Order

Michigan Supreme Court
Lansing, Michigan

November 10, 2022

Bridget M. McCormack,
Chief Justice

156150

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

JOSHUA WADE,
Plaintiff-Appellant,

v

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

UNIVERSITY OF MICHIGAN,
Defendant-Appellee.

_____/

By order of November 6, 2020, the application for leave to appeal the June 6, 2017 judgment of the Court of Appeals was granted. On order of the Court, and on the Court's own motion, we VACATE our order dated November 6, 2020, VACATE the June 6, 2017 judgment of the Court of Appeals, and REMAND this case to that court for consideration in light of *New York State Rifle & Pistol Ass'n, Inc, et al v Bruen*, 142 S Ct 2111 (2022).

We do not retain jurisdiction.

VIVIANO, J. (*concurring*).

The Court today remands to the Court of Appeals an important case concerning the constitutionality of the University of Michigan's prohibition of firearms on campus. The United States Supreme Court recently elucidated the structure of the required analysis in *New York State Rifle & Pistol Ass'n, Inc v Bruen*, 597 US ___; 142 S Ct 2111 (2022). I write to offer a few thoughts about how that analysis might apply here.

Presently, the University of Michigan bans firearms on campus unless, among a few other exceptions, the University's Director of Public Safety waives the prohibition for an individual "based on extraordinary circumstances." Plaintiff has challenged that ban on firearms as a violation of his Second Amendment right to bear arms. In rejecting his contentions, the Court of Appeals applied a two-part test: (1) "The threshold inquiry is whether the challenged regulation 'regulates conduct that falls within the scope of the Second Amendment right as historically understood,' " (2) and then, if the conduct is within the Second Amendment's scope, the court employs intermediate scrutiny to see whether there is " 'a reasonable fit between the asserted interest or objective and the burden

placed on an individual's Second Amendment right.' " *Wade v Univ of Mich*, 320 Mich App 1, 13 (2017) (citations omitted).

To support its threshold analysis, the Court of Appeals relied on the statement in *Dist of Columbia v Heller*, 554 US 570, 626-627 (2008), that the Second Amendment did not disturb "longstanding prohibitions on . . . laws forbidding the carrying of firearms in sensitive places such as schools and government buildings . . . ." In the present case, the Court of Appeals' entire "historical analysis" was to examine one dictionary from 1828 to determine whether universities were considered "school[s]" in 1868. *Wade*, 320 Mich App at 14.[1] Even if one concludes that the Court of Appeals reached the correct result, this paltry review of the main question is inadequate. Moreover, it is not at all apparent that *Heller*'s brief discussion of sensitive places was intended to establish a rule that all entities historically known as "schools" could permissibly ban firearms, meaning the only question that would remain for future cases is whether the entity at issue was considered a "school." Nor is it even clear that the Court meant to include universities and colleges in its reference to "schools," let alone to say that such locations can completely ban firearms. See Note, *Guns on Campus: Continuing Controversy*, 38 J C & U L 663, 667-668 (2012) (noting that *Heller* did not address guns on university campuses or define "schools" to include higher education).

In its recent decision on this topic, the Supreme Court rejected the two-part inquiry applied by the Court of Appeals and instead replaced it with an examination of "whether modern firearms regulations are consistent with the Second Amendment's text and historical understanding." *Bruen*, 597 US at ___; 142 S Ct at 2131. This test requires courts to examine any historical analogues of the modern regulation to determine how these types of regulations were viewed. *Id*. If there are no such analogues on the societal problem at issue, that historical silence "is relevant evidence that the challenged regulation is inconsistent with the Second Amendment." *Id*. "Likewise," the Court continued, "if earlier generations addressed the societal problem, but did so through materially different means, that also could be evidence that a modern regulation is unconstitutional." *Id.* Further, if regulations like the one at issue had been proposed and "rejected on constitutional grounds, that rejection surely would provide some probative evidence of unconstitutionality." *Id*. At base, the analysis requires "reasoning by analogy," which means the court must determine "whether a historical regulation is a proper analogue for a distinctly modern firearm regulation" by assessing "whether the two regulations are 'relevantly similar.' " *Id*. at ___; 142 S Ct at 2132 (citation omitted). In this assessment, two metrics are useful: "how and why the regulations burden a law-abiding citizen's right

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[1] The Court focused on 1868, when the Fourteenth Amendment was ratified, but as the Supreme Court in *Bruen* observed, there is some debate as to whether the relevant historical point is 1868 or instead 1791, when the Second Amendment was ratified. *Bruen*, 597 US at ___; 142 S Ct at 2138.

to armed self-defense." *Id*. at ___; 142 S Ct at 2133. But the modern regulation need not be "a dead ringer for historical precursors . . . ." *Id*.

In the present case, I believe there are at least two historical investigations needed to determine whether the University of Michigan's firearm regulation is constitutional. First, the Court of Appeals should consider whether there were any analogous firearm regulations on university and college campuses in the relevant historical period. In my own initial review of historical laws concerning campus carry, I have come across a few that contain partial restrictions of guns on campus.[2] The secondary literature notes the prevalence of gun restrictions on campus in the colonial and early republic periods, but like the laws just mentioned, none seems to have been a campuswide ban generally prohibiting open or concealed carry.[3]

In addition to more thoroughly researching historical restrictions in this context, the parties and the Court of Appeals should assess whether the more limited regulations noted

