# Order

**Michigan Supreme Court**
**Lansing, Michigan**

October 18, 2024

Elizabeth T. Clement,
Chief Justice

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Megan K. Cavanagh
Elizabeth M. Welch
Kyra H. Bolden,
Justices

166067

JOSHUA WADE,
Plaintiff-Appellant,

v

SC: 166067
COA: 330555
Ct of Claims: 15-000129-MZ

UNIVERSITY OF MICHIGAN,
Defendant-Appellee.

_____/

On order of the Court, the application for leave to appeal the July 20, 2023 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

VIVIANO, J. (*dissenting*).

The University of Michigan (the University) enacted a broad campuswide ban of firearms that applies regardless of whether a person has a permit to carry a concealed weapon. The ban's scope raises serious questions concerning the Second Amendment of the United States Constitution. The United States Supreme Court recently determined that, when considering the constitutionality of a firearm restriction, courts must analyze the restriction by looking at America's historical tradition of firearm regulations. *New York State Rifle & Pistol Ass'n, Inc v Bruen*, 597 US 1, 17 (2022). In this case, the Court of Appeals failed to perform the Second Amendment analysis required by the Supreme Court. Instead, the Court of Appeals misinterpreted Second Amendment caselaw and created its own complex, multifactor test that is not grounded in the text of the Second Amendment or the Supreme Court's caselaw interpreting it. By denying leave to appeal, the majority simply looks the other way. As a result, plaintiff's colorable claims that the University violated his Second Amendment right to keep and bear arms have never been properly analyzed by any court. I would grant plaintiff's application for leave to appeal in order to perform the correct legal analysis and to provide clarity following *Bruen*.

## I. FACTS AND PROCEDURAL HISTORY

In 2001, the University adopted Article X, which bans the possession of firearms on its campus or "any property owned, leased or otherwise controlled" by the University. That prohibition applies to all persons regardless of whether they possess a concealed-carry

permit. Plaintiff unsuccessfully applied for a waiver under Article X.[1] The record indicates that plaintiff does not work, reside, or study at the University and has a concealed-carry permit. Plaintiff challenged Article X's ban on firearms as a violation of the Second Amendment. The University moved for summary disposition under MCR 2.116(C)(8), and the Court of Claims granted the University's motion.

The Court of Appeals affirmed in a split decision, finding the regulation to be constitutional. *Wade v Univ of Mich*, 320 Mich App 1, 22 (2017) (*Wade I*), vacated 510 Mich 1025 (2022). Plaintiff applied for leave to appeal in this Court, and we held this case in abeyance for two cases pending in this Court.[2] *Wade v Univ of Mich*, 904 NW2d 422 (Mich, 2017). After these cases were decided, this Court again held this case in abeyance pending the outcome of *New York State Rifle & Pistol Ass'n, Inc v City of New York*, 590 US 336 (2020). *Wade v Univ of Mich*, 926 NW2d 806 (Mich, 2019). After the Supreme Court decided *New York State Rifle*, we granted leave to hear this case. *Wade v Univ of Mich*, 506 Mich 951 (2020). But before argument, the Supreme Court decided *Bruen*, 597 US at 17, which rejected the framework employed by the Court of Appeals in its initial decision. We remanded to the Court of Appeals for reconsideration in light of the Supreme Court's decision in *Bruen*. *Wade v Univ of Mich*, 510 Mich 1025 (2022). I concurred and recommended that the Court of Appeals consider (1) whether there were any analogous firearm regulations on university and college campuses in the relevant historical period and (2) whether large modern college campuses, like the University's, are "so dispersed and multifaceted that a total campus ban would now cover areas that historically would not have had any restrictions[.]" *Id*. at 1028 (VIVIANO, J., concurring). On remand, the Court of Appeals again affirmed the Court of Claims, holding that Article X is constitutional. *Wade v Univ of Mich (On Remand)*, ___ Mich App ___, ___ (July 20, 2023) (Docket No. 330555) (*Wade II*); slip op at 14.

## II. *BRUEN* AND THE SECOND AMENDMENT

The Supreme Court's decisions in *Dist of Columbia v Heller*, 554 US 570 (2008), and *McDonald v Chicago*, 561 US 742 (2010), established an individual right to firearms for self-defense and struck down laws prohibiting the possession and use of firearms in the home. Following the *Heller* and *McDonald* decisions, many courts, including our Court of Appeals, developed a two-step framework for analyzing Second Amendment disputes

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[1] Article X, § (4)(1)(f) exempts a person from Article X's prohibitions "when the Director of the University's Department of Public Safety has waived the prohibition based on extraordinary circumstances."

