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

Reply Brief for
Mikai Thomson

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Argument

Mr. Thomson waives his argument that the entirety of the resident firearms statute in effect in 2021, G. L. c. 140, § 131, was facially unconstitutional under *Bruen*. *See* DB[1] 18-22. The SJC rejected this argument in *Commonwealth v. Rodriguez*, 496 Mass. 627, 639 (2025), ruling that "at least some of its applications – in particular, to felons and person convicted of violent crimes – were constitutionally valid." *See id.*

Mr. Thomson maintains, however, that the age restriction contained in G.L. c. 140, § 131(d)(iv), insofar as it prohibits twenty-year-olds from obtaining a license to possess a firearm, is unconstitutional. DB 22-24. At trial, the Commonwealth relied upon Mr. Thomson's age at the time of the offense (twenty years old) as proof that he did not have the requisite licensure. Mr. Thomson has standing to bring both an as-applied and facial challenge to this provision. DB 22-25. Mr. Thomson has already addressed the Commonwealth's misplaced argument that Mr. Thomson lacks standing. DB 11-12.

I. The age restriction contained in G. L. c. 140, § 131(d)(iv) violates Mr. Thomson's Second Amendment rights, and the Commonwealth has failed to meet its burden under *Bruen* to demonstrate that the prohibition is consistent with any relevant historical tradition of firearm regulation.

To evaluate whether the G. L. c. 140, § 131(d)(iv) comports with the Second Amendment right to bear arms in public, this Court will engage in a two-step analysis. *See New York State Rifle*

[1] References appear as follows: Mr. Thomson's brief as "DB [page #]"; Commonwealth's brief as "CB [page #]."

& Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 24 (2022). First, the Court will determine whether the Second Amendment's plain text covers an individual's conduct" and, if so, the Commonwealth must "justify the regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *See United States v. Rahimi*, 602 U.S. 680, 744 (2024), quoting *Bruen*, 597 U.S. at 24. Mr. Thomson explained how step one is satisfied, DB 16-18, and the Commonwealth has not challenged that assertion.

The Commonwealth now has the burden to "demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation." *See Rahimi*, 602 U.S. at 689, quoting *Bruen*, 597 U.S. at 24. To satisfy its burden, the Commonwealth may "point[] to analogous regulations enacted close in time to the ratification of either the Second Amendment in 1791 or the Fourteenth Amendment in 1868." *See Commonwealth v. Canjura*, 494 Mass. 508, 514 (2024), citing *Bruen*, 597 U.S. at 34. The "how and the why the regulations burden a law-abiding citizen's right to armed self-defense" help inform whether they are relevantly similar. *See Bruen*, 597 U.S. at 29.

The Commonwealth has failed meet its burden because it relies on historical sources that (1) are not close enough in time to the passage of the Second and Fourteenth Amendments and (2) pertain to the sale and transfer of firearms and thus do not provide an appropriate historical analogue.

A. The Commonwealth improperly relies on sources too temporally remote from the ratification of the Second and Fourteenth Amendments to justify the restriction.

"[N]ot all history is created equal" in this analysis, and the scope of the Second Amendment rights must be analyzed "*when the people adopted them*." *See Bruen*, 597 U.S. at 34 (emphasis in original); *cf. Canjura*, 494 Mass. at 514 ("The Commonwealth may meet its burden by pointing to analogous regulations enacted close in time to the ratification of either the Second Amendment in 1791 or the Fourteenth Amendment in 1868."). References that "long predate[]" the Second Amendment's ratification in 1791 and the Fourteenth Amendment's in 1868 may not be apt comparisons. *See Bruen*, 597 U.S. at 34. Likewise, too much weight may not be given to post-enactment history and where "later history contradicts, the text controls." *Id.* at 35-37.

The Commonwealth asserts that "age[-]based restrictions on the sale and transfer of firearms under the age of twenty-one were common around the adoption of both the Second and Fourteenth Amendment." CB 23. It cites *United States v. Rene E.*, 583 F.3d 8, 14 (3d Cir. 2009), which collected cases involving state regulation of the transfer firearms to juveniles. *See id.* But most of the cases are not close in time to 1791 or 1868: they are from 1878, 1923, 1914, 1888, 1884, 1858, 1921, and 1918. *See id.* These cases cannot meaningfully inform the applicable historical analysis. Moreover, *Rene E.* cites only two instances where courts upheld state regulations criminalizing a juvenile's possession of firearms, but those cases were from 1911 and 1917, *id.* at 14-15 – a time inapposite to this analysis. The Commonwealth's reliance

