STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals

JOSHUA WADE,

Plaintiff-Appellant,

v.

UNIVERSITY OF MICHIGAN,

Defendant-Appellee.

Supreme Court No. 156150

Court of Appeals No. 330555

Court of Claims No. 15-00129

BRIEF FOR GIFFORDS LAW CENTER TO PREVENT GUN VIOLENCE AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLEE

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QUESTIONS PRESENTED

1. Whether the two-part analysis applied by the Court of Appeals is consistent with *District of Columbia v. Heller*, 554 US 570; 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).

   Plaintiff-Appellant answers: No

   Defendant-Appellee answers: Yes

   Amicus answers: Yes

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

   Plaintiff-Appellant answers: Strict Scrutiny

   Defendant-Appellee answers: Intermediate Scrutiny

   Amicus answers: Intermediate Scrutiny

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

   Plaintiff-Appellant answers: Yes

   Defendant-Appellee answers: No

   Amicus answers: No

INTEREST OF *AMICUS CURIAE*

Giffords Law Center to Prevent Gun Violence ("Giffords Law Center") is a non-profit policy organization dedicated to researching, writing, enacting, and defending laws and programs proven to reduce gun violence and save lives. Founded in 1993 after a gun massacre at a San Francisco law firm, the organization was renamed Giffords Law Center in October 2017 after joining forces with the gun-safety organization founded by former Congresswoman Gabrielle Giffords.

Today, Giffords Law Center provides free assistance and expertise to lawmakers, advocates, legal professionals, law enforcement officials, and citizens seeking to make their communities safe from gun violence. Its attorneys track and analyze firearm legislation, evaluate policy proposals regarding gun-violence prevention, and participate in Second Amendment litigation nationwide. The organization has provided courts with *amicus* assistance in many important cases implicating guns and gun violence.

Giffords Law Center is participating in this case because it is institutionally invested in ensuring an appropriate methodology for evaluating the constitutionality of gun-safety regulations. It believes that this Court should endorse a methodology that will treat rights under the Second Amendment as subject to the same reasonable regulation as other constitutional rights, safeguarding the progress many States have made toward preventing gun violence and saving lives.

Giffords Law Center also supports reasonable gun-safety regulations on university campuses. The organization believes that universities have a critical interest in maintaining a safe environment for their students, faculty, staff, and visitors. The presence of guns on campus can cause fear, intimidation, and self-censorship—all of which are antithetical to fostering an environment in which members of the university community can freely and openly exchange ideas.

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[1] Pursuant to MCR 7.212(H)(3), *amicus* affirms that neither the parties nor their counsel authored or contributed anything toward the production, preparation, or filing of this brief, and no person or entity other than *amicus* and its counsel funded its preparation or submission.

INTRODUCTION

The U.S. Supreme Court held in *District of Columbia v. Heller*, 554 US 570; 128 S Ct 2783; 171 L Ed 2d 637 (2008), that the Second Amendment guarantees "an individual right to keep and bear arms." *Id.* at 595. It also made clear, however, that "the right [is] not unlimited"—any more than is "the First Amendment's right of free speech." *Id.* To the contrary, the Second Amendment does not enshrine "a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Id.* at 626. And even in areas where Second Amendment protections are at their apex, regulators retain "a variety of tools" to regulate access to and use of guns in order to promote public safety. *Id.* at 636.

The *Heller* Court had no occasion to decide *how* courts should determine whether any such tool comports with the Second Amendment. That question has now come before this Court, as it has before other federal and state courts across the country. The vast majority of those courts have embraced a two-step approach which asks (at step one) whether a regulation burdens conduct within the scope of the Second Amendment, and if so, applies (at step two) either intermediate or strict scrutiny depending on "on the relative severity of the burden and its proximity to the core" of the Second Amendment right. *Ezell v. City of Chi.*, 846 F3d 888, 899 (CA 7, 2017) (quoting *Ezell v. City of Chi.*, 651 F3d 684, 708 (CA 7, 2011)). This Court should do the same. The consensus, two-step approach treats Second Amendment rights like other constitutional rights; it allows regulators to protect the public from the risks of gun violence if they satisfy the applicable level of scrutiny; and it comports with *Heller*'s enumeration of longstanding gun regulations that pose no serious constitutional concern.

The leading alternative—a purely historical approach—does none of those things, and suffers from other flaws besides. It is no wonder, then, that very few courts have adopted it. Indeed, nearly every federal Court of Appeals and state high court that has announced a methodological

test for Second Amendment cases uses the prevailing two-step test and applies some form of heightened scrutiny. Those courts have generally concluded that intermediate scrutiny applies to regulations that do not burden or only tangentially burden the core Second Amendment right, reserving strict scrutiny for regulations that directly and substantially implicate that core. They generally have not eschewed traditional tiers of scrutiny in favor of a Second Amendment-specific historical analysis.

Moreover, the consensus approach—unlikely the purely historical one—leaves legislators the flexibility they need to tackle the difficult, inherently localized issues that arise when reconciling the need to protect gun rights with the need to prevent gun violence. Legislators and elected officials across the country, Michigan's Board of Regents among them, are hard at work trying to get it right for the particular communities and diverse populations they represent. That work is far from finished. And debates about how best to accomplish it are hotly contested at the ballot box, with input from well-funded organizations on different sides of the issue. The "communal processes of democracy," in other words, are working. *Kolbe v. Hogan*, 849 F3d 114, 150 (CA 4, 2017) (en banc) (Wilkinson, J., concurring).

The University of Michigan's Article X is a good example of those processes at work. The Board of Regents of the University of Michigan adopted Article X to address gun-related concerns specific to the academic environment it aims to cultivate. The measure easily passes constitutional muster under the consensus two-part test. Because Article X aligns with historically longstanding prohibitions on firearms in sensitive places, it is constitutional at step one of the test. Should the Court nonetheless proceed to the second step, it should apply intermediate scrutiny because Article X merely regulates the possession of firearms on the campus of the University of Michigan and does not burden the core Second Amendment right of "citizens to use arms in defense of hearth

and home." *Heller*, 554 US at 635. And because Article X serves important University interests in ensuring safety and open dialogue on campus, Article X more than satisfies that standard. This Court should employ this prevailing two-step inquiry and affirm the judgment below.

