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 Case No. 15-0001290-MZ

BRIEF OF SECOND AMENDMENT LAW PROFESSORS AMICI CURIAE IN SUPPORT OF DEFENDANT-APPELLEE

MILLER, CANFIELD, PADDOCK AND STONE, PLLC

Larry J. Saylor (P28165)
Michael C. Simoni (P70042)
Joel C. Bryant (P79506)
Erika L. Giroux (P81998)
150 West Jefferson Ave., Suite 2500
Detroit, Michigan 48226
(313) 963-6420
saylor@millercanfield.com
simoni@millercanfield.com
bryant@millercanfield.com
giroux@millercanfield.com

Counsel for Amici Curiae Law Professors

MUNGER, TOLLES & OLSON LLP

Donald B. Verrilli Jr. (D.C. Bar No. 420434)
601 Massachusetts Avenue NW
Washington, D.C. 20001
donald.verrilli@mto.com

David H. Fry (CA Bar No. 189276)
Justin P. Raphael (CA Bar No. 292380)
560 Mission Street
Twenty-Seventh Floor
San Francisco, California 94105-2907
david.fry@mto.com
Justin.Raphael@mto.com

Laura M. Lopez (CA Bar No. 313450)
350 South Grand Avenue, Fiftieth Floor
Los Angeles, California 90071-3426
Telephone: (213) 683-9100

Of Counsel for Amici Curiae Law Professors
(not admitted to practice in Michigan)

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STATEMENT OF QUESTIONS PRESENTED

This Court has asked whether the two-part analysis applied by the Court of Appeals in this case is consistent with *District of Columbia v Heller*, 554 US 570; 128 S Ct 2783; 171 L Ed 2d 637 (2008) and *McDonald v Chicago*, 561 US 742; 130 S Ct 3020; 177 L Ed 2d 894 (2010), cf. *Rogers v Grewal*, 140 S Ct 1865, 1867; 207 L Ed 2d 1059 (2020) (Thomas, J., dissenting), and if so whether intermediate or strict judicial scrutiny applies in this case. The Court also asks whether the University of Michigan's firearm policy violates 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.

Amici curiae Joseph Blocher, Darrell Miller, and Eric Ruben submit that (1) the two-part framework applied by the Court of Appeals and the overwhelming majority of federal courts of appeal is the proper doctrinal framework and is consistent with *Heller* and *McDonald*; and that (2) intermediate scrutiny should apply. Amici file this brief in support of Defendant-Appellee the University of Michigan ("Appellee").

INTEREST OF AMICI CURIAE[1]

Amici curiae are scholars who have devoted a substantial part of their research and writing to the history of firearm regulation in the United States and the legal standards governing application of the Second Amendment. Their scholarship has been published by a major university press and in leading law journals, and has been cited by members of the U.S. Supreme Court and the federal courts of appeals. Amici have previously addressed the question now

[1] No party's counsel has authored this brief, in whole or in part, nor has any party's counsel, or any other person other than amici curiae, its members, or its counsel, contributed money that was intended to fund preparing or submitting this brief.

before this Court, regarding the application of the two-part framework including in an amicus brief in *New York State Rifle & Pistol Association, Inc. v City of New York*, 140 S Ct 1525; 206 L Ed 2d 798 (2020). Amici's interest in this case is in explaining the state of Second Amendment doctrine. Amici seek to correct the misconception that courts are applying a unique, second-class doctrinal framework in Second Amendment cases. Amici further seek to explain why Second Amendment doctrine must provide courts with the tools to determine the constitutionality of a wide diversity of gun regulations among the several States. Amici's expertise renders them particularly well-suited to assist the Court in this respect.

Joseph Blocher is the Lanty L. Smith '67 Professor of Law at Duke University School of Law. His scholarship on gun rights and regulation has been published in the Harvard Law Review Forum, the Yale Law Journal, the Stanford Law Review, and other leading academic journals. See, e.g., *Good Cause Requirements for Carrying Guns in Public*, 127 Harv L Rev Forum 218 (2014); *Firearm Localism*, 123 Yale L J 82 (2013); *The Right Not to Keep or Bear Arms*, 64 Stan L Rev 1 (2012). His work has been cited by federal courts of appeal. E.g., *Heller v Dist of Columbia*, 399 US App DC 314; 670 F3d 1244 (2011) ("*Heller II*"). Recently, Professor Blocher co-authored a book with amicus Professor Darrell Miller, *The Positive Second Amendment: Rights, Regulation, & the Future of Heller* (New York: Cambridge University Press, 2018), which includes a comprehensive account of the history, theory, and law of the right to keep and bear arms.

Darrell Miller is the Melvin G. Shimm Professor of Law at Duke University School of Law. His Second Amendment scholarship has been published in the University of Chicago Law Review, the Harvard Law Review Forum, the Yale Law Journal, the Columbia Law Review, and other leading journals. See, e.g., *What is Gun Control? Direct Burdens, Incidental Burdens, &*

the Boundaries of the Second Amendment, 83 U Chi L Rev 295 (2016) (with Joseph Blocher); Peruta*, the Home-Bound Second Amendment, & Fractal Originalism*, 127 Harv L Rev Forum 238 (2014); *Text, History, & Tradition: What the Seventh Amendment Can Teach Us About the Second*, 122 Yale L J 852 (2013).

Eric Ruben is Assistant Professor of Law at SMU Dedman School of Law. His scholarship on the Second Amendment has been published in the California Law Review, Duke Law Journal, Yale Law Journal Forum, and Journal of Law and Contemporary Problems. See, e.g., *An Unstable Core: Self-Defense and the Second Amendment*, 108 Calif L Rev 63 (2020); *From Theory to Doctrine: An Empirical Analysis of the Right to Keep & Bear Arms After Heller*, 67 Duke L J 1433 (2018) (with Joseph Blocher); *Firearm Regionalism and Public Carry: Placing Southern Antebellum Caselaw in Context*, 125 Yale L J Forum 121 (2015) (with Saul Cornell). His work has been cited in opinions of federal district and appellate courts addressing Second Amendment issues.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Amici urge the Court to hold that the two-part framework that the federal courts of appeals are using to adjudicate Second Amendment claims, and that the Court of Appeals used in this case, is the proper doctrinal analysis. Amici file this brief in support of Appellee, and agree with Appellee that the two-part framework applied by the Court of Appeals is correct and consistent with the U.S. Supreme Court's decisions in *District of Columbia v Heller*, 554 US 570 (2008) and *McDonald v Chicago*, 561 US 742 (2010).

In *Heller*, "th[e] … first in-depth examination of the Second Amendment," the U.S. Supreme Court explicitly disclaimed any attempt "to clarify the entire field," leaving the Amendment's precise contours to future cases. 554 US at 635. Ten years on, the Second

Amendment is no longer "*terra incognita*." *United States v Masciandaro*, 638 F3d 458, 475 (CA 4, 2011). Since *Heller*, federal and state courts have issued more than 1,000 decisions in cases asserting that laws violate the Second Amendment. Ruben & Blocher, *From Theory to Doctrine: An Empirical Analysis of the Right to Keep & Bear Arms After Heller*, 67 Duke L J 1433, 1435 (2018).

To analyze those claims, the federal courts of appeals have overwhelmingly adopted a two-part framework. They first "ask if the restricted activity is protected by the Second Amendment in the first place; and then, if necessary, [they] apply the appropriate level of scrutiny." *United States v Focia*, 869 F3d 1269, 1285 (CA 11, 2017), cert den 139 S Ct 846; 202 L Ed 2d 614 (2019) (internal quotation marks omitted). Courts typically apply intermediate scrutiny "if a challenged law does not implicate a core Second Amendment right, or does not place a substantial burden on the Second Amendment right." *United States v Torres*, 911 F3d 1253, 1262 (CA 9, 2019) (internal quotation marks omitted).

This Court should affirm that the two-part framework adopted by the Court of Appeals in this case properly protects the right to bear arms.

First, the two-part framework is consistent with *Heller*'s and *McDonald*'s recognition that a right to bear arms resembles other enumerated constitutional rights: fundamental, but not unlimited. *Heller*, 554 US at 626; *McDonald*, 561 US at 791. Appellant argues that the two-part framework is "insufficient" to protect the Second Amendment. Appellant Br. 8. But in fact, the application of the two-part framework by lower courts has harmonized Second Amendment law with other constitutional doctrines and provided a meaningful limit on the government's ability to restrict the right to bear arms.

