No. SJC-13856

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

COMMONWEALTH OF MASSACHUSETTS
Appellee,

v.

MIKAI THOMSON,
Defendant-Appellant

On Appeal from a Judgement of
the
Boston Municipal Court
Dorchester Division

Brief for Defendant-Appellant Mikai Thomson

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ISSUES PRESENTED

I. The pre-*Bruen* firearms resident licensing regime, G. L. c. 140, § 131(d), allowed the licensing authority unfettered discretion to issue firearms licenses. Is this licensing regime unconstitutional thus requiring vacatur of the defendant's conviction under G. L. c. 269, §10(a) for carrying a firearm without a license?

II. Massachusetts prohibits twenty-year-old residents from obtaining a firearms license, which is required to carry firearms outside of the home. The Commonwealth's only evidence to show that the defendant did not have a license was that he was twenty years old, and the judge instructed the jury about this prohibition. Is this prohibition unconstitutional thus warranting a reversal of the defendant's conviction for carrying a firearm without a license?

STATEMENT OF THE CASE

On December 27, 2021, Boston Municipal Court, Dorchester Division, issued a criminal complaint against Mikai Thomson charging him with, relevant here, one count of assault and battery on a police officer and one count of carrying a

firearm without a license.[1] RA 5; 12.[2] On January 11, 2022, Mr. Thomson pled not guilty at his arraignment. *See* RA 5.

On November 9 and 10, 2023, a jury trial was held before the Honorable Samir Zaganjori. RA 9-10. The jury found Mr. Thomson guilty of one count of assault and battery against a police officer and one count of carrying a firearm without a license. RA 10. Mr. Thomson filed a timely notice of appeal on November 22, 2023. RA 10.

STATEMENT OF FACTS

Prior to trial, the parties stipulated that the gun at issue met the legal definition of a firearm. RA 9; Tr. I- 29; 183-184.

I. Trial Testimony

The Commonwealth presented two witnesses: Massachusetts State Trooper Everton De Castro, the officer involved, and Trooper Jason Beausoleil, who responded to the scene for a firearm pickup. Tr. I-172-173.

On December 16, 2021, at approximately 6:20 p.m., Trooper De Castro was proactively policing American Legion Highway when he observed a white Volkswagen Jetta run a redlight. Tr. I-125. A RMV query revealed the car had no inspection sticker. Tr. I-126. The trooper activated his lights and

[1] Additional charges not relevant to appeal and for which Mr. Thomson was not convicted are omitted pursuant to G.L. c. 276, § 100C.

[2] References appear as follows: Record Appendix as "RA [pg. #]"; Day 1 of the Trial Transcript as "Tr. I [pg. #]"; and Day 2 of the Trial Transcript "Tr. II [pg. #]."

stopped the vehicle a short distance away on Blue Hill Avenue. Tr. I-126.

He approached the front passenger side where Mr. Thomson was seated (in front of the only other passenger in the back) and saw that nobody was wearing a seatbelt. Tr. I-128-129. Trooper De Castro also saw a lit marijuana blunt in the center console or cup holder area. Tr. I-129. He asked for the identification of all passengers, and Mr. Thomson provided his name and a birthdate of October 27, 2001.[3] Tr. I-129-130. While speaking with the rear passenger, Trooper De Castro saw a "large amount" of marijuana in the backseat. Tr. I-131. He testified that Mr. Thomson ignored him when he asked if anyone had a weapon. Tr. I-132. He ordered Mr. Thomson from the car. Tr. I-133. Trooper De Castro asked him if there were any weapons in the car, and Mr. Thomson pulled his pants up, pushed the trooper, and ran. Tr. I-133.

Trooper De Castro pursued Mr. Thomson and noticed he was running with one arm swinging and the other tucked to his waistband. Tr. I-133-134. He lost sight of Mr. Thomson for about 15 to 20 seconds as they turned into a small driveway next to 6 Wales Street. Tr. I-134; 138-139. He looked around and saw Mr.

[3] Trooper De Castro first testified that Mr. Thomson's birthday was in the year 2001. Tr. I-129. He then reviewed his report to refresh his recollection about what month and day and testified that it was "October 27, 2021." Tr. I-129-130 (consistent with recorded testimony). Clearly, Mr. Thomson was not born in 2021. The trooper made several references to all occupants being under 21 and how that informed his actions. Tr. I-132.

Thomson jump down a small wall onto Wales Street back toward Blue Hill Avenue. Tr. I-134-135.

After Trooper De Castro De Castro returned to the Volkswagen on Blue Hill Avenue, Boston police officers arrived and stayed with the remaining occupants and the car. Tr. I-141. Trooper De Castro retraced the path that he took when chasing Mr. Thomson. He found a firearm in the driveway of 6 Wales Street. Tr. I-142. Troopers subsequently secured the scene and recovered the gun. Tr. I-145. No fingerprints were recovered. Tr. I-184.

Defense counsel moved for a required finding of not guilty arguing, in part, that the Commonwealth had not met its burden to demonstrate that Mr. Thomson did not have his license because it failed to prove corroboration of Mr. Thomson's stated birthdate. Tr. I-185-187. The judge denied the motion. Tr. II-8.

II. Jury Instructions

Regarding the unlawful possession of a firearm, the judge instructed the jury that the Commonwealth had to prove four elements beyond a reasonable doubt, including that that Mr. Thomson did not have a valid license to possess a firearm. Tr. II-40-41. He added: "I instruct you that under Massachusetts law, a person under 21 years of age is ineligible for a license to carry a firearm." Tr. II-41.

The judge instructed on each element in more detail and <u>again</u> stated that a person under age 21 in Massachusetts in ineligible for a license to carry a firearm. Tr. II-42.

III. Jury Question

During deliberations, the jury had one question: "What are the items/points that must be established in order to prove carrying a firearm without a license, offense number two." RA 13; Tr. II-51-52. The parties consented to the judge rereading the instruction on possession of a firearm and possession. Tr. II-52. The judge repeated his prior instructions described in § II.

ARGUMENT

I. Mr. Thomson's conviction under G. L. c. 269, § 10(a) must be vacated because it is premised on an unconstitutional firearms licensing regime.

At the time Mr. Thomson was charged with carrying a firearm without a license, the resident firearms licensing regime, G. L. c. 140, §131(d), gave the licensing authority impermissible discretion to determine whether to issue a license, rendering it unconstitutional. *See* G. L. c. 140, § 131(d); *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 38-39 (2022). Accordingly, Mr. Thomson's conviction is based on an unconstitutional licensing regime and must be vacated. *See infra*.

A. Mr. Thomson has standing to challenge the constitutionality of G.L. c 140, §131(d).

Mr. Thomson may bring both an as-applied challenge and facial challenge. He may bring the former even though he did not apply for a license. Section 131 (d) (iv) made Mr. Thomson ineligible to apply for a license because of his age. *See* G. L. c. 131(d)(iv) (individual under twenty-one-years-old prohibited

from licensure). Accordingly, he was not required to apply as a prerequisite to challenging the statute as-applied. *See Lara v. Commissioner Pa. State Police*, 91 F.4th 122, 138-140 (3d. Cir.) (2024), *S.C.* No. 21-1832 (3d. Cir. Jan. 15, 2025) (plaintiffs who did not apply for license due to age restriction had standing to challenge licensing scheme that prohibited them from applying for a license); *contra Commonwealth v. Marquis*, SJC-13562, Slip. Op. at *11 (March 11, 2025) (citing *Lara* and rejecting as-applied challenge by defendant who had not applied for license despite eligibility).

Mr. Thomson also has standing to bring a facial challenge. "[I]n a prosecution for violation of a licensing statute which is unconstitutional on its face, the issue of its validity is presented even in the absence of an application for a license." *Commonwealth v. Johnson*, 461 Mass. 44, 58 (2011), quoting *Commonwealth v. Gordon*, 354 Mass. 722, 725 (1968); *accord Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 151 (1969) ("The Constitution can hardly be thought to deny to one subjected to the restraints of such an [unconstitutional] ordinance the right to attack its constitutionality because he had not yielded to its demands.") (citation omitted).

B. Standards of Review

The Court presumes a challenged statute is constitutional. *Blixt v. Blixt*, 437 Mass. 649, 652 (2002), cert. denied, 537 U.S. 1189 (2003). To prevail on a facial challenge, the defendant has the burden to demonstrate "beyond a reasonable doubt that there are no conceivable grounds which could support [the statute's] validity." *Commonwealth v. Dufresne*, 489 Mass. 195, 200 (2022),

quoting *Gillespie v. Northampton*, 460 Mass. 148, 152-153 (2011) (internal quotation marks omitted).

Although Mr. Thomson did not raise these constitutional claims at trial, the Court should nonetheless consider these arguments "because [the issue] involves a fundamental right, has been fully briefed, and is certain to be raised in other cases." *See Commonwealth v. Alvarez*, 413 Mass. 224, 233 (1992), abrogated on other grounds, *Commonwealth v. Kelly*, 484 Mass. 53 (2020). This Court will determine if the errors created a substantial risk of a miscarriage of justice. *Commonwealth v. Curran*, 488 Mass. 792, 794 (2021); *Commonwealth v. Chou*, 433 Mass. 229, 238 (2001) (employing substantial risk standard to unpreserved facial challenge). Such a risk exists if the Court "[has] a serious doubt whether the result of the trial might have been different had the error not been made.'" *Commonwealth v. Johnson*, 102 Mass. App. Ct. 195, 202 (2023).

C. The pre-*Bruen* resident licensing regime, G.L. c. 140, § 131(d), violated the Second and Fourteenth Amendments on its face because it gave the licensing authority impermissible discretion.

The criminalization of possessing a firearm without a license under G. L. c. 269, § 10(a) depends on G. L. c. 140, § 131, which is the "first-line measure" in the Commonwealth's firearms regulatory scheme. *See Ruggiero v. Police Comm'r of Boston*, 18 Mass. App. Ct. 256, 258-259 (1984); *Commonwealth v. Guardado*, 491 Mass. 666, 689-690 (2023) ("[T]he absence of a license is necessary to render a defendant's possession of a firearm 'punishable.' It follows, then, that the failure to obtain a license is a 'fact necessary to constitute' the crime of unlawful

possession of a firearm."). Therefore, someone exercising their Second Amendment right to carry a firearm must have a license or be exempt from this requirement. *See Chardin v. Police Comm'r of Boston*, 465 Mass. 314, 315 (2013).

At the time of Mr. Thomson's arrest, the resident firearms licensing regime bestowed the licensing authority with unlimited discretion whether to grant a license. *See* G. L. c. 140, § 131(d). It provided, in part, that the licensing authority:

> "may issue [a license] if it appears that the applicant is not a prohibited person . . . and that the applicant has good reason to fear injury or for any other reason, including the carrying of firearms for use in sport or target practice only"

G. L. c. 140, § 131(d) (emphasis added).

Approximately six months after Mr. Thomson's arraignment, the Supreme Court held that right to bear arms protected by the Second Amendment extends outside the home, and the government may only restrict this right if the regulation survives a two-step analysis. *See New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 32-33 (2022).

In *Bruen*, the Court confronted New York's "proper-cause" licensing regime that required applicants to "convince a 'licensing officer'" that "'proper cause exist[ed]'" to issue a license. 597 U.S. at 12. The Court announced and applied a new two-step analysis to determine whether a firearm regulation is constitutional: "[1] when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively

protects that conduct. [2] To justify its regulation . . . the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation." *Id.* at 17. The second step examines "whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified," i.e. the "'how and why' respectively, must be analogous." *Worth v. Jacobson*, 108 F.4th 677, 692 (8th Cir. 2024) (cert. pending), quoting *Bruen*, 597 U.S. at 29; *accord Rahimi*, 602 U.S. 680, 681 (2024) (regulation must be "relevantly similar" to historical tradition of firearm regulation). Importantly, "[h]istory, not policy, is the proper guide" to assessing the validity of the restriction. *Rahimi*, 602 U.S. at 717 (Kavanaugh, J., concurring).

The Court struck down New York's statute, finding no historical analogue to New York's "proper cause" requirement, concluding that this requirement "violate[ed] the Fourteenth Amendment in that it prevents law-biding citizens with ordinary self-defense needs from exercising their right to keep and bear arms." *Id.* at 71. The Court listed six states with "may issue" regimes like the impermissible New York regulation, which included Massachusetts. *Id.* at 13-15; *see* 79 (Kavanaugh, J., concurring) (declaring Court's ruling addressed "only the unusual discretionary licensing regimes, known as 'may-issue' regimes"). In contrast, to "may issue" regimes that rely on undefined judgment and opinion, "shall issue" regimes provide "narrow, objective, and definite standards" for licensure. *Id*. at 38 n.9.

In response, the Massachusetts Legislature amended G. L. c. 140, §§ 131 & 131F, effective August 10, 2022, by removing the "may issue" language and replacing it with "shall issue," thus eliminating the unconstitutional unfettered discretion of the licensing authority. *See* G. L. c. 140, § 131, as amended through St. 2022, c. 175, §§ 4-17A, effective Aug. 10, 2022; G. L. c. 140, § 131F, as amended through St. 2022, c. 175, §§ 17B-22; *Donnell*, at *13-15 (quoting state representative's comment on licensing changes in the "wake of *Bruen*, which we did to conform with that decision").

Massachusetts must allow people to exercise their Second Amendment "right to carrying handguns publicly for their self-defense," and only subject to regulations with historical analogues. *Bruen*, 597 U.S. at 8. Section 131(d) does not pass muster under the *Bruen* two-step analysis.

i. The Second Amendment presumptively protects Mr. Thomson's conduct.

In relevant part, the Second Amendment states that "the right of the people to keep and bear Arms, shall not be infringed." The Second Amendment did not "create" this right, but rather codified the inherent right of an individual to bear arms. *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008). The Commonwealth may not infringe upon it unless certain criteria are met. See *Bruen*, 597 U.S. at 17-18; *McDonald v. The City of Chicago*, 561 U.S. 742, 791 (2010) (Second Amendment right "fully applicable" to states through Due Process clause of the Fourteenth Amendment); *accord Commonwealth v. Guardado*, 491

Mass. at 689 (recognizing same, specifically with right to bear arms outside one's home).

The first step in the *Bruen* analysis requires the Court to determine whether the Second Amendment protects the conduct at issue. *See Bruen*, 597 U.S. at 24. If it does, then the Constitution presumptively protects the conduct. *Id.* at 10.

In relevant part, the Second Amendment states that "the right of the people to keep and bear Arms, shall not be infringed." Mr. Thomson is among "the people" that the Second Amendment applies. There is "strong presumption that the Second Amendment right is exercised individually and belongs to all Americans." *See Heller*, 554 U.S. at 575. Indeed, the Second Amendment did not "create" this right, but rather codified the inherent right of an individual and prohibits the government from infringing upon it. *Id.* at 592. His age does not exclude him from Second Amendment protections. Where eighteen- to twenty-year-olds are included in "'the people' for other constitutional rights such as the right to vote, freedom of speech, peaceable assembly, government petitions, and the right against unreasonable government searches and seizures," it would be nonsensical to import "an inconsistent reading of 'the people'" such that Second Amendment would be an outlier in the bill of rights guarantees. *See Lara*, 91 F.4th at 131. Indeed, where this term appears elsewhere in the Constitution, it" unambiguously refers to all members of the political community, not an unspecified subset." *Heller*, 554 U.S. at 580.

Further, age restrictions appear in other amendments but not the Second, supporting the view that eighteen- to twenty-

year-olds are a part of the people to whom the Second Amendment applies. *Contra* U.S. Cont. art. I, §§ 2 & 3 (setting minimum age (older than twenty-five and thirty, respectively) to serve in the House of Representatives and the Senate); art. II § 1 (setting minimum age of thirty-five to serve as President). Thus, "the Founders considered age and knew how to set age requirements but placed no such restrictions on rights, including those protected by the Second Amendment." *Worth*, 108 F.4th at 692, quoting *Hirschfeld v. BATFE*, 5 F.4th 407, 421, *vacated as moot*, 14 F.4th 322 (4th Cir. 2021) (additional citation omitted).

The Second Amendment encompasses Mr. Thomson's possession of a firearm for self-defense outside of the home. *See id.* at 10; *Guardado*, 491 Mass. at 690 (recognizing same). Since Mr. Thomson's conduct falls within Second Amendment protections, the Commonwealth must establish a historical analogue.

ii. The Commonwealth cannot meet its burden to demonstrate a historical analogue to the discretionary provisions in §131(d).

For §131(d) to survive a constitutional challenge, the second step of the *Bruen* analysis requires the Commonwealth to demonstrate a historical analogue to the licensing regime's discretionary power. *See Bruen*, 597 U.S. at 17. It cannot. The Supreme Court held that this very type of discretionary licensing regime is presumptively invalid. *See id.* at 13-15; 38 n.9 (Kavanaugh, J., concurring). The SJC recently held that the analogous "may-issue" pre-*Bruen* nonresident licensing regime, §131F, was facially invalid after the Commonwealth failed to

demonstrate that the discretion afforded to the licensing authority was "consistent with this Nation's historical tradition of firearm regulation." *See Donnell*, at *16-18, quoting *Bruen*, 597 U.S. at 17. The court explained:

> "These provisions place §131F squarely into the category of firearm restrictions that the Supreme Court rejected in *Bruen*, 597 U.S. at 13-15, 38 n.9. Licensing schemes that confer on officials the unfettered discretion to deny licenses even where the applicant is otherwise qualified do no find support in this nation's history of firearm regulations and cannot be upheld. *Id*."

Donnell, at *18. Section 131(d) fares no better: the Commonwealth cannot demonstrate the requisite historical analogue, and the broad discretion renders it facially unconstitutional. *See id*. This is precisely the type of licensing scheme that *Bruen* declared unconstitutional because it "confer(s) on officials the unfettered discretion to deny licenses even where the applicant is otherwise qualified[.]" *Id.* The same result is inevitable: the regime was unconstitutional.

D. Section 131(d)'s impermissible discretionary provisions cannot be severed.

When confronted with a regulation containing unconstitutional provisions, the Court will "hold the remainder [of the statute] constitutional and valid, if the parts are capable of separation and are not so entwined that the Legislature could

not have intended that the part otherwise valid should take effect without the invalid part." *Commonwealth v. Mattis*, 493 Mass. 216, 235 (2024) (citations omitted). Severance is implausible.

The entirety of G. L. §131(d) depends on the unconstitutional verb phrase "may issue." If the Court severed this phrase, the licensing official would have no power to issue licenses at all—stripping the entire statute of any effect. It is illogical that the Legislature would enact a licensing scheme in which no licenses would be issued. *See Commonwealth v. Colon-Cruz*, 393 Mass. 150, 172 n.25 (1984) (imposition of death penalty unconstitutional thus provisions related to methods of execution not severable because dependent on imposition). The unconstitutional discretionary portions of §131(d) are "so entwined with the otherwise valid provisions of [the regime] that the Legislature could not have intended that [§131(d)] would survive without [them]." *See Commonwealth v. Cole*, 468 Mass. 294, 308 (2014).

Furthermore, the Legislature's post-*Bruen* statutory amendments to §131(d) discussed above struck "may issue," replaced it with "shall issue," removing any language imparting unmeasured discretion to the licensing authority. *See* G. L. c. 140, § 131, as amended through St. 2022, c. 175, §§ 4-17A, effective Aug. 10, 2022. This implied repeal supports the prior version's facial unconstitutionality. *See Commonwealth v. Dotson*, 462 Mass. 96, 100 (2012) ("[T]o the extent that amended sections of a statute are inconsistent with the earlier provisions, there has been an implied repeal of the latter.").

As discussed above, in *Donnell*, the SJC declared the entirety of §131F invalid, which presented similar analogous language in a similar statutory construct. *See id*. at * 20-21 (discretionary authority "was an essential factor of [§131F]. . . . [it] is not capable of separation because the discretionary language was so entwined with the licensing procedure that its removal would not result in a constitutionally enforceable law").

The prohibited persons provision is likewise dependent on the unconstitutional language and does not survive. Indeed, §131F also contained a prohibited persons provision, which was not severed – 131F was declared unconstitutional. *See id.*; §131F (i-x) (listing prohibited persons); *see also Commonwealth v. Ramirez*, 479 Mass. 331, 342 (2018) (striking down broad prohibition on stun guns as facially invalid and declining to limit ban to class of prohibited persons even if that was legislative intent). Accordingly, the Court cannot save the remainder of §131(d) "without engaging in the 'quintessentially legislative work' of rewriting State law." *See Ramirez*, 479 Mass. at 342.

Where Mr. Thomson was faced with an unconstitutional licensing law, he was entitled to "ignore it and engage with impunity in the exercise of the right . . . for which the law purports to require a license." *Shuttlesworth*, 394 U.S. at 151. Mr. Thomson's conviction under G. L. C. 269, §10(a) cannot stand because depends on the facially unconstitutional licensing statute in §131(d). The prosecution resulted in more than a substantial risk of a miscarriage of justice. This court should vacate Mr. Thomson's conviction. *See Commonwealth v. Cole*, 468

Mass. 294, 308-309 (2014) (vacating sentences imposed pursuant to unconstitutional statute).

II. The judge's jury instruction that anyone under twenty-one is ineligible for a firearms license was based on an unconstitutional provision prohibiting twenty-year-olds from obtaining a firearms license.

Mr. Thomson's conviction should be vacated for the reasons discussed above. If the Court disagrees and upholds §131(d), Mr. Thomson's conviction should be vacated for another reason: it is depended on an unconstitutional licensing provision that prohibits twenty-year-olds from obtaining firearms licenses.

A. G.L. c. 140, § 131(d)(iv), the Massachusetts prohibition against eighteen- to twenty-year-olds from obtaining firearms licenses, is unconstitutional on its face.

At trial, the Commonwealth was required to prove that Mr. Thomson did not have a license to carry to prove that he violated G. L. c. 269, § 10(a). *See Guardado*, 491 Mass. at 690. To prove this element, the Commonwealth relied solely upon G. L. c. 140 § 131(d)(iv), which provided that a firearms license may issue if it appears that the applicant is not a prohibited person, which included "a person who . . . is younger than 21 years of age at the time of the application." The only evidence of lack of licensure came from Trooper De Castro's testimony about Mr. Thomson's stated birthdate, which meant he was twenty years old at the time of the incident. Tr. I-129-130. The judge instructed the jury four times that "under Massachusetts law, a person

under 21 years of age is ineligible for a license to carry a firearm." Tr. II- 40-42; 51-52.

As discussed *supra*, Argument I.C, to assess whether a restriction on the right to bear arms is constitutional under the Second Amendment, this Court must determine (1) whether the conduct falls within the Second Amendment and (2) whether the government has met its burden to show that the restriction is "consistent with the Nation's historical tradition of firearm regulation." *Bruen*, 597 U.S. at 24.

Since Mr. Thomson's conduct falls within the Second Amendment's ambit, *see supra*, Argument I.C.i, "the Constitution presumptively protects" it. *See Bruen*, 597 U.S. at 24. Therefore, for the age restriction to pass constitutional muster, the Commonwealth has the burden to demonstrate that prohibiting twenty-year-olds from possessing firearms is "consistent with this Nation's historical tradition of firearm regulation," as discussed above. *See id.* at 17.

