No. 22-1478

In the United States Court of Appeals for the First Circuit

STEFANO GRANATA, et al.,

Plaintiffs–Appellants,

v.

MAURA HEALEY, et al.,

Defendants–Appellees.

Appeal from the United States District Court
for the District of Massachusetts
The Honorable Rya W. Zobel
Case No. 1:21-CV-10960-RWZ

PLAINTIFFS' MOTION FOR VACATUR AND REMAND

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CORPORATE DISCLOSURE STATEMENT

Plaintiffs-Appellants submit this corporate disclosure and financial interest statement pursuant to Federal Rule of Appellate Procedure 26.1.

Firearms Policy Coalition, Inc., has no parent corporation, nor is there any publicly held corporation that owns more than 10% of its stock.

/s/ *Raymond M. DiGuiseppe*
Counsel for Appellants

TO THE COURT, ALL PARTIES, AND THEIR COUNSEL OF RECORD:

Under Rule 27 of the Federal Rules of Appellate Procedure and the Rulebook of the United States Court of Appeals for the First Circuit, Plaintiffs-Appellants hereby respectfully request that this Court vacate the district court's judgment and remand the matter for further proceedings consistent with the Supreme Court's decision in *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022) ("*Bruen*").

I. Background

Plaintiffs are pursuing a Second Amendment challenge to the constitutionality of Massachusetts's "Approved Firearms Roster" and related regulations, under which the Commonwealth broadly prohibits the commercial sale and transfer of numerous handguns otherwise in common use and widely available for purchase throughout the country based on its own legislative judgment that these arms should be deemed unsafe and thus broadly prohibited from sale or transfer to the ordinary, law-abiding citizens of Massachusetts (the "challenged regulations").

On August 20, 2021, Defendants moved to dismiss Plaintiffs' complaint for failure to state a claim for relief under rule 12(b)(6) of the

Federal Rules of Civil Procedure ("Rule 12(b)(6)"). Dkt. Nos. 14 & 15. Plaintiffs filed their opposition on September 17, 2021, Dkt. No. 18, and Defendants filed their reply on November 3, 2021, Dkt. No. 22. On May 19, 2022, the district court granted the motion, Dkt. No. 24 (Exhibit A), dismissing the complaint, Dkt. 25. Plaintiffs filed their notice of appeal on June 15, 2022. Dkt. No. 26. Eight days later, on June 23, 2022, the Supreme Court issued *Bruen*, which squarely rejected the prevailing "two-step" test for deciding Second Amendment claims—the test that had driven the parties' litigation over the motion to dismiss and the district court's decision to grant it—and supplanted it with a very different test.

Plaintiffs' opening brief on the merits is currently due on September 12, 2022.[1] For the following reasons, vacatur of the district court's judgment and remand for further proceedings in light of *Bruen*, so that the district court adjudicates Plaintiffs' Second Amendment claim under the *Bruen* test in the first instance, is not only appropriate but the most judicious course of action at this time.

[1] Plaintiffs will be seeking an extension of time for the opening brief by separate motion so as to ensure sufficient time for a ruling on this motion before the brief is due, among other reasons.