The two-part framework comports with well-established principles that apply to the First Amendment and other constitutional rights, and is far from the "freestanding 'interest-balancing' approach" rejected in *Heller*, 554 US at 634. Just as courts do not apply strict scrutiny to every law burdening any kind of speech in any context, so too they should not apply strict scrutiny to every law regulating firearms. Rather, courts have scrutinized laws burdening the "core" of the right to bear arms more strictly just as the U.S. Supreme Court has done for "core" political speech. No federal appellate court has adopted categorical strict scrutiny for firearm laws; to do so would make the right to bear arms *primus inter pares* among constitutional rights. Indeed, an invariable requirement to apply strict scrutiny in every case would require courts to give the people's representatives more leeway to discriminate against women than, for example, to limit minors' access to guns. See *United States v Virginia*, 518 US 515, 568, 576–79; 116 S Ct 2264; 135 L Ed 2d 735 (1996) (Scalia, J., dissenting) (intermediate scrutiny applies to gender classifications).

The evidence does not suggest courts are systematically misapplying heightened scrutiny. Gun Owners Am. Br. 18. Even if they were, the solution would be to make clear that intermediate scrutiny truly requires a law to be "substantially related to the achievement of . . . important governmental objectives," *Ngu-yen v INS*, 533 US 53, 70; 121 S Ct 2053; 150 L Ed 2d 115 (2001) (internal quotation marks omitted), not to supercharge the Second Amendment with a test that courts do not apply to other individual rights.

Second, the two-step framework is faithful to *Heller*'s emphasis that history and tradition play an important role in delineating the right to bear arms. Following the U.S. Supreme Court's guidance, courts hold that longstanding restrictions—e.g., possession of guns by felons or in schools—are "presumptively lawful," 554 US at 627 n 26 (citations omitted), and that the

Second Amendment does not apply to "dangerous and unusual weapons," *id.* at 627 (internal quotation marks omitted). As part of this analysis, the two-part framework follows *Heller*'s guidance that certain "sensitive places" are categorically outside of the reach of the Second Amendment. Conversely, courts categorically invalidate extreme laws that are flatly inconsistent with the right to keep and bear arms as historically understood. *Id.* at 627–28. Even in the many cases lying between these two *Heller* guideposts, courts still consult the historical record in determining whether a law burdens the "core" of the right and thus warrants strict scrutiny.

History shows that firearm regulations in this country have taken a variety of forms, reflecting the diversity of our communities and safety concerns regarding firearms. Thus, in many cases, historical analogies are far from decisive and might not even be illuminating, except at an unhelpfully high level of abstraction. In those cases, limiting Second Amendment doctrine to text, history, and tradition would mire courts in the kinds of strained analogies that have plagued Fourth Amendment jurisprudence with unpredictable and inconsistent results. Such a rigid limitation would also constrain society's options for dealing with changes over time, including technological advances in weaponry and the potential sensitivity of locations—like airplanes and day care centers—not in existence until recently.

More importantly, a test that relies solely on text, history and tradition, Gun Owners Am. Br. 8, will invade local communities' "ability to devise solutions to social problems that suit local needs and values," which the U.S. Supreme Court preserved in *McDonald*, 561 US at 785. It is one thing to uphold "longstanding prohibitions," *Heller*, 554 US at 626, on the theory that "the Bill of Rights codified venerable, widely understood liberties," *id.* at 605, and thus cannot be read to condemn widely adopted laws. But it is quite another thing to strike down any regulation that is not longstanding. In theory, one virtue of adopting "the original understanding

of the Second Amendment," *id.* at 625, is that it maximizes the people's "freedom to govern themselves" at future times. *Obergefell v Hodges*, 576 US 644, 714; 135 S Ct 2584; 192 L Ed 2d 609 (2015) (Scalia, J., dissenting). But interpreting the Second Amendment to permit only those firearm laws that many jurisdictions have tried for many years will freeze in time the people's options for addressing today's horrific epidemic of gun violence, not to mention raise immense challenges of judicial administration. See *infra* II.B.2. Such an inflexible historical approach is neither warranted by *Heller* and *McDonald* nor necessary to protect Second Amendment rights. Courts applying the two-part test have frequently struck down laws regulating firearms. See *infra* II.A.3.

The two-part framework protects the people's fundamental right to defend themselves with firearms while ensuring that the people have a "variety of tools" to protect their communities from gun violence through legislation as well. *Heller*, 554 US at 636. This Court should adopt that framework as the correct approach to evaluating claims that the government has infringed the Second Amendment.

ARGUMENT

I. THE COURT OF APPEALS FOLLOWED THE TWO-PART FRAMEWORK OVERWHELMINGLY ADOPTED BY LOWER COURTS APPLYING THE SECOND AMENDMENT.

In *Heller*, the U.S. Supreme Court "declin[ed] to establish a level of scrutiny for evaluating Second Amendment restrictions." 554 US at 634. The federal courts of appeals have since reached broad consensus on "a workable *framework*, consistent with *Heller*, for evaluating whether a challenged law infringes Second Amendment rights." *Gould v Morgan*, 907 F3d 659, 669 (CA 1, 2018) (emphasis added).

The First, Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, Eleventh, and District of Columbia Circuits have explicitly adopted this two-part framework. See *Gould*, 907

F3d at 669; *NY State Rifle & Pistol Ass'n, Inc. v Cuomo*, 804 F3d 242, 254 (CA 2, 2015); *United States v Marzzarella*, 614 F3d 85, 89 (CA 3, 2010); *United States v Chester*, 628 F3d 673, 680 (CA 4, 2010); *Nat'l Rifle Ass'n of America, Inc. v Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F3d 185, 194, 206 (CA 5, 2012) ("*NRA*"); *United States v Greeno*, 679 F3d 510, 518 (CA 6, 2012); *Ezell v Chicago*, 651 F3d 684, 701–04 (CA 7, 2011), aff'd 846 F3d 888 (CA 7, 2017), mandamus den 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*, 399 US App DC 314; 670 F3d 1244, 1252 (2011), aff'd 419 US App DC 287; 801 F3d 264 (2015) ("*Heller II*"). The Eighth Circuit, too, has acknowledged the framework, although that court has not yet specifically adopted it. See *United States v Adams*, 914 F3d 602 (CA 8, 2019); *United States v Hughley*, 691 F Appx 278, 279 n 3 (CA 8, 2017) (mem op). The Court of Appeals employed this same two-part framework in analyzing Appellant's Second Amendment claim. *Wade v Univ of Mich*, 320 Mich App 1, 13; 905 NW2d 439 (2017).[2]

State high courts have also applied this two-part framework. See, e.g., *Ohio v Weber*, 2020-Ohio-6832 ¶ 19, --- NE3d ----, 2020 WL 7635472, at p *4 (2020) ("We believe that the two-step framework provides the appropriate test for Second Amendment challenges to firearm regulations, and we therefore apply it."); *Wilson v County of Cook*, 2012 IL 112026 ¶ 40; 968 NE2d 641 (2012); *Hertz v Bennett*, 294 Ga 62, 64–67; 751 SE2d 90 (2013).

The first step involves a "threshold question [of] whether the regulated activity falls within the scope of the Second Amendment." *Ezell*, 846 F3d at 892. "A law does *not* burden

[2] Panels of the Michigan Court of Appeals have previously applied this two-part framework. See, e.g., *People v Wilder*, 307 Mich App 546, 556–57; 861 NW2d 645 (2014); *People v Deroche*, 299 Mich App 301, 308–11; 829 NW2d 891 (2013).

Second Amendment rights, if it either falls within one of the 'presumptively lawful regulatory measures' identified in *Heller* or regulates conduct that historically has fallen outside the scope of the Second Amendment." *Torres*, 911 F3d at 1258, quoting *Heller*, 554 US at 627 n 26.

"[I]f the historical evidence is inconclusive or suggests that the regulated activity is not categorically unprotected[,] then there must be a second inquiry into the strength of the government's justification for restricting or regulating the exercise of Second Amendment rights." *Kanter v Barr*, 919 F3d 437, 441 (CA 7, 2019) (internal quotation marks omitted). In such cases, courts "evaluate the regulatory means the government has chosen and the public-benefits end it seeks to achieve." *Id.* (internal quotation marks omitted).

