No. 22-1478

United States Court of Appeals
For the First Circuit

STEFANO GRANATA; JUDSON THOMAS; COLBY CANNIZZARO; CAMERON PROSPERI; THE GUNRUNNER, LLC; FIREARMS POLICY COALITION, INC.,
Plaintiffs-Appellants,

v.

ANDREA JOY CAMPBELL, in her official capacity as Attorney General of the Commonwealth of Massachusetts; TERRENCE REIDY, in his official capacity as Secretary of the Executive Office of Public Safety and Security of the Commonwealth of Massachusetts,
Defendants-Appellees.

APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

PLAINTIFFS-APPELLANTS' REPLY BRIEF

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INTRODUCTION

Through its statutes and regulations, Massachusetts has banned a huge number of handguns in common use throughout the Nation (the "Handgun Ban"). The Commonwealth's brief strains mightily to avoid the straightforward test imposed by *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S.Ct. 2111 (2022). Under *Bruen*, the proper result here is so plain that the Court should reverse and order that judgment be entered for Plaintiffs.

1. Where *Bruen* first instructs courts to determine whether a plaintiff's proposed conduct is covered by the text of the Second Amendment, Massachusetts begins by saying the Second Amendment isn't implicated here because Plaintiffs still have some choice of handguns. This isn't a textual argument. The Plaintiffs here wish to purchase handguns in common use throughout the Nation that are barred by the Handgun Ban. Under *Bruen*, this conduct is plainly "covered" by the text of the Second Amendment.

Nor is it a textual analysis for Massachusetts to repeat the mantra from *District of Columbia v. Heller*, that "the right secured by the Second Amendment is not unlimited," and that it is "not a right to keep and carry any weapon whatsoever . . . ." 554 U.S. 570, 626 (2008). Indeed, *Heller* confirmed in that same passage that, whatever the "limitations" on the Second Amendment's scope, its scope plainly

encompasses the right to possess handguns, whereas Massachusetts is restricting that right.

2. Massachusetts cannot elude *Bruen*'s operation by labeling the Handgun Ban a species of "presumptively lawful" "qualification on the commercial sale of arms" referred to in *Heller*. The Commonwealth conspicuously omits *Heller*'s statement that the unidentified "regulatory measure" it was describing was "longstanding," which the Handgun Ban is not. Whatever type of "qualification on commercial sale" *Heller* was referring to, *Bruen* confirms that courts cannot take shortcuts: If conduct is covered by the text, "[t]he government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation. ***Only*** then may a court conclude that the individual's conduct falls outside the Second Amendment's 'unqualified command.'" 142 S.Ct. at 2130 (emphasis added) (citation omitted). Massachusetts thus cannot avoid being put to the burden of justifying the Handgun Ban under *Bruen*'s historical test.

3. Massachusetts falls far short of carrying its burden of justifying the Handgun Ban, since it is quite inconsistent with the Nation's historical tradition of firearm regulation. "Roster" style regulations that drastically limit the choice of handguns did not exist until Maryland imposed a similar law in 1988. So the Commonwealth is left attempting to analogize to a variety of historical regulations, all of which fail *Bruen*'s "how" test (they imposed burdens not remotely comparable

to the Handgun Ban's drastic limitation on access to handguns) and its "why" test (they addressed different regulatory goals, mainly including fire safety).

4. On March 20, 2023, the United States District Court for the Central District of California enjoined California's nearly identical effort to restrict access to handguns through a state-approved "roster." In *Boland v. Bonta*, Case No. 22-01421-CJC (ECF No. 60), the court rejected many of the very same arguments that Massachusetts makes here. Those arguments should fare no better in this Court.

The district court's dismissal should be reversed.

REPLY ARGUMENT

I. The Commonwealth Misapplies *Bruen*: Plaintiffs' Proposed Conduct Is Covered By The Text Of The Second Amendment.

Massachusetts goes to extreme lengths to complicate what is a straightforward inquiry under *Bruen*: whether "the Second Amendment's plain text covers [plaintiffs' proposed] conduct." 142 S.Ct. at 2126. Plaintiffs want to "keep and bear" handguns that are not listed on the Commonwealth's Roster of "approved" guns and that are otherwise banned from lawful sale under the Attorney General's regulations. That means, they want to engage in conduct covered by the text of the Second Amendment. It is perfectly clear from *Heller* that handguns are "arms." *Heller*, 554 U.S. at 628. Massachusetts ignores that this simple textual analysis operates at a high level of generality. *E.g.*, *Bruen*, 142 S.Ct. at 2134 (plaintiffs' proposed conduct was "carrying handguns publicly for self-defense").

