a national

[10] See University of North Carolina information at https://museum.unc.edu/exhibits/show/davie/silhouette1820 and http://mwolverine.com/Founding_Dates_States_Colleges.html

university was rejected in the First Congress.[11] There certainly is no founding era historical analogue justifying the University of Michigan's decision to ban firearms on its properties.

B. The University is an Administrative Department of the Executive Branch Under Mich. Const. Article V, Section 2.

Lacking any historical evidence that public colleges or university's banned firearms in 1791, the University's ordinance is violative of both the Second Amendment and Michigan's Article 1, section 6 right of every person to keep and bear arms. Yet, the lower court's concern for the "university setting" also requires a *constitutional* understanding in addition to a *historical* understanding. The University's legal authority to enact ordinances is within its administrative authority based only on MCL 390.5, and not on any generic legislative authority under Article VIII, section 5, as the University's Board is constitutionally placed squarely within the Executive Branch of the state's government.

Article VIII, section 5 of the Michigan Constitution states that "The regents of the University of Michigan and their successors in office shall constitute a body corporate known as the Regents of the University of Michigan . . . . Each board shall have general supervision of its institution and the control and direction of all expenditures from the institution's funds." The object of this constitutional text is to grant the Appellees authority, which is exclusively administrative and managerial in nature, not legislative in nature.

Article IV, section 1, in turn, places the legislative power in the legislature, not in any university. "Except to the extent limited or abrogated by article IV, section 6 or article V,

[11] See 1st Cong., 3 May 1790, *The Annals of the Congress of the United States*, contained in Joseph Gales, comp., The Debates and Proceedings of the Congress of the United States, 42 vols., (Washington: Gales and Seaton, 1834) at 2:1550-51. (Library of American Civilization 21604). A review of the notes of the Constitutional Convention clearly indicates that the newly created national government was granted no Congressional jurisdiction over education. See Kerry L. Morgan, Real Choice, Real Freedom in American Education, University Press of America (1997), Chapters 10 -11.

section 2, the legislative power of the State of Michigan is vested in a senate and a house of representatives." The University of Michigan is neither the house nor senate. The two noted exceptions apply to the Independent Citizens Redistricting Commission and the Governor's organization of the executive branch. The later, Article V, section 2 recognizes that "the governing bodies of institutions of higher education provided for in this constitution" are squarely within *the executive branch*.[12] Constitutionally speaking, the Appellee University is not a separate branch of the state government. It is a department of the executive branch.

If the Constitution's text really means anything, multiple judicial opinions holding that the University "is an independent authority possessing power coordinate with and equivalent to the Legislature within the scope of its function" are palpably erroneous warranting overruling. See Michigan United Conservation Clubs v. Bd. of Trustees of Michigan State Univ., 172 Mich. App. 189, 192, 431 N.W.2d 217, 219 (1988). Opinions rendered almost 100 years ago and cited by the Court of Appeals, are more closely aligned with the Article V, section 2's text. The Court of Appeals declared: "It has long been recognized that the University Board of Regents 'is a separate entity, independent of the State as to the management and control of the university and its property, [while at the same time] a department of the State government, created by the Constitution . . . .'" Regents of Univ of Mich v Brooks, 224 Mich 45, 48; 194 NW 602 (1923).

[12] "All executive and administrative offices, agencies and instrumentalities of the executive branch of state government and their respective functions, powers and duties, except for the office of governor and lieutenant governor, and the governing bodies of institutions of higher education provided for in this constitution, shall be allocated by law among and within not more than 20 principal departments. They shall be grouped as far as practicable according to major purposes . . ." Mich. Const. Art. V, sec. 2.

(Court of Appeals, Majority opinion, June 6, 2017, p. 7.)[13] Yet, the *Wade* Court of Appeals majority repeats the *Conservation Clubs* error.[14]

C. The University's Authority to Enact Ordinances Is Based on A Statue, Not The Constitution.

The Defendant's Motion for Summary Disposition filed in the Court of Claims (pp. 12-14), arguing for a limitless, expansive and autonomous constitutionally grounded *legislative power* to adopt the firearm's ordinance at issue here is erroneous. The University's firearm ordinance is not *constitutionally based*. Rather, its authority to enact ordinances comes from a state statute. Its ordinance attached as Exhibit A to its Motion, itself identifies MCL 390.5 as the only legislative source to specially empower it to a adopt ordinances, i.e., "The regents shall have power to enact ordinances, by-laws and regulations for the government of the university."