The Commonwealth will not meet its burden. There have been several challenges to similar age restrictions where the government could not identify a relevantly similar historical analogue. *See, e.g.*, *Reese v. Bureau of Alcohol, Tabacco, Firearms, and Explosives*, No. 23-30033 (5th Cir. January 30, 2025) (regulation prohibiting eighteen- to twenty-year-olds from purchasing handguns unconstitutional); *Worth*, 108 F.4th at 698 (striking down a state law limiting permits for public carrying of handguns to people twenty-one or older, to the extent it applies to eighteen- to twenty- year-old Minnesotans); *Lara*, 91 F.4th at 127 & 139-140 (striking down provision prohibiting eighteen- to

twenty-year-olds from carrying firearm in public in an emergency).[4] Mr. Thomson is not obligated to "sift the historical materials for evidence to sustain" this age restriction, that is the Commonwealth's burden. *See Bruen*, 597 U.S. at 60.

Massachusetts may constitutionally regulate firearms, but it cannot do so in a way that subjugates the Second Amendment "to a second-class right, subject to an entirely different body of rules than the other Bill of Rights Guarantees." *See Bruen*, 597 U.S. at 70, quoting *McDonald*, 561 U.S. at 780. Absent a historical analogue, this regulation does exactly that to twenty-year-olds like Mr. Thomson. This restriction is unconstitutional.

B. The Commonwealth relied solely upon Mr. Thomson's age of twenty to satisfy its burden of proof that Mr. Thomson did not have a firearms license and therefore his conviction must be reversed.

The Commonwealth relied solely on §131(d)(iv) to fulfill its burden of proof that Mr. Thomson did not have a firearms license. As discussed *supra*, Argument I, faced with this unconstitutional provision, Mr. Thomson was entitled to "ignore it and engage with impunity in the exercise of the right . . . for which the law purports to require a license." *Shuttlesworth*, 394 U.S. at 151. Absent this unconstitutional prohibition, the

[4] *See also Escher v. Noble*, 1:25-cv-10389 (D. Mass Feb. 14, 2025) (seeking, in part, declaration that ban on eighteen- to- twenty-year-old adults from possessing and carrying firearms contained, inter alia, in G.L. c. 140, § 131 (d) is unconstitutional). *Escher* challenges the identical restriction disputed here as appears in the current version of the statute. *See id*.

Commonwealth could not have met its burden of proof with evidence it adduced at trial. Since his conviction rests upon an unconstitutional statutory provision, it must be reversed.

CONCLUSION

For the reasons stated above, this Court should vacate Mr. Thomson's convictions. If the Court finds that §131(d) was unconstitutional at the time of Mr. Thomson's prosecution, it should order an entry of acquittal. If it does not but agrees that the age restriction is unconstitutional insofar as twenty-year-olds, it should remand for a new trial.

Respectfully Submitted,
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By his attorney,

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UNITED STATES CONSTITUTION

Article I, § 2

The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen….

Article I, § 3

…

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen….

Article II, § 1

…

No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.
….

Second Amendment

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

Fourteenth Amendment

Section 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

…

MASSACHUSETTS GENERAL LAWS

Chapter 140, §131, as amended through St. 2018, c. 123, §§11-12, and St. 2014, c. 284, §§46-57 (eff. Jan. 1, 2021 – Aug. 9, 2022)

The issuance and possession of a license to carry firearms shall be subject to the following conditions and restrictions:

. . .

(d) A person residing or having a place of business within the jurisdiction of the licensing authority or any law enforcement officer employed by the licensing authority or any person residing in an area of exclusive federal jurisdiction located within a city or town may submit to the licensing authority or the colonel of state police an application for a license to carry firearms, or renewal of the same, which the licensing authority or the colonel may issue if it appears that the applicant is not a prohibited person as set forth in this section to be issued a license and that the applicant has good reason to fear injury to the applicant or the applicant's property or for any other reason, including the carrying of firearms for use in sport or target practice only, subject to the restrictions expressed or authorized under this section.

A prohibited person shall be a person who:

(i) has, in a court of the commonwealth, been convicted or adjudicated a youthful offender or delinquent child, both as defined
insection 52 of chapter 119, for the commission of (A) a felony; (B) a misdemeanor punishable by imprisonment for more than 2 years; (C) a violent crime as defined in section 121; (D) a violation of any law regulating the use, possession, ownership, transfer, purchase, sale, lease, rental, receipt or transportation of weapons or ammunition for which a term of imprisonment may be imposed; (E) a violation of any law regulating the use, possession or sale of a controlled substance as defined in section 1
of chapter 94C including, but not limited to, a violation of said chapter 94C; or (F) a misdemeanor crime of domestic violence as defined in18 U.S.C. 921(a)(33);

(ii) has, in any other state or federal jurisdiction, been convicted or adjudicated a youthful offender or delinquent child for the commission of (A) a felony; (B) a misdemeanor punishable by imprisonment for more than 2 years; (C) a violent crime as defined in section 121; (D) a violation of any law regulating the use, possession, ownership, transfer, purchase, sale, lease, rental, receipt or transportation of weapons or ammunition for which a term of imprisonment may be imposed; (E) a violation of any law regulating the use, possession or sale of a controlled substance as defined in said section 1 of said chapter 94C including, but not limited to, a violation of said chapter 94C; or (F) a misdemeanor crime of domestic violence as defined in 18 U.S.C. 921(a)(33);

(iii) is or has been (A) committed to a hospital or institution for mental illness, alcohol or substance abuse, except a commitment pursuant to sections 35 or36C of chapter 123, unless after 5 years from the date of the confinement, the applicant submits
with the application an affidavit of a licensed physician or clinical psychologist attesting that such physician or psychologist
is familiar with the applicant's mental illness, alcohol or substance abuse and that in the physician's or psychologist's opinion,

the applicant is not disabled by a mental illness, alcohol or substance abuse in a manner that shall prevent the applicant from
possessing a firearm, rifle or shotgun; (B) committed by a court order to a hospital or institution for mental illness, unless the applicant was granted a petition for relief of the court order pursuant to said section 36C of said chapter 123 and submits a copy
of the court order with the application; (C) subject to an order of the probate court appointing a guardian or conservator for a incapacitated person on the grounds that the applicant lacks the mental capacity to contract or manage the applicant's affairs, unless the applicant was granted a petition for relief of the order of the probate court pursuant to section 56C of chapter 215 and submits a copy of the order of the probate court with the application; or (D) found to be a person with an alcohol use disorder or
substance use disorder or both and committed pursuant to said section 35 of said chapter 123, unless the applicant was granted a petition for relief of the court order pursuant to said section 35 and submits a copy of the court order with the application;
(iv) is younger than 21 years of age at the time of the application;

(v) is an alien who does not maintain lawful permanent residency;

(vi) is currently subject to: (A) an order for suspension or surrender issued pursuant tosections 3B or3C of chapter 209A or a similar order issued by another jurisdiction; (B) a permanent or temporary protection order issued pursuant to said chapter 209A or a similar order issued by another jurisdiction, including any order described in18 U.S.C. 922(g)(8); or (C) an extreme risk protection order issued pursuant tosections 131R to131X, inclusive, or a similar order issued by another jurisdiction;

(vii) is currently the subject of an outstanding arrest warrant in any state or federal jurisdiction;

(viii) has been discharged from the armed forces of the United States under dishonorable conditions;

(ix) is a fugitive from justice; or

(x) having been a citizen of the United States, has renounced that citizenship.

The licensing authority may deny the application or renewal of a license to carry, or suspend or revoke a license issued under this
section if, in a reasonable exercise of discretion, the licensing authority determines that the applicant or licensee is unsuitable to be issued or to continue to hold a license to carry. A determination of unsuitability shall be based on: (i) reliable and credible
information that the applicant or licensee has exhibited or engaged in behavior that suggests that, if issued a license, the applicant
or licensee may create a risk to public safety; or (ii) existing factors that suggest that, if issued a license, the applicant or licensee
may create a risk to public safety. Upon denial of an application or renewal of a license based on a determination of unsuitability, the licensing authority shall notify the applicant in writing setting forth the specific reasons for the determination in accordance
with paragraph (e). Upon revoking or suspending a license based on a determination of unsuitability, the licensing authority shall notify the holder of a license in writing setting forth the specific reasons for the determination in accordance with paragraph
(f). The determination of unsuitability shall be subject to judicial review under said paragraph (f).
…

Chapter 140, § 131(d), as amended through St. 2022, c. 175, §§ 4-17A, effective Aug. 10, 2022; G. L. c. 140, § 131F, as amended through St. 2022, c. 175, §§ 17B-22

The issuance and possession of a license to carry firearms shall be subject to the following conditions and restrictions:

(d) A person residing or having a place of business within the jurisdiction of the licensing authority or any law enforcement

officer employed by the licensing authority or any person residing in an area of exclusive federal jurisdiction located within a city or town may submit to the licensing authority or the colonel of state police an application for a license to carry firearms, or renewal of the same, which the licensing authority or the colonel shall issue if it appears that the applicant is neither a prohibited person nor determined to be unsuitable to be issued a license as set forth in this section, provided that upon an initial application for a license to carry firearms, the licensing authority shall conduct a personal interview with the applicant.

A prohibited person shall be a person who:
(i) has, in a court of the commonwealth, been convicted or adjudicated a youthful offender or delinquent child, both as defined in section 52 of chapter 119, for the commission of (A) a felony; (B) a misdemeanor punishable by imprisonment for more than 2 years; (C) a violent crime as defined in section 121; (D) a violation of any law regulating the use, possession, ownership, transfer, purchase, sale, lease, rental, receipt or transportation of weapons or ammunition for which a term of imprisonment may be imposed; (E) a violation of any law regulating the use, possession or sale of a controlled substance as defined in section 1 of chapter 94C including, but not limited to, a violation of said chapter 94C; or (F) a misdemeanor crime of domestic violence as defined in 18 U.S.C. 921(a)(33);
(ii) has, in any other state or federal jurisdiction, been convicted or adjudicated a youthful offender or delinquent child for the commission of (A) a felony; (B) a misdemeanor punishable by imprisonment for more than 2 years; (C) a violent crime as defined in section 121; (D) a violation of any law regulating the use, possession, ownership, transfer, purchase, sale, lease, rental, receipt or transportation of weapons or ammunition for which a term of imprisonment may be imposed; (E) a violation of any law regulating the use, possession or sale of a controlled substance as defined in said section 1 of said chapter 94C including, but not limited to, a violation of said chapter 94C; or (F) a misdemeanor crime of domestic violence as defined in 18 U.S.C. 921(a)(33);
(iii) is or has been (A) committed to a hospital or institution for mental illness, alcohol or substance abuse, except a commitment pursuant to sections 35 or 36C of chapter 123, unless after 5 years from the date of the confinement, the applicant submits with the application an affidavit of a licensed physician or clinical

psychologist attesting that such physician or psychologist is familiar with the applicant's mental illness, alcohol or substance abuse and that in the physician's or psychologist's opinion, the applicant is not disabled by a mental illness, alcohol or substance abuse in a manner that shall prevent the applicant from possessing a firearm, rifle or shotgun; (B) committed by a court order to a hospital or institution for mental illness, unless the applicant was granted a petition for relief of the court order pursuant to said section 36C of said chapter 123 and submits a copy of the court order with the application; (C) subject to an order of the probate court appointing a guardian or conservator for a incapacitated person on the grounds that the applicant lacks the mental capacity to contract or manage the applicant's affairs, unless the applicant was granted a petition for relief of the order of the probate court pursuant to section 56C of chapter 215 and submits a copy of the order of the probate court with the application; or (D) found to be a person with an alcohol use disorder or substance use disorder or both and committed pursuant to said section 35 of said chapter 123, unless the applicant was granted a petition for relief of the court order pursuant to said section 35 and submits a copy of the court order with the application;

(iv) is younger than 21 years of age at the time of the application;

(v) is an alien who does not maintain lawful permanent residency;

(vi) is currently subject to: (A) an order for suspension or surrender issued pursuant to sections 3B or 3C of chapter 209A or a similar order issued by another jurisdiction; (B) a permanent or temporary protection order issued pursuant to said chapter 209A or a similar order issued by another jurisdiction, including any order described in 18 U.S.C. 922(g)(8); (C) a permanent or temporary harassment prevention order issued pursuant to chapter 258E or a similar order issued by another jurisdiction; or (D) an extreme risk protection order issued pursuant to sections 131R to 131X, inclusive, or a similar order issued by another jurisdiction;

(vii) is currently the subject of an outstanding arrest warrant in any state or federal jurisdiction;

(viii) has been discharged from the armed forces of the United States under dishonorable conditions;

(ix) is a fugitive from justice; or

(x) having been a citizen of the United States, has renounced that citizenship.
The licensing authority shall deny the application or renewal of a license to carry, or suspend or revoke a license issued under this section if the applicant or licensee is unsuitable to be issued or to continue to hold a license to carry. A determination of unsuitability shall be based on reliable, articulable and credible information that the applicant or licensee has exhibited or engaged in behavior that suggests that, if issued a license, the applicant or licensee may create a risk to public safety or a risk of danger to self or others. Upon denial of an application or renewal of a license based on a determination of unsuitability, the licensing authority shall notify the applicant in writing setting forth the specific reasons for the determination in accordance with paragraph (e). Upon revoking or suspending a license based on a determination of unsuitability, the licensing authority shall notify the holder of a license in writing setting forth the specific reasons for the determination in accordance with paragraph (f). The determination of unsuitability shall be subject to judicial review under said paragraph (f).

Chapter 140, §131F, as amended through St. 2014, c. 284, §§60, 63 (eff. Jan. 1, 2021 – Aug. 9, 2022).

A temporary license to carry firearms or feeding devices or ammunition therefor, within the commonwealth, may be issued by the colonel of state police, or persons authorized by him, to a nonresident or any person not falling within the jurisdiction of a local licensing authority or to an alien that resides outside the commonwealth for purposes of firearms competition and subject to such terms and conditions as said colonel may deem proper; provided, however, that no license shall be issued to a person who:

(i) has, in any state or federal jurisdiction, been convicted or adjudicated a youthful offender or delinquent child for the commission of (A) a felony; (B) a misdemeanor punishable by imprisonment for more than 2 years; (C) a violent crime as defined in section 121; (D) a violation of any law regulating the use, possession, ownership, transfer, purchase, sale, lease, rental, receipt or transportation of weapons or ammunition for

which a term of imprisonment may be imposed; (E) a violation of any law regulating the use, possession or sale of a controlled substance as defined in section 1 of chapter 94C; or (F) a misdemeanor crime of domestic violence as defined in 18 U.S.C. 921(a)(33);
(ii) has been confined to any hospital or institution for mental illness, unless the applicant
submits with his application an affidavit of a registered physician attesting that such physician is familiar with the applicant's mental illness and that in such physician's opinion the applicant is not disabled by such an illness in a manner that should prevent such applicant from possessing a firearm;
(iii) is or has been under treatment for or confinement for drug addiction or habitual
drunkenness, unless such applicant is deemed to be cured of such condition by a licensed physician, and such applicant may make application for said license after the expiration of five years from the date of such confinement or treatment and upon presentment of an affidavit issued by such physician stating that such physician knows the applicant's history of treatment and that in such physician's opinion the applicant is deemed cured;
(iv) is currently subject to: (A) an order for suspension or surrender issued pursuant to section 3B or 3C of chapter 209A or a similar order issued by another jurisdiction; or (B) a permanent or temporary protection order issued pursuant to chapter 209A or a similar order issued by another jurisdiction;
(v) is currently the subject of an outstanding arrest warrant in any state or federal jurisdiction;
(vi) has been discharged from the armed forces of the United States under dishonorable
conditions;
(vii) is a fugitive from justice;
(viii) having been a citizen of the United States, has renounced that citizenship;
(ix) not being a citizen or national of the United States, is illegally or unlawfully in the
United States; or
(x) not being a citizen or national of the United States, has been admitted to the United

States under a nonimmigrant visa as defined in 8 U.S.C. 1101(a)(26), unless the person has been admitted to the United States for lawful hunting or sporting purposes or is in possession of a hunting license or permit lawfully issued in the United States or another
exception set forth in 18 U.S.C. 922(y)(2) applies.
Such license shall be valid for a period of one year but the colonel may renew such license, if in his discretion, such renewal is necessary.
The colonel may also issue such license, subject to such terms and conditions as he deems proper, to any resident of the commonwealth for the purposes of sports competition.

A temporary license issued pursuant to this section shall be clearly marked "Temporary License to Carry Firearms" and shall not be used to purchase firearms in the commonwealth as provided in section 131E. A large capacity firearm and a large capacity feeding device therefor may be carried if the person has been issued a license. The colonel may permit a licensee to possess a large capacity rifle or shotgun or both; provided, however, that this entitlement shall be clearly indicated on the license. The fee for an application for the license shall be $100, which shall be payable to the licensing authority and shall not be prorated or refunded in case of revocation or denial. The licensing authority shall retain $25 of the fee; $50 of the fee shall be deposited into the general fund of the commonwealth; and $25 of the fee shall be deposited in the Firearms Fingerprint Identity Verification Trust Fund. A license issued under the provisions of this section to a non-resident who is in the employ of a bank,
public utility corporation, or a firm engaged in the business of transferring monies, or business of similar nature, or a firm licensed as a private detective under the provisions of chapter one hundred and forty-seven, and whose application is endorsed by his employer, or who is a member of the armed services and is stationed within the territorial boundaries of the commonwealth and has the written consent of his commanding officer, may be issued for any term not to exceed two years, and said licenses shall expire in accordance with the provisions of section one hundred and thirty-one.

A license, otherwise in accordance with provisions of this section, may be issued to a nonresident employee, whose application is endorsed by his employer, of a federally licensed Massachusetts manufacturer of machine guns to possess within the commonwealth a machine gun for the purpose of transporting or testing relative to the manufacture of machine guns, and the license shall be marked "temporary license to possess a machine gun" and may be issued for any term not to exceed two years and shall expire in accordance with the provisions of section one hundred and thirty-one.

Chapter 269, §10(a)

Whoever, except as provided or exempted by statute, knowingly has in his possession; or knowingly has under his control in a vehicle; a firearm, loaded or unloaded, as defined in section one hundred and twenty-one of chapter one hundred and forty without either:
(1) being present in or on his residence or place of business; or
(2) having in effect a license to carry firearms issued under section one hundred and thirty-one of chapter one hundred and forty; or
(3) having in effect a license to carry firearms issued under section one hundred and thirty-one F of chapter one hundred and forty; or
(4) having complied with the provisions of sections one hundred and twenty-nine C and one hundred and thirty-one G of chapter one hundred and forty; or
(5) having complied as to possession of an air rifle or BB gun with the requirements imposed by section twelve B; and whoever knowingly has in his possession; or knowingly has under control in a vehicle; a rifle or shotgun, loaded or unloaded, without either:
(1) being present in or on his residence or place of business; or
(2) having in effect a license to carry firearms issued under section one hundred and thirty-one of chapter one hundred and forty; or
(3) having in effect a license to carry firearms issued under section one hundred and thirty-one F of chapter one hundred and forty; or

(4) having in effect a firearms identification card issued under section one hundred and twenty-nine B of chapter one hundred and forty; or
(5) having complied with the requirements imposed by section one hundred and twenty-nine C of chapter one hundred and forty upon ownership or possession of rifles and shotguns; or
(6) having complied as to possession of an air rifle or BB gun with the requirements imposed by section twelve B; shall be punished by imprisonment in the state prison for not less than two and one-half years nor more than five years, or for not less than 18 months nor more than two and one-half years in a jail or house of correction. The sentence imposed on such person shall not be reduced to less than 18 months, nor suspended, nor shall any person convicted under this subsection be eligible for probation, parole, work release, or furlough or receive any deduction from his sentence for good conduct until he shall have served 18 months of such sentence; provided, however, that the commissioner of correction may on the recommendation of the warden, superintendent, or other person in charge of a correctional institution, grant to an offender committed under this subsection a temporary release in the custody of an officer of such institution for the following purposes only: to attend the funeral of a relative; to visit a critically ill relative; or to obtain emergency medical or psychiatric service unavailable at said institution. Prosecutions commenced under this subsection shall neither be continued without a finding nor placed on file.

No person having in effect a license to carry firearms for any purpose, issued under section one hundred and thirty-one or section one hundred and thirty-one F of chapter one hundred and forty shall be deemed to be in violation of this section.
The provisions of section eighty-seven of chapter two hundred and seventy-six shall not apply to any person 18 years of age or older, charged with a violation of this subsection, or to any child between ages fourteen and 18 so charged, if the court is of the opinion that the interests of the public require that he should be tried as an adult for such offense instead of being dealt with as a child.

The provisions of this subsection shall not affect the licensing requirements of section one hundred and twenty-nine C of chapter one hundred and forty which require every person not

otherwise duly licensed or exempted to have been issued a firearms identification card in order to possess a firearm, rifle or shotgun in his residence or place of business.

Chapter 276, § 100C

In any criminal case wherein the defendant has been found not guilty by the court or jury, or a no bill has been returned by the grand jury, or a finding of no probable cause has been made by the court, the commissioner of probation shall seal said court appearance and disposition recorded in his files and the clerk and the probation officers of the courts in which the proceedings occurred or were initiated shall likewise seal the records of the proceedings in their files. The provisions of this paragraph shall not apply if the defendant makes a written request to the commissioner not to seal the records of the proceedings.

In any criminal case wherein a nolle prosequi has been entered, or a dismissal has been entered by the court, and it appears to the court that substantial justice would best be served, the court shall direct the clerk to seal the records of the proceedings in his files. The clerk shall forthwith notify the commissioner of probation and the probation officer of the courts in which the proceedings occurred or were initiated who shall likewise seal the records of the proceedings in their files.

Such sealed records shall not operate to disqualify a person in any examination, appointment or application for public employment in the service of the commonwealth or of any political subdivision thereof.

An application used to screen applicants for employment, housing or an occupational or professional license which seeks information concerning prior arrests or convictions of the applicant shall include in addition to the statement required under section one hundred A the following statement: "An applicant for employment, housing or an occupational or professional license with a sealed record on file with the commissioner of probation may answer 'no record' with respect to an inquiry herein relative to prior arrests or criminal court

appearances." The attorney general may enforce the provisions of this section by a suit in equity commenced in the superior court.

The commissioner or the clerk of courts in any district or superior court or the Boston municipal court, in response to inquiries by authorized persons other than any law enforcement agency or any court, shall in the case of a sealed record report that no record exists. After a finding or verdict of guilty on a subsequent offense such sealed record shall be made available to the probation officer and the same, with the exception of a not guilty, a no bill, or a no probable cause, shall be made available to the court.

NOTICE: All slip opinions and orders are subject to formal revision and are superseded by the advance sheets and bound volumes of the Official Reports. If you find a typographical error or other formal error, please notify the Reporter of Decisions, Supreme Judicial Court, John Adams Courthouse, 1 Pemberton Square, Suite 2500, Boston, MA, 02108-1750; (617) 557-1030; SJCReporter@sjc.state.ma.us

SJC-13561

COMMONWEALTH vs. DEAN F. DONNELL, JR.

Middlesex. September 9, 2024. - March 11, 2025.

Present: Budd, C.J., Gaziano, Kafker, Wendlandt, Georges, & Wolohojian, JJ.

Firearms. License. Constitutional Law, Right to bear arms, Severability. Statute, Construction, Severability. Practice, Criminal, Dismissal.

Complaint received and sworn to in the Lowell Division of the District Court Department on July 25, 2022.

A motion to dismiss was heard by John F. Coffey, J., and a motion for reconsideration was considered by him.

The Supreme Judicial Court granted an application for direct appellate review.

Ryan J. Rall, Assistant District Attorney, for the Commonwealth.

Patrick Levin, Committee for Public Counsel Services, for the defendant.

The following submitted briefs for amici curiae:

Nicholas M. Berg, of Illinois, Jason P. Roskom, Thanithia Billings, & Katherine D. Kearns for Giffords Law Center to Prevent Gun Violence & another.