The Commonwealth cannot dispute this point, but instead claims Plaintiffs' rights are not infringed because they have the option to purchase *certain* handguns in Massachusetts. AB 30–31. But under *Bruen* and *Heller*, handguns are protected as a category, so the Commonwealth cannot preserve Plaintiffs' Second Amendment rights by permitting them "enough" choices of handguns.

Accordingly, under *Bruen*, the only way a handgun can be restricted from being kept or borne for self-defense is if the Commonwealth can meet its burden of showing its regulation is historically justified. It cannot do so here because *Bruen* and *Heller* have already established that any historically recognized tradition banning bearable arms is limited to a tradition of banning "dangerous and unusual weapons." *Bruen*, 142 S.Ct. at 2143 ("At most, respondents can show that colonial legislatures sometimes prohibited the carrying of 'dangerous and unusual weapons' . . . ."). By definition, arms in common use—like handguns—cannot be banned, yet Massachusetts has done exactly that by limiting access to only the subset of handguns that it approves. *Id.*

Massachusetts tries to avoid this issue—and limit the scope of this case—by claiming repeatedly that Plaintiffs' challenge only reaches "18 models of handgun." AB 2, 25, 29, 30. Not so. The Complaint states plainly that, while the individual Plaintiffs would purchase these models of handguns but for the Commonwealth's ban on numerous popular handguns, App. 16–18, Plaintiffs seek relief against the

ban on the sale of *all* "constitutionally protected handguns in common use for self-defense and other lawful purposes." App. 22–23; *see also* App. 2 (seeking "relief on behalf of themselves and all those similarly situated" who have suffered constitutional harm).

A. The Commonwealth's Argument That The Second Amendment Isn't Implicated Because Plaintiffs Can Still Buy Other Guns Isn't A Textual Argument.

Massachusetts conspicuously refuses to engage with *Bruen*'s instruction that the proper analysis begins with whether the plaintiffs' proposed conduct is covered by the text of the Second Amendment. Instead, the Commonwealth jumps ahead to its desired *conclusion* by repeatedly arguing that its Handgun Ban doesn't violate the Second Amendment because Plaintiffs supposedly have enough choices: (1) they "can purchase, keep, and carry over 1,000 handgun models that appear on the Approved Firearms Roster and meet the requirements of the Attorney General's Regulations," AB 25; and (2) "[n]othing . . . prevents the individual plaintiffs from purchasing, keeping, and carrying ***a*** functional handgun for the purpose of self-defense . . . ." AB at 29 (emphasis added).[1] It is a *non sequitur* under *Bruen*'s test to claim that the firearms regulations at issue here do "not *run afoul of the text* of the

[1] The logical conclusion of the Commonwealth's argument is that, so long as Massachusetts allows its citizens to buy one handgun, that is enough. In that light, the Commonwealth cannot be taken seriously when it protests that "partial" bans do not implicate the Second Amendment at all.

Second Amendment, because they do not meaningfully infringe plaintiffs' right to keep and bear arms for lawful self-defense." AB 1–2 (emphasis added). The question at this stage of the analysis is *only* whether the proposed conduct is covered by the Second Amendment's text, and it plainly is.

Indeed, it appears that the Commonwealth is clinging to the old "two-step" test that *Bruen* expressly rejected. As described in *Bruen*, the second step of the old test asked "how close the law comes to the core of the Second Amendment right and the severity of the law's burden on that right," 142 S.Ct. at 2126 (quoting *Kanter v. Barr*, 919 F.3d 437, 441 (7th Cir. 2019)), after which point the court would conduct means-end scrutiny. Massachusetts follows that superseded playbook when it argues that the "'central component' of the Second Amendment's guarantee is 'self-defense,'" but Plaintiffs can still protect themselves because the Handgun Ban doesn't "prevent[]" them from "purchasing, keeping and carrying a functional handgun" to defend themselves. AB 29 (citations omitted). After *Bruen*, the question is no longer whether a regulation strikes at the Second Amendment's "core" or "central component." If the Second Amendment covers Plaintiffs' conduct, as it does here, the only question is whether Massachusetts can justify its modern firearm regulation by showing it is consistent with the Nation's historical tradition of regulation.

The one time the Commonwealth pretends to follow *Bruen*, it defines Plaintiffs' proposed conduct with specificity bordering on satire: Massachusetts claims the relevant "conduct" here is "purchas[ing] particular handgun models that have not been shown to include certain basic safety features intended to protect handgun operators and bystanders, even while hundreds of other handgun models are authorized for commercial sale by retailers in Massachusetts." AB 28. This bears no resemblance whatsoever to *Bruen*'s formulation or application of the textual analysis. *See*, *e.g.*, 142 S.Ct. at 2134 (plaintiffs proposed conduct was "carrying handguns publicly for self-defense"); *Firearms Pol'y Coal., Inc. v. McCraw*, No. 4:21-CV-1245-P, 2022 WL 3656996, at *3 (N.D. Tex. Aug. 25, 2022) (proposed course of conduct was "18-to-20-year-olds seeking to carry a handgun for self-defense outside the home").