To determine the appropriate level of scrutiny, courts evaluate "how close the law comes to the core of the Second Amendment right and the severity of the law's burden on that right." *Id.* (internal quotation marks omitted). "If the core Second Amendment right is burdened, then strict scrutiny applies; otherwise, intermediate scrutiny applies." *Ass'n of NJ Rifle & Pistol Clubs, Inc. v Attorney Gen NJ*, 910 F3d 106, 117 (CA 3, 2018). At all events, "rational-basis review does not apply." *Kanter*, 919 F3d at 442 (internal quotation marks omitted).

Strict Scrutiny. The "weight of circuit court authority" has "identified the core of the Second Amendment," *Gould*, 907 F3d at 671 (citing cases), as "the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Heller*, 554 US at 635. Courts therefore apply strict scrutiny to regulations substantially limiting this core right of keeping and bearing arms in the home, for self-defense. E.g., *Ass'n of NJ Rifle & Pistol Clubs*, 910 F3d at 117 ("[L]aws that severely burden the core Second Amendment right to self-defense in the home are subject to strict scrutiny."); *Gould*, 907 F3d at 671 ("[T]he core Second Amendment right is limited to self-defense in the home"); *NRA*, 700 F3d at 195 ("A regulation that threatens a right

at the core of the Second Amendment—for example, the right of a law-abiding, responsible adult to possess and use a handgun to defend his or her home and family—triggers strict scrutiny.") (citation omitted); *Masciandaro*, 638 F3d at 471 ("[T]he application of strict scrutiny [is] important to protect the core right of the self-defense of a law-abiding citizen in his home."). But see *Wrenn v Dist of Columbia*, 431 US App DC 62, 73; 864 F3d 650, 661 (2017).

Under the two-part framework, as with other constitutional doctrines, "strict scrutiny 'requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.'" *Mance v Sessions*, 896 F3d 699, 705 (CA 5, 2018), quoting *Citizens United v Fed Election Comm*, 558 US 310, 340; 130 S Ct 879; 175 L Ed 2d 753 (2010).

Intermediate Scrutiny. Beyond cases substantially limiting the core right of keeping and bearing arms for self-defense as historically understood, there "has been near unanimity in the post-*Heller* case law that, when considering regulations that fall within the scope of the Second Amendment, intermediate scrutiny is appropriate." *Torres*, 911 F3d at 1262 (internal quotation marks omitted).

For instance, courts have applied intermediate scrutiny for basic registration requirements. E.g., *Heller II*, 670 F3d 1244. Courts also have applied intermediate scrutiny in considering restrictions on possession by certain classes of individuals. E.g., *Chester*, 628 F3d at 681–82 (prohibition on possession by any person convicted of a misdemeanor crime of domestic violence); *United States v Chapman*, 666 F3d 220, 226 (CA 4, 2012) (prohibition on possession for a "narrow class[ ] of persons who, based on their past behavior, are more likely to engage in domestic violence"), quoting *Reese*, 627 F3d at 802; *Tyler v Hillsdale County Sheriff's Dep't*, 837 F3d 678 (CA 6, 2016) (prohibition on possession for those who have been involuntarily

committed); *NRA*, 700 F3d at 206 (age restriction for sales); *Nat'l Rifle Ass'n of America, Inc. v McCraw*, 719 F3d 338, 348 (CA 5, 2013) (age-based restriction on public carry); *Marzzarella*, 614 F3d at 97 (prohibition on possession of a firearm with a removed serial number); *Ass'n of NJ Rifle & Pistol Clubs*, 910 F3d at 118 (prohibition on large-capacity magazines); *Masciandaro*, 638 F3d at 473 (prohibition on possession of a loaded weapon in a motor vehicle in a national park). See also *Deroche*, 299 Mich App at 310–11 (prohibition on possession of a firearm while intoxicated); *Weber*, 2020 WL 7635472 at *1 (prohibition on carrying or using firearm while under the influence); *Norman v Florida*, 215 So 3d 18, 38 (Fla, 2017) (open carry law was subject to intermediate scrutiny).

As with laws burdening other constitutional freedoms, intermediate scrutiny of a law restricting possession of firearms requires the government to show that the challenged law "is reasonably adapted to [a] substantial governmental interest." *Masciandaro*, 638 F3d at 471; e.g., *Chovan*, 735 F3d at 1139 ("[C]ourts have used various terminology to describe the intermediate scrutiny standard [but] all forms . . . require (1) the government's stated objective to be significant, substantial, or important; and (2) a reasonable fit between the challenged regulation and the asserted objective.").

II. THIS COURT SHOULD ADOPT THE TWO-PART FRAMEWORK FOR APPLYING THE SECOND AMENDMENT.

A. The Two-Part Framework Aligns the Second Amendment with Other Constitutional Rights.

The prevailing two-part framework for applying the right to bear arms employs modes of analysis that are consistent with those employed to address other fundamental rights. Courts are not treating "the right recognized in *Heller* as a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees." *McDonald*, 561 US at 780 (plurality opinion). That courts have frequently applied intermediate rather than strict scrutiny hardly

reflects a half-baked approach to the Second Amendment. To the contrary, applying strict scrutiny to all laws implicating the right to bear arms (as no federal appeals court has done) would render all other rights second-class.

1. This Court Should Not Apply Strict Scrutiny to Every Law Regulating Firearms.

The U.S. Supreme Court "has not said . . . and it does not logically follow, that strict scrutiny is called for whenever a fundamental right is at stake." *Heller II*, 670 F3d at 1256. See also *Gould*, 907 F3d at 670 ("Strict scrutiny does not automatically attach to every right enumerated in the Constitution."); *Chester*, 628 F3d at 682 ("We do not apply strict scrutiny whenever a law impinges upon a right specifically enumerated in the Bill of Rights.").

"In many areas of constitutional law, regulations that impose on rights are subject to one of three tests that are more or less stringent depending on the right and the burden at stake." *Wrenn*, 864 F3d at 656; see also *Marzzarella*, 614 F3d at 96 ("Strict scrutiny does not apply automatically any time an enumerated right is involved. We do not treat First Amendment challenges that way.").

"*Heller* itself repeatedly invokes the First Amendment in establishing principles governing the Second Amendment." *Marzzarella*, 614 F3d at 89 n 4. Courts have thus adopted the two-step framework "because First Amendment doctrine informs it." *NRA*, 700 F3d at 197. See also *Marzzarella*, 614 F3d at 89 n 4 ("the structure of First Amendment doctrine should inform our analysis of the Second Amendment"). Indeed, both steps of the two-part framework subject firearm regulations to scrutiny consistent with that which courts apply to laws burdening other fundamental individual rights, such as speech.

As noted, at the first step, courts ask "whether the law regulates conduct that falls within the scope of the Second Amendment's guarantee." *NRA*, 700 F3d at 194. The existence of

"[c]ategorical limits on the possession of firearms would not be a constitutional anomaly. Think of the First Amendment, which has long had categorical limits: obscenity, defamation, incitement to crime, and others." *United States v Skoien*, 614 F3d 638, 641 (CA 7, 2010), citing *United States v Stevens*, 599 US 460, 467; 130 S Ct 1577; 176 L Ed 2d 435 (2010). As the U.S. Supreme Court explained in *Heller*, "[o]f course the right [to bear arms] was not unlimited, just as the First Amendment's right of free speech was not. Thus, we do not read the Second Amendment to protect the right of citizens to carry arms for any sort of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for any purpose." 554 US at 595 (internal citation omitted). Cf. *New York v Ferber*, 458 US 747, 764; 102 S Ct 3348; 73 L Ed 2d 1113 (1982) ("[C]hild pornography . . . , like obscenity, is unprotected by the First Amendment"); *Virginia v Black*, 538 US 343, 359; 123 S Ct 1536; 155 L Ed 2d 535 (2003) ("'[T]hreats of violence are outside the First Amendment'").