[2] These two cases were *Mich Gun Owners, Inc v Ann Arbor Pub Sch* (Docket No. 155196) and *Mich Open Carry, Inc v Clio Area Sch Dist* (Docket No. 155204). Both cases were decided in *Mich Gun Owners, Inc v Ann Arbor Pub Sch*, 502 Mich 695 (2018).

that combines history with means-end scrutiny. *Bruen*, 597 US at 17; *Wade*, 320 Mich App at 13. "History" refers to the method of examining the Second Amendment's text "as informed by history." *Bruen*, 597 US at 19. "[M]eans-end scrutiny" examines whether a firearms regulation is " 'substantially related to the achievement of an important government interest.' " *Id*. (citation omitted). In *Bruen*, the Supreme Court rejected the framework's means-end scrutiny analysis, stating that courts may conclude that a person's conduct "falls outside the Second Amendment's 'unqualified command' " only if the firearm regulation is consistent with America's historical tradition of firearm regulation. *Id*., quoting *Konigsberg v State Bar of Cal*, 366 US 36, 50 n 10 (1961). This requires the government to "affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." *Id*. at 19. As part of this analysis, courts may consider, if applicable, whether the disputed laws prohibit the carrying of firearms in "sensitive places," which are locations where firearm regulations historically have been recognized as consistent with the Second Amendment. See *id*. at 30.

Therefore, when analyzing claims under the Second Amendment, courts must "ascertain whether the new law is 'relevantly similar' to laws that our tradition is understood to permit, 'apply[ing] faithfully the balance struck by the founding generation to modern circumstances.' " *United States v Rahimi*, 602 US 1, 7 (2024), quoting *Bruen*, 597 US at 29 & n 7 (alteration in *Rahimi*). "Why and how the regulation burdens the right are central to this inquiry." *Rahimi*, 602 US at 7, citing *Bruen*, 597 US at 29. For example, if modern firearms laws resemble laws in existence at the time of the founding and were imposed for reasons similar to those underlying founding-era laws, this would indicate that the contemporary laws are constitutional. *Rahimi*, 602 US at 7. A contemporary firearm restriction does not need to be a "dead ringer" or "historical twin" to a founding-era regulation. *Id*. at 8, quoting *Bruen*, 597 US at 30 (quotation marks omitted). However, even if a law regulates firearms for a permissible reason, it may not be constitutional "if it does so to an extent beyond what was done at the founding." *Rahimi*, 602 US at 7.

## III. THE COURT OF APPEALS MISINTERPRETED THE CASELAW

In *Wade II*, the Court of Appeals disregarded the analysis required by the United States Supreme Court for Second Amendment disputes and invented a confusing four-factor test that bears almost no resemblance to the Supreme Court's test. On remand, the Court of Appeals set forth the following factors for resolving Second Amendment challenges:

> 1) Courts must first consider whether the Second Amendment presumptively protects the conduct at issue. If not, the inquiry ends and the regulation does not violate the Second Amendment.

> 2) If the conduct at issue is presumptively protected, courts must then consider whether the regulation at issue involves a traditional "sensitive place." If so, then it is settled that a prohibition on arms carrying is consistent with the Second Amendment.
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> 3) If the regulation does not involve a traditional "sensitive place," courts can use historical analogies to determine whether the regulation prohibits the carry of firearms in *a new and analogous* "sensitive place." If the regulation involves a new "sensitive place," then the regulation does not violate the Second Amendment.
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> 4) If the regulation does not involve a sensitive place, then courts must consider whether the government has demonstrated that the regulation is consistent with this Nation's historical tradition of firearms regulations. This inquiry will often involve reasoning by analogy to consider whether regulations are relevantly similar under the Second Amendment. If the case involves "unprecedented societal concerns or dramatic technological changes," then a "more nuanced approach" may be required. [*Wade II*, ___ Mich App at ___; slip op at 10 (citations omitted).]

The first factor accurately reflects the principle that the Second Amendment presumptively protects a citizen's right to keep and bear arms. See *Bruen*, 597 US at 19, 32. On the basis of this factor, the Court of Appeals concluded that plaintiff is a "law-abiding, adult citizen" who enjoys Second Amendment protection. *Wade II*, ___ Mich App at ___; slip op at 10. Although the first factor accords with *Bruen*, the remaining factors do not accord with the analysis required by the Supreme Court.

Concerning the second factor, the Court of Appeals concluded that the University is a school and a sensitive place and that Article X is constitutional because regulations forbidding the carrying of firearms in sensitive places are consistent with the Second Amendment. *Wade II*, ___ Mich App at ___; slip op at 13. The Court of Appeals also stated that courts may only employ historical analogies when a firearm regulation does not have a direct historical precedent. See *id*. at ___; slip op at 5, 10.