Jason Gerhard, pro se.

C.D. Michel & Konstadinos T. Moros, of California, & Jason A. Guida for California Rifle & Pistol Association, Incorporated, & others.

Erin M. Erhardt, of Colorado, Joseph G.S. Greenlee, of Idaho, Adam Kraut, of Pennsylvania, & Edward F. George, Jr., for National Rifle Association of America & another.

John Parker Sweeney, of New York, James W. Porter, III, & William Chadwick Lamar, Jr., of Alabama, James M. Campbell, & Christopher R. Howe for Gun Owners' Action League, Inc.

Jay Edward Simkin, pro se.

Andrea Joy Campbell, Attorney General, Carlos Cousins, Grace Gohlke, & Nicole Nixon, Assistant Attorneys General, for the Attorney General.

John M. Formella, New Hampshire Attorney General, Anthony J. Galdieri, New Hampshire Solicitor General, & Brandon F. Chase, Assistant New Hampshire Attorney General, for the State of New Hampshire.

Joshua M. Daniels & Lisa J. Steele for Massachusetts Association of Criminal Defense Lawyers.

James Ostrowski, of New York, & Dan Hynes for New Hampshire Firearms Coalition, Inc., & another.

Clark M. Neily, III, & Christopher D. Barnewolt, of the District of Columbia, & Kevin J. Powers for Cato Institute.

GAZIANO, J. The defendant is a New Hampshire resident. On November 8, 2021, he was arrested in Massachusetts for operating a motor vehicle while under the influence of alcohol following a collision on Interstate 495 in Lowell. During a search of the vehicle's passenger compartment, a State police trooper found a handgun and ammunition stored inside a duffel bag. Lacking a Massachusetts nonresident firearm license, the defendant was charged with unlawful possession of a firearm in violation of G. L. c. 269, § 10 (a) (§ 10 [a]).

In August 2022, the defendant moved to dismiss the unlawful possession charge arguing, inter alia, that the nonresident

licensing scheme violated his rights under the Second Amendment to the United States Constitution. In his motion, the defendant relied on the United States Supreme Court's then-recently decided New York State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1 (2022) (Bruen). The Bruen decision called into question the discretionary "may issue" language that appeared in the Commonwealth's then-existing nonresident firearm licensing scheme. G. L. c. 140, § 131F (§ 131F), as amended through St. 2014, c. 284, §§ 60, 63.

A judge in the District Court allowed the defendant's motion, concluding that a law-abiding citizen exercising his constitutional right to carry a firearm for self-defense cannot be charged with unlawful possession of a firearm while traveling through the Commonwealth. In allowing the motion, the judge found that § 10 (a) was unconstitutional as applied to the defendant. After the Commonwealth appealed, we granted its application for direct appellate review.

In this case, along with Commonwealth v. Marquis, 495 Mass. (2025), also decided today, we consider the constitutionality of the statutory scheme under which a nonresident of the Commonwealth may be charged with unlawful possession of a firearm absent a temporary license. See G. L. c. 269, § 10 (a); G. L. c. 140, § 131F. Our opinion in Marquis examines the updated version of the licensing law enacted on

August 10, 2022. See St. 2022, c. 175, §§ 17B-22 (effective Aug. 10, 2022). Here, we examine the prior "may issue" version of § 131F in effect at the time of the defendant's arrest. For the reasons discussed below, we hold that the Commonwealth's prior nonresident licensing scheme violates the Second Amendment under the Bruen decision. Accordingly, we affirm the dismissal of the § 10 (a) charge against the defendant.[1]

Background. 1. Facts. We recite the relevant facts from the application for criminal complaint. See Commonwealth v. Ilya I., 470 Mass. 625, 626 (2015). At approximately 2:15 A.M. on November 8, 2021, two State police troopers, Colin DeMagistris and Byron Ramirez, responded to a report of a single-vehicle collision on Interstate 495 North near the Lowell Connector. Upon their arrival, the troopers encountered the

[1] We acknowledge the amicus briefs submitted in support of the defendant by New Hampshire State Representative Jason Gerhard; the National Rifle Association of America and Second Amendment Foundation; Gun Owners' Action League, Inc.; Jay Edward Simkin; the State of New Hampshire; the Massachusetts Association of Criminal Defense Lawyers; New Hampshire Firearms Coalition, Inc., and New Hampshire State Representative J.R. Hoell; the Cato Institute; and California Rifle & Pistol Association, Incorporated, Second Amendment Law Center, Inc., Gun Owners of America, Inc., Gun Owners of California, Inc., Gun Owners Foundation, Operation Blazing Sword-Pink Pistols, Second Amendment Defense and Education Coalition, Ltd., and Federal Firearms Licensees of Illinois, Inc. We further acknowledge the amicus briefs submitted in support of the Commonwealth by the Giffords Law Center to Prevent Gun Violence and the Brady Center to Prevent Gun Violence; and the Attorney General.

defendant sitting on the guardrail next to a white Ford Explorer. After speaking with the defendant, the troopers noticed a strong smell of alcohol on his person. The defendant agreed to perform a series of roadside field sobriety tests at the request of the troopers. Throughout these tests, the defendant displayed signs of intoxication. The troopers concluded that the defendant was under the influence of alcohol, placed him under arrest, and escorted him to the back of the troopers' cruiser.

Once the defendant was secured in the back of the cruiser, DeMagistris conducted an inventory search of the Explorer. A third State police trooper, Christopher Hardy, arrived on scene and assisted with the search. The troopers found several empty beer cans and liquor bottles, along with two twelve-gauge shotgun slugs in the cabin of the car. Inside of a duffel bag in the back of the car, Hardy found a black .40 caliber Smith and Wesson pistol with a single round in the magazine. Along with the firearm, the duffel bag contained a fifteen-round magazine, a twelve-round magazine, and a ten-round magazine, all of which were empty.

The defendant was transported to the State police barracks in Concord. After an observation period, the troopers administered a breath test to the defendant. The breath test result showed a blood alcohol content of 0.083 percent.

2. Procedural history. On August 16, 2022, the defendant was arraigned in the District Court on a complaint charging him with unlawful possession of a firearm in violation of § 10 (a).[2] That same day, the defendant filed a motion to dismiss, asserting that the complaint lacked probable cause and that the United States Supreme Court's decision in Bruen rendered § 10 (a) unconstitutional.[3] At a hearing on the defendant's

[2] Also in connection with the incident on Interstate 495, the defendant had been arraigned in November 2021 on an earlier criminal complaint charging him with five other firearms-related offenses: possession of a firearm without a firearm identification (FID) card, in violation of G. L. c. 269, § 10 (h); possession of ammunition without an FID card, in violation of G. L. c. 269, § 10 (h) (1); unlawful possession of a large capacity feeding device, in violation of G. L. c. 269, § 10 (m); improper storage of a firearm, in violation of G. L. c. 140, § 131L (a), (b); and carrying a firearm while intoxicated, in violation of G. L. c. 269, § 10H. The defendant was also charged in that same initial complaint with operating a motor vehicle while under the influence of intoxicating liquor, in violation of G. L. c. 90, § 24 (1) (a) (1). In December 2021, the Commonwealth entered a nolle prosequi on the § 10 (m) charge. The District Court dismissed the other firearms-related charges, the defendant was convicted of operating a motor vehicle while under the influence of intoxicating liquor after a jury trial, and he filed a notice of appeal. The instant appeal comes from the subsequent complaint, alleging a violation of § 10 (a) only, and neither the dismissal of the other charges nor the defendant's conviction is before us.

[3] Because we conclude that the version of § 131F applicable to the defendant was unconstitutional under the Second Amendment, we need not reach the defendant's arguments that the application for criminal complaint failed to establish probable cause with respect to the required elements of § 10 (a). Further, because we affirm the dismissal of the complaint on Second Amendment grounds, we do not reach the defendant's other constitutional arguments, including his contention that his

motion in October 2022, the judge rejected the defendant's probable cause argument but requested further briefing on the Bruen issue. After the parties filed additional briefing, a nonevidentiary hearing was held in March 2023.

On August 3, 2023, the judge issued a written decision allowing the defendant's motion to dismiss. The judge concluded that the Commonwealth had failed to meet its burden, at the second step of the Bruen analysis, of showing that § 10 (a) "is consistent with this Nation's historical tradition of firearm regulation." Bruen, 597 U.S. at 17. Apart from applying the two-part Bruen test, the judge reasoned that a nonresident cannot, consistent with the Second Amendment, be made a felon by exercising his constitutional right while traveling across State lines. Thus, the judge concluded that the statute was "unconstitutional as applied to this particularly situated defendant." After the Commonwealth timely appealed from the judge's rulings, we granted the Commonwealth's request for direct appellate review in February 2024.

Discussion. The issue presented in this case is whether the Commonwealth's "may issue" nonresident firearm licensing scheme in force at the time the defendant committed the unlawful

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constitutional rights to interstate travel and to equal protection were violated.

possession offense violates the Second Amendment.[4] On appeal, the Commonwealth argues that Bruen does not preclude it from imposing a licensing requirement on nonresidents. Certainly, the Commonwealth has the power to enforce firearm restrictions within its own borders that are consistent with the United States Constitution. See Marquis, 495 Mass. at . In this case, however, the statutory scheme under which the defendant was charged fails to pass the constitutional test as laid out in Bruen, 597 U.S. at 17.

Our discussion begins with a brief overview of the Second Amendment and the Supreme Court's decisions in District of Columbia v. Heller, 554 U.S. 570 (2008); McDonald v. Chicago, 561 U.S. 742 (2010); and Bruen, 597 U.S. 1. Then, we examine the language of the pre-amendment version of § 131F and the constitutionality of the Commonwealth's nonresident firearm licensing scheme as it existed at the time of the offense. Finally, we consider whether the impermissible portions of § 131F may be severed from the remainder of the law.

1. Second Amendment jurisprudence. The Second Amendment to the United States Constitution provides: "A well regulated

[4] Because the defendant never applied for a firearm license, the defendant does not have standing to bring an as-applied challenge. See Marquis, 495 Mass. at . Accordingly, we only consider the defendant's facial challenges to the licensing scheme.

Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." The contemporary interpretation of that language and the right it establishes began with Heller, 554 U.S. 570. In Heller, the Supreme Court held that the Second Amendment protected a person's right to bear arms for self-defense, irrespective of his service in a militia. Id. at 580-581 ("Reading the Second Amendment as protecting only the right to 'keep and bear Arms' in an organized militia therefore fits poorly with the operative clause's description of the holder of that right as 'the people'"). Heller concerned challenges to laws in the District of Columbia that required, among other restrictions, that firearms kept in the home be disassembled and unloaded. Id. at 575. The Court employed a historical analysis of the Second Amendment to conclude that the individual right to bear arms for self-defense extends to the home, where "the need for defense of self, family, and property is most acute." Id. at 628. The laws at issue were accordingly struck down as inconsistent with the Second Amendment. Id. at 636. The Heller Court also suggested that, at some point in the future, they would "expound upon the historical justifications for the exceptions we have mentioned if and when those exceptions come before us." Id. at 635.

Two years later, in McDonald, 561 U.S. 742, the Court considered whether the Second Amendment right to bear arms, as interpreted in Heller, applied to the States through the due process clause of the Fourteenth Amendment to the United States Constitution. A plurality concluded that it did, declaring that the "Second Amendment right is fully applicable to the States." Id. at 750. The McDonald Court further emphasized that self-defense was the "central component" of the Second Amendment right to bear arms. Id. at 787, quoting Heller, 554 U.S. at 599.

In November 2021, when the defendant in this case was arrested, Heller and McDonald were the controlling precedent under which we approached the Second Amendment and interpreted Massachusetts firearm restrictions. See Commonwealth v. Harris, 481 Mass. 767, 773 (2019) (rejecting facial challenge under Second Amendment to § 10 [a]); Commonwealth v. Cassidy, 479 Mass. 527, 539-540, cert. denied, 586 U.S. 876 (2018) (rejecting Second Amendment challenge to, inter alia, assault weapon statute, G. L. c. 140, § 131M); Commonwealth v. Johnson, 461 Mass. 44, 57-58 (2011) (upholding firearm licensing requirements under Heller and McDonald).

Then, in June 2022, the Supreme Court decided Bruen, approximately one month before the Commonwealth filed the instant complaint charging the defendant with unlawful

possession of a firearm. In Bruen, 597 U.S. at 70-71, the Court struck down the State of New York's firearm licensing scheme requiring applicants to show "proper cause" before they could be issued a permit to carry a firearm for self-defense purposes. The "proper cause" standard had been interpreted by New York courts to require the applicant to "demonstrate a special need for self-protection distinguishable from that of the general community" (citation omitted). Id. at 12. The Court noted that a licensing official's discretion to deny a license was bounded only by a loose requirement that the decision not be "arbitrary and capricious" (citation omitted). Id. at 13.

Expanding on the historical analysis from Heller and McDonald, the Court held that the Second Amendment right to bear arms for self-defense extends outside the home. Bruen, 597 U.S. at 32-33. The Court further explained that any restriction on that right will be upheld only if "the government . . . affirmatively prove[s] 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 19. The Court examined the history of American firearm regulations offered in support of New York's licensing scheme and found no historical analogue. Id. at 70-71. Accordingly, the licensing scheme was struck down as inconsistent with the Second Amendment. Id.

In rejecting the "proper cause" standard, the Supreme Court labeled New York's licensing scheme a "may issue" law "under which authorities have discretion to deny concealed-carry licenses even when the applicant satisfies the statutory criteria, usually because the applicant has not demonstrated cause or suitability for the . . . license." Id. at 14-15. The Court identified Massachusetts as one of only six States, along with the District of Columbia, that had a discretionary "may issue" firearm licensing regime and suggested that these regimes -- as "analogues to the 'proper cause' standard" -- contained the same or a similar constitutional defect. Id. at 13-15. In contrast to these "may issue" schemes, the Court explained that the criteria in a permissible "shall issue" firearm licensing scheme must be based on "narrow, objective, and definite standards" and not on the "appraisal of facts, the exercise of judgment, and the formation of an opinion" (citations omitted). Id. at 38 n.9.

Shortly after Bruen, and in light thereof, the Legislature amended § 131F. See St. 2022, c. 175, §§ 17B-22. See also Climate Conference and Two Bond Bills, State House News Service, July 21, 2022 (statement of Rep. Michael S. Day on "what we stripped out of our licensing laws in the wake of Bruen, which

we did to conform with that decision").[5] Of note, the provision that a nonresident license "may" be issued was changed to "shall" be issued. St. 2022, c. 175, § 18. Additionally, discretionary language providing for the issuance of a nonresident license "subject to such terms and conditions as said colonel [of the State police] may deem proper" was replaced with the condition that a license must be issued "if it appears the applicant is not a prohibited person and is not determined unsuitable to be issued a license as set forth in [G. L. c. 140, §] 131." St. 2022, c. 175, § 19.[6] Finally, in the provision governing renewal of a license, the phrase "if in [the colonel's] discretion" was shortened to "if," thereby providing

[5] We note that each of the remaining "may issue" States has responded similarly to Bruen by amending, or otherwise replacing, its discretionary firearm licensing scheme. See Cal. Penal Code § 26150, as amended through 2023 Cal. Stat. c. 249 (S.B. 2), § 10; Haw. Rev. Stat. §§ 134-2, 134-9(a), as amended by 2023 Haw. Sess. Laws c. 52 (S.B. 1230), §§ 4, 7; Md. Code Ann., Pub. Safety § 5-306(a), as amended through 2023 Md. Laws c. 651 (H.B. 824), § 1; N.J. Stat. Ann. § 2C:58-4(c), as amended through 2022 N.J. Laws c. 131 (Assembly 4769), § 3. Prior to Bruen, the District of Columbia's "may issue" licensing regime was permanently enjoined by Wrenn v. District of Columbia, 864 F.3d 650, 664-667 (D.C. Cir. 2017) (striking down D.C. Code §§ 7-2509.11[1], 22-4506[a]-[b]).

[6] It also struck the list of persons under § 131F who were prohibited from obtaining a temporary license, which was separate from a "prohibited person" as defined under G. L. c. 140, § 131. St. 2022, c. 175, § 20.

for the renewal of a license if such renewal is necessary.[7] St. 2022, c. 175, § 21.

2. Bruen analysis. The defendant argues that the pre-Bruen licensing scheme under which he was charged was facially unconstitutional because it vested impermissible discretion in the licensing authority to grant or deny firearm licenses to nonresidents.[8]

To succeed on a facial challenge, the defendant must "establish 'that no set of circumstances exists under which [the statute] would be valid.'" Chief of Police of Worcester v. Holden, 470 Mass. 845, 860 (2015), quoting United States v. Salerno, 481 U.S. 739, 745 (1987). "A statute so questioned is presumed constitutional." Blixt v. Blixt, 437 Mass. 649, 652 (2002), cert. denied, 537 U.S. 1189 (2003). "The challenging party bears the burden of demonstrating 'beyond a reasonable doubt that there are no "conceivable grounds" which could

[7] The amendment also inserted the words "rifles or shotguns" after the word "firearms." St. 2022, c. 175, § 17B.

[8] The defendant also argues that § 131F provided no opportunity for a nonresident to obtain a firearm for self-defense purposes, instead limiting the issuance of temporary licenses "for purposes of firearms competition." The defendant in Marquis, 495 Mass. at , asks us to adopt the same interpretation. Because that construction is inconsistent with our long-standing approach to statutory interpretation, we reject it here for the same reasons. See id. at (holding, pursuant to last antecedent rule, that firearms competition restriction of § 131F does not apply to nonresidents).

support its validity'" (citation omitted). Gillespie v. Northampton, 460 Mass. 148, 152-153 (2011). Conversely, the Commonwealth prevails if any application is valid.

At the time of the offense in question, § 131F provided, in relevant part:

> "A temporary license to carry firearms or feeding devices or ammunition therefor, within the commonwealth, may be issued by the colonel of state police, or persons authorized by him, to a nonresident or any person not falling within the jurisdiction of a local licensing authority or to an alien that resides outside the commonwealth for purposes of firearms competition and subject to such terms and conditions as said colonel may deem proper . . . ."

G. L. c. 140, § 131F. With respect to renewal of a temporary nonresident firearm license, § 131F provided: "Such license shall be valid for a period of one year but the colonel may renew such license, if in his discretion, such renewal is necessary." Id.

To evaluate whether a firearm regulation is consistent with the Second Amendment, we apply the two-part Bruen test: "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." Bruen, 597 U.S. at 24. The defendant's possession of a firearm for self-defense purposes is covered by the plain text of the Second Amendment. Id. at 10. Therefore,

the determinative question is whether the Commonwealth has demonstrated that the version of its nonresident firearm licensing scheme in force at the time of the offense was "consistent with this Nation's historical tradition of firearm regulation." Id. at 17.

The nation's historical tradition of firearm regulation, the Commonwealth argues, includes restrictions against nonresidents. Relying on "going armed" laws, surety statutes, and laws preventing dangerous or unfit persons from carrying firearms, the Commonwealth's historical materials mirror those considered by the Supreme Court in Bruen, 597 U.S. at 46-60. While we acknowledge the relevance of those historical regulations to the aspects of the Commonwealth's nonresident firearm licensing scheme that define "prohibited persons," they do not justify the discretion conferred on the State police colonel or his designee to deny a license to an otherwise qualified, law-abiding citizen. Id. at 38-39.

As discussed supra, in Bruen, 597 U.S. at 13-15, the Supreme Court indicated that such discretionary "may issue" firearm licensing regimes are presumptively invalid.[9] See id. at

[9] We note that the phrase "may issue" does not automatically render a firearm licensing scheme unconstitutional. The Bruen Court suggested that the Connecticut, Delaware, and Rhode Island firearm licensing schemes were constitutionally permissible, despite the discretionary criteria present in each, because of

38 n.9 (separating Massachusetts and other "may issue" jurisdictions from forty-three "shall issue" jurisdictions and explaining "nothing in our analysis should be interpreted to suggest the unconstitutionality of the . . . 'shall issue' licensing regimes"). See also Maryland Shall Issue, Inc. v. Moore, 116 F.4th 211, 229 (4th Cir. 2024), cert. denied, U.S. Supreme Ct., No. 24-373 (Jan. 13, 2025) (holding that uncertainty caused by "Bruen's invalidation of 'may-issue' licensing laws" does not extend to "shall-issue" licensing laws); McRorey v. Garland, 99 F.4th 831, 836-837 (5th Cir. 2024) (distinguishing unconstitutional "may-issue" regimes from "shall-issue" regimes with background check requirements).

Not only did the version of § 131F in force at the time of the offense contain "may issue" language, but it also allowed the licensing official to deny a temporary license to a

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the limits in place on the licensing officer's discretion. See Bruen, 597 U.S. at 13 n.1 ("Three States -- Connecticut, Delaware, and Rhode Island -- have discretionary criteria but appear to operate like 'shall issue' jurisdictions"). Each of these schemes is distinguishable from § 131F. The Commonwealth's nonresident firearm licensing scheme bears no resemblance to the scheme in Delaware, where a license is not required for open carry. See Del. Code Ann. tit. 11, § 1441. For Connecticut and Rhode Island, State supreme court decisions narrowly interpreted the discretionary provisions of their respective firearm licensing schemes. See Dwyer v. Farrell, 193 Conn. 7, 9 n.2, 12 (1984) (limiting criteria in "suitable person" determinations for firearm licenses); Gadomski v. Tavares, 113 A.3d 387, 392 (R.I. 2015) (holding that suitability requirement does not require demonstration of need).

nonresident based on "such terms and conditions as [the] colonel may deem proper." G. L. c. 140, § 131F. These provisions place § 131F squarely into the category of firearm restrictions that the Supreme Court rejected in Bruen, 597 U.S. at 13-15, 38 n.9. Licensing schemes that confer on officials the unfettered discretion to deny licenses even where the applicant is otherwise qualified do not find support in this nation's history of firearm regulations and cannot be upheld. Id.

Because the Commonwealth has failed at step two of the Bruen analysis, we hold that the version of the Commonwealth's nonresident firearm licensing scheme in effect at the time of the offense violates the Second Amendment. Accordingly, as the defendant was charged with violating § 10 (a) after the Supreme Court issued Bruen, he is entitled to dismissal of that charge.

3. Severability. The Commonwealth asks us to sever any impermissible provisions of its scheme. "When a court is compelled to pass upon the constitutionality of a statute and is obliged to declare part of it unconstitutional, the court, as far as possible, will hold the remainder to be constitutional and valid, if the parts are capable of separation and are not so entwined that the Legislature could not have intended that the part otherwise valid should take effect without the invalid part." Boston Gas Co. v. Department of Pub. Utils., 387 Mass. 531, 540 (1982), quoting Opinion of the Justices, 330 Mass. 713,

726 (1953). However, "[i]f the court is unable to know whether the Legislature would have enacted a particular bill without the unconstitutional provision, it will not sever the unconstitutional provision, but will strike the entire statute." Mayor of Boston v. Treasurer & Receiver Gen., 384 Mass. 718, 725 (1981). To determine whether a statute is capable of separation, we must consider whether the severed portion "is not so connected with and dependent upon other clauses of the act as to constitute an essential factor of the whole." Worcester County Nat'l Bank, petitioner, 263 Mass. 394, 400 (1928). See K.J. v. Superintendent of Bridgewater State Hosp., 488 Mass. 362, 373-374 (2021).

