UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

STEFANO GRANATA, *et al.*, Plaintiffs-Appellants, v. MAURA HEALEY, in her Official Capacity as Attorney General of the Commonwealth of Massachusetts, *et al.*, Defendants-Appellees.	No. 22-1478

DEFENDANTS-APPELLEES' OPPOSITION TO PLAINTIFFS-APPELLANTS' MOTION FOR VACATUR AND REMAND

The plaintiffs-appellants in this case raise a Second Amendment challenge to Massachusetts's regulatory scheme setting forth certain minimum safety requirements before a handgun may be sold by a licensed retailer in the state, in order "to prevent unnecessary death and injury from unsafe and defective handguns, particularly in the hands of children." District Court Decision at 1. Although over 1,000 handgun models are approved for sale in Massachusetts under this scheme, plaintiffs claim that it violates their Second Amendment rights not to be able to purchase or sell 18 particular models of handguns available in other states. *Id.* at 4-5.

The district court entered judgment in favor of defendants, and the plaintiffs filed a notice of appeal, prior to the Supreme Court's recent decision in *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022). Plaintiffs now claim

that a remand is required for the district court, in the first instance, to re-consider the Massachusetts regulatory scheme under the framework for analyzing Second Amendment claims set forth in *Bruen*.

As defendants explain below, vacatur and remand are unwarranted in the particular circumstances of this case. In moving to dismiss, the defendants made several arguments below—including that the Massachusetts scheme is consistent with both the text of the Second Amendment and the history of firearms regulation—that, under *Bruen*, remain central to the Second Amendment inquiry. The defendants, having prevailed below, are entitled to rely upon any ground apparent from the record that supports the judgment. And, while *Bruen* displaced the two-step framework previously applied by this Circuit to Second Amendment claims, the historical sources relevant to the analysis contemplated by *Bruen* are amenable to judicial notice; in this case, no expert testimony or other factual development in the district court is required. Finally, the question whether the Massachusetts scheme at issue here is consistent with the text and history of the Second Amendment is ultimately a purely legal one that this Court is just as well positioned to answer as the district court. This Court should therefore deny the motion to vacate and remand, and proceed with this appeal in the ordinary course.

BACKGROUND

At issue in this appeal is the constitutionality of the statutory requirements for the commercial sale of handguns established by Mass. Gen. Laws ch. 140, § 123, and the Attorney General's handgun sales regulations codified at 940 Code Mass. Regs. §§ 16.01 *et seq.* (together, the "handgun safety provisions"). The handgun safety provisions protect Massachusetts consumers from the sale of unsafe handguns that are prone to malfunction or accidental discharge during normal use, or are not equipped with basic childproofing and safety features. *See generally* Mem. of Law in Support of Defs.' Mot. to Dismiss [Dkt. No. 15].[1]

In their complaint, the plaintiffs challenged Massachusetts's handgun safety provisions under the Second Amendment to the U.S. Constitution. *See generally* Complaint [Dkt. No. 1]. Defendants moved to dismiss the complaint for failure to state a claim on August 20, 2021. Dkt. Nos. 14 & 15. At the time of briefing, the prevailing framework for reviewing Second Amendment challenges within the First Circuit (and all other circuits) was a two-step approach. *See* District Court Decision [Dkt No. 24] at 7. At step one, courts looked at whether the "challenged law burdens conduct that falls within the scope of the Second Amendment's guarantee" and, if it did, courts proceeded to step two, which applied an

[1] Consistent with plaintiffs' motion to remand, filings from the district court proceeding below, *Granata v. Healey*, No. 21-cv-10960-RWZ (D. Mass.), are cited herein as "Dkt. No. [X]."

appropriate level of means-ends scrutiny based on the severity of the challenged law's burden on the plaintiff's Second Amendment right. *See Gould v. Morgan*, 907 F.3d 659, 668-69 (1st Cir. 2018).

In the motion to dismiss, defendants asserted several independent bases for dismissal. *See* Dkt. Nos. 14 & 15. First, defendants argued that the handgun safety provisions do not implicate Second Amendment rights at all under step one of the two-step approach because (1) they do not burden conduct falling within the historical scope of the Second Amendment, and (2) they are "conditions and qualifications on the commercial sale of arms" and so are "presumptively lawful" under *District of Columbia v. Heller*, 554 U.S. 570, 626-27 & n.26 (2008). *See* Dkt. No. 15, at 9-13. Second, and in the alternative, defendants argued that that the handgun safety provisions should, at step two of the two-step framework, be upheld under intermediate constitutional scrutiny.

On May 19, 2022, the district court granted defendants' motion to dismiss under the then-prevailing two-step framework. District Court Decision at 7. Assuming without deciding that the handgun safety provisions burden conduct within the historical scope of the Second Amendment, the district court found that burden to be "modest" "at most" because "[e]ligible individuals within Massachusetts can freely choose from over a thousand handguns" approved for commercial sale within the state under the challenged provisions. *Id.* at 10-11.