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[2] See 1878 Miss Laws, ch 46, § 4 ("[A]ny student of any university, college or school, who shall carry concealed, in whole or in part, any weapon of the kind or description in the first section of this Act described, or any teacher, instructor, or professor who shall, knowingly, suffer or permit any such weapon to be carried by any student or pupil, shall be deemed guilty of a misdemeanor, and, on conviction, be fined not exceeding three hundred dollars, and if the fine and costs are not paid, condemned to hard labor under the direction of the board of supervisors or of the court."); 1879 Mo RS, ch 24, § 1276 (prohibiting the discharge of a firearm "in the immediate vicinity of . . . [a] building used for school or college purposes"); 2 1883 Wis Sess Laws 841, ch 184, tit 12, § 162 (amending the city charter of Neenah to prohibit individuals within a "school house" or any "building" within the city from firing a gun); see also 1890 Okla Territorial Statutes, ch 25, art 47, § 7 ("It shall be unlawful for any person, except a peace officer, to carry into 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, or into any circus, show or public exhibition of any kind, or into any ball room, or to any social party or social gathering, or to any election, or to any place where intoxicating liquors are sold, or to any political convention, or to any other public assembly, any of the weapons designated in sections one and two of this article.").

[3] See Kopel & Greenlee, *The "Sensitive Places" Doctrine: Locational Limits on the Right to Bear Arms*, 13 Charleston L Rev 205, 249-252 (2018) (noting nineteenth-century campus firearms restrictions and arguing that none of them supported the designation of campuses as sensitive places where arms could be banned); see also Rostron, *The Second Amendment on Campus*, 14 Geo J L & Pub Pol'y 245, 255-257 (2016); Brady, *"Campus-Carry" Laws on Public College Campuses: Can Social Science Research Inform State Legislative Decision-Making?*, 350 Ed Law Rep 1, 6 (2018).

above are nonetheless historically analogous to the modern regulation at issue here. Do they burden the right to self-defense in the same manner and for the same purposes? *Bruen*, 597 US at ___; 142 S Ct at 2134. And of course, any relevant historical discussion of these regulations, or the broader right of college-aged adults to bear firearms, should be examined. See, e.g., *Firearms Policy Coalition, Inc v McCraw*, ___ F Supp 3d ___ (ND Tex, 2022) (Case No 4:21-cv-1245-P) (examining the text and history of the Second Amendment and holding unconstitutional a prohibition on 18- to 20-year-olds from carrying a handgun outside the home for self-defense).

I believe a second historical inquiry is required in this case. Even if certain restrictions were historically permitted on college campuses, another important question arises: are large modern campuses like the University of Michigan's so dispersed and multifaceted that a total campus ban would now cover areas that historically would not have had any restrictions? In other words, are historical campuses the best analogy for the modern campus? It appears that campuses have always contained expansive outdoor settings. See Olin, *The Campus: An American Landscape*, 8 SiteLINES: A Journal of Place 3, 3 (Spring 2013) (noting that early American colleges were "simply a set of Georgian buildings placed in the open" and "set off by relatively level or gently sloping areas of turf and trees"). And some early schools, like the College of Philadelphia (1754), might have had a more modern feel, with "buildings scattered amid ordinary city blocks[.]" *Id*. at 4.

Nonetheless, it seems apparent that large, modern university campuses differ from their historical antecedents. Many are involved in urban planning with mixed-use projects that include shops and nonstudent residences. See, e.g., *id*. at 8-9 (discussing the University of Pennsylvania's experience in the late 1990s and early 2000s and noting that many other universities have employed similar models); Matthew Dalbey et al, *Communities of Opportunity: Smart Growth Strategies for Colleges and Universities*, National Association of College and University Business Officers (2007), pp 1-3 (noting that in 2006 $14.4 billion of construction on campuses occurred and advocating for mixed-use developments of shops, offices, housing, and schools). The University of Michigan itself occupies nearly one-tenth of Ann Arbor. Many areas on campus, such as roadways, open areas, shopping districts, or restaurants, might not fit the "sensitive place" model suggested by *Heller*—they may instead be more historically analogous to other locations that did not have gun restrictions. And because the campus is so entwined with the surrounding community, the ban might also burden carrying rights on locations outside campus, as many individuals will regularly go from campus to off-campus environments,

even in a single trip; because they cannot bring a gun on campus, they will not feasibly be able to bring the gun to the off-campus locations either.[4]

I believe that these considerations are necessary in the present case when applying the governing framework from *Bruen*. Because they require careful analysis of historical materials, I agree that a remand is appropriate.

BERNSTEIN, J., did not participate.

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[4] See, e.g., Note, *Rethinking the Nevada Campus Protection Act: Future Challenges & Reaching a Legislative Compromise*, 15 Nev L J 389, 421-422 (2014) ("Current laws and university policies that prohibit any degree of campus carry leave [carrying a concealed firearm] permit holders defenseless anywhere between college campuses and home. The professor that stops for groceries after work; the student that stops for gas across the street from campus; these are the real and unfortunately less documented dangers of 'no permission to campus carry' states."); *id*. at 425 ("The line that separates some universities from public property is fuzzy, and attempting to classify universities as a 'sensitive place' poses a significant problem. Universities are typically intermingled with other services and public property."); *Guns on Campus*, 38 J C & U L at 675 ("Additionally, some colleges and universities do not have the clearly defined perimeters that high schools, middle schools, and elementary schools usually have. Some colleges and universities span across city-scapes and mix with metropolitan areas. The physical layout of some colleges and universities can easily create confusion for individuals trying to determine if they are on campus or off campus at any given point. For example, public roads often run through college campuses. Could a public road be considered a sensitive school area subject to a reasonable regulation, or would the street merely be part of the public landscape where the same regulation would be unreasonable?").