Again, by packing all of its justifications for the regulation into a purported textual analysis, Massachusetts is jumping ahead to what comes *after* the textual inquiry: namely, whether it can justify the various qualifiers in its formulation of the proposed conduct by pointing to historical analogues for banning a subset of firearms for supposedly lacking "certain basic safety features." AB 28; *Bruen*, 142 S.Ct. at 2126, 2129–30. But Massachusetts cannot import those qualifiers to distort the simple textual analysis required by *Bruen*.

Nor is it a textual argument to say that the Second Amendment doesn't cover the proposed conduct because the Handgun Ban here isn't as comprehensive as the bans at issue in *Heller* or *McDonald v. Chicago*, 561 U.S. 742 (2010). AB 31. *Bruen* didn't involve a total ban on carry: some people could get carry licenses if they satisfied New York's "special need" requirement. 142 S.Ct. at 2123. In any event, nothing in *Heller*, *McDonald*, or *Bruen* stands for the proposition that the Second Amendment isn't implicated by regulations that fall short of total bans. *See also Caetano v. Massachusetts*, 577 U.S. 411, 421 (2016) (Alito, J., concurring) ("the right to bear other weapons is 'no answer' to a ban on the possession of protected arms") (citing *Heller*, 554 U.S. at 629). Indeed, *Bruen* repeatedly referred to the judicial task of evaluating, at the history stage, a regulation's "burden" on the right to armed self-defense, *e.g.*, 142 S.Ct. at 2132–33.

The Commonwealth's citation to *Worman v. Healey*, 922 F.3d 26 (1st Cir. 2019), is remarkable and illustrates its determination to cling to the pre-*Bruen* world. AB 32. *Bruen* cited *Worman* as a poster child for the type of decision it was abrogating with the rejection of the old two-step test. *Bruen*, 142 S.Ct. 2127 n.4. Thus, *Worman*'s statement that the "assault weapon" ban at issue there wasn't an "absolute prohibition" has zero bearing here. 922 F.3d at 32 n.2. Despite *Worman*'s abrogation, the Commonwealth's entire argument here is a restatement of *Worman*'s reasoning that the law at issue there "does not heavily burden the core right of self-

defense" because the law didn't "ban all semiautomatic weapons and magazines" but instead "proscribe[d] only a set of" them. 922 F.3d at 37. This is not a textual argument and has no relevance after *Bruen*.[2]

B. *Heller*'s Statement That The Second Amendment Doesn't Confer An Unlimited Right To "Any Weapon Whatsoever" Supports Plaintiffs, Not The Commonwealth.

Nor, finally, is it a textual argument for the Commonwealth to regurgitate *Heller*'s statement that "the right secured by the Second Amendment is not unlimited," and that it is "not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." 554 U.S. 626; *see* AB at 25, 32. First, this statement in *Heller* did not concern the coverage of the Amendment's *text*; rather, it was an acknowledgment that some *historical* limitations on the right have been recognized. *Heller* went on to explain that one of those "important limitation[s] on the right to keep and carry arms" is that "the sorts of weapons protected were those 'in common use at the time.'" 554 U.S. at 627 (citing *United States v. Miller*, 307 U.S. 174, 179 (1939)).

At the textual step, *any* weapon falls within the Amendment's ambit. *See Heller*, 554 U.S. at 582 ("[T]he Second Amendment extends, prima facie, to *all instruments* that constitute bearable arms.") (emphasis added). Here, Massachusetts

[2] The same goes for the Commonwealth's reliance on the Ninth Circuit's now-abrogated decision in *Pena v. Lindley*, 898 F.3d 969 (9th Cir. 2018), AB 26.

is banning handguns, the "quintessential self-defense weapon," which both *Heller* and *Bruen* explained are in common use (so history cannot provide support for a ban). *Heller*, 554 U.S. at 629; *Bruen*, 142 S. Ct. at 2143.[3] In trying to shift this question to the textual inquiry, the Commonwealth is just trying to evade the burden that *Bruen* places on it at the historical inquiry.