ARGUMENT

I. Federal and State Courts Have Coalesced Around a Two-Step, Scrutiny-Based Standard for Determining Whether a Regulation Violates the Second Amendment.

In the wake of *Heller*, "[a] two-step inquiry has emerged as the prevailing approach" for determining whether a regulation violates the Second Amendment. *Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F3d 185, 194 (CA 5, 2012). Every federal appeals court to have considered the question has adopted that two-part test. See *N.Y. State Rifle & Pistol Ass'n v. Cuomo*, 804 F3d 242, 254 (CA 2, 2015) (noting that the Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuits have adopted a two-part test); *Gould v. Morgan*, 907 F3d 659, 669 (CA 1, 2018) (adopting the same test). That includes the Sixth Circuit, which has endorsed and applied the consensus, two-step approach on at least three separate occasions. See *United States v. Greeno*, 679 F3d 510, 518 (CA 6, 2012) ("We find this two-pronged approach appropriate and, thus, adopt it in this Circuit."); *Tyler v. Hillsdale Cty. Sheriff's Dep't*, 837 F3d 678, 685, 699 (CA 6, 2016) (en banc); *Stimmel v. Sessions*, 879 F3d 198, 204, 212 (CA 6, 2018) (Griffin, J.).

State high courts have followed suit. Most that have considered Second Amendment challenges in the wake of *Heller* have endorsed the same two-step framework around which the federal appeals courts have coalesced. See, e.g., *State v. Roundtree*, 952 NW2d 765, 773 (Wis, 2021) ("Generally, Second Amendment challenges require this court to undertake a two-step approach."); *State v. Weber*, -- NE3d --, 2020 WL 7635472, at *4 (Ohio, 2020) ("We believe that the two-step framework provides the appropriate test for Second Amendment challenges to firearm

regulations, and we therefore apply it."); *Norman v. State*, 215 So 3d 18, 35 (Fla, 2017) ("[W]e apply the two-step analysis that has been employed by . . . the Eleventh Circuit . . . and nearly every other federal circuit court of appeal . . . ."); *Chief of Police of City of Worcester v. Holden*, 470 Mass 845, 853; 26 NE3d 715, 723 (2015) ("[P]rohibitions and regulations [that] do not burden conduct protected by the Second Amendment . . . . are not subject to heightened scrutiny"); *State v. DeCiccio*, 315 Conn 79, 111; 105 A3d 165 (2014) ("*Heller* aptly has been characterized as having adopted 'a two-pronged approach to second amendment challenges.'"); *Hertz v. Bennett*, 294 Ga 62; 751 SE2d 90 (2013) (adopting "a two-step inquiry"); *State v. Christian*, 354 Or 22, 44; 307 P3d 429 (2013) (applying the "two-pronged approach in examining Second Amendment challenges"); *Wilson v. Cnty. of Cook*, 2012 IL 112026; 968 NE2d 641, 654 (2012) (following "a two-pronged approach"); *Pohlabel v. State*, 128 Nev 1, 6; 268 P3d 1264 (2012) (applying the '"two-pronged approach to Second Amendment challenges'").

These courts first ask whether the regulation burdens conduct falling within the scope of the Second Amendment. If it does, they then apply either intermediate or strict scrutiny depending on "on the relative severity of the burden and its proximity to the core" of the Second Amendment right. *Ezell*, 846 F3d at 899 (quoting *Ezell*, 651 F3d at 708). Courts generally reserve strict scrutiny for severe burdens on core Second Amendment rights, and apply intermediate scrutiny where a regulation burdens core rights only tangentially or not at all. See, e.g., *Worman v. Healey*, 922 F3d 26, 38 (CA 1, 2019) ("In our view, intermediate scrutiny is appropriate as long as a challenged regulation either fails to implicate the core Second Amendment right or fails to impose a substantial burden on that right.").

II. The Court Should Endorse that Consensus Test.

The settled two-step inquiry is the right one. *Heller* effectively dictated that approach when it instructed courts to treat Second Amendment rights neither worse nor better than other

constitutional rights. And that standard gives regulators sufficient latitude to address the important public-safety concerns attendant to the use of firearms—including by adopting the kinds of common-sense gun laws *Heller* specifically called out as constitutional. The same cannot be said of the purely historical approach a few jurists and commentators have endorsed. A purely historical approach cannot be reconciled with *Heller* itself, offers few clear answers, would jeopardize regulations of dangerous conduct, and would prevent Michigan and other States from tailoring legislation to serve the particular needs of their diverse populations.

A. A Regulation Burdens the Core Second Amendment Right When It Impedes an Individual's Ability to Possess Firearms for Self-Defense in the Home.

"Like most rights, the right secured by the Second Amendment is not unlimited." *Heller,* 554 US at 626. Indeed, this Court has long recognized that constitutional rights to bear arms are subject to the "police power of the state to preserve public safety and peace and to regulate the bearings of arms." *People v. Brown*, 253 Mich 537, 541; 235 NW 245 (1931); see also *People v. Zerillo*, 219 Mich 635, 638; 189 NW 927 (1922) (recognizing "the right of the Legislature, under the police power, to regulate the carrying of firearms"). That means that the Second Amendment does not afford "a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Heller*, 554 US at 626. Its scope is narrower—and its "core" is narrower still. *Id.* at 630. Consistent with *Heller*, the "core" Second Amendment right is the responsible citizen's ability to use arms for self-defense in the home. *Id*. at 635 (recognizing "the right of law-abiding, responsible citizens to use arms in defense of hearth and home").