The second step's gradations of means-end scrutiny do not make the Second Amendment an outlier either. The U.S. Supreme Court has not held that all fundamental rights require strict scrutiny no matter where or how they are exercised. Rather, "First Amendment doctrine demonstrates that, even with respect to a fundamental constitutional right, we can and should adjust the level of scrutiny according to the severity of the challenged regulation." *NRA*, 700 F3d at 198.

For example, the U.S. Supreme Court repeatedly has emphasized that "[p]olitical speech, of course, is at the *core* of what the First Amendment is designed to protect." *Morse v Frederick*, 551 US 393, 403; 127 S Ct 2618; 168 L Ed 2d 290 (2007) (internal quotation marks omitted) (emphasis added). Cf. *Citizens United*, 558 US at 393 (Scalia, J., concurring) ("A documentary film critical of a potential Presidential candidate is core political speech."). "When

a law burdens *core* political speech, we apply exacting scrutiny." *McIntyre v Ohio Elections Comm*, 514 US 334, 347; 115 S Ct 1511; 131 L Ed 2d 426 (1995) (emphasis added). By contrast, "commercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, and is subject to modes of regulation that might be impermissible in the realm of noncommercial expression." *Bd of Trustees of State Univ of NY v Fox*, 492 US 469, 477; 109 S Ct 3028; 106 L Ed 2d 388 (1989) (internal quotation marks omitted). Similarly, "the First Amendment protects public employee speech only when it falls within the *core* of First Amendment protection—speech on matters of public concern." *Engquist v Or Dep't of Agriculture*, 553 US 591, 600; 128 S Ct 2146; 170 L Ed 2d 975 (2008) (emphasis added).

Courts have also calibrated First Amendment doctrine to the specific context in which fundamental speech rights are exercised—and in many cases the federal courts of appeals have determined "[i]ntermediate scrutiny makes sense in the Second Amendment context" because "[t]he right to carry weapons in public for self-defense poses inherent risks to others." *Bonidy v US Postal Serv*, 790 F3d 1121, 1126 (CA 10, 2015).

Thus, "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings," and "must be applied in light of the special characteristics of the school environment." *Morse*, 551 US at 396–97 (internal quotation marks and citations omitted). Further, "the extent to which the Government can control access" to a place for exercising fundamental speech rights "depends on the nature of the relevant forum." *Cornelius v NAACP Legal Defense & Ed Fund, Inc.*, 473 US 788, 800; 105 S Ct 3439; 87 L Ed 2d 567 (1985). "In a traditional public forum—parks, streets, sidewalks, and the like—the government may impose reasonable time, place, and manner restrictions on private speech,

but restrictions based on content must satisfy strict scrutiny, and those based on viewpoint are prohibited." *Minn Voters Alliance v Mansky*, 138 S Ct 1876, 1885; 201 L Ed 2d 201 (2018).

In short, "[t]he 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." *Marzzarella*, 614 F3d at 96 (citation omitted). There is "no reason why the Second Amendment would be any different." *Id.* at 97. See also *Heller II*, 670 F3d at 1257 ("As with the First Amendment, the level of scrutiny applicable under the Second Amendment surely depends on the nature of the conduct being regulated and the degree to which the challenged law burdens the right.") (internal quotation marks omitted).

Gradations of scrutiny characterize other fundamental rights as well. "In no quarter does the Fourth Amendment apply with greater force than in our homes, our most private space which, for centuries, has been regarded as entitled to special protection." *Kentucky v King*, 563 US 452, 474; 131 S Ct 1849; 179 L Ed 2d 865 (2011) (internal quotation marks omitted). See also *Silverman v United States*, 365 US 505, 511; 81 S Ct 679; 5 L Ed 2d 734 (1961) ("At the [Fourth Amendment's] very *core* stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.") (emphasis added).

Under the Takings Clause of the Fifth Amendment, courts similarly apply different standards depending on the nature of the government's intrusion—i.e., physical occupation or regulation—on constitutionally protected property interests. See, e.g., *Horne v Dep't of Agriculture*, 576 US 350, 356–62; 135 S Ct 2419; 192 L Ed 2d 388 (2015) (noting the distinction between a per se requirement of just compensation for a physical appropriation, e.g., *Loretto v Teleprompter Manhattan CATV Corp.*, 458 US 419;102 S Ct 3164; 73 L Ed 2d 868 (1982), a regulatory taking under *Penn Central Transportation Company v City of New York*, 438 US 104;

98 S Ct 2646; 57 L Ed 2d 631 (1978), and a regulatory taking that amounts to a complete deprivation under *Lucas v South Carolina Coastal Council*, 505 US 1003; 112 S Ct 2886; 120 L Ed 2d 798 (1992)). The Seventh Amendment "was designed to preserve the basic institution of jury trial in only its *most fundamental elements*." *Galloway v United States*, 319 US 372, 392; 63 S Ct 1077; 87 L Ed 1458 (1943) (emphasis added). And the level of scrutiny that the Equal Protection Clause requires depends on the nature of the government classification. Compare *Adarand Constructors, Inc. v Pena*, 515 US 200, 235–36; 115 S Ct 2097; 132 L Ed 2d 158 (1995) (strict scrutiny for racial classifications), with *Craig v Boren*, 429 US 190, 197–98; 97 S Ct 451; 50 L Ed 2d 397 (1976) (intermediate scrutiny for gender classifications), and *City of Cleburne v Cleburne Living Ctr*, 473 US 432, 446; 105 S Ct 3249; 87 L Ed 2d 313 (1985) (rational basis review for intellectual disability classifications). Cf. *Johnson v California*, 543 US 499, 524; 125 S Ct 1141; 160 L Ed 2d 249 (2005) (Thomas, J., dissenting) (arguing against strict scrutiny for prison regulations because "even when faced with constitutional rights no less 'fundamental' than the right to be free from state-sponsored racial discrimination, we have deferred to the reasonable judgments of officials").

The two-part framework plainly reflects common features of constitutional doctrine. Requiring strict scrutiny of every law regulating firearms would not give the right to bear arms its constitutional due, but instead would make that right "subject to an entirely different body of rules than the other Bill of Rights." *McDonald*, 561 US at 780 (plurality opinion).

2. The Two-Part Framework Is Not the Freestanding Interest Balancing That *Heller* Ruled Out.

Heller and *McDonald* pose no obstacle to the means-end scrutiny the federal courts of appeal have overwhelmingly applied to laws regulating firearms. The lower courts "do not understand the [U.S. Supreme] Court to have rejected all heightened scrutiny analysis." *NRA*,

700 F3d at 197. No federal appellate court has read *Heller* to hold 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." *Heller II*, 670 F3d at 1271 (Kavanaugh, J., dissenting); Gun Owners Am. Br. 8. And the courts' "heightened scrutiny is clearly not the 'interest-balancing inquiry' proposed by Justice Breyer and rejected by the Court in Heller." *Heller II*, 670 F3d at 1265 (opinion of the court).

Although it rejected an interest-balancing inquiry, *Heller* did not provide an "up-front" and "clear message" about the level of scrutiny that should apply. Gun Owners Am. Br. 8. Indeed, "*Heller* explicitly leaves many questions unresolved and says nothing to cast doubt upon the propriety of the lower courts applying some level of heightened scrutiny in a Second Amendment challenge to a law significantly less restrictive than the outright ban on all hand-guns invalidated in that case." *Heller II*, 670 F3d at 1267. In rejecting a "freestanding 'interest-balancing' approach," the *Heller* Court noted that this mode of analysis did not reflect any "of the traditionally expressed levels" of scrutiny—"strict scrutiny, intermediate scrutiny, rational basis." 554 US at 634.

These "familiar scrutiny tests are not equivalent to interest balancing." *NRA*, 700 F3d at 197. Indeed, under a proper application of the two-part framework, "[t]here is no balancing at either step." *Ass'n of NJ Rifle & Pistol Clubs*, 910 F3d at 119 n 22. The framework "require[s] an assessment of whether a particular law will serve an important or compelling governmental interest," which "is not a comparative judgment." *Heller II*, 670 F3d at 1265. Contrary to Justice Thomas's assertion in *Rogers v Grewal*, 140 S Ct 1865; 207 L Ed 2d 1059 (2020), the two-part framework does not inevitably "devolve[] into [an interest-balancing inquiry]." *Id.* at 1867. Courts make the same judgment in testing burdens on activity implicating other

constitutional rights. Even under the Seventh Amendment, one of the most historically constrained constitutional provisions, courts will strike down procedural rules only when they destroy the right in its "fundamental elements." *Galloway*, 319 US at 392. Nothing in *Heller* foreclosed applying to laws burdening the right to bear arms the same strict or intermediate scrutiny that courts have used so frequently to test other constitutional rights. Doing so now would "ben[d] the rules for favored rights." *Whole Woman's Health v Hellerstedt*, 136 S Ct 2292, 2321; 195 L Ed 2d 665 (2016), as revised (June 27, 2016) (Thomas, J., dissenting).