Thus, to correctly frame the issue, a Constitutional right guaranteeing that "Every person has a right to keep and bear arms for the defense of himself and the state" (Mich. Const., Art. 1, Sec. 6) as well as the Second Amendment, is pitted against an ordinance adopted by a University -- solely pursuant to a state statute declaring the "No person" on university property, "shall possess any firearm, or any other dangerous weapon . . . . [including carrying certain edged

[13] The actual text of the opinion stated a clearer meaning. "While it is true that 'the regents of the University of Michigan,' more commonly called the 'board of regents,' is a separate entity, independent of the state as to the management and control of the University and its property, it is *nevertheless* a department of the state government, created by the Constitution to perform state functions, and the real estate which it holds or acquires is public property belonging to the state, held by the corporation in trust for the purposes of the University, which are public purposes." See Auditor General v. Regents, 83 Mich. 468, 47 N. W. 440, 10 L. R. A. 376.

[14] "As this Court held in Branum v Regents of Univ of Mich, 5 Mich App 134, 138-139; 145 NW2d 860 (1966): [T]he legislature can validly exercise its police power for the welfare of the people of this State, and a constitutional corporation such as the board of regents of the University of Michigan can lawfully be affected thereby. The University of Michigan *is an independent branch of the government* of the State of Michigan, but it is not an island." Majority Opinion, p. 7. To the contrary, the University is an "administrative . . . instrumentalit[y] of the executive branch of state government." Mich. Const. Art V, sec. 2.

arms]." A statute is neither the equal of nor superior to the Constitution. It is subordinate to the Constitution. An ordinance adopted pursuant to a statute is of even less stature. This case does not present a battle between Article 1, section 6 and Article VIII, section 5. Article VIII, section 5 has no relevance to the outcome of this matter because the University's authority to enact the ordinance at issue here is only founded in a state law.

D. The University Ordinance Greatly Offends The Inalienable And Constitutional Right To Possess A Firearm On Campus.

Simply put, the Constitution guarantees the right to "every person," but the ordinance protects the right of "no person." Rather, it specifically denies the entire bundle of Second Amendment rights to "every person." The Constitution guarantees the "right to keep and bear arms" but the ordinance categorically excludes all "fire*arms*," and other arms including edged arms, from that guarantee. The right itself is an inalienable right recognized by *McDonald* as granted by mankind's Creator as a matter of Second Amendment jurisprudence. It is a right preexisting the University's existence.

Yet, the ordinance treats the exercise of this preexisting inalienable right as a criminal act. (Defendants' Motion, Exhibit A, Article X, Section 5 (misdemeanor, 10-60 days imprisonment, $50 fine)). A criminal prohibition is the exact opposite of a constitutionally guaranteed right. Permission to exercise the right renders it no longer a right, but merely a University option of beneficence exercisable only at the will of the Executive Director of Public Safety, based on "extraordinary circumstances," and subject to further "restrictions" when the Director "determines they are appropriate." Defendants' Motion, Exhibit A, Section 4(1)(f) &(2). In other words, enjoyment of this great right of ancient origin is reduced to a criminal act only exercisable as an act of University beneficence (which obtaining is far less likely than a

university parking permit), provided that extraordinary circumstances and further restriction apply, if permitted at all by one University bureaucrat.

E. The Court of appeals Sidestepped The *Heller* Test, Which, If Applied Would Clearly Require Striking Down The Ordinance.

Heller asks whether a law bans the types of firearms commonly used for a lawful purpose. It is a hardware test. *Heller* draws a distinction between firearms commonly owned for lawful purposes and firearms specially adapted to unlawful uses and not commonly owned. As applied to laws prohibiting possession of a firearm as is the instant case, the categorical *Heller* test would ask: is the Plaintiff's firearm commonly used by law-abiding citizens for a lawful purpose? If yes, then it is a protected firearm. The Court's analysis stops, and the Ordinance is unconstitutional in its ban on constitutionally protected arms.