II. The Wake of *Bruen*

Since *Bruen* was published, federal circuit courts of appeal have summarily vacated a litany of district court judgments rendered in Second Amendments cases before *Bruen* was decided, remanding them for further proceedings in light of *Bruen*. *See e.g.*, *Rupp v. Bonta*, No. 19-56004 (June 28, 2022) (9th Cir. Dkt. 71), 2022 WL 2382319; *McDougall v. Cty. of Ventura*, No. 20-56220 (June 29, 2022) (en banc) (9th Cir. Dkt. 55), 38 F.4th 1162; *Martinez v. Villanueva*, No. 20-56233 (July 6, 2022) (9th Cir. Dkt. 45), 2022 WL 2452308; *Taveras v. New York City*, 2022 WL 2678719 (2d Cir. July 12, 2022); *Sibley v. Watches*, 2022 WL 2824268 (2d Cir. July 20, 2022); *Miller v. Bonta*, No. 21-55608 (Aug. 1, 2022) (9th Cir. Dkt. 27), 2022 WL 3095986; *Oakland Tactical Supply, LLC v. Howell Twp.*, 2022 WL 3137711 (6th Cir. Aug. 5, 2022); *Young v. Hawaii*, No. 12-17808 (Aug. 19, 2022) (en banc) (9th Cir. Dkt. 329), 2022 WL 3570610; *Cupp v. Bonta*, No. 21-16809 (Aug. 19, 2022) (9th Cir Dkt. 23); *New Jersey Rifle & Pistol Clubs Inc. v. Attorney General New Jersey* (*ANJRPC*), No. 19-3142 (Aug. 25, 2022) (3d Cir. Dkt. 147-1).

This is fully consistent with the practice of reversing and remanding for reconsideration by the district court in the first instance when

intervening Supreme Court authority materially alters the legal standards of the issues on appeal. *See U.S. v. Bradley*, 426 F.3d 54, 55-56 (1st Cir. 2005) (remanding to the district court for resentencing in light of intervening Supreme Court authority impacting the relevant sentencing guidelines); *accord U.S. v. Byrne*, 435 F.3d 16, 28 (1st Cir. 2006); *Town of Barnstable v. O'Connor*, 786 F.3d 130, 143 (1st Cir. 2015) (declining "to decide questions of law upon which the district court has itself not yet focused or addressed other than in passing"); *accord LimoLiner, Inc. v. Datto*, 839 F.3d 61, 62 (1st Cir. 2016); *Salazar v. Buono*, 559 U.S. 700, 722 (2010) ("In light of the finding of unconstitutionality in *Buono I*, and the highly fact-specific nature of the inquiry, it is best left to the District Court to undertake the analysis in the first instance" regarding the application of the law to the facts).

The courts that have included reasoning for their summary reversals in the light of *Bruen* have all explained they are following this general practice. *See Sibley*, 2022 WL 2824268, at *1 ("We remand the case to the District Court to consider in the first instance the impact, if any, of *Bruen* on Sibley's claims, which concern a different provision imposing a 'good moral character' requirement on applications for both carry and

at-home licenses."); *Oakland Tactical Supply*, 2022 WL 3137711, at *2 ("The district court should decide, in the first instance, whether Oakland Tactical's proposed course of conduct is covered by the plain text of the Second Amendment" and, if so, "determine whether historical evidence—to be produced by the Township in the first instance—demonstrates that the Ordinance's shooting-range regulations are consistent with the nation's historical tradition of firearm regulation."); *Taveras*, 2022 WL 2678719, at *1 ("Because neither the district court nor the parties' briefs anticipated and addressed this new legal standard, it is appropriate for us to vacate the district court's judgment and remand the case for the district court to reconsider Taveras's claim, applying in the first instance the standard articulated by the Supreme Court in *Bruen*."); *ANJRPC* Order at 1, n. 1, Ex. 2 (reversing and remanding because *Bruen* "provided lower courts with new and significant guidance on the scope of the Second Amendment and the particular historical inquiry that courts must undertake when deciding Second Amendment claims").

Bruen compels the same result here for the same essential reasons.

III. The Framework Under *Bruen*

As the Supreme Court explained in *Bruen*, in the years since *Heller* and *McDonald*, "the Courts of Appeals have coalesced around a 'two-step' framework for analyzing Second Amendment challenges that combines history with means-end scrutiny." *Bruen*, 142 S.Ct. at 2125. "At the first step, the government may justify its regulation by 'establish[ing] that the challenged law regulates activity falling outside the scope of the right as originally understood.'" *Id.* at 2126 (quoting *Kanter v. Barr*, 919 F.3d 437, 441 (7th Cir. 2019)). "If the government can prove that the regulated conduct falls beyond the Amendment's original scope" based on "its historical meaning," "'the analysis can stop there'" because "'the regulated activity is categorically unprotected'" under this test. *Id.* (quoting *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012)). "But if the historical evidence at this step is 'inconclusive or suggests that the regulated activity is not categorically unprotected,' the courts generally proceed to step two." *Id.* (quoting *Kanter*, 919 F.3d at 441).