3. The Two-Part Framework Meaningfully Protects the Right to Bear Arms.

Not only is the two-part framework applied by the Court of Appeals congruent with other constitutional doctrines in theory, it also meaningfully protects the right to bear arms in practice and provides a bona fide check on the government's ability to prevent citizens from keeping or bearing firearms.

The fact that courts uphold some firearm restrictions even under heightened scrutiny does not suggest otherwise. Such cases "do arise" even under the First Amendment. *Williams-Yulee v Fla Bar*, 575 US 433, 444; 135 S Ct 1656; 191 L Ed 2d 570 (2015). And the U.S. Supreme Court has sought "to dispel the notion that strict scrutiny is strict in theory, but fatal in fact." *Adarand Constructors*, 515 US at 237 (internal quotation marks omitted). See also Winkler, *Fatal in Theory, Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 Vand L R 793, 795–96 (2006) ("Courts routinely uphold laws when applying strict scrutiny, and they do so in every major area of law in which they use the test."). Moreover, data suggesting that courts widely uphold firearm regulations, reflects in part that many Second Amendment cases are brought in jurisdictions where gun rights (like concealed carry) already extend beyond the bounds of what *Heller* squarely protects, leaving many weak challenges to

conventional kinds of firearm regulations. *From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms After Heller*, 67 Duke L J at 1474–77 (showing that Second Amendment claims succeed almost exclusively in states and federal circuits associated with more gun regulation).

Moreover, courts have not hesitated to strike down laws that amount to the "total ban on handgun possession in the home" that *Heller* identified as "the archetype of an unconstitutional firearm regulation." *United States v Cox*, 906 F3d 1170, 1184 (CA 10, 2018).

Even when applying intermediate scrutiny, courts still frequently strike down firearm laws. E.g., *Binderup v Attorney Gen*, 836 F3d 336 (CA 3, 2016), cert den 137 S Ct 2323 (2017) (holding a prohibition on possession by individuals convicted of a crime punishable by imprisonment for more than one year to be unconstitutional as-applied); *Heller III*, 419 US App DC 287; 801 F3d 264 (2015) (invalidating police inspection requirement, requirement to re-register every three years, limitation on registering more than one gun per month, and requirement that registrant pass a test); *NY State Rifle & Pistol Ass'n*, 804 F3d 242 (invalidating prohibition on possessing magazines loaded with more than seven rounds of ammunition). Indeed, empirical analysis shows that Second Amendment challenges subject to intermediate scrutiny are more likely to succeed than the average Second Amendment claim. See generally *From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms After Heller*, 67 Duke L J at 1496.

More generally, as courts have implemented the two-part framework, the overall success rate for Second Amendment claims has steadily increased, especially when excluding the criminal cases where claims tend to be weakest. *From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms After Heller*, 67 Duke L J at 1486. Some 30

percent of all civil plaintiffs asserting Second Amendment claims prevail in the federal courts of appeals; the success rate is 40 percent for civil plaintiffs represented by counsel. *Id.* at 1478–79, tbls. 4–5. Civil litigants challenging restrictions on certain categories of regulations such as public carry restrictions prevail at rates approaching 50 percent. *Id.* Appendix C: Summary Results at xxviii.

Those rates are well within the range of success rates for other constitutional claims, suggesting that courts take the right to bear arms as seriously as other constitutional rights—including property rights, religious liberty rights and rights against unreasonable searches and seizures. See Krier & Sterk, *An Empirical Study of Implicit Takings*, 58 Wm & Mary L Rev 35, 64 (2016) ("In takings claims based on regulatory activity, aggrieved landowners prevail in fewer than 10 percent of the cases in our survey, and even that may overstate the success rate because the table aggregates the results in all of the cases studied and does not account for subsequent reversals."); Leong, *Making Rights*, 92 BU L Rev 405, 428 (2012) (finding that "the plaintiff prevailed on 48% of all Fourth Amendment claims raised in the civil context: 52% of excessive force claims and 39% of all other claims excluding excessive force claims litigated in civil proceedings"); Forren, *Revisiting Four Popular Myths About the Peyote Case*, 8 U Pa J Const L 209, 222 n 52 (2006) (collecting sources and noting studies finding that claims under the Free Exercise clause prevail at rates of 12.4, 12.1, and 16 percent).

The Second Amendment is not "be[ing] singled out for special—and specially unfavorable—treatment." *McDonald*, 561 US at 778–79.

B. The Two-Part Framework Properly Incorporates History and Tradition.

The two-part framework employed by the Court of Appeals and the federal appellate courts ensures that "historical meaning enjoys a privileged interpretative role in the Second Amendment context." *Masciandaro*, 638 F3d at 470.

1. History and Tradition Are Integral to the Two-Part Framework.

The two-part framework's first step emanates directly from *Heller*, where the U.S. Supreme Court "acknowledged that the scope of the Second Amendment is subject to historical limitations." *Chester*, 628 F3d at 679.

In *Heller*, the U.S. Supreme Court stated that "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." 554 US at 626–27. In other words, *Heller* "catalogued a non-exhaustive list of presumptively lawful regulatory measures that have historically constrained the scope of the right" and that "comport with the Second Amendment because they affect individuals or conduct unprotected by the right to keep and bear arms." *Binderup*, 836 F3d at 343 (internal quotation marks omitted). The *Heller* Court further endorsed the "historical tradition of prohibiting the carrying of 'dangerous and unusual weapons,'" and "recognize[d] another important limitation on the right to keep and carry arms," *viz*., that the right applies only to those "sorts of weapons . . . in common use at the time." 554 US at 627 (internal quotation marks omitted).

Following this guidance, "[t]o determine whether a law impinges on the Second Amendment right, [courts] look to whether the law harmonizes with the historical traditions associated with the Second Amendment guarantee." *NRA*, 700 F3d at 194; *Wade*, 320 Mich App at 13 ("The threshold inquiry is whether the challenged regulation regulates conduct that falls within the scope of the Second Amendment right as historically understood.") (internal quotation marks omitted). See also *Kanter*, 919 F3d at 441 (step one involves "a textual and historical inquiry") (internal quotation marks omitted); *Torres*, 911 F3d at 1258 ("the first step of our analysis requires us to explore the amendment's reach 'based on a historical understanding of the

scope of the [Second Amendment] right'"); *Medina v Whitaker*, 439 US App DC 294; 913 F3d 152, 158 (2019) (courts at step one "look to tradition and history"); *Heller II*, 670 F3d at 1253 (step one involves determining whether a regulation "has long been accepted by the public").

Following *Heller*, "a longstanding, presumptively lawful regulatory measure—whether or not it is specified on *Heller*'s illustrative list—would likely fall outside the ambit of the Second Amendment; that is, such a measure would likely be upheld at step one of [the prevailing] framework." *NRA*, 700 F3d at 196; *Wade*, 320 Mich App at 13 ("If the regulated conduct has historically been outside the scope of Second Amendment protection, the activity is not protected and no further analysis is required."). See also *Hamilton v Pallozzi*, 848 F3d 614, 624 (CA 4), cert den 138 S Ct 500 (2017) ("for a presumptively lawful regulation [identified in *Heller*], at the first step of the Second Amendment inquiry, we need not undertake an extensive historical inquiry"); *Heller II*, 670 F3d at 1253 ("the activities covered by a longstanding regulation are presumptively not protected from regulation by the Second Amendment").

