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' REPLY TO DEFENDANTS' OPPOSITION TO 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*
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I. Vacatur and Remand is the Settled Course of Action Here

Pointing to no example of any case in which a circuit court has found it appropriate to do so in the wake of *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S.Ct. 2111 (2022) ("*Bruen*"), Attorney General Healey argues this Court should adjudicate in the first instance all the questions that *Bruen* directs courts to address in deciding Second Amendment claims even though the record in the district court was developed under the auspices of the "two-step test" that *Bruen* flatly rejected. She even goes so far as to say that "remand would merely result in 'a pointless prolonging of litigation.'" Opposition to Motion ("Opp.") at 7 (quoting *Medgraph, Inc. v. Medtronic, Inc.*, 843 F.3d 942, 948 (Fed. Cir. 2016)).

Attorney General Healey's opposition here not only goes against the strong tide of cases appropriately remanding Second Amendment claims for reconsideration in light of *Bruen*—at least ten, as detailed in the Motion—but it cannot be squared with the well-principled rules and conventions of this circuit. *See* Motion at 3-4 (listing illustrative cases); *see also, e.g., Gonzalez v. Cruz*, 926 F.2d 1, 3 (1st Cir. 1991) and *Lamphere v. Brown Univ.*, 798 F.2d 532, 542-43 (1st Cir. 1986) (similarly declining to decide in the first instance factual or legal questions arising from

changes in the controlling standards pending appeal); *CRST Van Expedited, Inc. v. EEOC*, 578 U.S. 419, 435 (2016) ("It is not the Court's usual practice to adjudicate either legal or predicate factual questions in the first instance."); Motion, Ex. 4 at 2 ("no court of appeals has taken the dramatic step Plaintiffs seek of resolving a post-*Bruen* challenge in the absence of a post-*Bruen* record or district court ruling").

Further, the cases that Attorney General Healey cites for support highlight how unusual it would be for this Court to resolve this matter in the first instance. While she points to *Phelps-Roper v. Troutman*, 712 F.3d 412 (8th Cir. 2013), Opp. at 7, the court there observed that "[w]hen 'a change in law does not extinguish the controversy, the preferred procedure is for the court of appeals to remand the case to the district court for reconsideration of the case under the amended law.'" *Troutman* at 416 (quoting *Green Party of Tenn. v. Hargett*, 700 F.3d 816, 824 (6th Cir.2012)). "This is normally the course of action pursued so that 'the district court [may have] an opportunity to pass [judgment] on the changed circumstances.'" *Id.* (quoting *Concerned Citizens of Vicksburg v. Sills*, 567 F.2d 646, 650 (5th Cir.1978)). And the case was in fact remanded because, based on modifications to the challenged picketing

buffer zones, the plaintiff's First Amendment claims "raise[ed] questions that ha[d] not yet been addressed by the district court." *Id.* at 414.

The Federal Circuit emphasized the same basic principles in *Medgraph, Inc. v. Medtronic, Inc.*, 843 F.3d 942 (Fed. Cir. 2016), *see* Opp. at 8, saying, "[o]rdinarily, when the governing legal standards change during an appeal, remand is an appropriate action," *id.* at 948. The case ended up being an unusual exception to the rule because of unique circumstances entirely absent here: the case was on appeal from an order on a summary judgment motion following "extensive" discovery, and any further discovery or litigation would have been fruitless because all the relevant facts and circumstances vetted through discovery were necessarily "unaffected" by the change in legal standards. *Id.* at 948-49.

II. The Attorney General Fails to Make a Case for the Extraordinary Exception to the Normal Rule that She Seeks

Attorney General Healey pushes two arguments in nevertheless opposing remand here: (1) the questions presented under *Bruen* are "purely legal" in nature, which this Court is "just as well positioned to answer as the district court," Opp. at 2; *id.* at 7; and (2) the "historical sources relevant to the analysis contemplated by *Bruen*" are either already part of the record developed below or are "amenable to judicial

notice," Opp. at 2. These arguments fall far short of justifying an extraordinary break from the usual, well-principled practice of remanding to the district court for reconsideration in such instances.

A. The Attorney General is Obfuscating Her Burdens

The notion that this appeal presents naked legal questions classically suited for appellate adjudication in the first instance rests on a recycled claim that the Attorney General advanced below in the pre-*Bruen* world: the "plain text" of the Second Amendment excludes the conduct targeted by the challenged regulations, because they "fall[] into a category of 'presumptively lawful' regulations' identified as examples by the Supreme Court," leaving the conduct unprotected as a matter of law. Opp. at 8. This claim is riddled with trouble, especially at this stage.