As recited above, the previous version of § 131F provided:

> "A temporary license to carry firearms or feeding devices or ammunition therefor, within the commonwealth, may be issued by the colonel of state police, or persons authorized by him, to a nonresident or any person not falling within the jurisdiction of a local licensing authority or to an alien that resides outside the commonwealth for purposes of firearms competition and subject to such terms and conditions as said colonel may deem proper . . . . Such license shall be valid for a period of one year but the colonel may renew such license, if in his discretion, such renewal is necessary." (Emphases added.)

G. L. c. 140, § 131F. The constitutional defect in § 131F is found, collectively, in the "may be issued" language, the colonel's discretion to deny an application based on "such terms and conditions as said colonel may deem proper," and in the

licensing official's discretion to grant or deny renewal applications. Id.

The Commonwealth cites to State v. Wade, 476 N.J. Super. 490 (App. Div. 2023), in support of its request to sever the impermissible portions of § 131F. In Wade, a New Jersey court identified the "proper cause" analogue that existed in the State's pre-Bruen firearm licensing statute and concluded that it was severable from the statute. Wade, supra at 511. Unlike the introductory phrases and repeated references to the colonel's discretion that exist in § 131F, the "justifiable need" provision in the New Jersey licensing statute was the only provision at issue, and it existed independently from other criteria in the statutory regime. Wade, supra at 509. As such, its removal nonetheless left a coherent and complete law. Id. The same cannot be said for the Commonwealth's nonresident firearm licensing scheme, where the remainder of the statute is dependent on the invalid portions.

Under the pre-amendment version of the Commonwealth's nonresident firearm licensing scheme, a person's right to carry was treated as a privilege capable of being conferred or revoked regardless of whether the applicant fell into one of the "prohibited person" categories. At every step in the licensing process, the Commonwealth had the authority to deny a nonresident applicant his constitutional right based on "such

terms and conditions as [the] colonel may deem proper." G. L. c. 140, § 131F. That authority, which the Supreme Court rejected in Bruen, 597 U.S. at 13-15, 38 n.9, was an essential factor of the prior nonresident firearm licensing scheme. Without ruminating as to what permissible language in a "may issue" licensing statute would look like, we hold that § 131F is not capable of separation because the discretionary language was so entwined in the licensing procedure that its removal would not result in a constitutionally enforceable law.

Conclusion. Notwithstanding the outcome in this case, we emphasize that the Second Amendment right to bear arms is not absolute. See United States v. Rahimi, 602 U.S. 680, 702 (2024) (government may temporarily disarm "individual[s] found by a court to pose a credible threat to the physical safety of another"); Bruen, 597 U.S. at 38 n.9 ("it appears that these shall-issue regimes, which often require applicants to undergo a background check or pass a firearms safety course, are designed to ensure only that those bearing arms in the jurisdiction are, in fact, 'law abiding, responsible citizens'" [citation omitted]); Heller, 554 U.S. at 626 ("From Blackstone through the [Nineteen]th-[C]entury cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose"); Maryland Shall Issue, Inc., 116 F.4th at 229

(upholding shall-issue licensing regime requiring background checks and firearm safety training). Our holding today does not, as the Commonwealth suggests, preclude it from requiring firearm licenses for persons within its borders. See Marquis, 495 Mass. at . To be consistent with the Second Amendment, the Commonwealth's nonresident firearm licensing scheme cannot vest an official with the discretion to deny a license to a qualified applicant. The defendant was charged under a firearm licensing scheme that did just that. This manner of firearm restriction is no longer permissible. Bruen, supra. Accordingly, the allowance of the defendant's motion to dismiss is affirmed.

So ordered.

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SJC-13562

COMMONWEALTH vs. PHILIP J. MARQUIS.

Middlesex. September 9, 2024. – March 11, 2025.

Present: Budd, C.J., Gaziano, Kafker, Wendlandt, Georges, & Wolohojian, JJ.

Firearms. License. Constitutional Law, Right to bear arms, Equal protection of laws, Right to travel, Standing. Practice, Criminal, Standing. Statute, Construction. Words, "Shall be issued," "Determined unsuitable."

Complaint received and sworn to in the Lowell Division of the District Court Department on October 12, 2022.

A motion to dismiss was heard by John F. Coffey, J., and a motion for reconsideration was considered by him.

The Supreme Judicial Court granted an application for direct appellate review.

Ryan J. Rall, Assistant District Attorney, for the Commonwealth.

K. Hayne Barnwell for the defendant.

The following submitted briefs for amici curiae:

Jason Gerhard, Matthew Coulon, Tom Mannion, Nikki McCarter, Diane Kelley, & Leah Cushman, pro se.

Jay Edward Simkin, pro se.

Andrea Joy Campbell, Attorney General, Carlos Cousins, Grace Gohlke, & Nicole Nixon, Assistant Attorneys General, for the Attorney General.

John M. Formella, New Hampshire Attorney General, Anthony J. Galdieri, New Hampshire Solicitor General, & Brandon F. Chase, Assistant New Hampshire Attorney General, for the State of New Hampshire.

Joshua M. Daniels & Lisa J. Steele for Massachusetts Association of Criminal Defense Lawyers.

Clark M. Neily, III, & Christopher D. Barnewolt, of the District of Columbia, & Kevin J. Powers for Cato Institute.

GAZIANO, J. This is one of two cases we decide today in which we determine the constitutionality of the Commonwealth's nonresident firearm licensing scheme.[1] See Commonwealth v. Donnell, 495 Mass. (2025). While we consider a prior version of the nonresident firearm licensing scheme in Donnell, here we consider the current version of that scheme. See St. 2022, c. 175, §§ 17B-22 (effective Aug. 10, 2022). Specifically, we address whether the current nonresident firearm licensing scheme violates the right to keep and bear arms under the Second Amendment to the United States Constitution or the

[1] General Laws c. 269, § 10 (a), makes it a crime to possess a firearm outside of one's residence or place of business without having a license to carry a firearm issued under G. L. c. 140, § 131, or under G. L. c. 140, § 131F. We refer to these licensing requirements, coupled with the criminalization of possession by those who fail to fulfill them, as the Commonwealth's "firearm licensing scheme." See, e.g., Commonwealth v. Johnson, 461 Mass. 44, 54-55, 55 n.14 (2011). Where we discuss the portions of this scheme specifically related to nonresidents -- including the conditions for the issuance of a temporary license to a nonresident pursuant to G. L. c. 140, § 131F, as well as the prohibition of G. L. c. 269, § 10 (a) (3), against a nonresident's possession of a firearm without a temporary license -- we refer to them as the Commonwealth's "nonresident firearm licensing scheme."

rights to travel and to equal protection under the Fourteenth Amendment to the United States Constitution. We hold that it does not.

In the Commonwealth, unlicensed possession of a firearm outside of one's residence or place of business is unlawful. G. L. c. 269, § 10 (a) (§ 10 [a]). Under G. L. c. 140, § 131F (§ 131F), a firearms license "shall be issued" to a nonresident applicant so long as that applicant is neither a "prohibited person," such as a felon or minor, or a person "determined unsuitable," about whom, as provided under G. L. c. 140, § 131, "credible information" exists that issuing a license would pose "a risk to public safety or a risk of danger to self or others."[2]

The defendant, a New Hampshire resident who did not obtain a Massachusetts firearms license, was involved in a vehicle accident in Massachusetts en route to his place of employment. After being found in possession of an unlicensed firearm, the defendant was charged with unlawful possession of a firearm in violation of § 10 (a) and unlawful possession of ammunition in violation of G. L. c. 269, § 10 (h) (1). The defendant filed a

[2] In contrast, the prior iteration of § 131F provided that a nonresident temporary license "may be issued . . . subject to such terms and conditions as [the] colonel [of State police] may deem proper." G. L. c. 140, § 131F, as amended through St. 2014, c. 284, §§ 60, 63. As discussed in Donnell, this prior scheme was inconsistent with the Second Amendment to the United States Constitution.

motion to dismiss, asserting that the Commonwealth's nonresident firearm licensing scheme violated his Second Amendment right to keep and bear arms in light of New York State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1 (2022) (Bruen). The motion judge allowed the defendant's motion to dismiss, and the Commonwealth appealed.

We hold as follows. First, we conclude that the defendant lacked standing to bring an as-applied challenge to the Commonwealth's nonresident firearm licensing scheme because only one denied a license under that scheme may challenge it as applied. We then proceed to consider the merits of a facial challenge to the constitutional validity of the Commonwealth's nonresident firearm licensing scheme. Applying the test enunciated in Bruen and further clarified in United States v. Rahimi, 602 U.S. 680 (2024), we hold that both the "why" of that scheme -- restricting access to firearms by demonstrably dangerous persons -- and the "how" of that scheme -- a "shall issue" licensing regime -- are "consistent with the Nation's historical tradition of firearm regulation." Bruen, 597 U.S. at 24. Hence, the Commonwealth's nonresident firearm licensing scheme is facially consistent with the Second Amendment right to keep and bear arms. Because that scheme does not penalize nonresidents' right to travel, and because differences in how that scheme operates for residents versus nonresidents are

rationally related to legitimate State interests, the Commonwealth's nonresident firearm licensing scheme is also facially consistent with the Fourteenth Amendment rights to travel and to equal protection.

In sum, the defendant's facial challenge to the constitutional validity of the Commonwealth's nonresident firearm licensing scheme fails. We therefore reverse the motion judge's order allowing the defendant's motion to dismiss.[3]

Background. 1. Facts. We recite the relevant facts from the application for criminal complaint. See Commonwealth v. Ilya I., 470 Mass. 625, 626 (2015). On September 22, 2022, at approximately 8 A.M., Trooper Avery Morin and Lieutenant Dana Atkinson of the State police responded to the scene of a two-vehicle crash on Interstate 495 in Lowell. On arrival, Morin observed a 2021 Toyota Tundra with New Hampshire license plates and a Freightliner box truck with Massachusetts license plates in the highway's breakdown lane. The defendant was the operator of the Toyota. When Morin approached the defendant, who was outside of his vehicle, the defendant removed a nine millimeter

[3] We acknowledge the amicus briefs submitted in support of the defendant by six New Hampshire State Representatives; Jay Edward Simkin; the State of New Hampshire; the Massachusetts Association of Criminal Defense Lawyers; and the Cato Institute. We further acknowledge the amicus brief submitted in support of the Commonwealth by the Attorney General.

Ruger pistol from his pocket and stated, "I just want to let you know that I have this." Morin asked if the weapon was loaded. The defendant stated that it was not loaded and "rack[ed]" it in full view of the trooper to so demonstrate. Morin then instructed the defendant to secure the weapon in his pocket and to sit on the guardrail in front of his vehicle.

After speaking with the operator of the box truck, Morin returned to speak to the defendant. Prior to securing the firearm, Morin asked the defendant if he possessed a license to carry a firearm in Massachusetts. He also asked the defendant to identify the origin and destination of his trip. The defendant stated that he did not possess a license to carry a firearm in Massachusetts, and further responded that he was traveling from his home in Rochester, New Hampshire, to his place of work in Massachusetts. Morin seized the pistol, along with a magazine loaded with twelve rounds of ammunition. Morin then "returned to [his] cruiser and confirmed [not only] that [the defendant] did not possess a license to carry in Massachusetts," but also "that [the defendant] was not [F]ederally prohibited from carrying a firearm." The defendant was cited for a civil motor vehicle infraction related to the crash with the box truck.

2. Prior proceedings. On November 28, 2022, the defendant was arraigned in the District Court on a complaint charging him

with unlawful possession of a firearm in violation of § 10 (a), and unlawful possession of ammunition in violation of G. L. c. 269, § 10 (h) (1).[4] On June 27, 2023, the defendant filed a motion to dismiss, arguing, inter alia, that, in light of Bruen, the Commonwealth's nonresident firearm licensing scheme violates his Second Amendment rights as a nonresident of the Commonwealth.

After a nonevidentiary hearing, the motion judge issued a written memorandum of decision on August 21, 2023, allowing the defendant's motion to dismiss. In his memorandum, the motion judge adopted portions of his decision allowing a motion to dismiss in Commonwealth vs. Donnell, Mass. Dist. Ct., No. 2211CR002835 (Lowell Div. Aug. 3, 2023). See Donnell, 495 Mass at . Specifically, the judge found that the Commonwealth failed to meet its burden under Bruen of demonstrating that § 131F is consistent with the nation's history and tradition of firearm regulation, and that § 10 (a) is therefore "unconstitutional as applied to this particularly situated defendant."

The Commonwealth filed a motion for reconsideration, which the motion judge denied orally and by margin endorsement at a

[4] Because the motion judge allowed the defendant's motion to dismiss only with respect to the § 10 (a) charge, our holding does not address G. L. c. 269, § 10 (h) (1).

hearing held the following month. The Commonwealth timely appealed from the motion judge's rulings, and the case was docketed in the Appeals Court. On February 16, 2024, this court granted the Commonwealth's request for direct appellate review.

Discussion. The Commonwealth raises two principal arguments on appeal in support of its contention that the motion judge erred in allowing the defendant's motion to dismiss. First, the Commonwealth asserts that the defendant lacks standing to raise an as-applied challenge, where he never applied for (and was not denied) a firearms license pursuant to the challenged licensing scheme. Second, while the motion judge did not address any facial challenge to the Commonwealth's nonresident firearm licensing scheme, the Commonwealth further asserts that any such challenge under the Second Amendment or the Fourteenth Amendment would also fail.

1. Standing to bring an as-applied challenge. We begin with first principles. "Only one whose rights are impaired by a statute can raise the question of its constitutionality, and he can object to the statute only as applied to him." Massachusetts Comm'n Against Discrimination v. Colangelo, 344 Mass. 387, 390 (1962). Likewise, "[a]s a general matter, to establish standing to challenge an allegedly unconstitutional policy, a plaintiff must submit to the challenged policy." Jackson-Bey v. Hanslmaier, 115 F.3d 1091, 1096 (2d Cir. 1997).

These principles have a well-established corollary in the context of standing to challenge the Commonwealth's firearm licensing scheme. This court has long held that standing to bring an as-applied challenge to the Commonwealth's firearm licensing scheme requires having applied for (and been denied) a license or firearm identification (FID) card pursuant to that scheme. See, e.g., Commonwealth v. Cassidy, 479 Mass. 527, 539 n.10, cert. denied, 586 U.S. 876 (2018) ("Because [the defendant] did not apply for a license or an FID card, the defendant cannot properly raise an as-applied challenge, and he appropriately does not do so" [citations omitted]); Commonwealth v. Loadholt, 460 Mass. 723, 725 (2011) ("because the defendant in this case has not asserted or made any showing that he applied for [and was denied] an FID card to possess a firearm and ammunition, we conclude that he may not challenge his convictions under G. L. c. 269, § 10 [h] [1], as unconstitutional under the Second Amendment"); Commonwealth v. Powell, 459 Mass. 572, 589-590 (2011), cert. denied, 565 U.S. 1262 (2012) ("Instead of applying for an FID card, the defendant chose to violate the law. In these circumstances, we conclude

that he may not challenge his conviction under G. L. c. 269, § 10 [h] [1]").[5]

The defendant contends that these holdings are undermined by Bruen, reasoning that the "premise of denying standing in Powell and other pre-Bruen opinions . . . was that there was no right to carry outside the home in the first instance." This contention misapprehends the basis for our holdings on standing. Standing, after all, is a "threshold" inquiry. Lujan v. Defenders of Wildlife, 504 U.S. 555, 569 (1992). As such, this court is required to address it before entertaining the substantive validity of the law or policy that is being challenged. The holding that licensure denial is a prerequisite for bringing an as-applied challenge to the Commonwealth's firearm licensing scheme is not premised on any substantive position, one way or the other, about the constitutional validity of that particular scheme. Rather, it simply reflects the more general principle that one may not challenge a licensing scheme if one has "never applied for a license, was never denied a hearing, and in no way was ever refused a

[5] This court has recognized the possibility of standing to bring an as-applied challenge to the firearm licensing scheme absent license denial where the defendant can show that applying would have been futile. See Commonwealth v. Harris, 481 Mass. 767, 771 n.5 (2019). In the case at bar, the defendant has not "argued that applying for a license would have been futile." Id.

license." Commonwealth v. Gordon, 354 Mass. 722, 724-725 (1968) (affirming dismissal of equal protection challenge to licensing scheme governing street vendors).

The defendant also cites several Federal decisions to support his contention that having applied for (and been denied) a license is not a requirement of standing to bring an as-applied challenge to a firearm licensing scheme. But those decisions are distinguishable from the case at bar. For example, the United States Court of Appeals for the Third Circuit recently held that plaintiffs who had not been denied a firearms license had standing to challenge Pennsylvania's firearm licensing scheme. Lara v. Commissioner Pa. State Police, 91 F.4th 122, 138-140 (3d. Cir.), judgment vacated on other grounds sub nom. Paris v. Lara, 145 S. Ct. 369 (2024). However, the plaintiffs in that case were ineligible to apply for a license in the first place: they were all between eighteen and twenty years old, and only persons who were at least twenty-one years old were eligible to apply under the challenged licensing scheme. Id. at 127.[6] By contrast, nothing in the Commonwealth's nonresident firearm licensing scheme

[6] Moreover, the Third Circuit did not endorse -- or even discuss -- the proposition that a person who is eligible to apply for a license and chooses not to may nevertheless have standing to bring an as-applied challenge to the relevant licensing scheme. Rather, the Third Circuit conferred standing on other grounds. Lara, 91 F.4th at 139-140.

precluded the defendant from applying for a nonresident temporary license under § 131F; he simply chose not to do so.

More broadly, Federal case law on standing under art. III of the United States Constitution mirrors this court's holdings that licensure denial is a prerequisite to bring an as-applied challenge to a firearm licensing scheme. Compare, e.g., United States v. Decastro, 682 F.3d 160, 164 (2d Cir. 2012), cert. denied, 568 U.S. 1092 (2013) ("because [the defendant] failed to apply for a gun license in New York, he lacks standing to challenge the licensing laws of the [S]tate"), and Fletcher v. Haas, 851 F. Supp. 2d 287, 291 (D. Mass. 2012) (rejecting organizational standing claim on grounds that no identified member would have standing to sue as individual because "[n]either [organization] has identified a single member who sought to obtain a license to carry a firearm in Massachusetts, let alone was denied"), with Commonwealth v. Johnson, 461 Mass. 44, 58 (2011) ("It does not appear in this case that the defendant has raised an as-applied challenge to the Commonwealth's statutory licensing scheme, nor could he properly do so . . . , [as] there was no evidence that the defendant ever applied for a license to carry a firearm or an FID card").

The defendant has standing to bring an as-applied challenge to the Commonwealth's nonresident firearm licensing scheme if -- but only if -- the defendant applied for (and was denied) a

license under that scheme. Because the defendant did not do so, he lacks standing to bring an as-applied challenge to the Commonwealth's nonresident firearm licensing scheme.

2. Merits of a facial challenge. Although the defendant does not have standing to bring an as-applied challenge to the Commonwealth's nonresident firearm licensing scheme, that holding does not end our inquiry. "[I]n a prosecution for violation of a licensing statute which is unconstitutional on its face, the issue of its validity is presented even in the absence of an application for a license." Gordon, 354 Mass. at 725. In particular, the defendant's failure to apply for a license does not preclude a facial challenge to the constitutional validity of the Commonwealth's nonresident firearm licensing scheme. Therefore, we evaluate the defendant's constitutional challenge to the Commonwealth's nonresident firearm licensing scheme under the standards that govern facial challenges.

As a general matter, the United States Supreme Court has cautioned that facial challenges are "disfavored" because they "often rest on speculation" and "threaten to short circuit the democratic process." Washington State Grange v. Washington State Republican Party, 552 U.S. 442, 450-451 (2008). Consequently, a facial challenge is "the 'most difficult challenge to mount successfully,' because it requires a

defendant to 'establish that no set of circumstances exists under which the [statute] would be valid.'" Rahimi, 602 U.S. at 693, quoting United States v. Salerno, 481 U.S. 739, 745 (1987). See Blixt v. Blixt, 437 Mass. 649, 652 (2002), cert. denied, 537 U.S. 1189 (2003) ("A facial challenge to the constitutional validity of a statute is the weakest form of challenge, and the one that is the least likely to succeed"). For the Commonwealth to prevail, it "need only demonstrate" that the Commonwealth's nonresident firearm licensing scheme is compatible with the Second Amendment and with the Fourteenth Amendment "in some of its applications." Rahimi, supra. Conversely, the defendant shall prevail if and only if he demonstrates "that the law is unconstitutional in all of its applications." Washington State Grange, supra at 449.

a. The meaning of § 131F. In order to determine whether there exist any circumstances in which the Commonwealth's nonresident firearm licensing scheme is constitutionally valid, it is necessary first to resolve disagreement between the parties about the meaning of one of the challenged provisions within that scheme. Specifically, the defendant and the Commonwealth advance substantially different interpretations of the meaning of § 131F with respect to the conditions under which temporary licenses "shall be issued" to nonresidents. The disputed portion of § 131F provides:

> "A temporary license to carry firearms, rifles or shotguns or feeding devices or ammunition therefor, within the commonwealth, shall be issued by the colonel of state police, or persons authorized by him, to a nonresident or any person not falling within the jurisdiction of a local licensing authority or to an alien that resides outside the commonwealth for purposes of firearms competition if it appears that the applicant is not a prohibited person and is not determined unsuitable to be issued a license as set forth in [§] 131."

G. L. c. 140, § 131F. The defendant asserts that § 131F provides that temporary licenses "shall be issued" to nonresidents only "for purposes of firearms competition." On the defendant's reading, § 131F does not provide that temporary licenses "shall be issued" to nonresidents for ordinary purposes of self-defense. By contrast, the Commonwealth asserts that the language "for purposes of firearms competition" only applies to "an alien that resides outside the commonwealth" and does not apply to "a nonresident." On the Commonwealth's reading, § 131F does provide that temporary licenses "shall be issued" to nonresidents for ordinary purposes of self-defense.

The correct interpretation of § 131F depends on whether the restriction "for purposes of firearms competition" applies to every enumerated category of applicant -- "nonresident[s]," "person[s] not falling within the jurisdiction of a local licensing authority," and "alien[s] that reside[] outside the commonwealth" -- or instead only to the last applicant category on the list: "alien[s] that reside[] outside the commonwealth."

G. L. c. 140, § 131F. This question has a familiar form. In general, the correct interpretation of a statutory provision often depends on whether limiting language appearing at the end of a list applies only to the last item on the list or to every item on the list. Indeed, this question arises frequently enough that there has emerged a recognized default rule: the last antecedent rule, according to which "a court determines that qualifying words or phrases modify the words or phrases immediately preceding them and not words or phrases more remote, unless the extension is necessary from the context or the spirit of the entire writing." Black's Law Dictionary 1602 (12th ed. 2024).[7] See A. Scalia & B.A. Garner, Reading Law: The Interpretation of Legal Texts 152-153 (2012).