Such "exclusions need not mirror limits that were on the books in 1791." *Skoien*, 614 F3d at 641. "[A] regulation can be deemed 'longstanding,'" and thus presumptively lawful, "even if it cannot boast a precise founding-era analogue." *NRA*, 700 F3d at 196. "After all, *Heller* considered firearm possession bans on felons and the mentally ill to be longstanding, yet the current versions of these bans are of mid–20th century vintage." *Id.* Even courts construing the historically bound Seventh Amendment have rejected strict adherence to "procedural forms and details" exactly as they existed in 1791: "[t]he Amendment did not bind the federal courts to the exact procedural incidents or details of jury trial according to the common law in 1791." *Galloway*, 319 US at 390, 392. See also *Text, History, and Tradition: What the Seventh Amendment Can Teach Us About the Second*, 122 Yale L J at 877–83.

Step two of the prevailing framework likewise effectuates *Heller*'s historical analysis. The U.S. Supreme Court held that "banning from the home the most preferred firearm in the nation to keep and use for protection of one's home and family, would fail constitutional muster" under any test. 554 US at 628–29 (internal quotation marks and citation omitted). The District of Columbia's handgun ban "ma[de] it impossible for citizens to use them for the core lawful purpose of self-defense and [wa]s hence unconstitutional." *Id.* at 630. Thus, as noted, the "weight of circuit court authority" has "identified the core of the Second Amendment," *Gould*, 907 F3d at 671 (citing cases), as "the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Heller*, 554 US at 635. Accordingly, in evaluating whether laws that implicate the Second Amendment, in fact, infringe it, courts have asked "whether the challenged regulation burdens the core Second Amendment right." *Ass'n of NJ Rifle & Pistol Clubs*, 910 F3d at 117.

This, too, incorporates historical analysis, for "a longstanding measure that harmonizes with the history and tradition of arms regulation in this country would not threaten the core of the Second Amendment guarantee." *NRA*, 700 F3d at 196. Indeed, the "longstanding out-of-the-home/in-the-home distinction bears directly on the level of scrutiny applicable." *Masciandaro*, 638 F3d at 470.

That distinction reflects the venerable principle that "every man's house is looked upon by the law to be his castle." 3 Blackstone, Commentaries on the Laws of England, p *288 (1803). More than 300 years ago, the common law recognized that "[i]n case a man 'is assailed in his own house, he need not flee as far as he can, *as in other cases of se defendendo*, for he hath the protection of his house to excuse him from flying." *People v Tomlins*, 213 NY 240, 243; 107 NE 496 (1914) (Cardozo, J.) (emphasis added). See also 2 Restatement Torts, 2d (1965), § 65,

comment *g* ("[T]he interest of society in the life and efficiency of its members and in the prevention of the serious breaches of the peace involved in bloody affrays requires one attacked with a deadly weapon, *except within his own dwelling place*, to retreat[.]") (emphasis added).

Thus, there is no tension between a framework that scrutinizes regulating firearms in the home more strictly than regulations applicable to public places. If the law of self-defense applies differently inside the home than out, then it is unsurprising that courts have recognized that the right to bear arms for self-defense has different dimensions at home than in public.

2. Means-End Scrutiny Is Better Suited Than a Purely Historical Approach.

The prevailing two-part framework is superior to a purely historical approach because it provides guidance in cases where courts face "institutional challenges in conducting a definitive review of the relevant historical record." *NRA*, 700 F3d at 204. Many cases are likely to defy easy historical answers for at least three reasons.

First, "conditions and problems differ from locality to locality" and "citizens in different jurisdictions have divergent views on the issue of gun control." *McDonald*, 561 US at 783. Firearms are and always have been subject to regulation throughout the United States. See, e.g., Blocher & Miller, *The Positive Second Amendment: Rights, Regulation, and the Future of Heller* (New York: Cambridge University Press, 2018), pp 19–21 (describing historical gun laws); Spitzer, *Guns Across America: Reconciling Gun Rules and Rights* (New York: Oxford University Press, 2015), p 5 ("[W]hile gun possession is as old as America, so too are gun laws."); Winkler, *Gunfight: The Battle Over the Right to Bear Arms in America* (New York: W.W. Norton & Co, 2011), p 115 ("Gun safety regulation was commonplace in the American colonies from their earliest days.").

Historically, such laws "were not only ubiquitous, numbering in the thousands; they spanned every conceivable category of regulation, from gun acquisition, sale, possession, transport, and use, including deprivation of use through outright confiscation, to hunting and recreational regulations, to registration and express gun bans." *Guns Across America: Reconciling Gun Rules and Rights*, p 5. From the very beginning, those laws also varied across communities and regions, especially between urban and rural areas. See generally Blocher, *Firearm Localism*, 123 Yale L J 82 (2013); Ruben & Cornell, *Firearm Regionalism and Public Carry: Placing Southern Antebellum Case Law in Context*, 125 Yale L J Forum 121 (2015).

Contemporary gun regulations likewise run the gamut, from restrictions on weapon possession by certain categories of people (such as those with a felony conviction, the mentally ill, and minors), to restrictions on specific weapons (like machine guns), to restrictions on possession in particular places (like court houses, polling places, police stations, and schools) to restrictions on possession at particular times (like pending trial or during a crime), to laws requiring permits for public carry. See, e.g., Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L Rev 1443, 1475–1545 (2009) (discussing and categorizing a broad range of gun laws). Indeed, post-*Heller* litigation has involved some 60 distinct forms of policies or government action subject to Second Amendment challenges. See *From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms After Heller*, 67 Duke L J, Appendix B.

This legal diversity makes it unlikely that, for individual cases, courts will have access to the kind of historical record that enabled the U.S. Supreme Court in *Heller* to assert with "no doubt" "that the Second Amendment conferred an individual right to keep and bear arms." 554 US at 595. *Heller* itself "d[id] not undertake an exhaustive historical analysis . . . of the full

scope of the Second Amendment." *Id.* at 626. And even proponents of a historical approach acknowledge that "analyzing the history and tradition of gun laws in the United States does not always yield easy answers." *Heller II*, 670 F3d at 1275 (Kavanaugh, J., dissenting).

Thus, lower courts deciding individual cases have found that "[h]istory and tradition do not speak with one voice." *Kachalsky v Westchester Co*, 701 F3d 81, 91 (CA 2, 2012). As a result, courts reading the same sliver of the historical record don't speak with one voice, either. For example, the District of Columbia Circuit relied on historical analysis to invalidate a law requiring a permit for carrying firearms in public. *Wrenn*, 864 F3d at 666–67. The First Circuit, however, upheld similar Massachusetts licensing requirements after finding that "the national historical inquiry does not dictate an answer to the question of whether the [challenged] policies burden conduct falling within the scope of the Second Amendment." *Gould*, 907 F3d at 670. Indeed, history can even conflict over time within a single jurisdiction. *Compare* An Act for the Better Security of the Inhabitants, by Obliging the Male White Persons to Carry Fire Arms to Places of Public Worship, 1770, § 1, in A DIGEST OF THE LAWS OF THE STATE OF GEORGIA (Phila, Pa, R. Aitken 1800), p 157 (requiring the carrying of guns to church), with An Act to Preserve the Peace and Harmony of the People of this State, and for Other Purposes, 1870, § 1, in Public Laws, PASSED BY THE GENERAL ASSEMBLY OF THE STATE OF GEORGIA, AT THE SESSION OF 1870 (Atlanta, New Era Printing Establishment 1870), p 42 (banning the carrying of guns to church).

Even amicus Gun Owners of America struggles to apply the text, history, and tradition approach that it urges this Court to adopt. Discussing early American public universities, like the University of Virginia, amicus argues that "it is extremely likely that these newly created public colleges never mentioned, contemplated or adopted any ordinance even addressing firearms during their early existence . . . . There is certainly no founding era historical analogue

justifying the University of Michigan's decision to ban firearms on its properties." Gun Owners Am. Br. 12–13. But the historical record is otherwise. In October of 1824, during a Board Meeting attended by Thomas Jefferson and James Madison, the University of Virginia adopted the following prohibition: "No student shall, within the precincts of the University, introduce, keep or use any spirituous or vinous liquors, keep or use weapons or arms of any kind. . . ." Founders Early Access, *Meeting Minutes of the University of Virginia Board of Visitors*, October 4–5, 1824, available at <https://encyclopediavirginia.org/entries/university-of-virginia-board-of-visitors-minutes-october-4-5-1824/> (accessed March 1, 2021).