on *State v. Callicutt*, 69 Tenn. 714, 714-715 (1878), does little to advance its case given its lack of temporal relevance and subject matter. The nineteen statutes cited by the Commonwealth, CB 23-24 & n.7, do not pertain to the relevant historical periods.[2] In fact, all statutes post-date 1873, except for two (1856 Ala. Acts 17 and 1856 Tenn. Pub. Acts 92), which are not close enough in time to the ratification of the either amendment to carry much weight. The postbellum statutes do not provide meaningful insight to the meaning of the Second Amendment in part because they occurred at least "75 years after the ratification of the Second Amendment [and] do not provide as much insight into its original meaning as earlier sources." *See Bruen*, 597 U.S. at 36, quoting *District of Columbia v. Heller*, 554 U.S. 570, 614 (2008).

The Commonwealth also cites a 1776 Massachusetts act, closer in time to the relevant time period, that required every male above sixteen years of age to swear their loyalty to the colonies or else he would be disarmed. CB 23. That act, however, does not support the Commonwealth's argument. Instead, it underscores the point that those age sixteen and older were lawfully permitted to possess firearms but conditioned on their loyalty to the Commonwealth – they could not be enemies. This "presumes, like the surety laws before it, that the Second Amendment right may only be burdened once a defendant has been found to pose a credibility threat to the safety of others." *See Rahimi*, 602 U.S. at 699-700. This act does not provide

[2] *See* CB 24 n.7. Nor do the statutes provide appropriate historical analogues. *See* Argument I.B. n. 3.

historical support for the blanket prohibition against twenty-year-olds from possessing firearms. *See id*.

Sources closer to the passage of the Second Amendment demonstrate that G. L. c. 140, § 131(d)(iv) is not consistent with the Nation's historical tradition. Prior to the Second Amendment's ratification, Massachusetts men ages sixteen to forty were required to have a firearm. *See United States v. Miller*, 307 U.S. 174, 180 (1939) (citing General Court of Massachusetts, January 1784 session: "every noncommissioned officer and private soldier of the said militia not under the controul of parents, masters or guardians, and being of sufficient ability therefor in the judgment of the Selectmen of the town in which he shall dwell, shall equip himself, and be constantly provided with a good fire arm"). Six years later, and less than five months after the Second Amendment's ratification, the federal Militia Act of 1792 set forth federal standards for militia organization and required that able-bodied male citizens ages eighteen to forty-five enroll in the militia and arm themselves with a musket or firelock and related accessories. Militia Act of 1792, ch. 33, § 1, 1 Stat. 271 (May 8, 1792).

The Commonwealth also argues that the SJC has recognized differences in brains of emerging adults that may justify the age restriction, citing *Commonwealth v. Mattis*, 493 Mass. 216, 225 (2024). CB 25. However, *Bruen* expressly disavows any means ends scrutiny and instead focuses on the historical context – even where there may be strong modern public policy reasons for a regulation. *See Bruen*, 597 U.S. at 24; 83-84 (Stevens, J., dissenting) (*Bruen* analysis "refuses to consider the

government interests that justify a challenged gun regulation, regardless of how compelling those interests may be"); *Rahimi*, 602 U.S. at 717 (Kavanaugh, J., concurring) ("History, not policy, is the proper guide" to determine constitutionality of firearms regulations).

The Commonwealth has not cited any relevant law from the applicable historical periods that prohibited twenty-year-olds from possessing firearms because of their age.

B. Statutes and jurisprudence about the sale and transfer of firearms to minors are not apt historical analogues.

The historical sources upon which the Commonwealth relies are further flawed because they are not apt analogues. While the Commonwealth is not obliged to find a "historical twin" to the prohibition, it must "identify a well-established and representative historical analogue[.]" *Bruen*, 597 U.S. at 30; *Canjura*, 494 Mass. at 514. Nearly all of the cases and statutes it cites concern the sale and transfer of firearms. *See* Argument § I.A *supra;* CB 24-25, citing *Coleman v. State*, 32 Al. 581, 582-583 (1858) (finding defendant violated statute prohibiting selling or transferring firearms to those under twenty-one but not assessing the statute's constitutionality) and *State v. Allen*, 94 Ind. 441, 443 (1884) (reversing quashing of information pertaining to violation of statute prohibiting sale of deadly weapon to minor twenty-one but not assessing the statute's constitutionality).