II. Massachusetts Cannot Avoid The Inevitable By Claiming The Handgun Ban Enjoys "Presumptively Lawful" Status.

The Commonwealth also claims that the Roster and related regulations banning handguns are "'presumptively lawful' as 'conditions and qualifications on the commercial sale of arms' under *Heller*, 554 U.S. at 626–27 & n.26, an exclusion from the scope of the Second Amendment that the Court did not disturb in *Bruen*." AB 36. This is a thin reed on which to rest a defense of the Handgun Ban, and Massachusetts makes the reed even thinner by shaving off the requirement that any such "conditions and restrictions" must *also* be "longstanding," which the Handgun Ban is not. *Heller*, 554 U.S. at 626–27 ("nothing 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

[3] Thus, by expressing this "limitation" on the reach of the Second Amendment's scope, *Heller* affirmed that the Second Amendment *does* extend to protect handguns in common use, because there is no historical practice limiting citizens' access to them.

on the commercial sale of arms") (emphasis added); *McDonald*, 561 U.S. at 786 (*Heller* "did not cast doubt on such longstanding regulatory measures as . . . 'laws imposing conditions and qualifications on the commercial sale of arms'").

Even "[t]he Ninth Circuit has held the phrase 'conditions and qualifications on the commercial sale of arms' 'sufficiently opaque' to prohibit reliance on it alone, instead opting to conduct a 'full textual and historical review' of the scope of the Second Amendment." *Yukutake v. Conners*, 554 F.Supp.3d 1074, 1082 (D. Hawaii 2021) (quoting *Teixeira v. Cnty. of Alameda*, 873 F.3d 670, 683 (9th Cir. 2017)). Indeed, "treat[ing] *Heller*'s listing of 'presumptively lawful regulatory measures,' for all practical purposes, as a kind of 'safe harbor,'" as some courts have done, '"approximates rational-basis review, which has been rejected by *Heller*."' *Tyler v. Hillsdale Cnty. Sheriff's Dep't*, 837 F.3d 678, 686 n.6 (6th Cir. 2016) (quoting *United States v. Chester*, 628 F.3d 673, 679 (4th Cir. 2010)).[4]

[4] What's more, for any presumption of lawfulness that *might* arise, "[a] plaintiff may rebut the presumption of validity by showing that the regulation at issue has 'more than a de minimis effect upon his right.'" *Pena*, 898 F.3d at 1006 (Bybee, J., concurring and dissenting) (citation omitted). The Commonwealth likewise allows that "[w]here the plaintiffs' complaint fails to make any plausible allegations *that could rebut* the presumption that the handgun safety regulations impose no burden on the right to keep and bear arms, the District Court's dismissal should be affirmed." AB 36 (emphasis added). The Complaint certainly does make "plausible allegations" that rebut any such claimed presumption. *See e.g.*, App. 12 (alleging that "the handguns approved for commercial sale to ordinary law-abiding citizens under Defendants' Handgun Roster and Handgun Sales Regulations represent a small fraction of the total number of commercially available handgun makes and

Whatever may be said about the Supreme Court's "opaque" discussion to date about "conditions and qualifications on the commercial sale of arms," it has been crystal clear that the government cannot justify a firearms regulation by pointing to *other* means for exercising the rights at stake and arguing that those means reduce the burden of its regulation, as the Commonwealth tries to do here. Rather, the government must *justify* cutting off the channel it has foreclosed. *Heller*, 554 U.S. at 629 ("It is no answer to say . . . that it is permissible to ban the possession of handguns so long as the possession of other firearms (*i.e.*, long guns) is allowed."); *Bruen*, 142 S.Ct. at 2130 (the Court has long enforced the rule that "[w]hen the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions"); *see also Frein v. Penn. State Police*, 47 F.4th 247, 256 (3d Cir. 2022) (rejecting the government's argument that "seizures do not burden Second Amendment rights as long as citizens can 'retain[ ] or acquir[e] other firearms'"); *id.* ("We would never say the police may seize and keep printing presses so long as newspapers may replace them, or that they may seize and keep synagogues so long as worshippers may pray elsewhere.").

In short, *Heller* "did not invite courts onto an analytical off-ramp to avoid constitutional analysis" or insulate firearms regulations from constitutional scrutiny.

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models which are constitutionally protected arms in common use for self-defense and other lawful purposes throughout all or the vast majority of the United States").

Tyler, 837 F.3d at 686–87. Instead, following *Bruen*, *Heller*'s list of "presumptively lawful" regulations should be understood as a set of regulations that the Court assumed would prove constitutional, *after the proper historical analysis was completed*.[5] In other words, nothing about that "presumption" indicates courts can simply skip the historical analysis *Bruen* prescribes.[6] To the contrary, *Bruen* twice stressed the governing presumption in its test: "[W]hen the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct," and "only" after conducting the necessary historical analysis "may a court conclude that the individual's conduct falls outside the Second Amendment's 'unqualified command.'" 142 S.Ct. at 2126, 2130 (citation omitted).

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[5] Indeed, *Heller*'s list of "presumptively lawful regulatory measures" included "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings," 554 U.S. at 626, but *Bruen* demonstrated that the government's designation of "sensitive places" does not create a special litigation presumption. Rather, the government must still demonstrate, just as with any other firearm regulation, that sensitive place restrictions are consistent with the Nation's history of firearm regulations. *See Bruen*, 142 S.Ct. at 2133–34.