The majority of citizens who use common firearms do so for lawful purposes, including self-defense. Under *Heller* and *McDonald*, that is all that is needed for citizens to have a right under the Second Amendment to acquire, keep and bear common firearms.[15] Using the "simple Heller test," it is obvious that the University's Article X regulatory scheme and resultant

[15] "We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding "interest-balancing" approach. The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is really worth insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all. Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad. We would not apply an "interest-balancing" approach to the prohibition of a peaceful neo-Nazi march through Skokie. See National Socialist Party of America v. Skokie, 432 U.S. 43, 97 S.Ct. 2205, 53 L.Ed.2d 96 (1977) (per curiam). . . . The Second Amendment . . . like the First, it is the very product of an interest balancing by the people—which Justice Breyer would now conduct for them anew. And whatever else it leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home." District of Columbia v. Heller, 554 U.S. 570, 634–35, 128 S. Ct. 2783, 2821, 171 L. Ed. 2d 637 (2008).

prohibition, blocking law-abiding responsible citizens from possessing common firearms, is unconstitutional. Under the simple *Heller* test, judicial review ends right there.

F. The Court Of Appeals Made No Effort To Apply Any Judicial Test to the University's Ordinance, Not Even The Contrived Two Part Test.

In Rhode v. Becerra, 445 F. Supp. 3d 902, (S.D. Cal. 2020), application of the two-step analysis took federal Judge Benitez *more than 40 pages to describe and apply*. As Judge Benitez explained, the "two-part test" is really a "tripartite binary test with a sliding scale and a reasonable fit." Rhode, 445 F. Supp. 3d at 930. The two-step test contains at least four levels of analysis, each requiring several different questions to be answered. *Id.* at pg. 42. He notes that "There are three different two-part tests, after which a point on the sliding scale of scrutiny is selected. Most courts select intermediate scrutiny in the end. Intermediate scrutiny, in turn, looks for a 'reasonable fit.' It is a complex analysis that only a law professor can appreciate. Worse, these complicated legal tests usually result in upholding Second Amendment restrictions upon something akin to a rational basis test. The test stands at odds with the simple test used by the Supreme Court in Heller. Heller's test is a test that any citizen can understand." Rhode, 445 F. Supp. 3d at 930.

The majority opinion of the Court of Appeals did not undertake any such multiple tripartite, two step, four-part test. Nor should it have, when the *Heller* test is quite sufficient. It would be a tragic miscarriage of justice and perversion of the inalienable right of self defense protected by the second amendment right, the state constitution, and the *Heller* and *McDonald* holdings, were this court to engraft any two-step test, variant thereof, or any intermediate scrutiny into this state's jurisprudence, or require the lower court to comprehend, apply or engage in any such legal charade upon remand.

Justice Thomas noted in his dissent in Rogers v. Grewal's denial of *certiorari*, that in *Heller* the court noted that "limitation[s]" on the right may be supported by "historical tradition," but the Court declined to "undertake an exhaustive historical analysis . . . of the full scope of the Second Amendment." Id., at 626–627, 128 S.Ct. 2783. Instead, "we indicated that courts could conduct historical analyses for restrictions in the future as challenges arose." Id., at 635, 128 S.Ct. 2783. Rogers v. Grewal, 140 S. Ct. 1865, 1866, 207 L. Ed. 2d 1059 (2020).

He complained that lower courts wrongfully "filled" their self-created "analytical vacuum" with a "two-step inquiry" that incorporates tiers of scrutiny on a sliding scale (citing National Rifle Assn. of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives, 700 F.3d 185, 194 (C.A.5 2012); Powell v. Tompkins, 783 F.3d 332, 347, n. 9 (C.A.1 2015) (compiling Circuit opinions adopting some form of the sliding-scale framework). Rogers, 140 S. Ct. at 1866.

Justice Thomas describes perfectly what has happen in the instant case. The Court of Appeals has used an 1828 dictionary as the summation of its historical inquiry, and rather than considering the sensitive place language presumption as a starting point, it has employed them both as an ending point of analysis. It would be beyond disappointing if this Court were to affirm such an approach, befit of history or analysis as it is.