"At the second step, courts often analyze 'how close the law comes to the core of the Second Amendment right and the severity of the law's burden on that right,'" *Bruen*, 142 S.Ct. at 2126 (quoting *Kanter*, 919 F.3d

at 441), while "generally maintain[ing] 'that the core Second Amendment right is limited to self-defense *in the home*,'" *id.* (quoting *Gould v. Morgan*, 907 F.3d 659, 668-69 (1st Cir. 2018)). "If a 'core' Second Amendment right is burdened, courts apply 'strict scrutiny' and ask whether the Government can prove that the law is 'narrowly tailored to achieve a compelling governmental interest.'" *Id.* (quoting *Kolbe v. Hogan*, 849 F.3d 114, 133 (4th Cir. 2017)). "Otherwise, they apply intermediate scrutiny and consider whether the Government can show that the regulation is 'substantially related to the achievement of an important governmental interest.'" *Id.* at 2126-27 (quoting *Kachalsky v. County of Westchester*, 701 F.3d 81, 96 (2d Cir. 2012)).

The First Circuit's test was in accord: "Under this approach, the court first asks whether the challenged law burdens conduct that falls within the scope of the Second Amendment's guarantee" based on "whether the regulated conduct 'was understood to be within the scope of the right at the time of ratification.'" *Gould v. Morgan*, 907 F.3d at 668-69 (quoting *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010)). "If the challenged law imposes no such burden, it is valid. If, however, it burdens conduct falling within the scope of the Second Amendment, the

court then must determine what level of scrutiny is appropriate and must proceed to decide whether the challenged law survives that level of scrutiny." *Id.* at 669. And, like many, this Court maintained the view that "the core Second Amendment right is limited to self-defense in the home," *id.* at 671, a view the Supreme Court also jettisoned in *Bruen* by affirming that the right unquestionably extends outside the home. *Bruen* at 2134-35; *id.* at 2135 ("confining the right to 'bear' arms to the home would make little sense given that self-defense is 'the central component of the [Second Amendment] right itself,'" *Heller*, 554 U.S. at 599, and it "would nullify half of the Second Amendment's operative protections").

This Court also followed the common practice of bypassing step one by assuming without deciding that the regulated conduct falls within the Second Amendment and resting the analysis on the means-ends scrutiny of step two. *See Worman v. Healey*, 922 F.3d 26, 35 (1st Cir. 2019) ("reluctant to plunge" into th[e] factbound morass" of step one, "we simply assume, albeit without deciding, that the Act burdens conduct that falls somewhere within the compass of the Second Amendment"); *Peña v. Lindely*, 898 F.3d 969, 976 (9th Cir. 2018) ("we and other courts often have assumed without deciding that a regulation does burden conduct

protected by the Second Amendment rather than parse whether the law falls into th[e] exception" in terms of "the presumption of legality for 'conditions and qualifications on the commercial sale of arms'").

Bruen rejected this test as inconsistent with *Heller*: while "[s]tep one of the predominant framework is broadly consistent with *Heller*," insofar as it is "rooted in the Second Amendment's text, as informed by history," the true test demanded by *Heller* and *McDonald* involves a single inquiry, precisely "centered on constitutional text and history," with no means-end scrutiny at all. *Bruen*, 142 S.Ct at 2128-29; *id.* at 2129 (quoting *Heller*, 554 U.S. at 634 ("*Heller* and *McDonald* expressly rejected the application of any 'judge-empowering 'interest-balancing inquiry' that 'asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests'"). Under this test, the court asks only whether "the Second Amendment's plain text covers" the regulated conduct. *Id.* at 2129. If so, "the Constitution presumptively protects that conduct," and the government must "justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Id.* Stated otherwise, "the government must

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 2127.