That conclusion follows from the four primary axes along which the right to keep and bear arms has historically been defined: (1) the identity of the individual exercising the right; (2) the type of "arms" at issue; (3) the location at which such arms are "kept"; and (4) the purpose for which they are "borne." As to the first (identity), *Heller* made clear that the Second Amendment

right extends to "law-abiding, responsible citizens," and not persons more likely to pose a threat to themselves or others, like "felons [or] the mentally ill." 554 US at 635; see *id.* at 626. As to the second (type), *Heller* explained that the Second Amendment protects arms typically used for civilian self-defense (like the handgun, America's "quintessential self-defense weapon," *id.* at 629), rather than the sorts of devastating weaponry developed for use by modern militaries. *Id.* at 624–25, 627–28. As to the third (location), *Heller* held that "the home . . . [is] where the need for defense of self, family, and property is most acute." *Id.* at 628. And as to the fourth (purpose), *Heller* emphasized that "self-defense" is the right's "core lawful purpose." *Id.* at 630. The heart of the Second Amendment right lies at the intersection of those four principles—exactly where the law at issue in *Heller* attempted to strike.

By contrast, laws that impose a lesser burden on the core right or do not implicate it at all have long been held (or presumed) constitutional. Those include "longstanding prohibitions on the possession of firearms by felons and the mentally ill." *Id.* at 626; see also, e.g., *Binderup v. Att'y Gen. United States of Am.*, 836 F3d 336, 347–49 (CA 3, 2016) (en banc) (noting that felons presumptively lack Second Amendment rights). They include laws restricting concealed carry. See *Heller*, 554 US at 626 (noting the "majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues"); see also, e.g., *Peruta v. Cty. of San Diego*, 824 F3d 919, 933–39 (CA 9, 2016) (en banc) (describing the long history of concealed-carry restrictions in the United States). They include bans on machine guns and other military-grade weapons not widely or appropriately used for self-defense. See *Heller*, 554 US at 627–28 (weapons "most useful in military service . . . may be banned" because "modern developments" have differentiated small-arms used for individual self-defense from arms useful in combat); *Kolbe*, 849 F3d at 134–39 (holding that weapons most

useful in military service are unprotected by the Second Amendment). And, most relevant here, they include "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings." *Heller*, 554 US at 626; see also, e.g., *United States v. Masciandaro*, 638 F3d 458, 470 (CA 4, 2011) ("[A]s we move outside the home, firearm rights have always been more limited, because public safety interests often outweigh individual interests in self-defense.").

B. Regulations that Burden the Second Amendment Right Are Subject to Heightened Scrutiny That Reflects the Severity of the Burden and Its Proximity to the Core.

Although *Heller* clarified the contours of the Second Amendment right by mapping out its core, it declined to decide what level of scrutiny applies to laws that burden that right. Federal and state courts across the country have since answered that question by applying either intermediate or strict scrutiny depending "on the relative severity of the burden and its proximity to the core" of the Second Amendment right. *Ezell*, 846 F3d at 899 (quoting *Ezell*, 651 F3d at 708); see *infra* Part I. That consensus rule follows from *Heller*, and from Second Amendment principles, for at least three reasons: It brings the Second Amendment in line with other constitutional rights; it affords regulators necessary leeway to protect the public from gun violence; and it comports with *Heller*'s enumeration of the kinds of gun laws that clearly withstand Second Amendment scrutiny.

1. The Two-Step Inquiry Treats the Second Amendment Consistently With Other Individual Rights.

Heller taught that the Second Amendment should be treated like other constitutional rights, rather than "as an odd outlier." 554 US at 603; see also, e.g., *id.* at 628 (looking to "the standards of scrutiny that [the Court has] applied to enumerated constitutional rights"). Indeed, in holding that the Second Amendment confers an individual right in the first place, the *Heller* Court repeatedly analogized the Second Amendment to the First Amendment in particular. See *id.* at

579, 582, 591, 592, 595, 606, 626, 635. And *McDonald* did the same thing, looking to First Amendment precedents and emphasizing that the Second Amendment cannot be "singled out for special . . . treatment." 561 US at 778–79 (majority op); see also *id.* at 780 (plurality op) (explaining that the Second Amendment is not a "second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees").

Consistent with these principles, courts should select and apply a level of heightened scrutiny in Second Amendment cases much the way they do in First Amendment cases: by assessing the severity of the burden imposed and its proximity to the core right. See, e.g., *Jackson v. City & Cty. of S.F.*, 746 F3d 953, 960–61 (CA 9, 2014) ("[J]ust as in the First Amendment context, we consider: (1) how close the law comes to the core of the Second Amendment right and (2) the severity of the law's burden on the right." (internal quotation marks omitted)); *United States v. Chester*, 628 F3d 673, 682 (CA 4, 2010) (similar). For the vast majority of modern gun-safety regulations—which fall well short of the restrictive ban invalidated in *Heller*—this framework means that courts will apply intermediate scrutiny to determine whether the regulation at issue is "substantially related to an important governmental objective." *Clark v. Jeter*, 486 US 456, 461; 108 S Ct 1910; 100 L Ed 2d 465 (1988); see, e.g., *Silvester v. Becerra*, 138 S Ct 945, 947; 100 L Ed 2d 293 (2018) (Thomas, J., dissenting from denial of certiorari) ("After *Heller*, the Courts of Appeals generally evaluate Second Amendment claims under intermediate scrutiny.").

The regular use of intermediate scrutiny to assess the constitutionality of gun regulations heeds *Heller*'s dictate that the Second Amendment should be treated "[l]ike most rights." 554 US at 626. Intermediate scrutiny has traditionally been applied to regulations burdening all manner of constitutional rights—including "discriminatory classifications based on sex or illegitimacy," *Clark*, 486 US at 461 (citing cases), and content-neutral restrictions that incidentally burden

speech, see, e.g., *Turner Broad. Sys., Inc. v. FCC*, 512 US 622, 662; 114 S Ct 2445; 129 L Ed 2d 497 (1994). The use of intermediate scrutiny in the First Amendment context is particularly illuminating, given the Court's repeated reliance on the First Amendment to answer threshold methodological questions related to the Second, and its insistence that the Second Amendment "right [is] not unlimited, just as the First Amendment's right of free speech [is] not." *Heller*, 554 US at 595.

Particularly given the danger inherent in the use of firearms, there is no reason to privilege the right to bear arms over the rights to be free from discrimination on the basis of sex or to speak freely. See *Bonidy v. U.S. Postal Serv.*, 790 F3d 1121, 1126 (CA 10, 2015). The Second Amendment is no more a supercharged right than it is a second-class one. And the two-step approach most appellate courts have adopted, including the use of intermediate scrutiny that most often results from its application, strikes that balance.