Both the courts of the Commonwealth and the United States Supreme Court have endorsed and applied the last antecedent rule. See Lockhart v. United States, 577 U.S. 347, 351 (2016) ("When this Court has interpreted statutes that include a list of terms or phrases followed by a limiting clause, we have typically applied an interpretive strategy called the rule of

[7] The entry notes that "strictly speaking," the "last antecedent rule" applies only to "nouns or noun phrases." Black's Law Dictionary 1602 (12th ed. 2024). However, "in modern practice" the last antecedent rule is commonly used to encompass this more general rule, sometimes dubbed the "nearest-reasonable-referent canon." Id.

the last antecedent," which "provides that a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows" [quotations and citations omitted]); Hopkins v. Hopkins, 287 Mass. 542, 547 (1934) ("It is the general rule of statutory as well as grammatical construction that a modifying clause is confined to the last antecedent unless there is something in the subject matter or dominant purpose which requires a different interpretation"); New England Survey Sys., Inc. v. Department of Indus. Accs., 89 Mass. App. Ct. 631, 638 n.17 (2016) ("a modifying clause is confined to the phrase that immediately precedes it and not to the phrases appearing earlier").[8]

As applied to § 131F, the last antecedent rule validates the Commonwealth's position. Specifically, pursuant to the last antecedent rule, the limiting language "for purposes of firearms competition" applies only to "alien[s] that reside[] outside the

[8] Commonwealth v. Kozubal, 488 Mass. 575, 592 (2021), cert. denied, 142 S. Ct. 2723 (2022), provides a recent example of the last antecedent rule in action. There, we examined G. L. c. 119, § 21, which defines a "mandated reporter" in part as a "person who is . . . a public or private school teacher, educational administrator, guidance or family counselor, child care worker, person paid to care for or work with a child in any public or private facility, or home or program funded by the commonwealth or licensed under [G. L. c.] 15D." Invoking the last antecedent rule, we held that "the phrase 'funded by the commonwealth or licensed under [G. L. c.] 15D' modifies only 'home or program'" in the statutory text. Kozubal, supra.

commonwealth." Because that limiting language does not apply to "nonresident[s]," the last antecedent rule implies that § 131F provides that a temporary license "shall be issued" to a nonresident not only for purposes of firearms competition but also for other purposes -- so long as the nonresident is "not a prohibited person and is not determined unsuitable."

To be sure, "[t]he last antecedent rule is not always a certain guide." New England Survey Sys., Inc., 89 Mass. App. Ct. at 638. In particular, it does not necessarily apply if the interpretation that would result goes against the controlling text's "context or . . . spirit," Black's Law Dictionary 1602 (12th ed. 2024), or "subject matter or dominant purpose," Hopkins, 287 Mass. at 547. In this case, the context and purpose of § 131F do not count against applying the last antecedent rule. On the contrary, they reinforce doing so.

When interpreting a statute, one relevant contextual consideration is whether a particular interpretation of one provision would render that provision incoherent or at odds with another, nearby provision. "Where possible, we seek to harmonize the provisions of a statute with related provisions that are part of the same statutory scheme . . . ." Chin v. Merriot, 470 Mass. 527, 537 (2015). Here, one related provision is G. L. c. 140, § 131G (§ 131G), which provides -- in relevant part -- that "[a]ny person who is not a resident of the

commonwealth may carry a pistol or revolver in or through the commonwealth for the purpose of taking part in a pistol or revolver competition."

The Commonwealth's interpretation, supported by the last antecedent rule, renders § 131F coherent with the plain meaning of § 131G. Specifically, while § 131F establishes the general rule that nonresidents who are not prohibited persons and not determined unsuitable "shall be issued" temporary licenses, irrespective of purpose, § 131G exempts a special category of nonresidents from the licensing regime: nonresidents who carry "for the purpose of taking part in a pistol or revolver competition."

By comparison, the interpretation of § 131F advanced by the defendant renders the two provisions less coherent with each other. On the defendant's reading, § 131F provides that a nonresident who seeks to carry a firearm only "for purposes of firearms competition" "shall be issued" a temporary license, while § 131G exempts nonresidents who seek to carry a pistol or revolver for purposes of firearms competition from the temporary licensing regime so long as the competition in question is "a pistol or revolver competition." While that interpretation does not, strictly speaking, render the two provisions contradictory, it does generate a less "harmoni[ous]" interpretation of § 131F and § 131G than the interpretation that follows from the last

antecedent rule. Chin, 470 Mass. at 537. Accordingly, the consequences of the parties' competing interpretations of § 131F for neighboring provisions reinforces -- and certainly does not override -- application of the last antecedent rule.

Likewise, one relevant consideration is whether the Legislature would likely have intended the interpretation implied by the last antecedent rule. Of special relevance, "we assume that the Legislature intends its statutes to pass constitutional muster, and therefore 'we construe statutes to avoid constitutional problems where possible.'" Chapman, petitioner, 482 Mass. 293, 305-306 (2019), quoting Commonwealth v. Maloney, 447 Mass. 577, 589 (2006). On the defendant's reading, § 131F makes no provision whatsoever for nonresidents who seek to carry for purposes of self-defense -- starkly implicating "the central component of the [Second Amendment] right itself." District of Columbia v. Heller, 554 U.S. 570, 599 (2008). By contrast, under the Commonwealth's interpretation, § 131F does provide for nonresident self-defense. Reading § 131F in accordance with the last antecedent rule therefore is reinforced -- and certainly not overridden -- by the fact that doing so avoids squarely implicating the most fundamental of Second Amendment interests. Accordingly, we conclude that the limiting language "for purposes of firearms competition" does not apply to "nonresident[s]" under § 131F.

b. The Second Amendment challenge. Having determined the meaning of § 131F, we now address the merits of the defendant's Second Amendment challenge to the Commonwealth's nonresident firearm licensing scheme. We begin with a brief overview of four foundational United States Supreme Court decisions that define the landscape of contemporary Second Amendment jurisprudence: Heller, 554 U.S. 570; McDonald v. Chicago, 561 U.S. 742 (2010); Bruen, 597 U.S. 1; and Rahimi, 602 U.S. 680.

Heller, 554 U.S. at 574-575, concerned a set of District of Columbia statutes, which, among other things, prohibited the registration of handguns while simultaneously making it a crime to carry unregistered firearms. The Court began with a close reading of the text of the constitutional amendment: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." Id. at 576, quoting Second Amendment to the United States Constitution. First, the Court held that the Second Amendment's prefatory clause -- i.e., "A well regulated Militia, being necessary to the security of a free State" -- "announces a purpose" but "does not limit or expand the scope of the operative clause." Heller, supra at 577-578. Second, with respect to the operative clause, the Court held that the term "the people" in the text of the Second Amendment "unambiguously refers to all members of the political community, not an

unspecified subset." Id. at 579-580. Third, the Court held that to "bear arms" means to "wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person" (citation omitted). Id. at 584. Putting these elements together, the Court concluded that the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation." Id. at 592. On that basis, the Court invalidated all of the challenged District of Columbia regulations. Id. at 592-593, 595.

At the same time, the Court also qualified the scope of its holding in several relevant respects. First, the Court clarified that the Second Amendment right to keep and bear arms is "not unlimited." Heller, 554 U.S. at 595. In particular, the Court noted that "from Blackstone through the [Nineteen]th-[C]entury cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." Id. at 626. Second, without purporting to have "undertake[n] an exhaustive historical analysis . . . of the full scope of the Second Amendment," the Court clarified that "nothing in [its] 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 on the commercial sale of arms." Id. at 626-627.

The Court reiterated these qualifications in McDonald, 561 U.S. at 786. At issue before the Court was whether the due process clause of the Fourteenth Amendment incorporates the Second Amendment, such that the latter applies with equal force to the States as to the Federal government. Id. at 753. The Court held that it does. Id. at 778. A plurality of the Court "repeat[ed] those assurances" from Heller regarding "longstanding" prohibitions on firearm possession by felons and the mentally ill, carrying of firearms in sensitive places, and conditions and qualifications on commercial arms sales. Id. at 786.

Bruen, 597 U.S. at 11-12, concerned a challenge to the State of New York's licensing scheme for carrying firearms in public. Under that scheme, persons seeking to carry a firearm outside the home for self-defense were obligated to obtain an "unrestricted license" that required a showing of "proper cause." Id. at 12. Although "[n]o New York statute define[d] 'proper cause,'" New York courts had understood a showing of proper cause to require "demonstrat[ing] a special need for self-protection distinguishable from that of the general

community" (citation omitted). Id. Because of its "proper cause" requirement, the challenged licensing scheme constituted a "may issue" regime, under which "authorities have discretion to deny concealed-carry licenses even when the applicant satisfies the statutory criteria." Id. at 14. This stands in contrast to the "shall issue" regimes then in force in forty-three States, wherein "authorities must issue concealed-carry licenses whenever applicants satisfy certain threshold requirements, without granting licensing officials discretion to deny licenses based on a perceived lack of need or suitability." Id. at 13.

In determining whether New York's "may issue" regime was compatible with the requirements of the Second Amendment, the Court began by clarifying the standard for evaluating a Second Amendment challenge. Bruen, 597 U.S. at 18-19. Prior to Bruen, a number of the United States Courts of Appeals had developed a standard for evaluating Second Amendment challenges under which courts first determined whether the challenged law regulated activity "falling outside the scope of the right as originally understood," Kanter v. Barr, 919 F.3d 437, 441 (7th Cir. 2019); if so, they held that "the regulated activity is categorically unprotected," United States v. Greeno, 679 F.3d 510, 518 (6th Cir.), cert. denied, 568 U.S. 922 (2012), and if not, they proceeded to apply different levels of scrutiny -- strict or

intermediate -- depending on whether the challenged regulation burdened "core" Second Amendment interests, id. at 517. See, e.g., Kanter, supra. The Court in Bruen, supra at 19, rejected this two-step approach, deeming it "one step too many." Instead, the Court formulated the controlling standard for evaluating Second Amendment challenges to firearm regulations by focusing squarely on the historical meaning of the Second Amendment. As the Court explained:

> "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. Only then may a court conclude that the individual's conduct falls outside the Second Amendment's 'unqualified command'" (citation omitted).

Id. at 24.

The crucial question raised by Bruen's standard is what it means for a certain regulation to be "consistent" with the nation's "historical tradition of firearm regulation." Bruen, 597 U.S. at 24. Without purporting to "provide an exhaustive survey of the features that render [modern] regulations relevantly similar [to historical regulations]," the Court highlighted "two metrics: how and why the regulations burden a law-abiding citizen's right to armed self-defense." Id. at 29. Accordingly, "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" (citation and emphasis omitted). Id. This analogical inquiry "requires only that the government identify a well-established and representative historical analogue, not a historical twin." Id. at 30. In particular, "even if a modern-day regulation is not a dead ringer for historical precursors, it still may be analogous enough to pass constitutional muster." Id.

The Court's application of this standard to the challenged New York regulations proceeded in two steps. First, the Court held that the defendants' conduct fell within the "Second Amendment's plain text" and was therefore "presumptively protect[ed]." Bruen, 597 U.S. at 24, 33. Specifically, the Court noted that it was "undisputed" that defendants were part of the "people" to whom the Second Amendment refers in virtue of being "ordinary, law-abiding, adult citizens." Id. at 31-32. Likewise, the Court noted that it was "[un]dispute[d]" that handguns are "arms" within the meaning of the Second Amendment because they are "weapons in common use today for self-defense" (quotation and citation omitted). Id. at 32. Finally, the Court held that "carrying handguns publicly for self-defense" qualifies as "bearing" arms within the meaning of the Second Amendment because the "definition of 'bear' naturally encompasses public carry" and "self-defense is 'the central

component of the [Second Amendment] right itself'" (citation and emphasis omitted). Id.

Second, the Court held that New York's "proper-cause" regime was not "consistent with this Nation's historical tradition of firearm regulation." Bruen, 597 U.S. at 34, 38, 70. In short, the Court concluded from reviewing the historical record that "[t]hroughout modern Anglo-American history, the right to keep and bear arms in public has traditionally been subject to well-defined restrictions governing the intent for which one could carry arms, the manner of carry, or the exceptional circumstances under which one could not carry arms." Id. at 38. However, the historical record "does not demonstrate a tradition of broadly prohibiting the public carry of commonly used firearms for self-defense." Id. In particular, there is no "historical tradition limiting public carry only to those law-abiding citizens who demonstrate a special need for self-defense." Id. From these premises, the Court concluded that New York's "proper-cause" regime violated the Second Amendment right to keep and bear arms. Id. at 38-39.

Finally, at issue before the Court in Rahimi, 602 U.S. at 693, was a facial challenge to the constitutionality of a Federal statute, 18 U.S.C. § 922(g)(8) (§ 922[g][8]). This Federal law prohibits firearm possession by a person subject to a domestic violence restraining order where the order includes a

finding that the person "represents a credible threat to the physical safety of [an] intimate partner or [a] child [of such intimate partner or person]." 18 U.S.C. § 922(g)(8). The Court began its analysis by observing that "[s]ince the founding, our Nation's firearm laws have included provisions preventing individuals who threaten physical harm to others from misusing firearms." Rahimi, supra at 690. After a review of various founding-era firearm regulations, the Court reaffirmed that these laws "confirm what common sense suggests: [w]hen an individual poses a clear threat of physical violence to another, the threatening individual may be disarmed." Id. at 698. Moreover, the Court held that § 922(g)(8) "fits neatly within the tradition" represented by these founding-era laws. Id. Specifically, because § 922(g)(8) "restricts gun use to mitigate demonstrated threats of physical violence," it comports with the "why" of the relevant historical laws. Rahimi, supra at 698. And because, like surety and going armed laws, § 922(g)(8) applies only following a determination that the relevant person "likely would threaten or had threatened another with a weapon," the burden it imposes is consistent with the "how" of such laws. Rahimi, supra at 699-700. Given these premises, the Court "ha[d] no trouble concluding that [§]922(g)(8) survive[d] [the defendant's] facial challenge." Id. at 700.

i. Bruen step one. Having reviewed contemporary Second Amendment jurisprudence, we are now in a position to ask where the Commonwealth's nonresident firearm licensing scheme fits within that doctrinal landscape. Our first step is to determine whether the regulated conduct falls within the "Second Amendment's plain text." Bruen, 597 U.S. at 24. This textual question depends on whether the persons subjected to the regulation at issue are members of "the people,"[9] whether the weapons at issue are "[a]rms,"[10] and whether the specific conduct

[9] Although this case does not present any issues about membership in the "people," a great many post-Bruen challenges to firearm regulations have turned on that issue. See, e.g., United States v. Duarte, 101 F.4th 657, 666 (9th Cir. 2024), rehearing en banc granted and opinion vacated, 108 F.4th 786 (9th Cir. 2024) (felons); Lara, 91 F.4th at 131-132 (persons eighteen to twenty-one years old); United States v. Sitladeen, 64 F.4th 978, 987 (8th Cir. 2023) (persons illegally present in United States); People v. Anderson, 104 Cal. App. 5th 577, 588-589 (2024) (felons).

[10] See, e.g., Commonwealth v. Canjura, 494 Mass. 508, 513 (2024) (switchblades are "arms"); Bevis v. Naperville, 85 F.4th 1175, 1194-1197 (7th Cir. 2023) (assault weapons and high-capacity magazines are not "[a]rms"); Grell v. Lopez, 76 F.4th 938, 949-950 (9th Cir. 2023), rehearing en banc granted and opinion vacated, 93 F.4th 1150 (9th Cir. 2024) ("butterfly knives" are "arms").

at issue qualifies as "keep[ing]" or "bear[ing]"[11] within the meaning of the Second Amendment.[12]

The type of regulated conduct at issue falls within the "Second Amendment's plain text" on all three counts and is therefore "presumptively protect[ed]." Bruen, 597 U.S. at 24. There is no dispute that nonresidents of the State whose firearms regulations are at issue belong to the "people" protected by the Second Amendment so long as they are "ordinary, law-abiding, adult citizens." Id. at 31. Likewise, there is no dispute that handguns are "arms" within the meaning of the Second Amendment because they are "weapons in common use today for self-defense" (quotation and citation omitted). Id. at 32.

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[11] See, e.g., United States v. Stambaugh, 641 F. Supp. 3d 1185, 1190 (W.D. Okla. 2022) (receiving firearm falls under Second Amendment's plain text as "condition precedent to keeping and bearing arms"); Defense Distributed vs. Bonta, U.S. Dist. Ct., No. CV 22-6200-GW-AGRx (C.D. Cal. Oct. 21, 2022) (self-manufacturing of firearms does not fall under Second Amendment's plain text); United States vs. Tilotta, U.S. Dist. Ct., No. 3:19-cr-04768-GPC (S.D. Cal. Aug. 30, 2022) (commercial sale and transfer of firearms does not fall under Second Amendment's plain text).

[12] We note that some courts include a fourth question in the step one inquiry: namely, whether the relevant regulation constitutes an "infringement." See, e.g., Maryland Shall Issue, Inc. v. Moore, 116 F.4th 211, 220-222 (4th Cir. 2024), cert. denied, U.S. Supreme Ct., No. 24-373 (Jan. 13, 2025). However, because the question whether a regulation constitutes an "infringement" may often implicate questions about consistency with history and tradition, we shall maintain the three-part analysis of step one.

Finally, there is no dispute that possessing a firearm outside of one's residence or place of business qualifies as "bearing," as the "definition of 'bear' naturally encompasses public carry." Id. We therefore proceed to step two of the Bruen analysis.

ii. Bruen step two. Our next question is whether the Commonwealth has demonstrated that its nonresident firearm licensing scheme is "consistent with the Nation's historical tradition of firearm regulation." Bruen, 597 U.S. at 24. As noted supra, at this stage of the analysis, the United States Supreme Court has "point[ed] toward at least two metrics: how and why the regulations burden a law-abiding citizen's right to armed self-defense." Id. at 29. We apply each metric in turn.

A. The "why" of §§ 131 and 131F. The "why" inquiry requires us first to articulate the purpose of the Commonwealth's nonresident firearm licensing scheme. Bearing that purpose in mind, we then must ask "if laws at the founding regulated firearm use to address particular problems," as "that will be a strong indicator that contemporary laws imposing similar restrictions for similar reasons fall within a permissible category of regulations." Rahimi, 602 U.S. at 692.

We have already established that § 131F creates a general entitlement on the part of nonresidents to obtain firearm licenses where the statutory conditions are met. Specifically,

so long as nonresident applicants are neither "prohibited" nor "determined unsuitable" within the meaning of § 131, such applicants "shall be issued" temporary firearms licenses. G. L. c. 140, § 131F. Because a nonresident's entitlement to a temporary license is restricted only if they are "prohibited" or "determined unsuitable," we shall look to the definition of those terms, as set forth in § 131, to clarify the purposes for which the Commonwealth's nonresident firearm licensing scheme restricts nonresidents. See Commonwealth v. Perez Narvaez, 490 Mass. 807, 809 (2022) ("The words of the statute generally are the main source from which we ascertain legislative purpose"). In particular, because the defendant does not challenge the Commonwealth's restrictions on "prohibited" persons, we examine only the definition of "determined unsuitable."

General Laws c. 140, § 131 (d), describes the conditions warranting a determination of unsuitability by a "licensing authority"[13] as well as the process by which such a determination is made:

> "The licensing authority shall deny the application or renewal of a license to carry, or suspend or revoke a license . . . if the applicant or licensee is unsuitable to be issued or to continue to hold a license to carry. A determination of unsuitability shall be based on reliable,

[13] Under G. L. c. 140, § 121, a "[l]icensing authority" is defined as "the chief of police or the board or officer having control of the police in a city or town, or persons authorized by them."

> articulable and credible information that the applicant or licensee has exhibited or engaged in behavior that suggests that, if issued a license, the applicant or licensee may create a risk to public safety or a risk of danger to self or others. Upon denial of an application or renewal of a license based on a determination of unsuitability, the licensing authority shall notify the applicant in writing setting forth the specific reasons for the determination . . . . Upon revoking or suspending a license based on a determination of unsuitability, the licensing authority shall notify the holder of a license in writing setting forth the specific reasons for the determination . . . . The determination of unsuitability shall be subject to judicial review . . . ."

By the plain terms of § 131 (d), the restriction on nonresidents "determined unsuitable" exists to prevent persons whose "behavior" demonstrates "a risk to public safety or a risk of danger to self or others" from carrying firearms within the Commonwealth. Importantly, this public safety rationale supplies both a necessary condition and a sufficient condition of unsuitability. If there is "credible information" that a nonresident applicant would pose a risk to "public safety," "self[,] or others," then that person shall not be granted a license to carry within the Commonwealth, subject to the aforementioned procedural requirements. G. L. c. 140, § 131 (d). But only if there exists such "credible information" shall a nonresident applicant be determined unsuitable. Id. The question, then, is whether this safety rationale is compatible with "the Nation's historical tradition of firearm regulation." Bruen, 597 U.S. at 24.

If there is any point of consensus about what purposes have historically been recognized as a permissible basis for regulating access to firearms, it is "what common sense suggests: [w]hen an individual poses a clear threat of physical violence to another, the threatening individual may be disarmed." Rahimi, 602 U.S. at 698. To that end, "the Second Amendment permits the disarmament of individuals who pose a credible threat to the physical safety of others." Id. at 693. See Kanter, 919 F.3d at 451 (Barrett, J., dissenting) ("History is consistent with common sense: it demonstrates that legislatures have the power to prohibit dangerous people from possessing guns").

Other State and Federal courts have also recognized the "common sense" proposition that keeping firearms out of the hands of demonstrably dangerous persons is a valid basis on which to restrict access to firearms. See, e.g., Antonyuk v. James, 120 F.4th 941, 976 (2d Cir. 2024) ("A reasoned denial of a carry license to a person who, if armed, would pose a danger to themselves, others, or to the public interest is consistent with the well-recognized historical tradition of preventing dangerous individuals from possessing weapons"); United States v. Collette, 630 F. Supp. 3d 841, 846 (W.D. Tex. 2022), petition for cert. filed, U.S. Supreme Ct., No. 24-6497 (Feb. 3, 2025) ("The common concern from all three [founding-era ratifying

conventions] . . . appears to be threatened violence and the risk of public injury, not felons specifically or even criminals in general"); R.M. v. C.M., 226 A.D.3d 153, 165 (N.Y. 2024) ("the Nation's historical tradition of firearm regulation in keeping dangerous individuals from carrying guns").

These judicial conclusions find support in relevant historical scholarship. See, e.g., Greenlee, The Historical Justification for Prohibiting Dangerous Persons from Possessing Arms, 20 Wyo. L. Rev. 249, 265 (2020) ("as was the case with all disarmaments during the colonial period, the justification was always that those being disarmed were dangerous"); Larson, Four Exceptions in Search of a Theory: District of Columbia v. Heller and Judicial Ipse Dixit, 60 Hastings L.J. 1371, 1377 (2009) (citing historical record for proposition that "any person viewed as potentially dangerous could be disarmed by the government without running afoul of the 'right to bear arms'"). In sum, "[s]ince the founding, our Nation's firearm laws have included provisions preventing individuals who threaten physical harm . . . from misusing firearms." Rahimi, 602 U.S. at 690.

To the extent that the Commonwealth restricts the ability of law-abiding citizens to carry firearms within its borders, the justification for so doing is credible, individualized evidence that the person in question would pose a danger if armed. Both case law and the historical record unequivocally

indicate that this justification is consistent with "the Nation's historical tradition of firearm regulation." Bruen, 597 U.S. at 24. It follows that with respect to the "why" dimension of assessment, the Commonwealth's nonresident firearm licensing scheme is compatible with the requirements of the Second Amendment.

However, our inquiry does not end here, for now we must ask if the means by which the Commonwealth pursues the permissible end of restricting access to firearms by demonstrably dangerous people -- i.e., through its "shall issue" licensing scheme -- "impose[s] a comparable burden on the right of armed self-defense" in light of "historical regulations." Bruen, 597 U.S. at 29.

B. The "how" of §§ 131 and 131F. Licensing schemes of one form or another have been used to regulate firearm use and possession in this country at least since the Nineteenth Century. See, e.g., The Laws of the State of New-Hampshire; with the Constitutions of the United States and of the State Prefixed 270-271 (I. Long, Jr., ed., 1830) (referring to "permission of the police officers . . . in writing"). More recently, by the time the United States Supreme Court decided Bruen, forty-nine States had employed the mechanism of licensure to regulate firearm use and possession within their borders. Bruen, 597 U.S. at 11.