The district court therefore applied intermediate scrutiny and held that the handgun safety provisions were "well supported and reasonable" and "pass intermediate scrutiny." *Id.* at 16. The district court accordingly dismissed the complaint. *Id.*

Soon after plaintiffs filed their notice of appeal of the district court's decision, the Supreme Court issued its decision in *Bruen* on June 23, 2022. In *Bruen*, the Supreme Court rejected the two-step approach and the application of means-end scrutiny that had previously been employed in this and every other Circuit. *Bruen*, 142 S. Ct. at 2127. However, the Court considered "[s]tep one of the predominant framework"—which looked at whether the plaintiff's conduct fell within the historical scope of the Second Amendment—to be "broadly consistent with *Heller*[.]" *Id.*

The Court described the legal framework for Second Amendment claims going forward as requiring consideration, first, of the text of the Second Amendment, followed by the historical tradition of firearms regulation. As the Court stated, "When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Id.* at 2129-30. In regard to the historical component of the *Bruen* framework, a central consideration is "whether

the modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified[.]" *Id.* at 2133.

In the Court's view, not all Second Amendment cases will be equally complex. The Court explained that "[i]n some cases," the inquiry as to "whether modern firearms regulations are consistent with the Second Amendment's text and historical understanding . . . will be fairly straightforward." *Id.* at 2131. Other cases, meanwhile, "may require a more nuanced approach." *Id.* at 2132.

Also relevant to the present motion, Justice Kavanaugh, in his concurring opinion joined by Chief Justice Roberts, "underscore[d]" certain "limits of the Court's decision" in *Bruen*. *Id.* at 2162 (Kavanaugh, J., concurring). In particular, consistent with prior Supreme Court precedent, the Second Amendment, "[p]roperly interpreted, . . . allows a 'variety' of gun regulations," including "laws imposing conditions and qualifications on the commercial sale of arms." *Id.* (quoting *Heller*, 554 U.S. at 626-27 & n.26 (citations and quotation marks omitted); and *McDonald v. Chicago*, 561 U.S. 742, 786 (2010) (plurality opinion)). Such laws, Justice Kavanaugh and the Chief Justice reaffirmed, are "presumptively lawful." *Id.* (quoting *Heller*, 554 U.S. at 626-27 n.26).

ARGUMENT

This Court should reject plaintiffs-appellants' request to vacate the judgment of the district court and remand the case for further proceedings in light of the

Supreme Court's decision in *Bruen*. While there are undoubtedly some Second Amendment cases in which remand to the district court is appropriate in order to take evidence and develop facts after *Bruen*—and indeed some states have sought remands in some cases—this case is not one of them. Instead, this case can and should be resolved in this Court based on the purely legal question whether the Massachusetts handgun safety provisions are consistent with the text and history of the Second Amendment. The relevant legal issues were briefed in the district court and this Court is well positioned to consider the plaintiffs' appeal under the *Bruen* framework. A remand would serve only to unnecessarily extend this litigation.

Where an appeal "raises purely legal issues," the Court may "reach the merits of th[e] case in the interest of judicial economy" despite an intervening change in the legal standard. *Phelps-Roper v. Troutman*, 712 F.3d 412, 417 (8th Cir. 2013) (internal citation omitted). In particular, if remand would merely result in "a pointless prolonging of litigation," the Court may apply intervening legal authority on appeal in the first instance. *Medgraph, Inc. v. Medtronic, Inc.*, 843 F.3d 942, 948 (Fed. Cir. 2016).

Here, the relevant legal questions have already been raised in the parties' initial briefing before the district court and can be presented within the context of the *Bruen* standard in the forthcoming briefing before this Court. Although the district court's opinion applied a form of means-end scrutiny that is no longer part

of the Second Amendment analysis after *Bruen*, the parties briefed both textual and historical legal arguments that were grounded in *Heller* and are fully consistent with *Bruen*. *See* Dkt. Nos. 15, 18, 22.

Specifically, defendants argued below that the challenged handgun safety provisions (1) are conditions and qualifications on the commercial sale of arms and so are presumptively lawful under *Heller*, and (2) do not burden conduct falling within the historical scope of the Second Amendment. *See* Dkt. No. 15, at 9-13. Both bases for dismissal remain central considerations under *Bruen*'s framework for analyzing Second Amendment claims. Indeed, the Supreme Court in *Bruen* explicitly noted that so-called "step one" arguments under the previously prevailing framework were consistent with a text-and-history approach. *Bruen*, 142 S. Ct. at 2127. Defendants' textual and historical arguments were raised below, and, in any event, this Court may affirm the grant of a motion to dismiss for failure to state a claim on any ground apparent from the record, regardless of whether it was presented to, or considered by, the lower court. *E.g.*, *In re Montreal, Maine & Atlantic R'way, Ltd.*, 888 F.3d 1, 8 n.4 (1st Cir. 2018); *accord Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970).