[6] Even if a firearms regulation could be considered "longstanding," "[w]hy should a longstanding regulation be kept permanently beyond the reach of constitutional review?" *See Fouts v. Bonta*, 561 F.Supp.3d 941, 948 (S.D. Cal. 2021), vacated and remanded for further proceedings consistent with *Bruen*, 2022 WL 4477732 (9th Cir. Sept. 22, 2022). "A presumptively lawful firearm restriction may, upon further analysis, actually be at odds with the Second Amendment." *Id.* An invalid restriction may have eluded any viable challenge in the past simply because the Second Amendment wasn't recognized as securing an *individual* right until the *Heller* decision in 2008, which was necessary to confer Article III standing. *Id.* at 948–49.

In that light, the Commonwealth's Handgun Ban cannot possibly constitute a type of "longstanding" regulation that passes *Bruen*'s historical test: "Roster" style laws and regulations like the ones at issue here never existed before Maryland enacted a similar ban in 1988. Md. Code Ann., Pub. Safety § 5-405. Nor, as shown further below, can Massachusetts analogize under *Bruen* to any other historical limitation to justify its Handgun Ban.

III. The Handgun Ban Is Inconsistent With The Nation's Historical Tradition Of Firearms Regulation.

It bears repeating that *Bruen* has already answered the historical question here: Handguns in common use cannot be banned. 142 S.Ct. at 2128 (quoting *Heller*, 554 U.S. at 627) & 2134; *Heller*, 554 U.S. at 625, 627. Even if the Court were to look beyond that and consider the Commonwealth's supposed historical analogues, the Commonwealth has failed to meet its burden of demonstrating that its Handgun Ban "is consistent with this Nation's historical tradition of firearm regulation." *Bruen*, 142 S.Ct. at 2126.

For a historical law to serve as a "proper analogue" to a modern firearm regulation, the two laws must be "relevantly similar" based on "how and why the regulations burden a law-abiding citizen's right to armed self-defense." *Id*. at 2132–33. "[W]hether 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.* at 2133

(citations omitted). To carry its burden, "the government [must] identify a well-established and representative" tradition of analogous regulation, and "courts should not 'uphold every modern law that remotely resembles a historical analogue,' because doing so 'risk[s] endorsing outliers that our ancestors would never have accepted.'" *Id.* at 2133 (citation omitted). And crucially, analogues are less valuable the further away they are from the ratification of the Second Amendment. Mark W. Smith, *Attention Originalists: The Second Amendment Was Adopted in 1791, Not 1868*, HARV. J. L. & PUB. POL'Y PER CURIAM, (Fall 2022), https://bit.ly/41OFQND.

The Commonwealth rolls out four lines of supposedly analogous historical support for its Handgun Ban. As an initial matter, Massachusetts attempts to frame its analogues far too generally: It claims that the Roster and related regulations are supported by "laws in place to reduce the dangers posed by firearms and ammunition." AB 37–38. This claim sweeps too broadly to serve as a "proper analogue" under *Bruen*. 142 S.Ct. at 2132 ("because '[e]verything is similar in infinite ways to everything else' . . . one needs 'some metric enabling the analogizer to assess which similarities are important and which are not'") (citations omitted).

On closer inspection, the Commonwealth's supposed analogues laws are rare, unrepresentative samples that bear little similarity to its heavy-handed effort to constrict the handgun market by banning firearms in common use across the country. Massachusetts falls far short of what *Bruen* demands.

A. The Firearm "Prover" Laws And A Colonial-era Firearm Inspection Requirement Are Not Relevant Analogues.

Massachusetts' leading example is an 1805 Massachusetts law requiring that all firearms manufactured in the Commonwealth be inspected and certified by a Commonwealth-appointed "prover" of firearms. The law required all muskets and pistols to pass a discharge test proving that they are operable, and the prover would then stamp their initials and the year of inspection on the firearm.

This law imposed a far lesser burden on Second Amendment rights than the Commonwealth's Handgun Ban: Massachusetts did not prescribe any particular features or specifications for firearms to be sold in the Commonwealth. Rather, manufacturers needed only prove that the firearm operated as intended (*i.e.*, to pass a basic objective firing test). Thus, quite unlike the Handgun Ban at issue here, the "prover" law did not exclude commonly used arms for lacking "safety" characteristics; the Massachusetts legislature was not trying to use the law to force gun manufacturers to *add* unusual "safety" features like those imposed by the Attorney General's regulation.