The Commonwealth argues there were historical laws restricting people under the age of twenty-one from "purchasing or using firearms," but fails to elucidate which activity was prohibited: purchase or use. CB 23-24. The Commonwealth then

lists "nineteen state statutes restricting persons under the age of twenty-one from possessing firearms[.]" CB 24 n. 7 (emphasis added). However, only one of those nineteen statutes criminalized possession,[3] 1883 Wis. Sess. Laws 290, ch. 329. All

[3] *See* 1856 Ala. Acts 17 (punishing those who "sell, give or lend" bowie knives, any like knives or air guns or pistols to minors); 27 Stat. 116-17 (1892) (District of Columbia) (punishing those who sell or furnish weapon to minor under age twenty-one); 1876 Ga. Laws 112 (punishing those who "sell, give, lend or furnish any minor or minors with deadly weapons"); 1881 Ill. Laws 73 ("Whoever, *not being the father, guardian or employer of the minor* herein named, by himself or agent, shall sell, give, loan hire or barter [or offer to do the same]" a pistol, revolver, or the like to a minor shall be punished) (emphasis added); 1875 Ind. 86 (unlawful to barter, sell, or give pistol or the like or ammunition to minor); 1884 Iowa Acts 86 (prohibiting sale or conveyance of any pistol, revolver, or toy pistol to any minor); 1883 Kan. Sess. Laws 159 (criminalizing sale, trade, gift, loan or furnishing of any pistol, revolver or toy pistol or any dangerous weapons to a minor); 1873 Ky. Acts 359 (prohibiting sale of deadly weapon to minor); 1890 La. Acts 39 (unlawful for person to sell, lease, or give pistol or other dangerous weapon that might be carried concealed to person under age twenty-one); 1882 Md. Laws 656 (unlawful to sell, barter, or give away any firearm or other deadly weapon, except for shot guns, fowling pieces and rifles, to any person who is minor under age twenty-one); 1878 Miss. Laws 175 (prohibiting sales of weapons to minors); Mo. Rev. Stat. § 1274 (1879) (prohibiting indirect or direct sale, loan, delivery or barter of deadly weapon *without the consent of the parent* or guardian of the minor); 1885 Nev. Stat. 51 (criminalizing concealed carry or pistols and other deadly weapons by minors); 1893 N.C. Sess. Laws 468-69 (unlawful to sell, offer to sell, or give a minor any pistol or pistol cartridge, among other weapons); 1856 Tenn. Pub. Acts 92 (unlawful to sell, loan, or give

the other statutes regulated the sale or provision of weapons to a minor. *See* n. 3. [4]

In addition to the sources cited above, the Commonwealth also cites a footnote from Thomas M. Cooley's 1883 constitutional treatise, asserting that he recognized that "the State may prohibit the sale of arms to minors pursuant to its police power." CB 24, citing Treatise on Constitutional Limitations, 740 n. 4 (5th Ed. 1883). That footnote cites *Callicutt*, 69 Tenn. at 714-715, discussed *supra*, which for the reasons discussed above, carries little weight.

The Second Amendment protects the "right of the people to keep and bear arms," including carrying handguns in public for self-defense purposes. *Bruen*, 597 U.S. at 32. "[L]aws imposing conditions and qualifications on the sale and purchase of arms do not implicate the plain text of the Second

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minor a pistol other than for hunting); 1897 Tex. Gen. Laws 221-22 (criminalizing sale, fit, barter of pistol to a minor *without the written consent of the parent or guardian*); 1882 W. Va. Acts 421-22 (prohibiting sale or provision of weapon to those under twenty-one); 1883 Wis. Sess. Laws 290 (outlawing minors to go armed with any pistol or revolver); 1890 Wyo. Sess. Laws [140, § 97] (prohibiting sale of pistol or any deadly weapon that can be carried concealed to person under age twenty-one).

[4] The most recent statutes are from 1890, *see* CB 24 n. 7, at which time there were forty-four states. *See* U.S. Territory and Statehood Status by Decade, 1790-1960, United States Census Bureau, 2013.[4] Thus less than half of the states had statutes regulating the sale and transfer of weapons to minors, further diminishing their persuasive value. Census data available at https://www.census.gov/dataviz/visualizations/048/508.php

Amendment." *Rocky Mountain Gun Owners v. Polis*, 121 F.4th 96, 120 (10th Cir. 2024). These are distinct categories of rights. *See id.*; *Bruen*, 597 U.S. at 73 (Alito, J. concurring) (explaining *Bruen* "does not expand the categories of people who may lawfully possess a gun" noting that federal law general prohibits those under eighteen from possessing a handgun and bars the sale of handguns those under twenty-one); *Vt. Fed'n of Sportsmen's Clubs v. Birmingham*, 741 F. Supp. 3d 172, 209 (D. Vt. 2024) (noting the Second Amendment's plain text does not address obtaining a firearm in a commercial transaction).