The "plain text" of the Second Amendment declares "the right of the people to keep and bear Arms, shall not be infringed"—period. It says and implies nothing to suggest a government may prohibit law-abiding citizens from acquiring arms in common use for lawful purposes around the country—much less that such a prohibition is "*presumptively* lawful" so as to *shield* it from scrutiny, as Attorney General Healey claims. The

text could only suggest the prohibition is presumptively *un*lawful *necessitating* the historically-based scrutiny of the *Bruen* framework.

As *Bruen* specifically instructs, "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." *Bruen*, 142 S.Ct. at 2127 (italics added). "When the Second Amendment's plain text covers" the targeted conduct, "the Constitution *presumptively protects* that conduct," and "[t]he 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 (italics added). "Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's 'unqualified command.'" *Id.* 2126 (quoting *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 50, n. 10 (1961)). Nothing about this test suggests that the government can get a free pass to pursue its regulation unchecked by simply claiming it qualifies as a "presumptively lawful" regulatory measure. It would be perverse to read *Bruen* this way, *especially* when the "plain text" *covers* the targeted conduct.

Further, the Attorney General overlooks—once again—the reality that anything that *might* be considered "presumptively lawful" must be "longstanding." There's no real hope of attaining any such status for a scheme installed just 25 years ago in 1997. The New York law *struck down* in *Bruen* had been on the books since 1905. *Bruen*, 142 S.Ct. at 2122. Yet, that was clearly not treated as "*presumptively* lawful"—if it were, the burden would have been *reversed*, with the challengers bearing the burden to show the law was unconstitutional in order to overcome the presumption. Instead, *Bruen* emphatically compelled New York to *justify* its regulation of the protected conduct. That was surely because the law stood against the established traditions of this Nation. The provenance of modern-day firearms regulations doesn't cut it. Even the California Attorney General has acknowledged this in seeking remand in *Duncan v. Bonta*, 9th Circuit Case No. 19-55376. Motion, Ex. 3 at 11 (*Bruen* "suggested that when determining whether a law is 'longstanding,' the focus should be on gun regulations predating the 20th century").

It is no answer to simply say the challenged regulations constitute "conditions and qualifications on the commercial sale of arms." Opp. at 3, 6; *see Heller*, 554 U.S. at 626-27. Indeed, "the Supreme Court in *Heller*

could not have meant that anything that *could* be *characterized* as a condition and qualification on the commercial sale of firearms is immune from more searching Second Amendment scrutiny." *Peña v. Lindely*, 898 F.3d 969, 1007 (9th Cir. 2018) (Bybee, J., concurring and dissenting) (italics original). Otherwise, "a law saying that a condition for the commercial sale of firearms is that sales may take place only between 11 p.m. and midnight, on Tuesdays," or one "imposing a $1,000,000 point-of-sale tax on the purchase of firearms for self-defense" would be insulated from review *notwithstanding* that such restrictions are surely "inconsistent with the 'scope of the Second Amendment.'" *Id.* *Heller* itself makes clear that "challenges to these laws would easily overcome any presumption of lawfulness." *Id.* at 1008. And the *Bruen* framework is designed to ferret out modern-day gun laws divorced from "the Nation's historical tradition of firearm regulation." *Bruen*, 142 S. Ct. at 2130

Further, to whatever extent the issues involve "textual" or other "legal" issues, *Troutman* itself makes clear that appellate review in the first instance is still the *exception* to the general rule of remand: "courts have *sometimes chosen* 'to reach the merits of th[e] case in the interest of judicial economy' because the appeal raises purely legal issues."

Troutman, 712 F.3d at 417 (quoting *Hadix v. Johnson*, 144 F.3d 925, 935 (6th Cir.1998)). And such an exception did *not* apply in *Troutman*, because "the record ha[d] not been developed" with a view towards addressing the constitutionality of the later modified picketing buffer zone; "[n]or ha[d] the district court considered the constitutionality" of the zone as modified. *Id.* Therefore, "the better course [wa]s to afford the district court an opportunity to make appropriate findings of fact *and conclusions of law* before evaluating the validity of the new statute." *Id.* (italics added); *see also Oakland Tactical Supply, LLC v. Howell Twp.*, 2022 WL 3137711, *2 (6th Cir. Aug. 5, 2022) ("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").

So, the Commonwealth cannot credibly claim that this Court may properly adjudicate the issues presented by upholding the challenged regulations on the "purely legal" basis that they are "presumptively lawful" regulatory measures insulated from the review *Bruen* demands.