An historical analysis like this "can be difficult" because "it sometimes requires resolving threshold questions, and making nuanced judgments about which evidence to consult and how to interpret it.'" *Bruen*, 142 S.Ct. at 2130 (quoting *McDonald v. City of Chicago*, 561 U.S. at 803–804 (2010) (Scalia, J., concurring). The court provided guidance in the proper application of this test. It explained that the Second Amendment's "meaning is fixed according to the understandings of those who ratified it," although its protection "can, and must, apply to circumstances beyond those the Founders specifically anticipated," so that, for example, to it "'extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.'" *Id.* at 2132 (quoting *Heller*, 554 U.S. at 584)). "Much like we use history to determine which modern 'arms' are protected by the Second Amendment, so too does history guide our consideration of modern regulations that were unimaginable at the founding." *Id.* "[T]his historical inquiry that courts must conduct will

often involve reasoning by analogy"—i.e., "a determination of whether the historical and current regulations are "'relevantly similar.'" *Id.* While an "historical *twin*" isn't necessary, the government must "identify a well-established and representative historical *analogue*." *Id.* at 2133.

Further, "*Heller* and *McDonald* point toward at least two metrics" as key factors in this analysis: "how and why the regulations burden a law-abiding citizen's right to armed self-defense." *Bruen*, 142 S.Ct. at 2133. "Therefore, whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified are '*central*' considerations when engaging in an analogical inquiry." *Id.* (quoting *McDonald*, 561 U.S. at 767). Importantly, however, in no event may courts "engage in independent means-end scrutiny under the guise of an analogical inquiry, because "the Second Amendment is the 'product of an interest balancing *by the people*," not the evolving product of federal judges." *Id.* n. 7 (quoting *Heller*, 554 U.S. at 635) (emphasis in *Bruen*).

IV. The Current Record Was Developed Based on the Standards of the "Two-Step" Test that *Bruen* Squarely Rejected

Here, the district court followed the same then well-trodden path in applying the First Circuit's articulation of the now-invalidated "two-step" test. Ex. 1 at 7-8 (setting forth the standards articulated in *Gould v. Morgan*, 907 F.3d 659 as the "Second Amendment Legal Framework"). And it took the typical detour around any textual or historical analysis of the actual scope of the Second Amendment as it relates to the rights at stake, bypassing "step one" to just "assum[e], without deciding, that the challenged regulations touch on conduct protected by the Second Amendment." *Id.* (following *Peña* to "bypass" such an inquiry). The court then immediately proceeded to the "step two," where it quickly found the challenged regulations subject to the then commonly applied "intermediate" form of means-end scrutiny. *Id.* at 9-12. In finding that the challenged regulations impose a "modest burden" on Plaintiffs, the court also emphasized the prevailing view that the Amendment secures only a limited right "'to bear arms for self-defense in one's home.'" *Id.* at 10 (quoting *Draper v. Healey*, 98 F.Supp.3d 77, 85 (D. Mass. 2015)).

Under this government-deferential standard, instead of deferring to the judgment made *by the people* as the *Bruen* standard is designed to

do, the district court deemed itself bound to find the challenged regulations pass muster so long as they reflect "'a reasonable appraisal'" by the Massachusetts legislature, Ex. 1 at 12 (quoting *Gould*, 907 F.3d at 673), because it could not supplant the "judgment" of "the Attorney and the Legislature in determining the appropriate means to pursue its important interests" of protecting public safety, *id.* at 15-16 (quoting *Worman v. Healey*, 922 F.3d 26, 40 (1st Cir. 2009) ("'[t]he role of a reviewing court is limited to ensuring that, in formulating its judgments, [the legislature] has drawn reasonable inferences based on substantial evidence'"). And, consistent with this highly circumscribed review of Second Amendment claims, the only "evidence" the court considered were the stated purposes declared by the legislature and a Government Accounting Office report produced in 1991, centuries after the ratification of the Second Amendment. *Id.* at 13-16. The court inevitably found the challenged regulations "pass intermediate scrutiny," compelling a conclusion that Plaintiffs' Second Amendment claim could not even survive the preliminary testing of a Rule 12(b)(6) motion. *Id.* at 16.