The underpinnings of the age of majority illuminate the "why" and "how" of historical firearms transfer and sale regulations, which are distinct from possession regulations. In English common law, individuals under twenty-one were deemed "infants" who could not enter contracts. *See Nat'l Rifle Ass'n v. Bondi*, 133 F.4th 1108, 1117-1118 (11th Cir. 2025) (collecting sources explaining limitations on "infants" in public life). The statutes regulating the sale and trade of firearms were based in contract considerations, as the transfer of firearms could be the subjects of a contract. *See id.* at 1165 (Branch, J., dissenting) (infancy doctrine is matter of contract law, not a firearm regulation, and is "a far cry from the historical regulations that the Court has considered as proper analogues").

At the Founding, minors "generally could not purchase firearms because they lacked the judgment and discretion to enter contracts and to receive the wages of their labor." *Id.* at 1118. Despite this characterization, those over the age of eighteen were required to keep a firearm. *See* Militia Act of 1792, ch. 33, §

1, 1 Stat. 271 (May 8, 1792). By 1826, the vast majority of states, at least 21 of 24, had enacted laws "that placed the onus on parents to provide minors with firearms for militia service. These laws reflected that, at common law, minors could not purchase weapons for themselves." *Bondi*, 133 F.4th at 1120; *see, e.g.*, Mo. Rev. Stat. § 1274 (1879) (prohibiting indirect or direct sale, loan, delivery or barter of deadly weapon *without the consent of the parent* or guardian of the minor). The sources addressing the sale and transfer of firearms to minors "are inapposite because they involve historical regulations of categorically different" type of right. *Cf. Canjura*, 494 Mass. at 514 n.9 (Commonwealth failed to demonstrate historical tradition to justify switchblade knife regulation where it cited cases and regulations pertaining to different types of bladed weapons); *Bruen*, 597 U.S. at 30 (cautioning courts against "uphold[ing] every modern law that resembles a historical analogue [because it] risk[s] endorsing outliers that our ancestors would never have accepted") (quoting *Drummond v. Robinson*, 9 F. 4th 217, 226 (3d Cir. 2021) (emphasis added).

Recent rulings from the circuit courts are informative. The Fourth, Tenth, and Eleventh Circuits have ruled that restrictions on the sale of firearms to eighteen- to twenty-year-olds pass constitutional muster under *Bruen* and *Rahimi*. *See Bondi*, 133 F.4th at 1108 (upholding Florida statute prohibiting those under twenty-one from purchasing firearms because they would be considered minors in founding era and thus precluding from contracting to buy firearms); *McCoy v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 140 F.4th 568, 579 (4th Cir. 2025) (inability

of minors to contract justifies prohibition on sale to those under twenty-one); *Rocky Mountain*, 121 F.4th at 104 (dissolving injunction of enforcement of law that twenty-one is minimum age to purchase guns). None of these decisions addressed the right of those under twenty-one to possess or carry a firearm – the analysis was limited to the sale and purchase of handguns. *See, e.g.*, *McCoy*, 140 F.4th at 569 (statute at issue "regulates only transactions involving firearms. It does not prohibit anyone from owning, possession, or using firearms"). The Fifth Circuit ruled a prohibition on the sale of handguns to eighteen-to-twenty-year-olds was unconstitutional, finding the regulation was inconsistent with the Second Amendment. *Reese v. Bureau of Alcohol, Tabacco, Firearms & Explosives*, 127 F.4th 583, 586 (2025).

On the other hand, the Third and Eighth Circuits have found regulations prohibiting eighteen- to twenty-year-olds from possessing firearms unconstitutional. *See Lara v. Comm'r Pa. State Police*, 125 F.4th 428, 442, 445 (3d Cir. 2025) (holding statute prohibiting eighteen to twenty year olds from possessing firearm in state of emergency unconstitutional where government did not satisfy step-two of *Bruen* analysis) (decided on remand after *Rahimi*); *Worth v. Jacobson*, 108 F.4th 677, 698 (8th Cir. 2024) (holding statute prohibiting those eighteen to twenty years old from carrying handguns in public unconstitutional where government did not satisfy step-two of *Bruen* analysis).

The Commonwealth has failed to demonstrate a relevant historical analogue to justify the prohibition on twenty-year-olds from possessing firearms. General Laws c. 140, § 131(d)(iv) is

unconstitutional as it pertains to twenty-year-olds like Mr. Thomson.

Conclusion

This Court should vacate Mr. Thomson's conviction and remand for a new trial.

Respectfully Submitted,
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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 3,033 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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