Indeed, "there is a long history of forbidding firearms in educational institutions." Miller, *Constitutional Conflict and Sensitive Places*, 28 Wm & Mary Bill Rights J 459, 471 (2019) (discussing, e.g., Harvard University's ban on guns on campus dating back to 1655). See also Terr Okla Stat ch 25, art 47, § 7 (1890) (prohibiting "any person, except a peace officer" from bearing any offensive or defensive weapon in "any church or religious assembly, any school room or other place where persons are assembled for public worship, for amusement, or for educational or scientific purposes"); 1879 Tex Crim Stat tit IX, Ch. 4 (Penal Code) Art 320 ("If any person shall go into any . . . any school room, or other place where persons are assembled for amusement or for educational or scientific purposes . . . and shall have or carry about his person a pistol or other fire-arm, dirk, dagger, slung-shot, sword-cane, spear, brass-knuckles, bowie-knife, or any other kind of a knife manufactured and sold for the purposes of offense and defense, he shall be punished by fine not less than fifty nor more than five hundred dollars, and shall forfeit to the county the weapon or weapons so found on his person."). Clearly then, the University of Michigan's Article X represents the type of "longstanding prohibition" the *Heller* Court had in mind.

Appellant's argument that "schools" are not the same as universities for purposes of the sensitive places analysis is unavailing. Appellant Br. 11–13. As noted above, regulations banning guns from universities undoubtedly qualify as "longstanding prohibitions" under *Heller*. 554 US at 626–27. Moreover, courts have recognized universities as sensitive places. *DiGiacinto v Rector & Visitors of George Mason Univ*, 281 Va 127, 134–37; 704 SE2d 365 (2011); *Fla Carry, Inc. v Univ of Fla*, 180 So 3d 137 (Fla, 2015). Whether there might be some corner of the University of Michigan's campus that is not a sensitive place under *Heller* should not alter the conclusion in this case given that Appellant has raised a facial—and not as-applied—challenge to the University of Michigan's ordinance. See *Wash State Grange v Wash State Republican Party*, 552 US 442, 449; 128 S Ct 1184; 170 L.Ed.2d 151 (2008) (requiring a litigant to "establish[] that no set of circumstances exists under which the Act would be valid, *i.e.*, that the law is unconstitutional in all of its applications") (internal citations and quotation marks omitted); *Bonner v City of Brighton*, 495 Mich 209, 223; 848 NW2d 380 (2014) ("A party challenging the facial constitutionality of an ordinance faces an extremely rigorous standard. To prevail, plaintiffs must establish that no set of circumstances exists under which the [ordinance] would be valid….") (internal citations and quotation marks omitted, alterations in original).

Second, "[j]ust as the First Amendment protects modern forms of communications, and the Fourth Amendment applies to modern forms of search, the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding." *Heller*, 554 US at 582 (citations omitted). Yet "when legislatures seek to address new weapons that have not traditionally existed or to impose new gun regulations because of conditions that have not traditionally existed, there obviously will not be a history or

tradition of banning such weapons or imposing such regulations." *Heller II*, 670 F3d at 1275 (Kavanaugh, J., dissenting).

Measuring a firearm regulation's constitutionality based solely on its longevity therefore would jeopardize a number of important public policies. Although, as discussed above, *supra* pp 25–26, even under the purely historical approach advocated by Appellant and amicus Gun Owners, universities are sensitive places beyond the coverage of the Second Amendment, that mode of analysis is ill-suited to considering other modern spaces. For example, it is clear that airplanes are the kind of "sensitive places" where legislatures should be able to prohibit firearms. E.g., *United States v Davis*, 304 F Appx 473, 474 (CA 9, 2008). But it is unclear how such a sensible regulation would fare under a historical test given that Congress did not regulate firearms in airplanes until the 1960s. See Act of September 5, 1961, Pub L No 87-197, 75 Stat 466; see also Ariz Rev Stat § 13-3102(A)(13) (forbidding "entering a nuclear or hydroelectric generating station carrying a deadly weapon" unless permitted by law). The same can be said for daycare centers, which were not widespread until the early to mid-twentieth century, and where regulations prohibiting firearms have been implemented only recently. See Allen, et al., *Transforming the Workforce for Children Birth Through Age 8*, National Academies Press (July 23, 2015), available at <https://www.ncbi.nlm.nih.gov/books/NBK310532/> (accessed February 26, 2021); see also Benjamin-Neelon & Grossman, *State Regulations Governing Firearms in Early Care and Education Settings in the US*, JAMA Network Open (April 22, 2020), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7177197/> (accessed February 26, 2021); Camden, *Gun Rules for Child Care Centers Pass Senate*, The Spokesman-Review (Mar. 12, 2019), available at <https://www.spokesman.com/stories/2019/mar/12/gun-rules-for-child-care-centers-pass-senate> (accessed February 26, 2021). Yet it is evident that places such as daycare

centers, like schools, are sensitive places where legislatures may regulate the use and possession of firearms. *Constitutional Conflict and Sensitive Places*, 28 Wm & Mary Bill Rights J at 459.

Nor is there strong historical precedent for today's mass spectator events. Michigan Stadium has an official capacity of 107,601 people—nearly four times the 33,000 people who lived in New York, America's largest city and the home of the First Congress, in 1791. Los Angeles will host the 2028 Summer Olympic Games—which since ancient times have signaled a period of peace—at numerous venues owned by the State of California and/or the City of Los Angeles, including the Los Angeles Coliseum and the University of California-Los Angeles. More people will attend the Olympics than lived in the United States in 1791 (3 million). The fact that colonial America did not host such events should not prevent the Michigan legislature[3] or authorities in Los Angeles from taking measures to prevent the kind of terrorist violence that horrified the world in Munich in 1972 and Atlanta in 1996.

Thus, while longevity may be sufficient, there is no necessary correlation between how long a law regulating firearms has been on the books and whether that law passes constitutional muster. There are no clear historical reference points for "ghost guns" designed to bypass background checks and licensing law or technology that enables individuals to "print" working firearms made of plastic that can pass through metal detectors. *United States v McSwain*, No. CR 19-80 (CKK), 2019 WL 1598033, at *3 (D.D.C. Apr. 15, 2019) (describing a "ghost gun" as "a weapon that lacks a serial number" and "is therefore untraceable by law enforcement"); *Defense Distributed v US Dep't of State*, 838 F3d 451, 454–55 (CA 5, 2016) (noting that "[t]hree-dimensional ('3D') printing technology allows a computer to 'print' a physical object"

[3] Possessing a firearm in a stadium is prohibited by statute in Michigan. See MCL 28.425*o*(1)(c); MCL 750.234d(1)(e).

including, for example, with the right files, a "single-shot plastic pistol" or "a fully functional plastic AR-15"); *Wash v US Dep't of State*, 318 F Supp 3d 1247, 1255 (WD Wash 2018) ("3D [printed] guns" are "virtually undetectable in metal detectors and other security equipment."). At best, a test requiring historical precedent to uphold any firearm regulation would severely confine legislatures' ability to address these policy issues; more likely, such a test would provide no guidance at all.

The Second Amendment is not the only constitutional right that must grapple with technological change, but a rigid historical test would make it uniquely ill-equipped to do so. If the People's representatives must point to some precedent for restricting firearms in order for their policies to pass constitutional muster, then gun policy in America will be confined to what has been done before. That would render empty the U.S. Supreme Court's assurances that the Second Amendment will not compromise communities' "ability to devise solutions to social problems that suit local needs and values," *McDonald*, 561 US at 785, and that *Heller* leaves them "a variety of tools for combating" gun violence. 554 US at 636.

Moreover, a singular directive requiring historical analogies will counterintuitively lead to the very freestanding balancing that the U.S. Supreme Court rejected in *Heller*. The Court's Fourth Amendment case law shows the limits of historical analogies untethered to well-settled legal doctrines. E.g., *Riley v California*, 573 US 373, 401; 134 S Ct 2473; 189 L Ed 2d 430 (2014) ("Is an e-mail equivalent to a letter? Is a voicemail equivalent to a phone message slip? It is not clear how officers could make these kinds of decisions before conducting a search, or how courts would apply the proposed rule after the fact."); *United States v Jones*, 565 US 400, 420; 132 S Ct 945; 181 L Ed 2d 911 (2012) (Alito, J., concurring) (noting that "it is almost impossible to think of late-18th-century situations that are analogous to" GPS searches). Cf.