2. The Two-Step Inquiry Affords Political Actors Necessary Leeway To Protect the Public from Gun Violence.

The consensus approach also allows legislatures—and the courts in which their legislation may be challenged—appropriate latitude to address the personal and public risks of firearms. *Heller* itself recognized the importance of that result. Indeed, the *Heller* Court was well "aware of the problem of handgun violence in this country," 554 US at 636—a problem that has regrettably not diminished in the thirteen years since that decision was issued. And it took care to emphasize that "[t]he Constitution leaves [regulators] a variety of tools for combating that problem." *Id.*

The settled heightened-scrutiny approach—which subjects to intermediate scrutiny many reasonable regulations that restrict, rather than prohibit, the use of firearms—ensures that those tools will remain at policy-makers' disposal. That is because preventing gun violence qualifies as an "important governmental objective" for purposes of an intermediate-scrutiny analysis. *Clark*,

486 US at 461. The U.S. Supreme Court has effectively already held as much, saying, for instance, that "concern for the safety and indeed the lives of . . . citizens" is "a primary concern of every government." *United States v. Salerno*, 481 US 739, 755; 107 S. Ct. 2095; 95 L Ed 2d 697 (1987). And it has "found such public-safety concerns sufficiently forceful to justify restrictions on individual liberties" in "a wide variety of constitutional contexts"—even including those in which strict scrutiny applies. *Heller*, 554 US at 689 (Breyer, J., dissenting) (citing *Brandenburg v. Ohio*, 395 US 444, 447; 89 S Ct 1827; 23 L Ed 2d 430 (1969) (per curiam) (First Amendment free speech rights); *Sherbert v. Verner*, 374 US 398, 403; 83 S Ct 1790; 10 L Ed 2d 965 (1963) (First Amendment religious rights); *Brigham City v. Stuart*, 547 US 398, 403–04; 126 S Ct 1943; 164 L Ed 2d 650 (2006) (Fourth Amendment rights); *New York v. Quarles*, 467 US 649, 655; 104 S Ct 2626; 81 L Ed 2d 550 (1984) (Fifth Amendment *Miranda* rights); *Salerno*, 481 US at 755 (Eighth Amendment bail rights).

Although this means that regulators will often have little trouble establishing that gun regulations serve an "important government objective," heightened scrutiny is still far from a free pass. Again, regulations that impose significant burdens on the core right may be subject to strict scrutiny, which requires a showing "that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert, Ariz.*, 576 US 155, 163; 135 S Ct 2218; 192 L Ed 2d 236 (2015). And even for tangentially burdensome regulations, intermediate scrutiny requires a "reasonable fit" between a law's ends and the means chosen to redress them. *Cincinnati v. Discovery Network, Inc.*, 507 US 410, 416; 113 S Ct 1505; 123 L Ed 2d 99 (1993). Regulators can establish a "reasonable fit" in any number of ways—including by relying on "[a] long history, a substantial consensus, and simple common sense." *Burson v. Freeman*, 504 US 191, 211; 112 S Ct 1846; 119 L Ed 2d 5 (1992) (plurality op). But regulators will still have to show that their

chosen mechanism is "sufficiently tailored," *Rubin v. Coors Brewing Co.*, 514 US 476, 490; 115 S Ct 1585; 131 L Ed 2d 532 (1995), and courts may still evaluate "less-burdensome alternatives," *Discovery Network*, 507 US at 417 n 13. That process works, and laws are regularly struck down under intermediate scrutiny—including in the Second Amendment context. See, e.g., Eric Ruben & Joseph Blocher, *From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms After Heller*, 67 Duke L J 1433, 1508 (2018) (reviewing empirical data and concluding that "intermediate scrutiny challenges [in Second Amendment cases] actually succeed at a higher rate than" cases in which a purely historical approach was applied).

3. The Two-Step Inquiry Comports with *Heller's* Instruction That Longstanding Prohibitions on Firearm Possession Are Constitutional.

Finally, *Heller* made clear that well-established, common-sense gun regulations are constitutional. See *Heller*, 554 US at 626–27 ("[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms."). Some of the regulations *Heller* blessed (like laws banning machine guns, *id.* at 624, 627) involve conduct or weaponry that falls outside the scope of the Second Amendment entirely. Others (like "laws regulating the storage of firearms to prevent accidents," *id.* at 632), may burden the core right, but only modestly, and would survive intermediate scrutiny. And still others might survive even strict scrutiny. The point is that *Heller*'s list of acceptable regulations makes sense only if the applicable constitutional standard would accommodate them.

The consensus, two-step approach to Second Amendment analysis fits that bill. Applying strict scrutiny across the board would not. Laws subject to strict scrutiny "are presumptively unconstitutional and may be justified only" upon searching judicial review. *Reed*, 135 S Ct at

2226. And importing that standard wholesale into Second Amendment jurisprudence—without considering the limited scope of the core right and allowing for intermediate scrutiny where the burden on that right is limited—would "cast doubt on longstanding" and uniformly accepted gun laws, including those specifically deemed constitutional in *Heller*. 554 US at 626–27.

III. The Court Should Eschew a Purely Historical Test.

A minority of commentators and judges have argued that the typical method for determining whether a regulation unconstitutionally burdens an enumerated right—analyzing that regulation under some form of heightened scrutiny—should not apply to the Second Amendment. They argue that courts hearing Second Amendment cases should instead ask only whether a challenged regulation comports with historical tradition; if there is no sufficiently close and longstanding historical analogue, they would deem the regulation unconstitutional. See, e.g., *Heller v. District of Columbia* (*Heller II*), 399 US App DC 314, 341; 670 F3d 1244 (2011) (Kavanaugh, J., dissenting); *State v. Sieyes*, 168 Wash 2d 276, 295; 225 P3d 995 (2010) ("declining to analyze [a gun restriction] under any level of scrutiny" and instead focusing on "original meaning" and "traditional understanding").