Of course, not all licensing schemes are created equal. As discussed supra, of special relevance is the distinction highlighted in Bruen, 597 U.S. at 13-14, between "may issue" licensing regimes, under which "authorities have discretion to deny concealed-carry licenses even when the applicant satisfies the statutory criteria," and "shall issue" licensing regimes, wherein "authorities must issue concealed-carry licenses whenever applicants satisfy certain threshold requirements." The Court elaborated on this distinction in a footnote, identifying several indices of presumptive constitutionality in a "shall issue" regime. See id. at 38 n.9.[14] First, "shall issue" regimes "do not require applicants to show an atypical need for armed self-defense." Id. This corresponds to the Court's express rationale for invalidating New York's "may issue" regime. See id. at 11 ("Because the State of New York issues public-carry licenses only when an applicant demonstrates

[14] On the precedential force of this footnote, see, e.g., McRorey v. Garland, 99 F.4th 831, 837 (5th Cir. 2024) ("[Plaintiffs] characterize passages such as footnote 9 as dicta. We, however, are generally bound by Supreme Court dicta, especially when it is recent and detailed[, a]nd it doesn't get more recent or detailed than Bruen" [quotation and citation omitted]); Maryland Shall Issue, Inc., 116 F.4th at 221-222 ("We are not free to ignore the Supreme Court's substantive dictum on 'shall-issue' licensing laws . . . [and s]o, in accord with the Supreme Court's 'shall-issue' discussion, we hold that non-discretionary 'shall-issue' licensing laws are presumptively constitutional").

a special need for self-defense, we conclude that the State's licensing regime violates the Constitution"). Second, "shall issue" regimes are "designed to ensure only that those bearing arms in the jurisdiction are, in fact, law-abiding, responsible citizens" (quotation and citation omitted). Id. at 38 n.9. Third, "shall issue" regimes "guid[e] licensing officials" by means of "narrow, objective, and definite standards" (citation omitted). Id.

In addition to the semantic fact that § 131F employs the phrase "shall be issued," in substance the Commonwealth's nonresident firearm licensing scheme displays all three hallmarks of a "shall issue" regime. First, any nonresident who is neither a prohibited person nor determined unsuitable pursuant to the criteria and procedures outlined in § 131 "shall be issued" a license to carry. Applicants need not demonstrate an "atypical need for armed self-defense," Bruen, 597 U.S. at 38 n.9 -- or indeed articulate any purpose for which they seek to possess a firearm outside of their home or place of business. Second, because the only statutorily permissible ground on which to withhold or revoke a license from a nonprohibited person is a determination that the person would pose "a risk to public safety or a risk of danger to self or others" if armed, G. L. c. 140, § 131 (d), the Commonwealth's nonresident firearm licensing scheme is "designed to ensure only that those bearing

arms in the jurisdiction are, in fact, law-abiding, responsible citizens" (quotation and citation omitted), Bruen, supra. Third, the statutory criteria for "unsuitability" appropriately "guid[e]" the licensing authority by means of "narrow, objective, and definite standards" (citation omitted). Id. Specifically, an applicant can be identified as posing "a risk to public safety or a risk of danger to self or others" if armed only on the condition that the applicant "has exhibited or engaged in behavior" indicating such a risk. G. L. c. 140, § 131 (d). Likewise, the determination that an applicant has engaged in the specified behavior indicating the specified safety risk must itself be supported by "reliable, articulable and credible information." Id. Subjective, impressionistic judgments of "unsuitability" are thereby proscribed. In addition, once a determination of unsuitability has been made pursuant to these criteria, the licensing authority "shall notify the applicant in writing setting forth the specific reasons for the determination." Id. Finally, if an applicant is unsatisfied with the reasons given for a determination of unsuitability, that applicant may petition for judicial review. G. L. c. 140, § 131 (d), (f).

In addition to displaying the substantive hallmarks of a "shall issue" regime, the Commonwealth's nonresident firearm licensing scheme also has historical analogues in the form of

firearm regulations motivated by safety considerations. Two such regulations, as detailed in Rahimi, 602 U.S. at 695-699, and Bruen, 597 U.S. at 46-59, are surety laws and "going armed" laws. Although these did not employ the specific mechanism of licensure, they employed the more general mechanism of administratively conditioning firearm access by persons for whom individualized evidence of risk was found. See Bruen, supra at 30 ("even if a modern-day regulation is not a dead ringer for historical precursors, it still may be analogous enough to pass constitutional muster").

As the Court explained in Bruen, 597 U.S. at 55, surety statutes "required certain individuals to post bond before carrying weapons in public." Importantly, surety statutes "presumed that individuals had a right to public carry," id. at 56, and burdened this right "only when 'attended with circumstances giving just reason to fear that [the person] purposes to make an unlawful use of [arms],'" id., quoting W. Rawle, A View of the Constitution of the United States of America 126 (2d ed. 1829). The Court in Bruen held that surety statutes were not a historical analogue of New York's "proper cause" regime because the former "were not bans on public carry, and they typically targeted only those threatening to do harm." Bruen, supra at 55. Conversely, the Court in Rahimi, 602 U.S. at 698, held that surety statutes were a historical analogue of

§ 922(g)(8) because both "restrict[] [firearm] use to mitigate demonstrated threats of physical violence." Going armed laws, by contrast, provided a mechanism for restricting those "who had menaced others with firearms." Id. at 697. Specifically, these laws prohibited conduct such as "riding or going armed, with dangerous or unusual weapons, [to] terrify[] the good people of the land." Id., quoting 4 W. Blackstone, Commentaries *149. As the Court explained, going armed laws are "relevantly similar" to § 922(g)(8) because -- like surety statutes -- they specifically "appl[y] to individuals found to threaten the physical safety of another." Rahimi, supra at 698.

The Commonwealth's nonresident firearm licensing scheme "fits neatly within the tradition the surety and going armed laws represent." Rahimi, 602 U.S. at 698. It begins with the presumption that all nonresident applicants "shall be issued" a temporary license and will thereby enjoy the unencumbered right to public carry. G. L. c. 140, § 131F. That right is burdened "only when attended with circumstances giving just reason to fear that [the applicant] purposes to make an unlawful use of [arms]" (quotation and citation omitted), Bruen, 597 U.S. at 56 -- specifically, the circumstance that the applicant has "exhibited or engaged in behavior" indicative of "a risk to public safety or a risk of danger to self or others," G. L. c. 140, § 131 (d). By the same token, the Commonwealth's

nonresident firearm licensing scheme is analogous to going armed laws, in that both restrict a person's right to carry only on the basis of "credible information" that the person has engaged in specific, threatening conduct. Id.

The defendant maintains that the Commonwealth's nonresident firearm licensing scheme is unsupported by the nation's historical tradition. Specifically, the defendant argues that "[t]here is no historical law or regulation allowing the government to collectively disarm a broad swath of the public so as to ferret out any individual who is or could be dangerous or 'unsuitable.'" However, this description mischaracterizes the operation of the Commonwealth's nonresident firearm licensing scheme. The image evoked by that description is of a regime whereby all citizens must surrender their arms to a government authority, only to reacquire those arms if that authority deems them suitable. This image misleads. The Commonwealth's nonresident firearm licensing scheme places an ex ante condition on the right to carry. Before carrying a firearm in the Commonwealth outside of one's home or place of business, both residents and nonresidents alike must obtain a license; and before issuing a license, the licensing authority must verify that the applicant satisfies the statutory requirement of being neither "prohibited" nor determined "unsuitable" within the specified meaning of § 131 (d). Although it is true that a

person who violates State law by possessing a firearm outside of his residence or place of business without first having obtained a license is liable to disarmament, the Commonwealth's scheme no more "disarm[s] a broad swath of the public" than does any licensing scheme regardless of its substantive requirements.

The defendant also argues that there is no "historical law or regulation demonstrating that residents of one colony or [S]tate reflexively distrusted armed residents of another colony or [S]tate." However, there is no evidence that the Commonwealth's scheme is motivated in any way by such attitudes of "reflexive[] distrust" towards nonresidents. On the contrary, the Commonwealth's firearm licensing scheme applies the same substantive requirements to residents as to nonresidents. Both must obtain a license in order to possess a firearm outside of their homes or places of business within the Commonwealth, and both "shall be issued" such a license pursuant to the same statutory criteria. Compare G. L. c. 140, § 131 (d) (residents), with G. L. c. 140, § 131F (nonresidents). As emphasized, the Commonwealth's firearm licensing scheme operates to ensure "only that those bearing arms in the jurisdiction are, in fact, law-abiding, responsible citizens" (quotation and citation omitted), Bruen, 597 U.S. at 38 n.9 -- whether "those bearing arms in the jurisdiction" are residents of the Commonwealth or nonresidents, id.

Finally, the defendant asserts a more specific objection to the fact that "processing may take up to [ninety] days" for nonresident license applications. He characterizes this projected wait time as "another significant curtailment of [his] freedom." As a threshold matter, we have doubts whether this timeline -- which apparently stems from a webpage, see https://www.mass.gov/how-to/apply-for-a-firearms-license [https://perma.cc/4TAJ-RSWV] -- has "the legal force of a statute or regulation" (citation omitted). DeCosmo v. Blue Tarp Redev., LLC, 487 Mass. 690, 694–695 (2021). Putting those doubts to one side, however, the defendant's substantive objection fails on its own terms.

To be sure, the defendant is correct to highlight Bruen's cautionary note that "we do not rule out constitutional challenges to shall-issue regimes where, for example, lengthy wait times in processing license applications or exorbitant fees deny ordinary citizens their right to public carry." Bruen, 597 U.S. at 38 n.9. More broadly, the defendant is correct to point out that "shall issue" licensing regimes do not automatically comply with the Second Amendment, because it is possible for such a regime's procedural requirements to be so onerous that they effectively deny some or all prospective licensees their Second Amendment rights. Indeed, "any permitting scheme can be put toward abusive ends." Id. And it goes without saying that

a "shall issue" licensing regime that operated in this "abusive" manner would be the proper subject of an as-applied challenge by persons injured thereby.

However, as the party bringing a facial challenge to the constitutionality of the Commonwealth's "shall issue" licensing regime, the defendant must demonstrate not that it is possible for the Commonwealth's processing times to deny nonresidents their right to public carry, but that "no set of circumstances exists" under which those processing times are compatible with the Second Amendment (citation omitted). Rahimi, 602 U.S. at 693. The defendant has not pointed to any evidence that the Commonwealth's processing times meaningfully hinder the ability of nonresidents to exercise their right to public carry in all circumstances, let alone that the processing timeline is so burdensome that it rises to the level of a constitutional violation. Indeed, the defendant makes no argument in support of that conclusion apart from asserting that the Commonwealth's processing times are a "significant curtailment" of his freedom. To invalidate the Commonwealth's "shall issue" regime on that basis alone would require us to "focus[] on hypothetical scenarios where [that regime] might raise constitutional concerns" as opposed to "circumstances in which [that regime is] most likely to be constitutional" -- an error that would leave us "slaying a straw man." Rahimi, 602 U.S. at 701.

Consequently, the defendant has not carried the "most difficult" burden of bringing a successful facial challenge to the Commonwealth's processing times for nonresident license applicants (citation omitted). Id. at 693. See Maryland Shall Issue, Inc. v. Moore, 116 F.4th 211, 227 (4th Cir. 2024), cert. denied, U.S. Supreme Ct., No. 24-373 (Jan. 13, 2025) ("By equating 'infringement' with any temporary delay, the [defendant] improperly discount[s] the Supreme Court's guidance that requirements such as background checks and training instruction, which necessarily occasion some delay, ordinarily will pass constitutional muster"); McRorey v. Garland, 99 F.4th 831, 839 (5th Cir. 2024) ("Our law is plain as can be that some amount of time for background checks is permissible").

In sum, the defendant's facial challenge under the Second Amendment fails to "establish that no set of circumstances exists under which the [Commonwealth's nonresident firearm licensing scheme] would be valid" (citation omitted). Rahimi, 602 U.S. at 693. Therefore, that challenge fails.

c. The Fourteenth Amendment challenges. Finally, the defendant argues that the Commonwealth's nonresident firearm licensing scheme violates the Fourteenth Amendment rights to travel and to equal protection. Specifically, the defendant objects to several differences between the resident and nonresident licensing processes, including the following: (1) a

resident's license is valid for a period of from five to six years, see G. L. c. 140, § 131 (i), while a nonresident's license is valid for only one year, see G. L. c. 140, § 131F; (2) resident license applications must be processed within forty days, see G. L. c. 140, § 131 (e), whereas nonresidents "must wait up to [ninety] days" for their applications to be processed;[15] and (3) newly arrived or returning residents have a sixty-day grace period in which to obtain an FID card, see G. L. c. 140, § 129C (j), whereas no such grace period exists for nonresidents. Given the constraints of a facial challenge, the defendant is again limited to arguing that no set of circumstances exists under which that scheme complies with the Fourteenth Amendment. See Rahimi, 602 U.S. at 693.

We first evaluate the defendant's argument that the Commonwealth's licensing scheme violates nonresidents' Fourteenth Amendment right to travel. "The word 'travel' is not found in the text of the Constitution." Saenz v. Roe, 526 U.S. 489, 498 (1999). Nevertheless, the right to travel is "firmly embedded in our jurisprudence" such that "imposing a penalty on the exercise of the right to travel violate[s] the Equal

[15] The defendant again cites to a webpage for the ninety-day timeline. See https://www.mass.gov/how-to/apply-for-a-firearms-license [https://perma.cc/4TAJ-RSWV]. We assume, without deciding, that the defendant's argument as to this timeline is proper here.

Protection Clause unless shown to be necessary to promote a compelling governmental interest" (quotation and citation omitted). Id. at 498-499. By the same token, "only those classifications that serve to penalize the exercise of that right [to travel] are tested on that strict scrutiny basis." Lee v. Commissioner of Revenue, 395 Mass. 527, 530 (1985). Otherwise, "[l]ess significant impositions on the right to travel have been upheld when supported by a rational or conceivable basis." Id. at 531.

Turning now to the substance of the Fourteenth Amendment right to travel, the United States Supreme Court has held that this right contains three basic components:

> "[(1)] the right of a citizen of one State to enter and to leave another State, [(2)] the right to be treated as a welcome visitor rather than unfriendly alien when temporarily present in the second State, and . . . [(3)] for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State."

Saenz, 526 U.S. at 500. Because there is no contention that the defendant elected or attempted to elect to become a permanent resident of the Commonwealth, only the first two components of the right to travel are at issue.[16]

[16] We note that in making his right to travel argument, the defendant nevertheless places significant weight on a line of cases that properly belong to the third component. These include Attorney Gen. of N.Y. v. Soto-Lopez, 476 U.S. 898 (1986); Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974);

With respect to the first component, the defendant maintains that "[t]he unchanneled discretion lodged with a colonel as well as lengthy wait times for any license . . . deter (if not preclude) nonresident travel into Massachusetts." As the reference to "unchanneled discretion" makes evident, the defendant's argument presupposes that the Commonwealth's nonresident firearm licensing scheme violates the Second Amendment right to keep and bear arms. In essence, the defendant posits a constitutional dilemma: either "suffer disarmament, arrest and/or prosecution" by entering the Commonwealth with an unlicensed firearm or "yield Second

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Dunn v. Blumstein, 405 U.S. 330 (1972); Shapiro v. Thompson, 394 U.S. 618 (1969). All of these cases featured State laws that differentially assigned various rights and benefits to current residents of the State depending on when or for how long those residents had resided in the State. Such cases differ from the case at bar in two relevant respects. First, these cases involved statutory distinctions among current residents rather than between current residents and nonresidents. Second, the laws challenged in these cases categorically withheld the relevant right or benefit from residents who failed to satisfy the temporal residency requirement -- whether the right to vote (Dunn, supra), entitlement to a civil service employment preference (Soto-Lopez, supra), entitlement to hospitalization medical care for the indigent (Memorial Hosp., supra), or entitlement to welfare benefits (Shapiro, supra). By contrast, under the Commonwealth's licensing scheme, nonresidents who wish to publicly carry firearms in the Commonwealth are not categorically barred from so doing for any period of time, so long as they obtain a license pursuant to § 131F prior to entry and public carry. Accordingly, insofar as the defendant's right to travel argument relies on these component cases, that reliance is misplaced.

Amendment rights." Because the Commonwealth's nonresident firearm licensing scheme does not violate the Second Amendment, however, no such constitutional dilemma exists. On the contrary, the dilemma posited by the defendant merely "repackag[es] a claim that is more appropriately brought under . . . the Second Amendment." Culp v. Raoul, 921 F.3d 646, 658 (7th Cir. 2019), cert. denied, 141 S. Ct. 109 (2020).

More generally, the mere fact of having to apply for and obtain a license before entering the Commonwealth with a firearm does not penalize the right to travel. Although such a requirement "necessarily occasion[s] some delay," Maryland Shall Issue, Inc., 116 F.4th at 227, "[o]nly those statutes resulting in some significant effect on the right to travel will be deemed 'penalties,'" Lee, 395 Mass. at 530. Unlike a criminal prohibition on transporting indigent nonresidents into the State, Edwards v. California, 314 U.S. 160, 171 (1941), or a conspiracy to prevent members of certain racial groups from crossing State lines using public highways, United States v. Guest, 383 U.S. 745, 757 (1966), the requirement that nonresidents obtain a license on the same terms as residents before publicly carrying a firearm within the Commonwealth does not "impos[e an] obstacle to [nonresidents'] entry into [the Commonwealth]," interfere with "free ingress and regress to and from neighboring States," or otherwise "directly impair the

exercise of the right to free interstate movement" (quotation and citation omitted). Saenz, 526 U.S. at 501. See Commonwealth v. Harris, 481 Mass. 767, 771, 774 (2019) (rejecting argument that G. L. c. 269, § 10 [a], and G. L. c. 140, § 129C [h], facially violate right to travel). In short, the Commonwealth's nonresident firearm licensing scheme does not penalize the first component of the right to travel.

With respect to the second component of the right to travel, the question is whether the Commonwealth's nonresident firearm licensing scheme treats nonresidents as "unfriendly alien[s]" rather than as "welcome visitor[s]." Saenz, 526 U.S. at 500. As emphasized, the substantive eligibility criteria for residents and nonresidents are identical: both must be neither prohibited nor unsuitable within the meaning of § 131. Because nonresidents must satisfy the same substantive criteria as residents in order to receive a license, § 131F's requirement that nonresidents be neither prohibited nor unsuitable cannot be said to demean nonresidents as "unfriendly aliens." Simply put, a nonresident "may travel across [the Commonwealth] unimpeded so long as he abides by the reasonable and minimally burdensome regulations necessary to protect the safety of [the Commonwealth]'s citizens." Johnson v. County of Horry, S.C., 360 Fed. Appx. 466, 471 (4th Cir. 2010) (rejecting right-to-travel challenge to vehicle registration statute both facially

and as applied to nonresident). Therefore, the Commonwealth's nonresident firearm licensing scheme does not penalize the second component of the right to travel, either.

Finally, it bears noting that the Commonwealth's licensing requirement for nonresidents is not exceptionless. In particular, unlicensed possession of a pistol or revolver is not unlawful for nonresidents traveling in or through the Commonwealth to participate in a shooting competition or to attend a meeting of firearms collectors, provided they have a valid permit or license issued by a State that denies such licenses to persons with felony or drug convictions. G. L. c. 140, § 131G. Likewise, unlicensed possession of a pistol or revolver is not unlawful for nonresidents traveling for the purpose of hunting, provided they have a valid hunting or sporting license issued by their State of destination. Id. More generally, Federal law protects the interstate transportation of unloaded and properly secured firearms by anyone who is neither federally prohibited from transporting, shipping, or receiving firearms nor locally prohibited from possessing or carrying such firearms in their place of origin or destination. 18 U.S.C. § 926A. Hence, although unlicensed possession of a firearm outside of one's home or place of business is generally unlawful under G. L. c. 269, § 10 (a), that requirement is circumscribed by several commonsense

exceptions and limitations that facilitate interstate travel by nonresidents.

In sum, the Commonwealth's nonresident firearm licensing scheme does not violate nonresidents' Fourteenth Amendment right to travel. On the contrary, it embodies "State and local experimentation with reasonable firearms regulations [that] will continue under the Second Amendment" as part and parcel of the "ability to devise solutions to social problems that suit local needs and values." McDonald, 561 U.S. at 785.

We have already seen that the Commonwealth's nonresident firearm licensing scheme does not impermissibly interfere with the Second Amendment right to keep and bear arms. See supra. In addition, there is no contention that the Commonwealth's nonresident firearm licensing scheme relies on a suspect classification. Because the Commonwealth's nonresident firearm licensing scheme neither violates a fundamental right nor relies on a suspect classification, we evaluate the right to travel challenge and the equal protection challenge under rational basis review.[17] See Romer v. Evans, 517 U.S. 620, 631 (1996)

[17] We note that some United States Courts of Appeals evaluating Second Amendment and equal protection challenges to firearm regulations have treated the analysis required by the latter as subsumed under the analysis required by the former. See, e.g., Pena v. Lindley, 898 F.3d 969, 986 (9th Cir. 2018), cert. denied sub nom. Pena v. Horan, 141 S. Ct. 108 (2020) ("To the extent that the Equal Protection challenge is based on the

("if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end"); Federal Communications Comm'n v. Beach Communications, Inc., 508 U.S. 307, 313 (1993) ("a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification"); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312 (1976) ("equal protection analysis requires strict scrutiny of a legislative classification only when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class" [footnote omitted]); Commonwealth v. Freeman, 472 Mass. 503, 506 (2015) (statutes that "neither burden a fundamental right nor discriminate on the basis of a suspect classification . . . are subject to a rational basis level of judicial

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Second Amendment's fundamental right to bear arms and the disparate treatment of groups in exercising that right, as recognized by [the United States Supreme Court], that challenge is subsumed in the Second Amendment inquiry above"); United States v. Carey, 602 F.3d 738, 741 n.2 (6th Cir.), cert. denied, 562 U.S. 895 (2010) (declining to consider claims that "conflate the enumerated Second Amendment right with Equal Protection and Due Process protections under the Fifth Amendment"). Nevertheless, in the interest of completeness, we conduct a full and separate review of the defendant's equal protection claim.

scrutiny" [citation omitted]). Compare Smith v. District of Columbia, 568 F. Supp. 3d 55, 62-66 (D.D.C. 2021) (concluding that District of Columbia regulations violate Second Amendment right to keep and bear arms, and proceeding to evaluate, under strict scrutiny, equal protection challenge to differential treatment of residents versus nonresidents), with United States v. Gil-Solano, 699 F. Supp. 3d 1063, 1073–1074 (D. Nev. 2023) (concluding that Federal prohibition on firearms possession by undocumented immigrants does not violate Second Amendment right to keep and bear arms, and proceeding to evaluate, under rational basis review, equal protection challenge to differential treatment of undocumented versus documented immigrants).

Under rational basis review, "State action will be upheld as long as it is rationally related to the furtherance of a legitimate [S]tate interest" (quotation and citation omitted). Commonwealth v. Roman, 489 Mass. 81, 86 (2022). In particular, "those attacking the rationality of the legislative classification have the burden to negative every conceivable basis which might support it" (quotation and citation omitted). Federal Communications Comm'n, 508 U.S. at 315. To be sure, "[t]he distinctions drawn by a challenged statute must bear some rational relationship to a legitimate state end." McDonald v. Board of Election Comm'rs of Chicago, 394 U.S. 802, 809 (1969).