These conclusions represent a stilted misreading of the Supreme Court's precedent. To begin, the Supreme Court has articulated nothing like the multifactor test concocted by the Court of Appeals. Particularly troubling is the Court of Appeals' treatment of "sensitive places." In *Heller*, the Supreme Court stated in dicta that its holding did not call into question "longstanding" laws that forbid "the carrying of firearms in *sensitive places* such as *schools* and government buildings . . . ." *Heller*, 554 US at 626 (emphasis added). In *Bruen*, the Supreme Court expressly declined to "comprehensively define 'sensitive places,' " although, interestingly, it rejected an approach that would extend the concept across large areas, such as the island of Manhattan. *Bruen*, 597 US at 30-31. Arguably,

the Court of Appeals' conclusion that the entire campus of the University of Michigan—spanning one-tenth of Ann Arbor—does what *Bruen* rejected and extends sensitive places across large swaths of territory.

The Court of Appeals' analytical problems run deeper still. The core error is the wooden application of the Supreme Court's discussion of sensitive places. In *Wade I*, the Court of Appeals' holding rested largely on the proposition that universities were presently and historically understood to be "schools." *Wade I*, 320 Mich App at 14. Consequently, without more, the Court concluded that they were sensitive places. *Id.* As I noted, however, it did not appear that the Supreme Court intended to uphold any and all gun regulations in a location as long as the place could somehow be understood as a "school." *Wade*, 510 Mich at 1026 (VIVIANO, J., concurring). Nor did it appear that the Court meant to include universities within the ambit of sensitive places. *Id.*

In any event, *Bruen* makes it clear that sensitive places are those locations where firearms have been historically regulated. This conclusion reflects *Bruen*'s general text-and-history approach to Second Amendment rights, under which courts must "examine any historical analogues of the modern regulation to determine how these types of regulations were viewed." *Id.* As noted above, in so holding, the Court rejected a pragmatic balancing that considered a court's perception of the need for a certain regulation. *Bruen*, 597 US at 17. Instead, the required analysis is historical, with due consideration for the historical rationales of regulations burdening the right to bear firearms. *Rahimi*, 602 US at 4. The Court did not exempt sensitive places from this historical approach. Rather, in *Bruen*, it described sensitive places as those locations where " 'longstanding' 'laws forbidding the carrying of firearms' " existed. *Bruen*, 597 US at 30 (citation omitted). Put differently, a sensitive place is one in which firearms have historically been forbidden. In determining whether a location is a sensitive place, the ultimate inquiry would therefore necessarily entail a historical analysis of whether the location is the type of place in which firearms have been banned. Or, as the Supreme Court noted, the location might be relevantly analogous to such a location. *Id.* At bottom, however, the question is a historical one. And as the Supreme Court has never dealt with a sensitive place, let alone indicated that a university qualifies as such, there can be no shortcuts to the historical work needed to answer the question.

Yet the Court of Appeals tried to take a shortcut here. As can be seen from its multifactor test, the Court suggested that any historical analysis is unnecessary if a location is a sensitive place. *Wade II*, ___ Mich App at ___; slip op at 13. This completely ignores that sensitive places are those locations with historical regulations. And in applying its newly fabricated test, the Court once again offered little more than an analysis of whether universities are schools, this time relying solely on modern definitions of schools. *Id.*

By denying leave and letting this flawed analysis stand, the majority today leaves an important question—the near total ban of firearms on a large section of Ann Arbor—

lacking proper consideration by the courts of this state. Under a proper analysis, there is significant reason to question whether the Court of Appeals reached the correct outcome, i.e., that a total prohibition on firearms is permissible under the Second Amendment. As I noted before, my own review of historical gun restrictions on campuses and the secondary literature on the topic has not uncovered any tradition of *complete* firearm bans, only partial and targeted prohibitions, e.g., regulations on the discharge of firearms on campus. *Wade*, 510 Mich at 1026-1027.[3]