This Court should not be among the first to venture down that path. A purely historical approach would treat the Second Amendment differently from most other constitutional rights—including the First Amendment, to which *Heller* consistently analogized. See *supra* Part II.B.1. Such an indeterminate approach—which *Heller* in no way dictates—would be difficult to administer. Worse, using history as the sole constitutional metric would be profoundly anti-federalist, stripping States of the ability to effectively tailor regulations to local needs and changing circumstances based on the policy choices other States made centuries ago.

A. *Heller* Does Not Dictate that the Constitutionality of Gun Regulations Be Judged Only According to Their Historical Pedigree.

Heller is not short on historical analysis. To the contrary, the majority opinion and the dissenting ones are chock full of it. That history, however, was all in service of resolving whether and to what extent the Second Amendment protects an individual right to use guns for self-defense. In other words, the *Heller* Court used history as a guide in answering the "'scope' question" that constitutes the first step of the consensus two-step approach: "Is the restricted activity protected by the Second Amendment in the first place?" *Ezell*, 651 F3d at 701; see also *McDonald*, 130 S Ct at 3047 (explaining that "the scope of the Second Amendment right" is governed by a historical inquiry); *Heller II*, 670 F3d at 1253 (holding that conduct regulated by longstanding prohibitions, such as those on the possession of firearms by felons or the carrying of firearms in sensitive places, is outside the scope of the Second Amendment).

The *Heller* Court did not need to decide what level of scrutiny applied to the D.C. regulation at issue in that case because that regulation could not have passed muster "[u]nder *any* of the standards of scrutiny that [courts] have applied to enumerated constitutional rights." 554 US at 628 (emphasis added). The Court therefore declined to determine a level of scrutiny broadly appropriate for regulations of conduct falling within the historically defined scope of the Second Amendment right. *Id.* But that non-answer itself is illuminating: The Court assumed that one of the tiers of scrutiny would apply; it simply had no occasion to specify which one.

The approach *Heller* signaled—whereby history informs the scope of the right but does not dictate whether a regulation is permissible—accords, most notably, with First Amendment jurisprudence. In that context, "some categories of speech are unprotected"—and thus fall outside the Amendment's scope—purely "as a matter of history and legal tradition." *Ezell*, 651 F3d at 702 (citing *United States v. Stevens*, 559 US 460; 130 S Ct 1577; 176 L Ed 2d 435 (2010)); cf.

Heller, 554 US at 635 (noting that obscenity, libel, and the disclosure of state secrets are excluded altogether from the First Amendment's protections). But where a regulation burdens protected speech, a heightened tier of scrutiny is applied to assess its constitutionality.

To be sure, history has a role to play within a traditional heightened-scrutiny analysis. In particular, "[a] long history, a substantial consensus, and simple common sense" are all ways the government might show that a particular regulatory mechanism is reasonably related to an important government interest. *Burson*, 504 US at 211 (plurality op); see *supra* Part II.B.2. But nothing in *Heller* requires legislatures to rely *exclusively* on historical evidence and arguments in regulating firearms. Nor does *Heller* require courts to jettison all other analytical tools in favor of a purely historical approach.

B. A Purely Historical Test Would be Difficult to Administer.

A Second Amendment test grounded exclusively in historical analysis, even if justifiable as a jurisprudential matter, would be impossible to predictably administer. As even originalism's staunchest defenders admit, "it is often exceedingly difficult to plumb the original understanding of an ancient text." Antonin Scalia, Essay, *Originalism: The Lesser Evil*, 57 U Cin L Rev 849, 856 (1989). History rarely speaks with a unified voice. And it has nothing at all to say about firearm technologies and regulatory problems—like school shootings carried out with assault weapons—unheard of at the time of the Founding. A purely historical approach forces courts to invent answers where there are none, and to ignore the very considerations that birthed the Second Amendment right in the first place.

1. The Historical Record Is Often Indeterminate or Even Contradictory.

Historical evidence often conflicts, even as to supposedly "simple" factual assertions such as the existence and enforcement of specific laws. See, e.g., *Wrenn v. Dist. of Columbia*, 431 US App DC 62, 71–72; 864 F3d 650 (2017) (discussing disagreement among scholars regarding

whether the Statute of Northampton—a 14th century statute that provided the foundation for firearms regulation in England—generally banned the carrying of weapons in crowded areas). With respect to "the scope of the right to bear arms," what history generally "demonstrates is that states often disagreed." *Kachalsky v. Cty. of Westchester*, 701 F3d 81, 91 (CA 2, 2012) (comparing *Bliss v. Commonwealth*, 12 Ky (2 Litt) 90, 90 (1822), which found a prohibition on concealed carry to be unconstitutional, with *Aymette v. State*, 21 Tenn (2 Hum) 154, 160 (1840), which reached the opposite result). Courts have found historical evidence "inconclusive" as to such basic questions such as whether felons could be categorically barred from possessing firearms, *United States v. Chester*, 628 F3d 673, 680–81 (CA 4, 2010), and whether the Second Amendment protects public carry, *Kachalsky*, 701 F3d at 91. Requiring courts to sort through this conflicting evidence every time a firearm regulation is challenged would impose a significant burden for little reward, as most judges have no specialized training in determining the accuracy and relevance of historical primary sources—or in placing these sources appropriately in their historical context.

Indeed, the very same evidence can sometimes be marshaled to support contrary propositions. In *Heller* itself, the majority pointed to state constitutional provisions that explicitly protected a personal right to bear arms for self-defense as confirming the understanding that the federal right to "keep and bear" arms was not limited to the military. *Heller*, 554 US at 600–03. But Justice Stevens countered that these state provisions demonstrated that the Framers knew how to enumerate a personal right if they wanted to do so. *Id*. at 642–43 (Stevens, J., dissenting). "For every persuasive thrust by one side," it seemed, "the other ha[d] an equally convincing parry." J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 Va L Rev 253, 267–69, 271 (2009) (comparing Justice Scalia's and Justice Stevens's historical analysis in *Heller*

and concluding that "[i]t is hard to look at all this evidence and come away thinking that one side is clearly right on the law").