In advocating its motion to dismiss, the Commonwealth pushed the same two-step test under *Gould*. Dkt. No. 15 at 8. While it claimed the

"regulations fall squarely within the category of 'laws imposing conditions and qualifications on the commercial sale of arms' that *Heller* identified as 'presumptively lawful regulatory measures,'" *id.*, the Commonwealth failed to acknowledge that any such exception can only apply to "*longstanding*" regulations of this nature, *Heller*, 554 U.S. at 626-27, n. 26; *McDonald*, 561 U.S. at 786; *Bruen*, 142 S.Ct. at 2162 (Kavanaugh, J., concurring); *see also Duncan v. Bonta*, 9th Circuit Case No. 19-55376, Supp. Brf. of California Attorney General, Ex. 3 at 10-11 ("*Bruen* has since suggested that when determining whether a law is 'longstanding,' the focus should be on gun regulations predating the 20th century"). So, it made no effort to even argue that these regulations—first enacted in 1997, eons after the ratification of the Second Amendment—are "longstanding" in any meaningful sense of the word.

While the Commonwealth also claimed that "the challenged handgun safety regulations do not burden conduct that 'was understood to be within the scope of the right at the time of ratification,'" Dkt. No. 15 at 12 (quoting *Gould*, 907 F.3d at 669), it cited only a garden "'variety of gun safety regulations'" "'around the time of the founding,'" like those "'regulating the storage of gun powder,'" "'keeping track of who in the

community had guns,'" "'administering gun use in the context of militia service,'" "'prohibiting the use of firearms on certain occasions and in certain places,'" and "'disarming certain groups and restricting sales to certain groups,'" and an 1821 Maine law that required inspectors to "try the strength" of firearm barrels. *Id.* at 12 (quoting *Nat'l Rifle Ass'n of Am., Inc. v. Bur. of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 200 (5th Cir. 2012)). Again, the government is now required to prove the existence of a well-established and representative historical *analogue*" that "impose[d] a *comparable* burden on the right of armed self-defense." *Bruen*, 142 S.Ct. at 2133 (second italics added).

Amorphous "gun safety" regulations in the Founding Era and a single post-ratification law concerning the strength of barrels are far removed from the challenged regulations which target scores of handguns commonly used and widely available—and thus entirely legal for purchase and transfer—across the country, based on the policy judgment of the Massachusetts legislature and Attorney General that they should be deemed unsafe and thus broadly prohibited from sale.

Anyway, beyond this light scratching of the surface about "the scope of the right at the time of ratification," Dkt. No. 15, the Commonwealth

devoted the lion's share of its analysis to arguing what the district court ultimately found under the *Gould* standards, *id.* at 13-20. So, the gravamen of its argument was that the challenged regulations are subject to the government-deferential form of "intermediate" means-end scrutiny flatly rejected in *Bruen*, under which "[u]ltimately, it is the Legislature and the Attorney General's 'prerogative . . . to weigh the evidence, choose among conflicting inferences, and make the necessary policy judgments.'" *Id.* at 20 (quoting *Worman*, 922 F.3d at 40). Thus, like the district court, the Commonwealth simply pointed to the legislature's stated declarations and the GAO report as being enough to pass constitutional muster, *id.* at 16-20, which the court indeed found were enough under these standards.