Ross v Bernhard, 396 US 531, 538 n 10; 90 S Ct 733; 24 L Ed 2d 729 (1970) (noting that analogizing modern causes of action to those at common law "requir[es] extensive and possibly abstruse historical inquiry" and is "difficult to apply").

On a blank historical canvass, jurists are more likely to paint a self-portrait. Thus, a Fourth Amendment test that nominally searches for "encroachment of the sort the Framers, after consulting the lessons of history, drafted the Fourth Amendment to prevent," *Carpenter v United States*, 138 S Ct 2206, 2223; 201 L Ed 2d 507 (2018) (internal quotation marks omitted), has led courts into "normative" policy-making that balances "the value of privacy in a particular setting and society's interest in combating crime." *Id.* at 2265 (Gorsuch, J., dissenting). Cf. *Wyoming v Houghton*, 526 US 295, 299–300; 119 S Ct 1297; 143 L Ed 2d 408 (1999) ("Where [historical] inquiry yields no answer, we must evaluate the search or seizure under traditional standards of reasonableness by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.").

So, too, grounding the right to bear arms on this Court's capacity to mine historical materials for appropriate historical analogues will lead to an "unpredictable—and sometimes unbelievable—jurisprudence," *Carpenter*, 138 S Ct at 2266 (Gorsuch, J., dissenting), that has little to do with whether legislatures are depriving Americans' ability to defend themselves under the guise of combating the ills of gun violence.

Finally, an approach requiring a one-to-one correspondence between a modern regulation and a historical one fails to account for the unique characteristics rendering certain spaces "sensitive places." "Places are sensitive, not necessarily because of physical safety alone, but because sensitive places are where gun rights come into conflict with other public goods

generated by other institutions enabled by other kinds of constitutional rights." *Constitutional Conflict and Sensitive Places*, 28 Wm & Mary Bill Rights J at 487. Places like universities, religious buildings, and political institutions occupy a historically significant place, because they are spaces devoted to facilitating the exercise of other constitutional rights. See generally *id.* Schools and universities for example, are "First Amendment institutions, tasked with training children and young adults how to become responsible public citizens" and entrusted with ensuring the free exchange of ideas. *Id.* at 470. Permitting students to bring guns on campus can have a chilling effect on that exchange because a reasonable person will think twice about arguing with an interlocutor wearing a sidearm.

Recently, in *United States v Class*, the D.C. Circuit confronted the question of whether a parking lot "approximately 1,000 feet from the entrance to the Capitol [Building]" qualified as a sensitive place. 442 US App DC 257; 930 F3d 460, 462 (2019). Class had parked his car in one of the parking lots near the U.S. Capitol, leaving three firearms locked inside the vehicle, in contravention of a federal statute banning firearms on Capitol Building property. *Id.* Class challenged his conviction on Second Amendment grounds. *Id.* The D.C. Circuit upheld the conviction, finding that the parking lot was a sensitive place beyond the reach of the Second Amendment. The court noted that "with respect to the Capitol itself, there are few, if any government buildings more 'sensitive' than the 'national legislature at the very seat of its operations.'"[4] *Id.* at 463. The court went on to find that the parking lot was "sufficiently

[4] The D.C. Circuit also noted that "tragically, gunmen have targeted the Capitol before." *Class*, 900 F3d at 463. Of course, when *Class* was decided, the January 6, 2021 riot where an armed mob invaded the U.S. Capitol had yet to occur. Similarly, the spring 2020 armed protests forcing the temporary closing of the Michigan Legislature had also not happened. See Blocher & Siegel, *When Guns Threaten the Public Sphere: A New Account of Public Safety Regulation Under* Heller, 115 Nw U L Rev at 32-33 (forthcoming 2021) (discussing the Michigan armed protests and analyzing the recognition, rooted in *Heller,* that the government interest in regulating guns

integrated with the Capitol for *Heller*[]'s sensitive places exception to apply" and that therefore "the Second Amendment d[id] not give Class the right to bear arms" in the parking lot. *Id.* at 464.

Class argued that unlike the parking lot, the Capitol building itself or similar government property, is protected by security and not easily accessible by the public, thereby lessening the need to have a gun for self-defense. *Id.* at 464-65. The court rejected this argument:

> Many "schools" and "government buildings"—the paradigmatic "sensitive places" identified in *Heller I*—are open to the public, without any form of special security or screening. In an unsecured government building like a post office or school, the risk of crime may be no different than in any other publicly accessible building, yet the *Heller I* opinion leaves intact bans on firearm possession in those places. As one court put it, those places are "sensitive" for purposes of the Second Amendment because of "the people found there" or the "activities that take place there."

Id. at 465, citing *GeorgiaCarry.Org v. Georgia*, 764 F Supp 2d 1306, 1319 (MD Ga 2011), aff'd 687 F3d 1244 (CA 11, 2012). In focusing on the "people" found in sensitive places, or "the activities that take place there," the court in *Class* recognized that "ensuring safety is a sufficient, but not a necessary, reason to prohibit firearms in some places." *Constitutional Conflict and Sensitive Places*, 28 Wm & Mary Bill Rights J at 461.

Like the U.S. Capitol and the Michigan Legislature, the University of Michigan is a sensitive place in part because of the activities that take place there. This recognition, rooted in *Heller*, rejects the notion that sensitive places are only those with a historical counterpart dating back to the country's founding. *Heller* does not stand for the proposition that a school is a sensitive place only if it is the present-day equivalent of the schoolhouse the founders would

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goes beyond protecting individuals from physical injury and must also encompass the "government interest in securing public safety as protecting both individual and societal interests in engaging in valued activities—from childrearing to education, commerce, worship, voting, and governing—free from threat and intimidation.").

have recognized. See *Class*, 930 F3d at 465 ("Under Class's reading, the ban *in that location* must have been longstanding. But this makes little sense when viewed through the language of *Heller I*, which spoke generally of 'schools' and 'government buildings.' The relevant inquiry is whether a particular *type* of regulation has been a "longstanding" exception to the right to bear arms.") (citations omitted). Rather, courts applying *Heller* have recognized limits on the Second Amendment's application in certain sensitive places that enable the exercise of constitutional rights, such as the freedom of speech. See generally *Constitutional Conflict and Sensitive Places*, 28 Wm & Mary Bill Rights J 459; see also *Class*, 930 F3d at 465; *GeorgiaCarry.Org*, 764 F Supp 2d at 1319.

A strict historical approach can lead to inconsistent results, improperly hamstring legislatures tackling emerging challenges and new technologies, and create analytical blind spots. The better approach, consistent with *Heller* and *McDonald*, is the one that each federal court of appeals to have considered the question has adapted from other constitutional jurisprudence, and that the Court of Appeals applied here: absent a categorical ruling at the first step of the framework, "a law impinging upon the Second Amendment right must be reviewed under a properly tuned level of scrutiny—i.e., a level that is proportionate to the severity of the burden that the law imposes on the right." *NRA*, 700 F3d at 198. Cf. *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L Rev at 1549 (after *Heller*, courts should resolve Second Amendment cases by "looking closely at the scope of the right, at the burden the regulation imposes, [and] at evidence on whether the regulation will actually reduce danger of crime and injury").

CONCLUSION

This Court should hold that the Court of Appeals applied the correct two-part framework for adjudicating claims that the Second Amendment prohibits a law restricting the right to bear arms.

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Respectfully submitted,

By: */s/ Larry J. Saylor*

MILLER, CANFIELD, PADDOCK AND STONE, PLLC
Larry J. Saylor (P28165)
Michael C. Simoni (P70042)
Joel C. Bryant (P79506)
Erika L. Giroux (P81998)
Attorneys for Amici Curiae Law Professors

MUNGER, TOLLES & OLSON LLP
Donald B. Verrilli Jr. (D.C. Bar No. 420434)
David H. Fry (CA Bar No. 189276)
Justin P. Raphael (CA Bar No. 292380)
Laura M. Lopez (CA Bar No. 313450)
Of Counsel for Amici Curiae Law Professors
(not admitted to practice in Michigan)