Because of its indeterminacy, historical evidence is vulnerable to cherry-picking and obfuscation. It "can be readily spun in various directions, depending on what conclusion a court ultimately wants to reach." Allen Rostron, *Justice Breyer's Triumph in the Third Battle over the Second Amendment*, 80 Geo Wash L Rev 703, 743 (2012). That such motivated reasoning can come dressed in historical clothing is all the more troubling because it will be difficult for the lay person with no easy access to 200-year-old evidence to detect.

2. Several Aspects of the Second Amendment Make the Historical Approach Especially Challenging.

A purely historical test is especially difficult to administer in the Second Amendment context for three additional reasons.

First, it is far from clear what historical time period courts should consider. *Heller* itself looked to authorities from almost 100 years after ratification of the Second Amendment to determine the "public understanding" of the Second Amendment right. 554 US at 605, 616 (emphasis omitted). And it deemed regulations dating back to that period to be "longstanding" ones. But *Heller* also deemed regulations prohibiting gun possession by felons and the mentally ill, which are "of 20th Century vintage," to be "longstanding." *United States v. Skoien*, 614 F3d 638, 639–41 (CA 7, 2010) (Easterbrook, J.). *Heller* suggested no way of determining whether a regulatory mechanism of relatively more recent vintage might nevertheless be sufficiently "longstanding" to merit constitutional respect.

Second, firearm technology has changed dramatically since 1791, and many of the salient issues in firearm regulation today have no historical analogs. Perhaps most notably, modern firearms are much deadlier than their historical counterparts. Today, an individual can purchase a

weapon that will enable her to fire many rounds at a high rate, while even military-grade "[f]raming-era firearms were capable of nothing" of the sort. Lawrence Rosenthal, *The Limits of Second Amendment Originalism and the Constitutional Case for Gun Control*, 92 Wash U L Rev 1187, 1216 (2015). Or an individual may download a gun from the Internet and print it on a commercially available 3D-printer. See, e.g., James B. Jacobs & Alex Haberman, *3D-Printed Firearms, Do-It-Yourself Guns, & the Second Amendment*, 80 Law & Contemp Probs 129, 137–42 (2017). Because the regulated technology itself has no historical analog, the absence of historical precedent for the regulation of that technology "indicate[s] no more than the fact that no fairly analogous regulatory issue arose in the framing era." Rosenthal, *supra*, at 1215. The absence of "precedent for [a particular form of] state control" does not "establish that [there] is a constitutional right" to be free of such control. *Brown v. Ent. Merchs. Ass'n*, 564 US 786, 835 n 2, 3; 131 S Ct 2729; 180 L Ed 2d 708 (2011) (Thomas, J., dissenting) (internal quotation marks omitted).

Third, some behavior that contemporary society now views as dangerous and criminal was not always acknowledged as such at the Founding. For example, many modern laws recognize that domestic violence offenders pose a grave risk to their intimate partners, and accordingly disarm convicted domestic abusers or those subject to certain protective orders. These laws might not find close historical analogs, however, because domestic violence was not previously classified either as criminal or as warranting disarmament. E.g., *Stimmel v. Sessions*, 879 F3d 198, 205 (CA 6, 2018); see also Brief for Appellant at 8, *Stimmel*, 879 F3d 198 (No. 15-4196), 2016 WL 7474670 (arguing "domestic violence was not illegal at the time the Bill of Rights or Fourteenth Amendment were enacted"). A purely historical framework for deciding Second Amendment cases would be difficult to apply to evolving understandings of threatening or dangerous criminal conduct

C. A Purely Historical Test Would Be Fundamentally Anti-Federalist.

Finally, a test grounded solely in historical tradition would undermine our federalist system of government by stripping Michigan and other States—the "laboratories of democracy," *Evenwel v. Abbott*, 136 S Ct 1120, 1141; 194 L Ed 2d 291 (2016) (internal quotation marks omitted)—of the ability to devise new solutions to difficult problems and to respond to uniquely local challenges.

Justice Brandeis's famous observation regarding the States as laboratories of democracy—that "[d]enial of the right to experiment may be fraught with serious consequences to the nation," *New State Ice Co. v. Liebmann*, 285 US 262, 311; 52 S Ct 371; 76 L Ed 747 (1932) (Brandeis, J., dissenting)—rings particularly true with respect to the regulation of firearms, because both the technology itself and social expectations regarding its use are constantly evolving. Accordingly, "[e]xperimentation among states and cities" has been and will continue to be "critical to producing effective gun regulations." Wilkinson, *supra*, at 318; see also *McDonald*, 561 US at 785 (making clear that "[s]tate and local experimentation with reasonable firearms regulations will continue under the Second Amendment" (internal quotation marks omitted)).

Moreover, effective regulation of firearms depends on inherently local factors. Firearms might, for instance, be put to different uses in rural communities than in urban ones, and the risks inherent in their use likewise varies. "[S]tate and local governments need the freedom to . . . adapt their solutions to the unique circumstances in their own community." Wilkinson, *supra*, at 318.

Throughout history, States and localities have done exactly that. Michigan, for instance, was the first State to impose a gun registration scheme upon the purchasers of all firearms in 1913. See Robert Spitzer, *Gun Law History in the United States and Second Amendment Rights*, 80 Law & Contemp Probs 55, 77 (2017). Southern States were historically more likely to propound a right to carry guns in public than Northern States. See Saul Cornell, *The Right to Carry Firearms Outside of the Home: Separating Historical Myths from Historical Realities*, 39 Fordham Urb L J

1695, 1716–23 (2012). And more crowded locales, where negligent handling of firearms posed increased risks, have generally regulated gun use accordingly. Rhode Island, for instance, saw the need to prohibit the firing of firearms in streets and taverns. See *Heller*, 554 US at 631–33. Massachusetts prohibited Boston residents from taking loaded firearms into dwellings or other buildings. See *id.* And Michigan itself required all pistol owners to present their firearms "for safety inspection" if they lived in an incorporated city or village. Spitzer, *supra*, at 77. Rural populations did not enact such laws because they did not need them. A purely historical approach to assessing Second Amendment challenges offers courts no guidance regarding which States' or regions' traditions of regulation should define the contours of the contemporary right to keep and bear arms, or which regulatory traditions violate that right.