Moreover, the prover law only applied to in-Commonwealth manufacturers. Based on the text of the law, Bay Staters remained free to purchase any firearms manufactured out of Commonwealth, which were not subject to the testing law. And while Massachussetts touts Springfield Armory to bolster its argument about the prominence of the proving law, AB 40, the Commonwealth's expert has

acknowledged in similar litigation in California that the law did not even apply to firearms manufactured there because it was a federal armory. Decl. of Saul Cornell, ¶ 33, *Renna v. Bonta*, Case No. 8:17-cv-00746-JLS-JDE (S.D. Cal. Jan. 27, 2023), ECF No. 72-5. As such, the "prover" law operates nothing like the Commonwealth's complete prohibition on the sale of popular makes and models of semiautomatic handguns in common use throughout the country—they could pass 100 firing tests to confirm they work, but they would still be banned.

The Commonwealth notes in passing that Maine is the only other state to have enacted similar legislation, AB 40, and tries to downplay the significance of such a small sample size. But *Heller*, 554 U.S. at 632, and *Bruen*, 142 S.Ct. at 2153, teach that more is required to establish a tradition. And because these prover laws stand alone, they are not a "well-established and representative historical analogue"—relying on them to uphold the Commonwealth's Handgun Ban here would "risk[] endorsing [an] outlier[]." *Bruen*, 142 S.Ct. at 2133. These rare laws do not amount to the "well-established and representative" tradition of analogous regulation *Bruen* requires. *Id.*

Massachusetts next points to two colonial-era examples of the government's inspection of arms purchased for militia use as loose analogues to the prover laws. AB 40–41. These are not remotely close to being relevantly similar to the Handgun Ban at issue here: The colonies' efforts to purchase arms from the public (against

the backdrop of the British arms embargo) was not a restriction in any way on the sale or purchase of arms by persons not trying to sell guns to the government. They might be analogous to the Pentagon setting standards for its purchase of service pistols, but they have nothing to do with limiting *citizens'* access to huge numbers of commonly used firearms because they lack certain government-mandated features.

The government's effort to analogize the Handgun Ban to gunpowder-inspection laws (AB 41–43) falls short as well. Similar to the prover laws discussed above, the inspection laws ensured that gunpowder met basic performance standards. Gunpowder was subject to a firing test to ensure it was the proper "proof." As with the prover laws, these inspection laws are far cry from prohibiting the purchase of commonly used handguns—not for failing to meet basic performance standards, but rather for lacking uncommon features that Massachusetts seeks to impose on the market.

B. Gunpowder Storage Laws And Other Fire-Safety Regulations Are No Analogues Either.

Massachusetts next cites a handful of 19th-century fire-safety regulations, which it acknowledges were passed "to protect communities from fire and explosion." AB 43. These laws fail both the "how" and "why" metrics that are "central" to *Bruen*'s analogical analysis: They do not impose a comparable burden

on Second Amendment rights (they do not ban any arm), and they were passed for a different reason altogether (to prevent fire).

First up is a Massachusetts law that prohibited storing loaded weapons in Boston homes. AB 43–44. This law is of no help to the Commonwealth: As it admits, *Heller* rejected the District of Columbia's attempt to analogize this same law because it was directed at *fire* safety, not at limiting the possession or use of firearms. Because the law's purpose "was to eliminate the danger to firefighters posed by the 'depositing of loaded Arms' in buildings," it "gives reason to doubt that colonial Boston authorities would have enforced that general prohibition against someone who temporarily loaded a firearm to confront an intruder." 554 U.S. at 631; *see* 2 Acts And Laws Of The Commonwealth Of Massachusetts 120 (1890) (noting that "the depositing of loaded Arms in the Houses [of Boston] is dangerous to the Lives of those who are disposed to exert themselves when a Fire happens to break out").[7] It also rejected the possibility of relying on "a single law, in effect in a single city, that contradicts the overwhelming eight of other evidence regarding the right to keep and bear arms for defense of the home." 554 U.S. at 632. The Commonwealth's

[7] The Ninth Circuit likewise rejected San Francisco's attempt to analogize the Massachusetts fire-protection law to support its handgun ordinance. *Jackson v. City & Cnty. of San Francisco*, 746 F.3d 953, 963 (9th Cir. 2014) (finding that Boston's firearm-and-gunpowder storage law was historically irrelevant based on *Heller*).

reliance on the early Massachusetts loaded-gun storage law fares no better here than it did for the District of Columbia in *Heller*.

The Commonwealth's strained effort to analogize this fire-safety law to its Handgun Ban ("[b]oth laws restrict[ ] certain types of weapons . . . but [do] not ban an 'entire class of arms'" as in *Heller*) makes no sense. AB 44. First, the Commonwealth bans the sale of handguns outright, it does not regulate how they must be stored. Second, banning "loaded firearms carried inside a building" is not banning a "type[] of weapon[]" at all, let alone a ban based on design characteristics. The Commonwealth cannot overcome these fatal "how" test weaknesses by repeatedly invoking *Heller*'s statement that fire safety laws did "not remotely burden the right of self-defense as much as an absolute ban on handguns." AB at 42–45. *Heller* cannot be read to suggest that those laws impose a proportionately comparable to the Handgun Ban here.