But statutory classifications "will be set aside . . . only if based on reasons totally unrelated to the pursuit of that goal" and "only if no grounds can be conceived to justify them." Id.

In subjecting the Commonwealth's nonresident firearm licensing scheme to rational basis review, we are mindful of two points. First, at the most general level, the equal protection clause "does not forbid classifications. It simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike." Nordlinger v. Hahn, 505 U.S. 1, 10 (1992). By the same token, States "may treat unlike cases accordingly." Vacco v. Quill, 521 U.S. 793, 799 (1997). Second, because residents and nonresidents are frequently not "in all relevant respects alike," Nordlinger, supra, there is in general "no duty on the State to have its licensing structure parallel or identical for both residents and nonresidents," Baldwin v. Fish & Game Comm'n of Mont., 436 U.S. 371, 391 (1978). See, e.g., Marilley v. Bonham, 844 F.3d 841, 854-855 (9th Cir. 2016), cert. denied, 583 U.S. 915 (2017) (finding rational basis for differential fishing license fees in relevant differences between resident versus nonresident fishers); Sestric v. Clark, 765 F.2d 655, 661-662 (7th Cir. 1985), cert. denied, 474 U.S. 1086 (1986) (noting relevant differences between nonresident attorneys and new resident

attorneys in affirming rational basis for law permitting only latter to gain bar admission by motion alone).

Bearing these points in mind, we now consider first whether the Commonwealth's nonresident firearm licensing scheme serves a legitimate State interest. The Commonwealth has at least a legitimate interest in regulating firearm possession within its borders so as to protect public safety. See, e.g., Chief of Police of Worcester v. Holden, 470 Mass. 845, 858 (2015) (recognizing "compelling" and "significant" interest in firearm regulation because it "directly affects the physical safety of the citizenry" [citation omitted]); Kanter, 919 F.3d at 451 (Barrett, J., dissenting) (noting "government's undeniably compelling interest in protecting the public from gun violence"). As discussed, the Commonwealth's general interest in public safety implies a more specific interest in ensuring that persons who publicly carry firearms within the Commonwealth satisfy the statutory criteria of being neither prohibited nor unsuitable. Moreover, that interest applies with equal strength to all persons who wish to publicly carry firearms within the Commonwealth regardless of their State of residence. The Commonwealth's interest in verifying the suitability and prohibition status of nonresidents who seek to publicly carry firearms within its borders is no weaker than its interest in

verifying the suitability and prohibition status of residents who seek to publicly carry firearms within its borders.

At the same time, the factual reality is that it may often be more costly or time-consuming to obtain and verify the facts that are necessary to verify the suitability and prohibition status of a nonresident applicant as compared to a resident applicant. Specifically, the Commonwealth provides several statutory mechanisms whereby the relevant licensing authority is automatically notified of disqualifying events that would render a person prohibited or unsuitable to possess a firearms license. See, e.g., G. L. c. 140, § 131S (upon issuance of extreme risk protection order following petition demonstrating probable risk of bodily injury to self or others, clerk-magistrate required to transmit order to licensing authority and licensing authority required to immediately suspend firearms license); G. L. c. 209A, § 3B (mandating automatic suspension of firearms license upon issuance of temporary or emergency abuse prevention order following complaint demonstrating substantial likelihood of immediate danger of abuse). The defendant, as the party "attacking the rationality of the legislative classification[,] ha[s] the burden to negative every conceivable basis which might support it" (quotation and citation omitted). Federal Communications Comm'n, 508 U.S. at 315. See Murphy v. Department of Correction, 429 Mass. 736, 742 (1999). The

defendant has not pointed to any comparable statutory infrastructure that would ensure that the Commonwealth's licensing authority is equally apprised of disqualifying events outside the Commonwealth's borders that have an impact on the suitability or prohibition status of a nonresident. Compare G. L. c. 209A, § 3B, with G. L. c. 209A, § 5A (affording full faith and credit to protection orders issued in other jurisdictions, but conditioning enforcement on protected party's filing certified copy of order in Superior Court or Boston Municipal Court along with sworn affidavit asserting that order is presently in effect as written).

Moreover, it is generally recognized that States often have more reliable access to information having an impact on the firearms license eligibility of their own residents as compared to residents of other States. See, e.g., Culp, 921 F.3d at 651 (discussing practical difficulties in accessing and monitoring other States' criminal history databases and mental health repositories); Peterson v. LaCabe, 783 F. Supp. 2d 1167, 1175, 1178 (D. Colo. 2011) ("Information about a person's contacts with law enforcement, mental health status, alcohol and drug use, and domestic violence history is simply more likely to be found in the jurisdiction where that person resides" such that "residents and non-residents are not similarly situated in terms of the state's ability to obtain information about and monitor

the potential licensee's eligibility for a concealed weapons permit").

In light of these facts, the complained-of differences between the Commonwealth's treatment of resident and nonresident license applicants survive rational basis review. We first consider the provision of one year license durations for nonresidents, G. L. c. 140, § 131F,[18] versus five to six year

[18] The renewal provision in § 131F was amended in light of Bruen to eliminate discretionary language. Specifically, the prior iteration of § 131F provided that a "license shall be valid for a period of one year but the colonel may renew such license, if in his discretion, such renewal is necessary." G. L. c. 140, § 131F, as amended through St. 2014, c. 284, §§ 60, 63. See St. 1998, c. 180, § 46. The current iteration excises the phrase "in his discretion" and provides that a "license shall be valid for a period of one year but the colonel may renew such license if such renewal is necessary." G. L. c. 140, § 131F. The defendant does not argue that the nonresident renewal provision as amended confers any additional discretion on the colonel with respect to renewing nonresident licenses as compared to issuing first-time nonresident licenses. Context and purpose confirm that the current nonresident renewal provision does not import discretion. First, the paragraph that immediately precedes the renewal provision states the eligibility conditions for nonresident license applicants: such applicants "shall be issued" a temporary firearms license so long as they are neither prohibited nor unsuitable. The nonresident renewal provision does not modify those conditions; on the contrary, it presupposes their satisfaction. It merely specifies that, if a nonresident renewal applicant intends to continue to publicly carry firearms within the Commonwealth after one year such that it is "necessary" to continue to possess a valid firearms license in order to lawfully do so, the colonel is fully authorized to renew the license in question, so long as there has been no change to the applicant's suitability or prohibition status. Hence, although the nonresident renewal provision employs the phrase "may renew" to describe the colonel's renewal authorization, in the context of the

license durations for residents, G. L. c. 140, § 131. One implication of the license duration differential is that nonresidents are obligated to apply more frequently than residents. This affords the Commonwealth's licensing authority more frequent opportunities to verify the continued eligibility of nonresidents for a firearms license. Insofar as it may be more difficult to reliably monitor nonresidents' continued compliance with the substantive requirements of the Commonwealth's firearm licensing scheme, having shorter license durations and concomitantly more frequent opportunities to verify nonresident suitability and prohibition status stand in a "rational relationship" to the Commonwealth's legitimate end of equally verifying the eligibility of all firearms license applicants regardless of their State of residency. McDonald, 394 U.S. at 809. At minimum, differential access to eligibility-relevant information about resident and nonresident applicants embodies a "reasonably conceivable state of facts

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Commonwealth's "shall issue" nonresident licensing scheme, this phrase does not import any discretion. Second, "we construe statutes to avoid constitutional problems where possible." Maloney, 447 Mass. at 589. Pursuant to that principle, any ambiguity with respect to whether the nonresident renewal provision imports discretion would be resolved in favor of the foregoing construction, as it avoids squarely implicating fundamental constitutional rights. In sum, nonresident license renewal applicants are subject to the same substantive eligibility conditions as nonresident first-time license applicants.

that could provide a rational basis" for the license duration differential. Federal Communications Comm'n, 508 U.S. at 313.

Second, we consider the fifty-day differential in expected processing times for nonresidents (ninety days) versus residents (forty days). As noted, it may often take more time -- and entail higher costs of investigation -- to review nonresident applications as thoroughly as resident applications because out-of-State databases containing relevant information about applicants are not necessarily as accessible to in-State authorities as are in-State databases. See Culp, 921 F.3d at 651; Peterson, 783 F. Supp. 2d at 1175. Allowing the Commonwealth's licensing authority more time to process nonresident applications is one rational response to this asymmetry. At minimum, the fifty-day expected processing time differential is not "totally unrelated to the pursuit of that goal [of evaluating all applicants with equal thoroughness]." McDonald, 394 U.S. at 809.

Third, we consider the exclusion of nonresidents from the sixty-day "grace period" available to new or returning residents. See G. L. c. 140, § 129C (j). As this Court has held, having a grace period for new or returning residents but not for nonresidents can "be explained by the relatively short, one-year period of validity applicable to nonresident licenses." Firearms Records Bur. v. Simkin, 466 Mass. 168, 178 (2013). In

particular, a sixty-day grace period for nonresident licenses would represent a waiver of more than fifteen percent of the relevant license duration, whereas a sixty-day grace period for resident licenses waives at most approximately three percent of the relevant license duration. More broadly, the Legislature could rationally have concluded that extending the sixty-day grace period to nonresidents would effectively nullify the licensure requirement for nonresidents, since any nonresident physically present in the Commonwealth for less than a sixty-day period would presumably thereby become immune from liability for unlicensed possession. See generally Federal Communications Comm'n, 508 U.S. at 315 (under rational basis review, "a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation"); McDonald, 394 U.S. at 809 (legislative distinctions invalidated under rational basis review "only if no grounds can be conceived to justify them").

In short, each of the complained-of differences in the Commonwealth's treatment of resident versus nonresident firearms license applicants "bear[s] some rational relationship to a legitimate state end." McDonald, 394 U.S. at 809. Specifically, the defendant has not fulfilled the attacking party's "burden [under rational basis] to negative every conceivable basis which might support [the Commonwealth's nonresident firearm licensing scheme]" (quotation and citation

omitted). Federal Communications Comm'n, 508 U.S. at 315. Therefore, the Commonwealth's nonresident firearm licensing scheme does not violate nonresidents' Fourteenth Amendment equal protection rights.

Conclusion. The defendant's Second Amendment challenge to the Commonwealth's nonresident firearm licensing scheme fails because "shall issue" licensing schemes the purpose of which is to restrict possession of firearms by demonstrably dangerous persons are consistent with this nation's historical tradition of firearm regulation. The defendant's Fourteenth Amendment challenge also fails because the Commonwealth's scheme does not violate a nonresident's right to travel or to equal protection. It follows that the Commonwealth's nonresident firearm licensing scheme is facially valid. Accordingly, the order allowing the defendant's motion to dismiss is reversed.

So ordered.

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
January 30, 2025
Lyle W. Cayce
Clerk

No. 23-30033

CALEB REESE; FIREARMS POLICY COALITION, INCORPORATED; SECOND AMENDMENT FOUNDATION; LOUISIANA SHOOTING ASSOCIATION; EMILY NAQUIN,

Plaintiffs—Appellants,

versus

BUREAU OF ALCOHOL, TOBACCO, FIREARMS, and EXPLOSIVES; STEVEN DETTELBACH, *Director of the Bureau of Alcohol, Tobacco, Firearms and Explosives*; JAMES R. MCHENRY III, *Acting U.S. Attorney General*,

Defendants—Appellees.

Appeal from the United States District Court
for the Western District of Louisiana
USDC No. 6:20-CV-1438

Before ELROD, *Chief Judge*, JONES, and BARKSDALE, *Circuit Judges*.

EDITH H. JONES, *Circuit Judge*:

This is a second challenge in our court to the constitutionality of 18 U.S.C. §§ 922(b)(1) and (c)(1), which together prohibit Federal Firearms Licensees from selling handguns to eighteen-to-twenty-year-old adults. In *National Rifle Ass'n, Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*,

700 F.3d 185 (5th Cir. 2012) ("*NRA I*"), this court upheld those provisions. But that decision, which was criticized at the time, *see National Rifle Ass'n, Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 714 F.3d 334, 341 (5th Cir. 2013) ("*NRA II*") (Jones, J., dissenting from denial of rehearing en banc), preceded two recent clarifying Supreme Court opinions on the methodology by which we construe gun regulations under the Second Amendment. We are now compelled to focus intently on the evidence of firearm access and ownership by eighteen-to-twenty-year-olds near and at the founding, and we conclude that (1) *NRA I* is incompatible with the *Bruen* and *Rahimi* decisions of the Supreme Court, and (2) these provisions are inconsistent with the Second Amendment. Accordingly, we REVERSE the district court's contrary judgment and REMAND for further proceedings consistent with this opinion.

I. Background

A. Procedural History

Appellants filed suit in the district court against the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF"), its Director, and the Attorney General of the United States, challenging the constitutionality of 18 U.S.C. §§ 922(b)(1) and (c)(1), and their attendant regulations, including 27 C.F.R. §§ 478.99(b), 478.124(a), and 478.96(b). These provisions, in effect, prohibit Federal Firearms Licensees ("FFLs") from selling or delivering handguns to adults under the age of twenty-one. *Id.* Appellants contend that the federal laws unconstitutionally infringe on their right to keep and bear

arms under the Second Amendment and deny them equal protection under the Due Process Clause of the Fifth Amendment.[1]

Appellants are individuals between the ages of eighteen and twenty-one and three nonprofit organizations, filing on behalf of their members who are unable to buy handguns from FFLs and FFLs who are, in turn, prohibited from selling them handguns. Because the federal laws ban purchases by adults of a certain age, Appellants recently added additional named Plaintiffs who are currently over eighteen and under twenty-one.

In 2021, the government moved to dismiss or for summary judgment, contending that Appellants lacked Article III standing and failed to state a claim upon which relief could be granted. Appellants filed a cross-motion for summary judgment. The district court found that Appellants had standing, but granted the government's motion to dismiss under Rule 12(b)(6).

In so doing, the district court purported to adopt the framework established by the Supreme Court in *New York Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 142 S. Ct. 2111 (2022). The court considered first "whether the Second Amendment's plain text protects the ability of 18 to 20-year-olds to directly purchase handguns from FFLs," and, if so, "whether the challenged restrictions are consistent with the Nation's historical tradition of firearm regulation." *See id.* at 24, 142 S. Ct. at 2129–30. "Out of an abundance of caution," the court assumed that the Second Amendment's plain text covered the purchase of firearms by eighteen-to-twenty-year-olds. Proceeding to *Bruen*'s historical prong, the court found that the prohibition is consistent with this Nation's historical tradition of

[1] Appellants also sought as-applied relief with respect to women under the age of twenty-one. The district court did not rule on that question. Given our conclusion on the facial unconstitutionality of these statutes and regulations, we do not address this issue.

firearms regulation. The court relied considerably on this court's analysis in *NRA I*, which upheld the same laws challenged here under intermediate means-ends scrutiny. The court acknowledged, however, that means-ends scrutiny was rejected by *Bruen*, 597 U.S. 1, 142 S. Ct. 2111. Appellants timely appealed.

After oral argument, this appeal was abated pending the Supreme Court's decision in *United States v. Rahimi*, 602 U.S. 680, 144 S. Ct. 1889 (2024). There, the Supreme Court largely reinforced and refined the *Bruen* analysis and ultimately upheld 18 U.S.C. § 922(g)(8), which prohibits individuals subject to a domestic violence restraining order from possessing firearms. *Id.* at 692, 144 S. Ct. at 1898. After supplemental briefing and another round of oral argument, we now return to the constitutionality of §§ 922(b)(1), (c)(1) and their attendant regulations.

B. Statutory Framework

Congress enacted the Omnibus Crime Control and Safe Streets Act ("Act") in 1968, and, *inter alia*, prohibited FFLs from selling certain firearms to certain purchasers based on the purchaser's age. Pub. L. No. 90-351, tit. IV, § 922(b)(1), 82 Stat. 197 (1968). The first challenged provision states:

> It shall be unlawful for any licensed importer, licensed manufacturer, licensed dealer, or licensed collector to sell or deliver [] any firearm or ammunition to any individual who the licensee knows or has reasonable cause to believe is less than eighteen years of age, and, if the firearm, or ammunition is other than a shotgun or rifle, or ammunition for a shotgun or rifle, to any individual who the licensee knows or has reasonable cause to believe is less than twenty-one years of age[.]

18 U.S.C. § 922(b)(1). Additionally, § 922(c)(1) prohibits FFLs from selling such a firearm to "a person who does not appear in person at the licensee's

business premises," absent a sworn statement that they are "twenty-one years or more of age[.]" 18 U.S.C. § 922(c)(1).

ATF implemented regulations prohibiting the sale of firearms "other than a shotgun or rifle" to adults under twenty-one. 27 C.F.R. § 478.99(b), for instance, states in part:

> A licensed importer, licensed manufacturer, licensed dealer, or licensed collector shall not sell or deliver . . . [any] firearm, or ammunition, . . . other than a shotgun or rifle, or ammunition for a shotgun or rifle, to any individual who the importer, manufacturer, dealer, or collector knows or has reasonable cause to believe is less than 21 years of age[.]

As a result, eighteen-to-twenty-year-olds "may not purchase handguns from FFLs." *NRA I*, 700 F.3d at 190. The Act and regulations do nothing to prohibit eighteen-to-twenty-year-olds from owning, possessing, or carrying handguns, nor does it prohibit them from buying handguns in the unlicensed, private market or receiving handguns as gifts.

Appellants allege that this "handgun ban" is inconsistent with our Nation's history of firearm regulation and thus unconstitutionally infringes on their Second Amendment right to keep and bear arms.

C. The Second Amendment

The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II. In *District of Columbia v. Heller* and *McDonald v. City of Chicago*, the Supreme Court held that the Amendment, in conjunction with the Fourteenth, "protect[s] an individual right to keep and bear arms for self-defense." *Bruen*, 597 U.S. at 17, 142 S. Ct. at 2125; *Heller*, 554 U.S. 570, 628, 128 S. Ct. 2783, 2817 (2008); *McDonald*, 561 U.S. 742, 767–68, 130 S. Ct. 3020, 3036 (2010).

Subsequently, *Bruen* clarified the framework for determining when a given statute or regulation unconstitutionally infringes on that right. *Bruen*, 597 U.S. at 24, 142 S. Ct. at 2129–30. First, courts must determine whether "the Second Amendment's plain text covers an individual's conduct." *Id.* If so, "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.*

"Why and how the regulation burdens the right are central to this inquiry" in "considering whether the challenged regulation is consistent with the principles that underpin our regulatory tradition." *Rahimi*, 602 U.S. at 692, 144 S. Ct. at 1898 (citing *Bruen*, 597 U.S. at 26–31, 142 S. Ct. at 2131–34). Neither *Bruen* nor *Rahimi* contemplates "a law trapped in amber," where the government must show a "historical twin." *Id.* at 691–692, 144 S. Ct. at 1897–98 (quoting *Bruen*, 597 U.S. at 30, 142 S. Ct. at 2111). If a challenged regulation "does not precisely match its historical precursors, 'it still may be analogous enough to pass constitutional muster.'" *Id.* at 692, 144 S. Ct. at 1898 (quoting *Bruen*, 597 U.S. at 30, 142 S. Ct. at 2133). At the same time, a law may unconstitutionally infringe on the right when it goes "beyond what was done at the founding," "[e]ven when [it] regulates arms-bearing for a permissible reason." *Id.*

In *Bruen*, the Court considered the constitutionality of New York's licensing regime for carrying handguns in public. 597 U.S. at 8–11, 142 S. Ct. at 2122. Following up on a 1905 law, New York's "Sullivan Law" criminalized the possession of handguns, either concealed or otherwise, without a government-issued license, which could be issued if the applicant demonstrated "good moral character" and "proper cause." *Id.* (quoting 1913 N.Y. Laws ch. 608, § 1, p. 1629; citing 1911 N.Y. Laws ch. 195, § 1, p. 443). At the time *Bruen* was decided, the regulatory scheme had evolved to criminalize the possession of "any firearm without a license, whether inside

or outside the home." *Id.* at 11–12, 142 S. Ct. at 2122 (internal quotations omitted). What made New York's licensing regime relatively unique was its "may issue" framework, which gave state authorities discretion in issuing licenses even where the applicant had demonstrated the requisite criteria. *Id.* at 13–14, 142 S. Ct. at 2123–24.

The Court considered it "undisputed" that the plaintiffs in *Bruen*, both "law-abiding, adult citizens," were a part of "the people" protected by the Amendment, and that "handguns are weapons in 'common use' today for self-defense." *Id.* at 31–32, 142 S. Ct. at 2134 (citing *Heller*, 554 U.S. at 580, 627, 128 S. Ct. at 2790–91, 2817). Because the plain text of the Amendment covered the conduct at issue, the government bore the burden of justifying the regulation under our Nation's regulatory tradition. Turning to that tradition, the "historical record . . . [did] not demonstrate a tradition of broadly prohibiting the public carry of commonly used firearms for self-defense." *Id.* at 38, 142 S. Ct. at 2138. While there were a "handful of late-19th-century" examples of such prohibitions, there was "little evidence of an early American practice of regulating public carry by the general public." *Id.* at 38, 46, 142 S. Ct. at 2138, 2142. Further, "late-19th-century evidence cannot provide much insight into the meaning of the Second Amendment when it contradicts earlier evidence." *Id.* at 38, 46, 66, 142 S. Ct. at 2138, 2142, 2154 (citing *Heller*, 554 U.S. at 614, 128 S. Ct. at 2810). After a thorough discussion of firearm regulation stretching from medieval England to the early 20th century, the Court concluded that the government had "not met [its] burden to identify an American tradition justifying [New York's] proper-cause requirement." Accordingly, the licensing statute violated the Second Amendment as incorporated by the Fourteenth. *Id.* at 34, 70–71, 142 S. Ct. at 2135–36, 2156.

Two years later, in *Rahimi*, the Court applied the *Bruen* two-part framework and upheld a challenge to the federal law that prohibits individuals

subject to a domestic violence restraining order from possessing firearms. 602 U.S. at 684–686, 144 S. Ct. at 1894; 18 U.S.C. § 922(g)(8). The Court analogized the provision to surety laws and "going armed" laws around the time of the founding. *Rahimi*, 602 U.S. at 693–699, 144 S. Ct. at 1899–1901. Surety laws, a form of "preventive justice," "authorized magistrates to require individuals suspected of future misbehavior to post a bond" (which would be forfeited on any breaking of the peace), providing a "mechanism for preventing violence before it occurred." *Id.* at 695, 144 S. Ct. at 1899–1900. "Going armed" laws prohibited "riding or going armed, with dangerous or unusual weapons, [to] terrify[] the good people of the land," and were punishable, *inter alia*, by "forfeiture of . . . arms." *Id.* at 697, 144 S. Ct. at 1901 (alterations in original) (quoting 4 William Blackstone, *Commentaries on the Laws of England* 149 (10th ed. 1787)). "Taken together, the surety and going armed laws confirm what common sense suggests: When an individual poses a clear threat of physical violence to another, the threatening individual may be disarmed." *Id.* at 698, 144 S. Ct. at 1901. Consequently, § 922(g)(8) was consistent with the principles that underlie our regulatory tradition and passed constitutional muster.

II. Analysis

With this background, we review the constitutional questions *de novo*. *United States v. Perez-Macias*, 335 F.3d 421, 425 (5th Cir. 2003). Addressing the first question under *Bruen*, the government contends that "the Second Amendment's plain text" does not cover the conduct that §§ 922(b)(1) and (c)(1) prohibit. *Bruen*, 597 U.S. at 24, 142 S. Ct. at 2130. The government argues that a limited ban on the purchase of handguns from FFLs is not an infringement on the Second Amendment rights, and in any event eighteen-to-twenty-year-olds are not among "the people" protected by the right. We reject these points, then move to *Bruen*'s second inquiry: whether the

government met its burden to demonstrate historical analogues supporting the challenged regulations.