Differences in history, tradition, and values also manifest themselves in the different approaches to carrying firearms on campus. Sixteen States *prohibit* carrying a concealed weapon on a college campus by law; 10 States *allow* concealed carry by law; and a plurality of States—23 of them—even further delegate the decision to individual colleges and universities. See National Conference of State Legislatures, *Guns on Campus: Overview* (November 1, 2019), https://www.ncsl.org/research/education/guns-on-campus-overview.aspx. An overly intransigent Second Amendment standard would freeze all of this experimentation and impose a single federal answer to a highly contextual question that differs from State to State—and even locality to locality.

IV. Article X is Constitutional.

Courts around the country have applied these principles (or similar, state-constitutional ones) in upholding campus-carry restrictions like Article X. The Supreme Court of Virginia, for example, recognized "the sensitivity of the university environment" in upholding a ban on guns on campus at George Mason University under both the Second Amendment and the Virginia

Constitution. *DiGiacinto v. Rector & Visitors of George Mason Univ.*, 281 Va 127, 134–36; 704 SE2d 365 (2011). A Florida appellate court upheld the University of Florida's prohibition against firearms in university housing under the Florida Constitution. *Florida Carry Inc. v. Univ. of Fla.*, 180 So 3d 137, 147–48 (Fla Dist Ct App, 2015). And Missouri courts upheld the validity of firearm ban imposed by the University of Missouri even under the *strict scrutiny* required by the Missouri Constitution. *State ex. rel. Schmitt v. Choi,* -- SW2d --, 2021 Mo App LEXIS 103, *13–14, 29, 30 (Mo Ct App February 2, 2021) (upholding university firearm ban under strict scrutiny, while invalidating narrow part of university's rule found to conflict with state law).

This Court should reach the same result and uphold Article X. Because history demonstrates that carrying guns on campus falls outside the scope of the Second Amendment, it should uphold Article X at step-one of the consensus approach. But even at step two, because Article X does not significantly burden the core Second Amendment right, intermediate scrutiny applies. And Article X easily survives review under that standard, because it serves the University's important interests in preserving campus safety and fostering the open exchange of ideas that is crucial to its academic mission.

A. Guns on Campus Fall Outside the Scope of the Second Amendment

As noted above, history is an important guide in evaluating the scope of the Second Amendment at step one of the consensus two-step approach. See *supra* Part III.A. Here, history confirms that guns on campus fall outside the Second Amendment's scope. Indeed, history shows that the notion that guns have no place on college campuses is as old as the country. More than a century before the ratification of the Constitution, Harvard University's bylaws provided that "[n]o students shall be suffered to have a gun in his or their chambers or studies, or keeping for their use anywhere else in the town." The Laws Of Harvard College, 1655, at 4 (1876), https://archive.org/details/acopylawsharvar00unkngoog. Further, as members of the Board of

Visitors for the University of Virginia, Thomas Jefferson and James Madison helped pass a rule stating that "[n]o student shall within the precincts of the University . . . keep or use weapons or arms of any kind, or gunpowder." Meeting Minutes of the University of Virginia Board of Visitors October 4, 1824, http://bit.ly/1eyAWeB. That the authors of the Declaration of Independence and Bill of Rights banned firearms from the university they governed is powerful evidence that the Second Amendment was not understood by the Founders to protect a right to carry guns at institutions of higher learning. Consistent with these historical precedents, *Heller* and *McDonald* reaffirmed the presumptive validity of "longstanding" firearm prohibitions including "laws forbidding the carrying of firearms in sensitive places such as schools." *Heller*, 554 US at 626; *McDonald*, 561 US at 786. Article X is just the latest chapter of that historical tradition of prohibiting guns in sensitive places, and this Court should uphold it on that basis alone.

B. If the Court Reaches Step Two, It Should Apply Intermediate Scrutiny.

To determine the appropriate level of heightened scrutiny at step two of the applicable methodology, the Court should examine "the relative severity of the burden and its proximity to the core" of the Second Amendment right, *Ezell*, 846 F3d at 899 (internal citation omitted): "the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Heller*, 554 US at 635. Because Article X neither reaches the "core" right nor imposes a severe burden, intermediate scrutiny applies.

Article X does not implicate the core right because it regulates the University of Michigan's classrooms, hospitals, clinics, and other buildings, not "self-defense within the home." *Heller*, 554 US at 577. Although Article X reaches University dormitories, dorm rooms are not privately owned or leased homes; they are communal living arrangements provided by the University to its students and often feature shared bathrooms, kitchen areas and other living spaces, not typically

found in private homes. If anything, the need for restrictions on firearms in such close and compact quarters is accentuated: "[P]arents who send their children to a university have a reasonable expectation that the university will maintain a campus free of foreseeable harm." *DiGiacinto*, 704 SE2d at 370; see also *Florida Carry*, 180 So 3d at 147–48.

In any event, the burden imposed by Article X is also limited in scope. Article X restricts the possession of firearms only upon University property, not anywhere else. *Wade v. Univ. of Mich.*, 320 Mich App 1, 6; 905 NW2d 439 (2017). And students are not required to reside on campus, so if they wish to keep a gun in their home for purposes of self-defense they are free to do so. The Article also contains several exemptions, including for recreational hunting, University educational and training programs, and military ceremonies. *Id.* In this way, Article X is akin to time, place, or manner restrictions in the First Amendment context, which are analyzed under intermediate scrutiny. *Ward v. Rock Against Racism*, 491 US 781, 791; 109 S Ct 2746; 105 L Ed 2d 661 (1989). Courts regularly apply intermediate scrutiny (if not even more lenient scrutiny) to firearm restrictions limited in geographical scope. See, e.g., *United States v. Class*, 442 US App DC 257, 260; 930 F3d 460 (2019) (U.S. Capitol Grounds); *Bonidy v. U.S. Postal Serv.*, 790 F3d 1121, 1126 (CA 10, 2015) (postal service property); *GeorgiaCarry.Org v. U.S. Army Corps of Eng'rs*, 788 F3d 1318, 1328–29 (CA 11, 2015) (U.S. Army Corps of Engineers recreational lands); *United States v. Masciandaro*, 638 F3d 458, 460 (CA 4, 2011) (national parks). So too here.