The text-based component of the *Bruen* framework is purely legal, relying on traditional sources of constitutional textual interpretation and past precedent. *See Bruen*, 142 S. Ct. at 2127 (reviewing *Heller*'s "textual analysis" of the Second

Amendment). This Court is as well-equipped as the district court to decide whether a Massachusetts scheme that allows for the sale and purchase of over 1,000 different models of handguns, while denying plaintiffs the ability to sell or purchase the 18 specific models they identify in their complaint, infringes their right to keep and bear arms. *See id.* at 2128 (Second Amendment right is "not unlimited," and is "not a right to keep and carry any weapon whatsoever") (quoting *Heller*, 554 U.S. at 626). Moreover, as defendants argued in the district court, "the Second Amendment's plain text" does not "cover[] [the plaintiffs'] conduct," *id.* at 2129, because the challenged law falls into a category of "presumptively lawful" regulations identified as examples by the Supreme Court. *See Heller,* 554 U.S. at 626-27 & n.26; *McDonald*, 561 U.S. at 786; *Bruen*, 142 S. Ct. at 2162 (Kavanaugh, J., concurring). Thus, this appeal can be resolved on the basis of text alone.

To the extent the Court were to reach the historical component of the *Bruen* framework, defendants would bear the burden of proof. *See Bruen*, 142 S. Ct. at 2129-30. To meet that burden, defendants anticipate relying on historical sources—including but not limited to those cited in their district court briefing, *see* Dkt. No. 15, at 12-13—that are amenable to judicial notice by this Court. *See In re Jackson*, 988 F.3d 583, 594 (1st Cir. 2021) ("Courts may take judicial notice at any stage of the proceeding") (citing Fed. R. Evid. 201(d)). Materials are subject to

judicial notice if they are "not subject to reasonable dispute because" they "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). Courts routinely consider historical statutes and judicial opinions like those upon which defendants would seek to rely in this matter, without any requirement that they be presented to and considered by the district court in the first instance. *See*, *e.g.*, *Bruen*, 142 S. Ct. at 2138-56; *Heller*; 554 U.S. at 592-619; *Gould*, 907 F.3d at 669-70. It has long been established that "[t]he law of any state of the Union, whether depending upon statutes or upon judicial opinions, is a matter of which the courts of the United States are bound to take judicial notice, without plea or proof." *Lamar v. Micou*, 114 U.S. 218, 223 (1885); *see also White v. Gittens*, 121 F.3d 803, 805 (1st Cir. 1997) ("[W]e may take judicial notice of published state court dispositions of cases.").

Consistent with this precedent, similar historical sources were introduced through briefing for the first time on appeal in prior Second Amendment cases before this Court. *See*, *e.g.*, Brief of the Defendant-Appellee Commonwealth of Massachusetts Office of the Attorney General, *Gould v. Morgan* (1st Cir. 2018), 2018 WL 3013305, at **5-8, 21-29; Brief of Defendant-Appellee Mark Morgan, in his official capacity as Acting Chief of the Brookline Police Department, *Gould v. Morgan* (1st Cir. 2018), 2018 WL 3058327, at **5-6, 20-44. In sum, the *Bruen* framework calls for legal arguments that have already been briefed in this case

before the district court and that, due to the nature of the legal analysis prescribed by the Supreme Court, may be raised in briefing before this Court.

Indeed, any decision by the district court following remand would be likely to reach this Court again on appeal. If this case were to be remanded, the defendants would likely file a renewed motion to dismiss, asking the district court to take judicial notice of the same historical sources they would ask this Court to consider were the case to remain here. Thus, the case is likely to return on appeal in precisely the same posture as it currently stands. Where this Court is equally well positioned to consider the parties' textual and historical arguments under the *Bruen* standard, there is no benefit to a remand. On the contrary, vacatur and remand would only produce "a pointless prolonging of litigation" that delays final resolution of this challenge to an important component of Massachusetts's gun-safety laws. *Medgraph*, 843 F.3d at 948.

Plaintiffs' reliance on several cases where circuit courts have vacated district court judgments and remanded in light of *Bruen* is misplaced. *See* Plaintiffs' Motion for Vacatur and Remand ("Remand Motion") at 3. As the Supreme Court anticipated in *Bruen*, Second Amendment challenges can range in their complexity and in the sources that must be consulted to determine a law's constitutionality. 142 S. Ct. at 2131-32 (noting that some Second Amendment cases "will be fairly straightforward" while others "may require a more nuanced approach"). There are

undoubtedly some Second Amendment challenges requiring a "nuanced approach" under *Bruen* where the parties quite reasonably seek to develop a factual record, including expert testimony where appropriate, such that remand to the district court is warranted. This is not such a case.