A. Purchasing Firearms

Contrary to the district court's assumption, the government denies that the plain text of the Second Amendment "establish[es] a right" to purchase firearms "at any time from any source." It emphasizes that § 922(b)(1) only limits the sale of handguns by a "particular type of seller" (FFLs) to a "particular class of buyers (under-21-year-olds)." Of course, the words "purchase," "sale," or similar terms describing a transaction do not appear in the Second Amendment. But the right to "keep and bear arms" surely implies the right to purchase them. *See Luis v. United States*, 578 U.S. 5, 26, 136 S. Ct. 1083, 1097 (2016) (Thomas, J., concurring) ("Constitutional rights . . . implicitly protect those closely related acts necessary to their exercise."); *see also Teixeira v. Cnty. of Alameda*, 873 F.3d 670, 677 (9th Cir. 2017) ("[T]he core Second Amendment right to keep and bear arms for self-defense 'wouldn't mean much' without the ability to acquire arms.") (quoting *Ezell v. City of Chicago*, 651 F.3d 684, 704 (7th Cir. 2011)); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 96 (2012) (When "a text authorizes a certain act, it implicitly authorizes whatever is a necessary predicate of that act.").

Further, the contention that sales to young adults are not covered by the Second Amendment simply because of the Act's targeted application is fundamentally inconsistent with the *Bruen/Rahimi* framework. The threshold textual question is not whether the laws and regulations impose reasonable or historically grounded limitations, but whether the Second Amendment "covers" the conduct (commercial purchases) to begin with. Because constitutional rights impliedly protect corollary acts necessary to their exercise, we hold that it does. To suggest otherwise proposes a world

where citizens' constitutional right to "keep and bear arms" excludes the most prevalent, accessible, and safe market used to exercise the right. The baleful implications of limiting the right at the outset by means of narrowing regulations not implied in the text are obvious; step by step, other limitations on sales could easily displace the right altogether.[2]

B. "The People"

The government next asserts that eighteen-to-twenty-year-olds are not "part of 'the people' whom the Second Amendment protects." *Bruen*, 597 U.S. at 31–32, 142 S. Ct. at 2134. This argument is based largely on the common law's recognition of 21 years as the date of legal maturity at the time of the founding, and the fact that legislatures have long established minimum age requirements for various activities.

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[2] In *Rocky Mountain Gun Owners v. Polis*, the court upheld a Colorado state firearms purchase ban on 18- to 20-year old adults as a "presumptively lawful regulatory measure" not characterized by "abuse" and therefore outside Second Amendment protection. 121 F.4th 96, 112–128 (10th Cir. 2024). The court excluded this ban from the *Bruen* analysis allegedly based on *Heller*'s statement that regulations on commercial firearms sales are "presumptively lawful." In our view, as pointed out above, the court committed a category error in its analysis that a complete ban of the most common way for a young adult to secure a firearm is not an abridgement of the Second Amendment right and therefore subject to *Bruen*'s test.

Nor is this court's decision in *McRorey v. Garland*, 99 F.4th 831 (5th Cir. 2024), to the contrary. *McRorey* upheld expanded federal background checks for firearms purchases by 18- to 20-year olds. Although this court stated that the "keep and bear" language does not include "purchase," it also observed that the right to "keep and bear" can "implicate the right to purchase" and noted that is the reason "the Court prohibits shoehorning restrictions on purchase into functional prohibitions on keeping." *Id.* at 838 (citing *Bruen,* 597 U.S. at 38 n.9, 142 S. Ct. at 2138). The case before us is more than a "functional prohibition," it is an outright ban. We fail to see how a purchase ban unknown at the time of the founding can evade *Bruen* analysis. *See also United States v. Diaz*, 116 F.4th 458 (5th Cir. 2024) (applying *Bruen* to federal law disarming convicted felons).

The operative clause of the Second Amendment states that "the right of *the people* to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II (emphasis added). There are no age or maturity restrictions in the plain text of the Amendment, as there are in other constitutional provisions. *See, e.g.*, U.S. CONST. art. I, § 2, cl. 2 (members of the House of Representatives must be at least 25 years old). This suggests that the Second Amendment lacks a minimum age requirement. *See, e.g.*, Scalia & Garner, *supra*, at 93–100 (discussing the "omitted-case canon—the principle that what a text does not provide is unprovided").

Moreover, in the unamended Constitution and Bill of Rights, the phrase "right of the people" appears in the First Amendment's Assembly-and-Petition Clause, the Fourth Amendment's Search-and-Seizure Clause, and the Ninth Amendment. *Heller*, 554 U.S. at 579, 128 S. Ct. at 2790. All of these references confer "individual rights" and undoubtedly protect eighteen-to-twenty-year-olds as much as twenty-one-year-olds. In fact, with modifications, the rights they confer extend to younger minors. *See, e.g.*, *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212, 95 S. Ct. 2268, 2274 (1975) ("[M]inors are entitled to a significant measure of First Amendment protection."); *New Jersey v. T.L.O.*, 469 U.S. 325, 337, 105 S. Ct. 733, 740 (1985) (school-age children are protected by the Fourth Amendment, with greater permissible intrusions in the school context).

Elsewhere in the Constitution, "the people" refers to all Americans collectively. *See* U.S. CONST. pmbl.; *id.* art. I, § 2; *id.* amend. X. But as *Heller* explained, these provisions "deal with the exercise or reservation of powers, not rights. Nowhere else in the Constitution does 'a right' attributed to 'the people' refer to anything other than an individual right." 554 U.S. at 579–80, 128 S. Ct. at 2790. From another angle, "in all six other provisions of the Constitution that mention 'the people', the term unambiguously refers to all members of the political community, not an unspecified subset." *Id.* at

580, 128 S. Ct. at 2790–91. In sum, "the people" is a term of art that refers to a "class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community." *Id.* (quoting *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265, 110 S. Ct. 1056, 1061 (1990). On examining the constitutional text, *Heller* "start[ed] therefore with a strong presumption that the Second Amendment right is exercised individually and belongs to all Americans." *Id.* at 581, 128 S. Ct. at 2791.

Seizing on *Heller*'s reference to a "political community," the government asserts that, because eighteen-to-twenty-year-olds did not "enjoy the full range of civil and political rights" in the founding-era, they are not a part of "the people" for Second Amendment purposes. *Id.* at 580, 128 S. Ct. at 2790; *see, e.g.*, 1 John Bouvier, *Institutes of American Law* 148 (new ed. 1858) ("The rule that a man attains his majority at the age of twenty-one years accomplished, is perhaps universal in the United States."); 1 Blackstone, *supra*, at 463 ("[F]ull age in male or female is twenty-one years . . ."). While it may be true that eighteen-to-twenty-year-olds could not then serve on juries, firearm restrictions are notably absent from the government's list of founding-era age-limited civil and political rights. *See* Albert W. Aschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 877 n.52 (1994). Nor does the government provide any evidence suggesting that eighteen-to-twenty-year-olds historically lacked the right to self-defense, the "central component" of the Second Amendment. *Heller*, 554 U.S. at 599, 128 S. Ct. at 2801 (emphasis omitted).

Still, the government emphasizes that the right to vote "from the founding to the Twenty-Sixth Amendment" was typically reserved for citizens over twenty-one. Thus, because voting is a "hallmark of membership in the polity," eighteen-to-twenty-year-olds were originally, and

now remain, excluded from the "political community" described in *Heller*. This argument is incompatible with Second Amendment precedent, nonsensical when considered against the backdrop of American suffrage, and contradicted by the history of firearm use at the founding.

First, *Heller* unambiguously holds that "the Second Amendment confer[s] an *individual* right to keep and bear arms" (as opposed to a right conditioned on service in the militia). 554 U.S. at 595, 600, 128 S. Ct. at 2799, 2802 (emphasis added). And in contrast to "civic rights" that presuppose virtue limitations, the right to keep and bear arms is an "individual right" rooted in the right to self-defense. *See Kanter v. Barr*, 919 F.3d 437, 462–63 (7th Cir. 2019) (Barrett, J., dissenting); *Heller*, 554 U.S. at 595, 128 S. Ct. at 2799. The fact that eighteen-to-twenty-year-olds were minors unable to vote (or exercise other civic rights) does not mean they were deprived of the individual right to self-defense. *See NRA I*, 700 F.3d at 204 n.17 ("The terms 'majority' and 'minority' lack content without reference to the right at issue."), *abrogated by Bruen*, 597 U.S. 1, 142 S. Ct. 2111.

Second, the contention that "the people" covered by the Second Amendment is limited to those who enjoyed civic or voting rights at the founding does not withstand common-sense scrutiny. In most cases, early colonial governments conditioned eligibility to vote on various criteria, including variations of the "forty-shilling freehold" requirement.[3] Shortly after the Constitution was ratified in 1788, states began to reassess this "landed" requirement,[4] but often maintained race and gender-based voter

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[3] New York, for example, amended its voting laws in 1701 to exclude anyone who was not in "possession [of] an Estate of freehold." Hayley N. Lawrence, *The Untold History of Women's Suffrage: Voting Rights Pre-Ratification*, 52 INT'L SOC'Y BARRISTERS Q., 1, 8 (2020).

[4] *See, e.g.*, Laura E. Free, *Suffrage Reconstructed: Gender, Race, and Voting Rights in the Civil War Era* 3 (2015). By 1840, only three states retained a property qualification, and

qualifications.[5] In 1870, nearly eighty years after the ratification of the Bill of Rights, the Fifteenth Amendment extended voting rights to all Americans, regardless of race; and it was not until 1920 that the Nineteenth Amendment guaranteed women the right to vote. Finally, the Twenty-Sixth Amendment lowered the voting age for all Americans from twenty-one to eighteen in 1971.

Thus, to say that "the people" covered by the Second Amendment is limited to those who were a part of the "political community" *at the founding* would imply excluding "law-abiding, adult citizens" based on property ownership, race, or gender. *See Bruen*, 597 U.S. at 31–32, 142 S. Ct. at 2134 ("It is undisputed that petitioners . . .—two ordinary, law-abiding, adult citizens—are part of 'the people' whom the Second Amendment protects.") (citing *Heller*, 554 U.S. at 580, 128 S. Ct. at 2790). Just as defining "arms" as "only those arms in existence in the 18th century" "border[s] on the frivolous," likewise, attempting to limit "the people" to individuals who were part of the "political community" at ratification is ludicrous. *See Heller*, 554 U.S. at 582, 128 S. Ct. at 2791. "Although its meaning is fixed according to the understandings of those who ratified it, the Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated." *Bruen*, 597 U.S. at 28, 142 S. Ct. at 2132.

Finally, the history of firearm use, particularly in connection with militia service, contradicts the premise that eighteen-to-twenty-year-olds are not covered by the plain text of the Second Amendment. The Second

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the practice finally ended nation-wide with North Carolina in 1856. Stanley Engerman & Kenneth Sokoloff, *The Evolution of Suffrage Institutions in the New World*, NAT'L BUREAU OF ECON. RSCH. 18 (2001).

[5] Delaware, for example, amended its constitution in 1831 to limit the right to "free white male citizen[s]" that were over the age of twenty-one, and was followed shortly thereafter by Tennessee in 1843. Lawrence, *supra*, at 15.

Amendment's prefatory clause states that "[a] well regulated Militia, being necessary to the security of a free State . . . ." U.S. CONST. amend. II. While *Heller* recognized that the "central component" of the right to keep and bear arms is self-defense, the "prefatory clause announces the *purpose* for which the right was codified: to prevent elimination of the militia." 554 U.S. at 599, 128 S. Ct at 2801 (emphasis omitted and added); *see also Bruen*, 597 U.S. at 18, 142 S. Ct. at 2126. The Framers knew all too well the dangers a disarmed and defenseless public could face under monarchical control. *See Heller*, 554 U.S. at 592–95, 128 S. Ct. at 2797–99.

At the founding, "the 'militia' in colonial America consisted of a subset of 'the people'—those who were male, able bodied, and within a certain age range." *Id.* at 580, 595–97, 128 S. Ct. at 2791, 2799–800 (citing *United States v. Miller*, 307 U.S. 174, 179, 59 S. Ct. 816, 818 (1939) ("the Militia comprised all males physically capable of acting in concert for the common defense"); The Federalist No. 46, pp. 329, 334 (B. Wright ed. 1961) (J. Madison) ("near half a million of citizens with arms in their hands"); Letter to Destutt de Tracy (Jan. 26, 1811), in *The Portable Thomas Jefferson* 520, 524 (M. Peterson ed. 1975) ("the militia of the State, that is to say, of every man in it able to bear arms")). Under Article I, Congress has the power to "call[] forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions[.]" U.S. CONST. art. I, § 8, cl. 15. When called, militiamen were "expected to appear bearing arms supplied by themselves and of the kind in common use at the time." *Miller*, 307 U.S. at 179, 59 S. Ct. at 818.

The Second Congress consequently enacted the Militia Act of 1792, which stated, in part:

> That each and every free able-bodied white male citizen of the respective states, resident therein, who is or shall be of the age of eighteen years, and under the age of forty-five years (except

> as is herein excepted) shall severally and respectively be enrolled in the militia . . . . And it shall at all time hereafter be the duty of every such captain or commanding officer of a company to enroll every such citizen, as aforesaid, and also those who shall, from time to time, arrive at the age of eighteen years . . . . That every citizen so enrolled and notified, shall, within six months thereafter, provide himself with a good musket or firelock, . . . [and] a pouch with a box therein to contain not less than twenty-four cartridges, suited to the bore of his musket or firelock; . . . or with a good rifle, . . . [and] twenty balls suited to the bore of his rifle . . . .

Act of May 8, 1792, 1 Stat. 271, 271. After *Heller*, there is no doubt that "the militia" was "a subset of 'the people'" protected by its operative clause. *See Heller*, 554 U.S. at 580, 128 S. Ct. at 2790–91. The 1792 Militia Act, in turn, shows that eighteen-to-twenty-year-olds not only served in that militia, but were required to serve. Act of May 8, 1792, 1 Stat. 271, 271. Eighteen-to-twenty-year-olds therefore must be covered by the plain text of the Second Amendment, as they were compulsorily enrolled in the regiments that the Amendment was written to protect.

In response, the government points to four instances in which states set the minimum age for militia service above eighteen. One is from the colonial era, while the rest were codified between 1829 and 1868.[6] Colonial Virginia exempted men under twenty-one from militia service from 1738 to 1757, but adopted the minimum age of eighteen in response to a need for

[6] The government points to New Jersey's 1829 "Act to exempt minors from Militia Duty in time of peace," the 1860 Code of the State of Georgia, and the 1868 North Carolina Constitution as examples of states raising the minimum militia age to twenty-one. An Act to exempt minors from Militia Duty in time of peace (1829), *reprinted in A Compilation of the Public Laws of the State of New-Jersey, Passed Since the Revision in the Year 1820* 266 (Josiah Harrison ed., 1833); *The Code of the State of Georgia*, pt. 1, tit. 11, chs. 1, 2, §§ 981, 1027, at 189, 199 (Richard H. Clark et al. eds., 1861); N.C. CONST. of 1868, art. XII, § 1.

additional forces during the French & Indian War. David B. Kopel & Joseph G. S. Greenlee, *The Second Amendment Rights of Young Adults*, 43 S. ILL. U. L.J. 495, 533, 579 (2019) ("*Rights of Young Adults*"). Apart from this example, colonial legislatures consistently set the minimum militia age at eighteen, and in some cases even lower.[7] *Id.* at 533; *see Miller*, 307 U.S. at 180–81, 59 S. Ct. at 819 (discussing Massachusetts and New York laws from 1784 and 1786, respectively, that required able-bodied men from sixteen to forty-five to enroll in the militia, and "provide himself, at his own Expense, with a good Musket").

One brief pre-ratification aberration and a handful of post-ratification examples do not outweigh the consistent approach of all states—including Virginia—where the minimum age of eighteen prevailed at or immediately after ratification of the Second Amendment. *See NRA II*, 714 F.3d at 340–41 n.8 (Jones, J., dissenting from denial of rehearing en banc). The founding-era laws are far more probative of what "the people" meant when the Second Amendment was ratified, as "Constitutional rights are enshrined with the scope they were understood to have when the people adopted them." *Heller*, 554 U.S. at 634–35, 128 S. Ct. at 2821.

Reliance on the Militia Act does not, of course, constrain the Second Amendment to founding-era militiamen. *Heller* expressly rejected that argument. *Id.* at 577, 128 S. Ct. at 2789. But the prefatory clause, in establishing the Amendment's purpose, describes those who, at a minimum, must have been covered by it. In other words, the Framers wanted to ensure that individuals eligible for militia service to defend "themselves, if

[7] After returning to a minimum age of eighteen in 1757, Virginia briefly lowered the minimum age for militia service to sixteen during the Revolutionary War. Shortly thereafter, Virginia brought the minimum age back to eighteen in 1784, where it remained through ratification of the Second Amendment. *Id.* at 582–83.

necessary, and . . . their country" could not be disarmed. *Id.* at 613, 128 S. Ct. at 2809 (quoting *State v. Chandler*, 5 La. Ann. 489, 490 (1850)).

Finally, the government argues that mere participation in the militia was not enough to establish Second Amendment protections because (1) black men served in the militia but were otherwise barred from possessing arms; and (2) Virginia, by law, disarmed men who refused to take a loyalty oath while still requiring them to enroll in the militia, albeit without firearms.[8] The treatment of blacks is hardly probative as to eighteen-to-twenty-year-olds because race-based classifications would apply regardless of age. *See McDonald*, 561 U.S. at 770–78, 130 S. Ct. at 3038–42 (discussing race, ratification of the Fourteenth Amendment, and the right to keep and bear arms). Similarly, although Virginia (and presumably other states) disarmed men who refused to swear loyalty to the United States during the Revolution, this exception does not show that eighteen-to-twenty-year-olds, as a class, were excluded from the right to keep and bear arms. *See NRA II*, 714 F.3d at 343 (Jones, J., dissenting from denial of rehearing en banc). In some respects, "Loyalty Tests" contradict the government's position. Virginia required men over sixteen years old to swear an oath of allegiance lest they "be *dis*armed".[9] This language implies that Virginia expected that potential dissidents as young as sixteen may be armed; and young men of sixteen were "considered to have rights even if they were being restricted equally with other suspect class members." *NRA II*, 714 F.3d at 343 (Jones, J., dissenting from denial of rehearing en banc). Finally, this Virginia law was a wartime

[8] An Act to Oblige the Free Male Inhabitants of this State Above a Certain Age to Give Assurance of Allegiance to the Same, and for Other Purposes ("Virginia Loyalty Act") (1777), *printed in Printed Ephemera Collection*, Library of Congress, Portfolio 178, Folder 27.

[9] Virginia Loyalty Act (emphasis added).

U.S. at 29, 142 S. Ct. at 2132). Proceeding past the bounds of founding-era analogues, however, is risky under *Bruen*, and courts must "guard against giving [such] postenactment history more weight than it can rightly bear." *Bruen*, 597 U.S. at 35, 142 S. Ct. at 2136. The limitation of these late 19th century analogues is not in the "how" or the "why" of regulation, but rather that the laws were passed too late in time to outweigh the tradition of pervasively acceptable firearm ownership by eighteen-to-twenty-year-olds at "the crucial period of our nation's history." *NRA II*, 714 F.3d at 339 (Jones, J., dissenting from denial of rehearing en banc).

Bruen cautioned that "when it comes to interpreting the Constitution, not all history is created equal." 597 U.S. at 34, 142 S. Ct. at 2136. Rather, "Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad." *Heller*, 554 U.S. at 634–35, 128 S. Ct. at 2821; *see Bruen*, 597 U.S. at 34, 142 S. Ct. at 2136. As Justice Barrett explained in her concurrence in *Rahimi*, "for an originalist, the history that matters most is the history surrounding the ratification of the text; that backdrop illuminates the meaning of the enacted law. History (or tradition) that long postdates ratification does not serve that function." *Rahimi*, 602 U.S. at 737–38, 144 S. Ct. at 1924 (Barrett, J., concurring); *see Bruen*, 597 U.S. at 36, 142 S. Ct. at 2137 (quoting *Heller*, 554 U.S. at 614, 128 S. Ct. at 2810) ("[B]ecause post-Civil War discussions of the right to keep and bear arms 'took place 75 years after the ratification of the Second Amendment, they do not provide as much insight into its original meaning as

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provision of bowie-knives, dirks, and the like depending on the age of the recipient. Ala. Acts 17, No. 26, § 1; *see, e.g.,* 1890 Wyo. Sess. Laws 140, § 97.

earlier sources.'"); *United States v. Connelly*, 117 F.4th 269, 281–82 (5th Cir. 2024).

To be sure, *Heller* and *Bruen* both considered 19th century sources in their analysis—to confirm and reinforce earlier historical evidence contemporaneous with the Constitution's ratification. *See Bruen*, 597 U.S. at 37, 142 S. Ct. at 2137 (quoting *Gamble v. United States*, 587 U.S. 678, 702, 139 S. Ct. 1960, 1976 (2019)) (stating that, in *Heller*, "[t]he 19th-century evidence was 'treated as mere confirmation of what the Court thought had already been established.'"). While acknowledging the "ongoing scholarly debate" regarding the most relevant period of history for issues arising under the Fourteenth Amendment, the Court clarified that "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." *Id.* at 36, 38, 142 S. Ct. at 2137–38 (citations omitted) (emphasis in original). "[T]he scope of the protection applicable to the Federal Government and States is pegged to the public understanding of the right when the Bill of Rights was adopted in 1791." *Id.* at 37, 142 S. Ct. at 2137–38 (citing *Crawford v. Washington*, 541 U.S. 36, 42–50, 124 S. Ct. 1354 (2004) (Sixth Amendment); *Virginia v. Moore*, 553 U.S. 164, 168–69, 128 S. Ct. 1598 (2008) (Fourth Amendment); *Nevada Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 122–25, 131 S. Ct. 2343 (2011) (First Amendment)).

III. Conclusion

Ultimately, the text of the Second Amendment includes eighteen-to-twenty-year-old individuals among "the people" whose right to keep and bear arms is protected. The federal government has presented scant evidence that eighteen-to-twenty-year-olds' firearm rights during the founding-era were restricted in a similar manner to the contemporary federal handgun purchase ban, and its 19th century evidence "cannot provide much

insight into the meaning of the Second Amendment when it contradicts earlier evidence." *Id.* at 66, 142 S. Ct. at 2154 (citing *Heller*, 554 U.S. at 614, 128 S. Ct. at 2810). In sum, 18 U.S.C. §§ 992(b)(1), (c)(1) and their attendant regulations are unconstitutional in light of our Nation's historic tradition of firearm regulation.

We REVERSE the district court's judgment and REMAND for further proceedings consistent with this opinion.

CERTIFICATE OF COMPLIANCE

I certify pursuant that this brief complies with the rules of the court that pertaining to the filing of briefs, including but not limited to M.R.A.P. 16(a)(13), 16(e), 18, 20, and 21. This brief complies with the length limit of Rule 20 because it is in 14-point, Palatino and contains 4, 470 non-excludable words, as determined by the "Word Count" feature in Microsoft Word.

/s/ Elizabeth Lazar
Elizabeth Lazar

CERTIFICATE OF SERVICE

I certify, pursuant to Mass. R.A.P. 13(d) that on this date I served this brief and accompanying record appendix upon the attorney of record for the Commonwealth via the Electronic Filing System and email:

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