Massachusetts lumps the Boston loaded-gun storage law together with early American gunpowder storage regulations from a handful of states. AB 45. Even if the Commonwealth could catalogue similar gunpowder storage laws in *every* state at the Founding, such laws are not "relevantly similar" to the Commonwealth's Handgun Ban on the retail sale of handguns that are in common use across the country because these laws fail *Bruen*'s "how" and "why" tests as well. The gunpowder regulations and the Handgun Ban do not impose "comparable" burdens

on Second Amendment rights under the "how" test. Whereas the historical laws restricted the amount of gunpowder that could be kept or regulated the manner of storage, they did not ban any type or brand of commonly-used gunpowder based on its characteristics, as the Handgun Ban does here to a huge number of commonly used weapons.

Nor are these fire safety regulations comparably justified under the "why" test: The gunpowder regulations were based on the danger of combustion in residential dwellings in the event of a fire. The Handgun Ban, on the other hand, is motivated by the Commonwealth's purported consumer safety justification, based on malfunction or accidental discharge. It is no accident or malfunction, however, for gunpowder to combust in the event of a fire. The Commonwealth tries to sweep past these fatal distinctions by saying the analogy here is that both sets of laws are broadly necessary to address the alleged "collateral dangers of firearms." AB 45. As noted above, however, *Bruen* requires more specific analogical reasoning than big-picture comparisons to "safety" interests. 142 S.Ct. at 2132.

Finally, the Commonwealth suggests that yet another law rejected in *Heller* as comparable—the ban on "indiscreet" firing of weapons near highways (Act of May 28, 1746, ch. X, Acts and Laws of Mass. Bay, p.208)—nevertheless justifies the Handgun Ban here. AB 45–46; *Heller*, 554 U.S. at 633. Massachusetts claims this law "*regulated the collateral effects* of wanton or careless use or discharge of a

firearm," AB 46 (emphasis added), but, as *Heller* recognized, the law "prohibit[ed] 'discharg[ing] any Gun or Pistol,'" 554 U.S. at 633. While it sought to avoid "the collateral effects" of such wanton discharges (not regulate them), it did not limit citizens' *access* to "any Gun or Pistol" to achieve this goal. This law is no analogue.

C. Laws Prohibiting The Sale Of Firearms To Minors Also Bear No Relevance In A Proper Analysis.

Massachusetts also turns to several late 19-century laws banning the sale of firearms to minors. AB 46–47. This misses the mark for several reasons. First, these laws—which, aside from one 1856 law, date from 1878 to 1884—come too late to establish a historical tradition: *Bruen* affirmed that post-founding-era regulations like these late-19-century laws are relevant only to the extent they *confirm* traditions from the founding. It warned that courts must "guard against giving postenactment history more weight than it can rightly bear." 142 S.Ct. at 2136. Nineteenth-century laws that regulated firearms in a manner that broke with founding-era traditions do not establish a "tradition" that could narrow the scope of the Second Amendment's protection. *Id.* at 2137 ("'post-ratification adoption or acceptance of laws that are *inconsistent* with the original meaning of the constitutional text obviously cannot overcome or alter that text'") (citation omitted); *id.* at 2154 n. 28 ("late-19th-century [and] 20th-century evidence . . . does not provide insight into the meaning of the Second Amendment when it contradicts earlier evidence").

But even if these regulations were consistent with the founding-era understanding of the Second Amendment, laws restricting minors' access to firearms are not "relevantly similar" to the Commonwealth's ban on the sale of handguns to adults. *Bruen* explains that "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." 142 S.Ct. at 2131. To the extent the founding-era generations addressed firearm accidents by children, they did so by restricting children from acquiring arms, not by banning the sale of common arms to law-abiding *adults*.

D. Prohibitions On "Trap" Or "Spring" Guns Are Historically Irrelevant As Well.

Finally, Massachusetts claims that a handful of laws banning so-called "trap" or "spring" guns supports its case. AB 48–49. The Commonwealth argues that laws prohibiting such weapons—a common subject of One-L torts hypotheticals—are relevantly similar to its Handgun Ban because they do not "ban a class of weapons *per se*; instead, they banned the *configuration* of otherwise-common weapons in a certain way that rendered them unusually dangerous." AB 49. But of course what Massachusetts has done is quite different: The Commonwealth has prohibited the sale of otherwise-common handguns in wholly common "configurations" that are not unusually dangerous.