Plaintiffs highlight in their motion two cases where the States of New Jersey and California each sought vacatur and remand for the purpose of compiling a historical record in the district court in the first instance. *See* Remand Motion at 17-18. But those matters are distinguishable from this one, not least in that they challenge entirely distinct firearm restrictions. *Association of New Jersey Rifle & Pistol Clubs, Inc. v. New Jersey* ("*ANJRPC*"), remanded by the Third Circuit, and *Duncan v. Bonta*, remanded by the Ninth Circuit, both involve challenges to state restrictions on large-capacity magazines. *See* Remand Motion, Ex. 2 (Third Circuit's Order of Remand in *ANJRPC*); *id.*, Ex. 4 (Letter Brief of New Jersey Attorney General in *ANJRPC*); *id.*, Ex. 3 (Supplemental Brief of California Attorney General in *Duncan v. Bonta*). And more broadly, none of the cases identified by the plaintiffs involve a challenge to laws that require childproofing and safety features before a handgun may be sold—provisions that are "presumptively lawful" "conditions and qualifications on the commercial sale of arms." *Heller*, 554 U.S. at 626-27 & n.26; *McDonald*, 561 U.S. at 786 (quoting same); *Bruen*, 142 S. Ct. at 2162 (Kavanaugh, J., concurring) (quoting same).

The two cases that the plaintiffs highlight are also in a different procedural posture than this case. In *ANJRPC*, the appeal had already been briefed in the Third Circuit based primarily on "law of the case" arguments that no longer applied on their face. *See* Remand Motion, Ex. 4 (Letter Brief of New Jersey Attorney General in *ANJRPC* at 9). Furthermore, in both cases, the state defendants—who bear the burden of proof on the historical component of *Bruen*'s legal framework—requested vacatur and remand in those cases to further develop the factual record on that point, unlike here. While vacatur and remand may have been the proper course of action in those cases, it is not the proper course here.[2]

[2] Similarly, plaintiffs' reliance upon a decision from this Court, *Town of Barnstable v. O'Connor*, 786 F.3d 130 (1st Cir. 2015), is misplaced. *See* Remand Motion at 4. There, a significant *factual* development arose after oral argument in this Court—a unilateral termination by one party of the contract between the private parties in the case that was central to the litigation, in circumstances where the other party to the contract disputed that the termination was valid or that it mooted the litigation. 786 F.3d at 141-44. In those circumstances, this Court determined that the prudent course was to remand the case to the district court, which was "better able" to assess, in the first instance, whether the termination of the contract was valid, and whether it mooted the case. *Id.* at 143. No such changed factual circumstances render the district court "better able" to resolve this purely legal dispute than this Court.

CONCLUSION

For the reasons set forth above, defendants respectfully request that this Court deny Plaintiffs' Motion for Vacatur and Remand, and instead set a briefing schedule for this case to proceed in this Court.

Respectfully submitted,

MAURA HEALEY, in her official capacity as Attorney General of the Commonwealth of Massachusetts; TERRENCE REIDY,[3] in his official capacity as Secretary of the Executive Office of Public Safety and Security of the Commonwealth of Massachusetts,

By their attorneys,

/s/ Timothy J. Casey

Timothy J. Casey (First Circuit No. 123832)
Grace Gohlke (First Circuit No. 1204282)
Assistant Attorneys General
Government Bureau
Office of the Attorney General of Massachusetts
One Ashburton Place
Boston, Massachusetts 02108-1698
(617) 727-2200
Timothy.Casey@mass.gov
Grace.Gohlke@mass.gov

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[3] Terrence Reidy has succeeded Thomas Turco as Secretary of the Executive Office of Public Safety and Security of the Commonwealth of Massachusetts, so his name is automatically substituted in the caption of the case, in accordance with Fed. R. App. P. 43(c)(2).

CERTIFICATE OF COMPLIANCE WITH WORD LIMIT, TYPEFACE, AND TYPE-STYLE REQUIREMENTS

I hereby certify that:

1. This motion complies with the word limit of Fed. R. App. P. 27(d)(2)(A) because the motion contains 3,075 words, excluding the parts of the document exempted by Fed. R. App. P. 32(f); and

2. This motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because the document has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point, Times New Roman font.

/s/ Timothy J. Casey
Counsel for the Defendants-Appellees
September 16, 2022

CERTIFICATE OF SERVICE

I hereby certify that this document, filed through the ECF system, will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF), on September 16, 2022.

/s/ Timothy J. Casey
Counsel for the Defendants-Appellees