C. Article X Survives Intermediate Scrutiny.

To survive intermediate scrutiny, Article X must be "substantially related to an important governmental objective." *Clark*, 486 US at 461. It clearly is.

First, the University has an interest of the highest order in maintaining a safe environment for its students, faculty, staff, and visitors. See *Healy v. James*, 408 US 169, 184; 92 S Ct 2338; 33 L Ed 2d 266 (1972) ("[A] college has a legitimate interest in preventing disruption on the campus.");

DiGiacinto, 281 Va at 132 (finding a "compelling State interest" in the "safety concerns on a public university campus"); *Bloedorn v. Grube*, unpublished opinion of the United States District Court for the Southern District of Georgia, issued November 24, 2009 (Case No. 609CV055), p *7–8 *aff'd*, 631 F3d 1218 (CA 11, 2011) ("Maintaining safety, efficiency, and order on campus are crucial to the furtherance of the University's mission of providing a proper educational environment . . . . .[T]he University has an interest in maintaining campus safety in order to support its educational mission."); *Rock for Life-UMBC v. Hrabowski*, 643 F Supp 2d. 729, 747 (D Md, 2009) *aff'd*, 411 F Appx 541 (CA 4, 2010) ("Safety and security are legitimate interests of a university.").

Second, the University has a mission-critical interest in fostering an environment that promotes free and open exchange of ideas—including controversial ideas that can prove emotionally provocative. See *Keyishian v. Bd. of Regents*, 385 US 589, 603; 87 S Ct 675; 17 L Ed 2d 629 (1967) ("The classroom is peculiarly the 'marketplace of ideas,'" and for that reason, academic freedom is "a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom."); *Todd v. Rochester Cmty. Schools*, 41 Mich App 320, 340; 200 NW2d 90 (1972) ("Schools are an institution, indeed the only institution, in which our youth is exposed to exciting and competing ideas, varying from antiquity to the present."); *Garner v. Mich. State Univ.*, 185 Mich App 750, 765; 462 NW2d 832 (1990) (observing that "academic freedom thrives on the uninhibited exchange of ideas between a professor and his students"). Professors must be "exemplars of open-mindedness and free inquiry" through "the very atmosphere they generate." *Wieman v. Updegraff*, 344 US 183, 196; 73 S Ct 215; 97 L Ed 216 (1952) (Frankfurter, J., concurring). And they cannot "carry out their noble task if the conditions for the practice of a responsible and critical mind" are made impossible. *Id.*

Article X is substantially related to these interests. The proliferation of firearms on campus will lead to fear, intimidation, and self-censorship in the class room (at best) and increasingly frequent incidents of gun violence on campus (at worst). Universities that restrict firearms have succeeded in maintaining comparatively lower levels of gun violence, see Defendant-Appellee's Br. at 30, and experts believe that repealing such policies in favor of "allowing more people to have firearms on campuses is likely to lead to more deaths and serious injuries." Daniel W. Webster et al., Johns Hopkins Bloomberg School of Public Health (October 15, 2016), Firearms on College Campuses: Research Evidence and Policy Implications 3, https://bit.ly/2WmmWNm. This is because the presence of firearms both makes assaults and suicide attempts more lethal, and complicates law enforcement efforts to identify and apprehend crime suspects—including active shooters. *Id.* It is well-documented that the presence of guns can escalate otherwise avoidable conflicts, leading to increases in violent assaults and injury—including to gun carriers themselves. See, e.g., Charles Branas et al., *Investigating the Link Between Gun Possession and Gun Assault*, 99 Am J Pub Health 2034, 2037 (2009) ("A gun may falsely empower its possessor to overreact, instigating and losing otherwise tractable conflicts with similarly armed persons.").

These risks are heightened in the university environment, where many adolescents are living alone for the first time. College-age students have not yet cognitively transitioned to adulthood and developed the brain functions that regulate emotions, impulse control, and judgment. *Id.* That development continues well into the early twenties. See, e.g., Scott et al, *Young Adulthood as a Transitional Legal Category: Science, Social Change, and Justice Policy*, 85 Fordham L Rev 641, 642 (2016) ("Over the past decade, developmental psychologists and neuroscientists have found that biological and psychological development continues into the early twenties, well beyond the age of majority."); National Academies of Sciences, The Promise of Adolescence: Realizing

Opportunity for All Youth 22 (2019) ("[T]he unique period of brain development and heightened brain plasticity . . . continues into the mid-20s. . . . [M]ost 18-25 year-olds experience a prolonged period of transition to independent adulthood, a worldwide trend that blurs the boundary between adolescence and 'young adulthood,' developmentally speaking."). As a result, adolescents and young adults are uniquely vulnerable to stress and risk-taking behaviors—dangers that are compounded by the fact that young people are within the age range where serious mental illness is more likely to develop or persist. For example, although suicidal behavior peaks at age 16, it remains high through age 25. Webster, *supra*, at 3; see also *id.* at 13 ("Risks for violence, suicide attempts, alcohol abuse, and risky behavior are greatly elevated among college-age youth and the campus environment"). All of these environmental and cognitive factors increase the risk of firearm-related injury and violence. *Id.* at 13.

Because Article X serves important University interests in promoting campus safety, protecting the lives and health of students in the University's care, and fostering the open exchange of ideas, the ordinance clears the hurdle of intermediate scrutiny and with plenty of room to spare.

CONCLUSION

The Court should adopt the consensus two-step test, under which the courts select a tier of scrutiny for laws that implicate the Second Amendment based on "the relative severity of the burden and its proximity to the core" of the Second Amendment right. *Ezell*, 846 F3d at 899 (quoting *Ezell*, 651 F3d at 708). This methodology appropriately respects both rights and public safety, and it conforms to ordinary principles of constitutional jurisprudence. And it should apply this methodology to easily reject the constitutional challenge to Article X.

Dated: March 1, 2021 Respectfully submitted,

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