Moreover, "spring" gun laws are not at all analogous to this ban. They have nothing to do with consumer safety or the failure of firearms to operate as prescribed by the Commonwealth (the core justification supplied here), nor do they regulate the bearing of arms by a person for self-defense. Rather, they are outlawed for the reasons every future lawyer learns in law school: ensuring near-certain death or injury for the act of opening a door, whether wrongfully or not, is not a justified protection of property. *See, e.g.*, *Katko v. Briney*, 183 N.W.2d 657, 659–61 (Iowa 1971). In other words, these prohibitions on booby traps fail not only *Bruen*'s "how" test but the "why" inquiry as well.

IV. The *Boland* Case Demonstrates How This Case Should Be Resolved Under *Bruen*.

The Commonwealth's roster of government-approved handguns is very similar to California's "Unsafe Handgun Act" ("UHA"), California Penal Code §§ 31900–32110. Just like Massachusetts, California publishes a roster of handguns that the state deems "not unsafe." And just as with the Commonwealth's ban, California bans the addition of any new handguns to its roster unless they have a chamber load indicator and a magazine disconnect mechanism. Cal. Penal Code § 31910(b)(4), (5); *see* 940 C.M.R. § 16.05(3).

On March 20, 2023, the United States District Court for the Central District of California enjoined California's roster ban in *Boland v. Bonta*, Case No. 22-01421-CJC, --- F.Supp.3d ----, 2023 WL 2588565. Since the legal issues are

identical, the *Boland* injunction should be highly instructive to the Court's decision here.

Bruen Textual Analysis. The *Boland* court rejected California's argument, similar to Massachusetts' argument here, that "the plain text of the Second Amendment does not protect Plaintiffs' proposed course of conduct because Plaintiffs are still able to purchase *some* firearms and therefore keep and bear them." *Id.* at *5. The court stressed that "a law does not have to be a complete ban on possession to meet *Bruen*'s first step." *Id*. The court also observed that, because gun manufacturers do not even offer guns that meet the UHA's requirements (and the guns on the roster are grandfathered in), the roster has the effect of denying Californians the innovations that have occurred since the roster's enactment; and "[r]equiring Californians to purchase only outdated handguns for self-defense without question infringes their right to keep and bear arms." *Id*.

Historical Analysis. The court rejected the historical analogues California offered in its attempt to carry its burden under *Bruen*. California's evidence matches the core historical regulations Massachusetts offered here.

First, the *Boland* court considered the same Massachusetts and Maine "proving laws," *see supra* § III(A), which required the inspection and stamping of

firearms offered for sale.[8] *Id.* at *6–7. The court concluded that load indicators and magazine disconnect mechanism requirements were not "'analogous enough'" to the proving laws because they pursued different goals and imposed distinct Second Amendment burdens. *Id.* at *7 (quoting *Bruen*, 142 S. Ct. at 2133). The court catalogued many differences between the regulations and explained that "requiring each model of handgun to contain additional features to potentially help a user safely operate the handgun is completely different from ensuring that each firearm's basic features were adequately manufactured for safe operation." *Id.* The court then observed that because California's roster prohibits the sale of "virtually all new, state-of-the-art handguns," it imposes "a much greater burden on the right of armed self-defense than the proving laws." *Id.*

The *Boland* court also rejected California's effort to analogize the same gunpowder storage laws Massachusetts relies on in this case. *See supra* § III(B). The court noted that "the goals of gunpowder storage laws and the means use to achieve those goals are very different from those" of California's roster. *Id.* at *8. Specifically, "[t]he main goal of the gunpowder storage laws was to prevent fire" through "regulat[ing] where and how gunpowder could be sorted and sold, and to allow searches to ensure compliance with those storage laws." *Id.* California's roster

[8] California, like Massachusetts (AB 41–42), lumped gunpowder inspection laws in with the firearm proving laws. *Boland*, 2023 WL 2588565 at *6 n.7.

requirements, by contrast, "are meant to prevent inadvertent discharge or firing of the firearm . . . by requiring particular safety features in handguns." *Id.* In short, "[h]ow and why these regulations burden a law-abiding citizen's right to armed self-defense are too different to pass constitutional muster." *Id.*

The Commonwealth's nearly identical arguments in support of its nearly identical regulatory regime should be rejected here for the same reasons.

CONCLUSION

The Court should reverse the district court's dismissal and remand with directions to enter judgment for Plaintiffs.

Dated: March 22, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B)(i)(ii) because the brief contains 6,417 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief 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 brief has been prepared in a proportionally spaced typeface using Microsoft Word with 14-point, Times New Roman font.

Dated: March 22, 2023

By: s/Bradley A. Benbrook
Bradley A. Benbrook

CERTIFICATE OF SERVICE

I hereby certify that on March 22, 2023, 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: March 22, 2023

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