III. THE COURT OF APPEALS ERRONEOUSLY TREATED *HELLER'S* PRESUMPTION AS AN IRREBUTTABLE PRESUMPTION, RATHER THAN A PRESUMPTION THAT COULD BE OVERCOME BY EVIDENCE AND LEGAL ARGUMENT.

In the context of the Second Amendment, defenders of gun control will typically quote Justice Scalia's statement that the right, "like most rights . . . is not unlimited."[16] Heller at 636.

[16] In context, Justice Scalia's statement is correct: the Second Amendment does not provide unlimited protection to every person (e.g., a child), every weapon (e.g., an F-14), every activity

The Court of Appeals relied upon *Heller's* statement that some measures were "presumptively lawful," stating: "Although *we do not undertake* an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms. [Id. at 626-627, 627 n 26.]". (emphasis added). Not only was Justice Scalia's observation about not undertaking any real historical analysis ignored, but so too was Justice Thomas' observation in *Rogers* that the "courts could conduct historical analyses for restrictions *in the future* as challenges arose" was ignored. Id., at 635.

The Court of Appeals, rather than examining Heller's presumption as a presumption, or conducting a historical analysis worthy of the task, instead treated the presumption as an irrebuttable presumption justifying the lower court's grant of summary disposition.[17] In Vlandis v. Kline, 412 U.S. 441 (1973), the Supreme Court struck down irrebuttable presumptions as a violation of the Due Process Clause of the Fourteenth Amendment. The Court held that the clause does not permit a state to deny an individual the opportunity to present evidence contrary to the presumption, when that presumption is not necessarily or universally true in fact. In this case, Plaintiff was not only entitled to introduce evidence of the firearm he sought to possess, but

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(e.g., robbing a bank), and every location (e.g., a federal prison). But when the Second Amendment protects the person, the arm, the activity, and the location, it protects absolutely, and cannot be infringed for some so-called "good reason."

[17] "We conclude as a matter of law that Article X does not burden conduct protected by the Second Amendment. Therefore, no further analysis is required. Stated differently, Article X does not infringe on Second Amendment rights. No factual development could change this result. Because plaintiff has not made a cognizable Second Amendment claim, summary disposition under MCR 2.116(C)(8) was proper." Majority Opinion, p. 7.

also he was entitled to overcome the presumption that sensitive places do not include the University, or even if it does, the inalienable right associated with the possession of his firearm can overcome the presumption.[18]

The lower court committed reversible error in concluding as a matter of law that "Article X does not burden conduct protected by the Second Amendment. Therefore, no further analysis is required." Violation of the due process clause is not a valid analytical tool for any court.

CONCLUSION

Article 1, Section 6 of the Michigan Constitution and the Second Amendment protect a God-given right and its preservation is a duty absolutely binding on the State as a condition of statehood. Moreover, the prohibition against infringement of the right applies to the University as a department of the executive branch, whose statutory power to adopt ordinances, cannot lawfully include the criminalization of a constitutional right. The right protects Plaintiff against the University's ill-conceived infringement of the right by its criminal ordinance.

Finally, *Heller*'s presumptively lawful observation regarding sensitive places is not a rule of law to be applied with greater or even equal fervor than the right to keep and bear arms itself. The lower court's dictionary consultation did not meet the historical analysis requirement. Its treatment of the presumption as irrebuttable is clearly reversible error. The presumption referenced in *Heller* is, at best, a presumption that is rebuttable by evidentiary consideration of the firearm itself and its lawful self-defense purpose by a member of "We the People," all of which are constitutionally protected. Within its terms, the right is absolute.

[18] Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972), and Cleveland Board of Education v. LaFleur, 414 U.S. 632, 94 S.Ct. 791, 39 L.Ed.2d 52 (1974), are two additional cases which struck down conclusive presumptions because both dealt with protected rights as is the case here. When privileges are at issue, however, the opportunity to rebut is diminished. See Weinberger v. Salfi, 422 U.S. 749, 802, 95 S. Ct. 2457, 2485, 45 L. Ed. 2d 522 (1975).

The issue and conclusion before the Court is a simple one: The University's ordinance prevents law-abiding students from possessing lawfully owned bearable arms for lawful purposes and viewed as such cannot stand against either an Article 1, Section 6, or Second Amendment challenge, or *Heller* analysis.

Respectfully submitted,
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