B. The Legal and Factual Questions Presented Must be Adjudicated by the District Court in the First Instance

If forced to actually "bear the burden of proof" on "the historical component of the *Bruen* framework," Attorney General Healey claims

that this Court can simply rely on the sources "cited in their district court briefing" and other unspecified "historical statutes and judicial opinions like those upon which defendants would seek to rely in this matter." Opp. 9-10. As for the "sources" cited in the district court brief, what the Attorney General continues to ignore is that they consist of generic Founding Era "gun safety regulations" and an 1821 Maine law that bear no analogical relation to the challenged regulations, much less demonstrate "how and why" the challenged regulations "impose a comparable burden" to "a well-established and representative historical *analogue*." *Bruen*, 142 S.Ct. at 2133. And the Attorney General doesn't say what other evidence "amenable to judicial notice" may be out there that "defendants would seek to rely [o]n in this matter." Opp. at 10.

This case is nothing like the situation in *Gould v. Morgan*, 907 F.3d 659 (1st Cir. 2018), to which the Attorney General draws a purported comparison. Opp. at 10. *Gould* came to this Court on cross-motions for summary judgment following extensive discovery, which was "supplemented by a myriad of helpful amicus briefs." *Id.* at 665. Here, with *no* discovery and one round of briefing under *pre-Bruen* standards, this is like the New Jersey case, where the New Jersey Attorney General

argued, "[t]o the limited extent prior briefing and proposed findings addressed firearms regulatory history, the prior submissions were cursory—at most, a couple of double-spaced pages per filing—and no expert testimony was presented on analogies." Motion, Ex. 4 at 6. The Commonwealth's briefing on this *central* topic here was actually limited to *less than a page* of argument and citations to generic firearms regulations bearing no analogical relation to the challenged regulations.

Again, it is the Commonwealth's burden to "*affirmatively prove* that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms," *Bruen*, 142 S.Ct. at 2127 (italics added), with evidence from the relevant historical period of "a well-established and representative historical *analogue*," *id.* at 2133.

The position of Attorney General Healey stands in stark contrast to that of the California and New Jersey Attorneys General, and she offers no explanation for breaking company with them and no reasoned argument in opposition to their positions advocating for remand post-*Bruen*. *See* Opp. at 13 (simply noting that they have "requested vacatur and remand in those cases to further develop the factual record on [the historical component of *Bruen's* legal framework], unlike here"). In fact,

the arguments of the California Attorney General show that he believes remand is necessary for record development and decision-making in such cases *regardless* of whether the government intends to argue that the regulation does not implicate the Second Amendment. Motion, Ex. 3 at 8 (citing *Bruen*, 142 S. Ct. at 2128, 2133) (only "*assuming*" that "the plain text of the Second Amendment protects large-capacity magazines," but arguing that remand was necessary regardless). He never suggested that the government could avoid scrutiny by baldly asserting the regulation is presumptively exempted, as Attorney General Healey does here. This is true *despite* the California Attorney General's position that the State's large-capacity magazine restrictions "could be considered 'longstanding' and therefore presumptively constitutional under *Heller*," because they were "part of a longer tradition of regulating especially dangerous weapons once they began to circulate widely in society." *Id.* at 9-11.

While Attorney General Healey claims that the California and New Jersey cases are "distinguishable," the only substantive distinction she draws is that they involve "distinct" firearms regulations, *implying* but not articulating with any argument that this means the necessary record development process is somehow meaningfully different here. The factors

that matter on this question are constant and indistinguishable: "The 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*." Motion, Ex. 3 at 11. "That is an important responsibility, and it allows this Court to perform its appellate function effectively." Motion, Ex. 4 at 2. "[T]his Court is one 'of review, not first view,' meaning that district courts must make factual and legal findings in the first instance." *Id.*

Finally, Attorney General Healey's lamentations that "any decision by the district court following remand would be likely to reach this Court again on appeal," Opp. 11, and remand will "delay" the "final resolution of this challenge to an important component of Massachusetts's gun-safety laws," *id.*, underscore how misguided her position is. Undoubtedly, *all* the cases remanded under these well-settled principles calling for remand in such instances are "likely"—if not certain—to return to the circuit stage. The issue is not *whether* these cases will reach the circuit courts again; it's the state of the record—the evidence the parties have developed and the findings the district court has made—*when they do*.

And the whole point of this case is to *test* the legitimacy of the Commonwealth's regulations—not based on its own policy judgments about how "important" they are to "gun safety," but based on the proper constitutional standards as set forth in *Bruen*. The district court is best suited for that task in the first instance—as the normal rules would hold.

Dated: September 22, 2022

Respectfully submitted,

/s/ *Raymond M. DiGuiseppe*
Raymond M. DiGuiseppe
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Certification of Word Count

I certify that the foregoing document is prepared with 14-point Century Schoolbook font and contains 2,598 words.

Executed this 22nd day of September 2022.

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

I hereby certify that on September 22, 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 22nd day of September 2022.

/s/ *Raymond M. DiGuiseppe*
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