For their part, Plaintiffs advocated foremost for "a categorical test" under *Heller* much like the one ultimately adopted in *Bruen*, Dkt. No. 18, pp. 1, 5-7, 11, and they argued in rebuttal to the Commonwealth's claims that the challenged regulations are "longstanding" and target conduct falling outside the scope of the Second Amendment, *id.* at 7-11. However, given the status of the law at the time, they were required to devote most of their allotted argument space to addressing the issues relevant only to

the now-defunct two-step test, which forced the parties to litigate the case through a prism that elevated Massachusetts's legislative prerogatives above the prerogatives of the Second Amendment. *Id.* at 11-20.

V. Vacatur and Remand is the Proper Course of Action

As illustrated by the long list of cases where the judgments have already been reversed and the matters remanded for further proceedings, Plaintiffs seek only what makes sense at this stage of the litigation.

Indeed, in seeking the vacatur and remand just ordered in the *ANJRPC* case, the State of New Jersey itself contended, "[i]n short, *Bruen* now requires the parties to embark on the difficult but important project of identifying historical analogies for the challenged law, and making 'nuanced' and likely competing arguments to the district court regarding 'which evidence to consult and how to interpret it.'" Letter Brf. of New Jersey Attorney General, Ex. 4 at 8 (quoting *Bruen*, 142 S.Ct. at 2132). Now, the Attorney General argued, "the parties must be able to introduce the evidence—including from analogically similar prior laws—that bears on that constitutional inquiry." *Id.* at 1-2. "Such issues have never been addressed by this Court or any other court, and there is no basis to resolve them without record evidence." *Id.* at 5. As noted, the

Third Circuit Court of Appeals agreed, reasoning that *Bruen* "provided lower courts with new and significant guidance on the scope of the Second Amendment and the particular historical inquiry that courts must undertake when deciding Second Amendment claims." Order, No. 19-3142 (Aug. 25, 2022) (3d Cir. Dkt. 147-1), Ex. 2, at 1, n. 1.

The California Attorney General is currently seeking the same result in the *Duncan v. Bonta* case before the Ninth Circuit. He has argued that, because "[t]he Supreme Court has dramatically changed the ground rules with respect to plaintiffs' Second Amendment claim," "[v]acatur and remand is necessary to allow the parties to compile the kind of historical record that *Bruen* now requires, and would allow the district court to address a number of important issues raised by *Bruen* in the first instance." Supp. Brf. of California Attorney General, *Duncan v. Virginia*, Case No. 19-55376, Dkt. No. 203, Ex. 3 at 2. The Attorney General further argued, "[t]he parties should have the opportunity to develop a record and arguments consistent with *Bruen*, and the district court should have the opportunity to conduct the analysis *Bruen* requires, before this Court passes on these questions on the basis of a record that was developed before *Bruen*." *Id.* at 11.

While we do not endorse every aspect of the defendants' arguments in those cases, we do believe that vacatur and remand for the district court to address *Bruen* in the first instance is the proper course of action here.

WHEREFORE, Plaintiffs-Appellants respectfully request that the Court vacate the judgment of the district court and remand the matter for further proceedings consistent with *Bruen*.

Dated: September 6, 2022

Respectfully submitted,

/s/ *Raymond M. DiGuiseppe*
Raymond M. DiGuiseppe
Counsel for Plaintiffs-Appellants

Certification of Word Count

I certify that the foregoing document is prepared with 14-point Century Schoolbook font and contains 3,752 words.

Executed this 6th day of September 2022.

/s/ *Raymond M. DiGuiseppe*
Raymond M. DiGuiseppe
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Certificate of Service

I hereby certify that on September 6, 2022, an electronic PDF of the foregoing document was uploaded to the Court's CM/ECF system, which will automatically generate and send by electronic mail a Notice of Docket Activity to all registered attorneys participating in the case. Such notice constitutes service on those registered attorneys. No privacy redactions were necessary.

Dated this 6th day of September 2022.

/s/ *Raymond M. DiGuiseppe*
Raymond M. DiGuiseppe