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[3] Most courts that have recently addressed these regulations have recognized that they do not support a total prohibition of firearms on university campuses. See *United States v Metcalf*, opinion and order of the United States District Court for the District of Montana, issued Jan 31, 2024 (Case No. CR 23-103-BLG-SPW), pp 7-8 ("The Court is unconvinced by evidence of these early university bans because they were not regulations on carrying weapons in "sensitive places." Rather, they banned certain persons—students—from carrying weapons. The University of Georgia restriction banned students from carrying weapons anywhere. Neither the University of Virginia ban nor the University of North Carolina ban applied to faculty members or to members of the community, so they, too, only banned certain persons from carrying weapons."); *United States v Allam*, 677 F Supp 3d 545, 572 (ED Tex, 2023) ("In any event, although these enactments occurred close to our Nation's founding, the prohibitions applied to students only, and, thus, the university campus 'was not a place where arms were forbidden to responsible adults,' much less within 1,000 feet of campus. Kopel & Greenlee, [*The ''Sensitive Places'' Doctrine: Locational Limits on the Right to Bear Arms*, 13 Charleston L Rev 205, 252 (2018)]. Moreover, three university regulations that applied only to students cannot be said to be representative of our Nation's tradition of firearms regulation."). The Court of Appeals relied on, among other things, two recent out-of-state federal cases for the proposition that a university is a college campus. *United States v Power*, unpublished memorandum opinion of the United States District Court for the District of Maryland, issued January 9, 2023 (Case No. 20-po-331-GLS); *United States v Robertson*, unpublished memorandum opinion of the United States District Court for the District of Maryland, issued January 9, 2023 (Case No. 22-po-867-GLS). These courts were less thorough in their analysis, however. Neither case addressed college or university campuses; instead, both examined a nonschool government location. While the court in both cases did analogize the location to universities, the court addressed only three historical regulations, none of which totally prohibited firearms on campus. *Power*, unpub op at 12; *Robertson*, unpub op at 12. In a third case cited by the Court of Appeals, the decision upheld a prohibition on carrying concealed weapons, not a total ban; in doing so, the court cited various additional historical examples of limited prohibitions on student possession of firearms and the carrying of firearms in school *rooms*, not across entire campuses. *Antonyuk v Hochul*, 635 F Supp 3d 111, 142 & n 33 (ND NY, 2022). Tellingly, too, all these decisions at least attempted to do the historical analysis that the Court of Appeals said was unnecessary here.

The limited nature of these historical regulations is particularly important after the Supreme Court's most recent decision on the Second Amendment, *Rahimi*. There, the Court noted that "[w]hy and how the regulation burdens the right are central to [the historical] inquiry." *Rahimi*, 602 US at 7. "Even when a law regulates arms-bearing for a permissible reason, . . . it may not be compatible with the right if it does so to an extent beyond what was done at the founding." *Id*. The University's prohibition here arguably goes far beyond the narrower restrictions at the founding. Moreover, even if these limited regulations could be thought to bear some resemblance to the University's campuswide ban here, it should be questioned whether, given the vast extent of the University's campus and its varied uses (far exceeding what founding-era campuses encompassed), the historical regulations are truly analogous to the prohibition at issue. *Wade*, 510 Mich at 1027-1028 (VIVIANO, J., concurring).

It seems doubtful that after establishing a text-and-tradition approach to the Second Amendment, the Supreme Court would uphold total bans on firearms in locations that historically never had such prohibitions. Indeed, such a regulation would not be supported by text or tradition, so what reasoning could support it? A rationale grounded in the pragmatic balancing of interests was rejected in *Bruen*, as discussed above. I therefore

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Even worse, the Court of Appeals relied on an article cited by *Bruen*, stating that "the authors presume that *Heller*'s reference to 'schools' included universities." *Wade II*, ___ Mich App at ___; slip op at ___, citing *The "Sensitive Places" Doctrine*, 13 Charleston L Rev at 251-252. But the Court of Appeals completely misrepresented the thrust of the article, which carefully goes through founding-era regulations of firearms on campuses and concludes:

> None of the above laws provides support for *Heller*'s designation of "schools" as sensitive places where arms carrying may be banned. Students at the two New Jersey schools were allowed to carry on campus, although they were deprived of nearby handgun ranges. Students in Mississippi could carry arms as long as they did so openly. The riotous students at the University of Virginia were wholly disarmed, but the faculty and staff remained as well-armed as ever. Whatever one thinks about the collective punishment of the U. Va. students, the campus was not a place where arms were forbidden to responsible adults. [*Id.* at 252.]

In other words, as noted above, the article stands for the proposition that historical regulations on campuses do not support the regulation upheld by the Court of Appeals here. Even to the extent the article assumes that universities are schools, the authors were writing before *Bruen*, which indicated that sensitive places are not mere abstract categories of locations but places of the sort where historical regulations existed.

struggle to see how the Court of Appeals' framework here, which eschews text and tradition altogether, can be justified under the Supreme Court's precedent.

## IV. CONCLUSION

For these reasons, I conclude that the Court of Appeals' application of *Bruen* was flawed. I would grant leave to appeal to consider this significant case.

ZAHRA, J., joins the statement of VIVIANO, J.

BERNSTEIN, J., did not participate.