S.J.C. No. 13432
A.C. No. 2022-P-76

Commonwealth of Massachusetts

Supreme Judicial Court

COMMONWEALTH

vs.

DAVID E. CANJURA

ON APPEAL FROM A JUDGMENT OF THE
BOSTON MUNICIPAL COURT

BRIEF OF AMICI CURIAE KNIFE RIGHTS, INC. AND THE KNIFE RIGHTS FOUNDATION, INC. IN SUPPORT OF DEFENDANT-APPELLANT DAVID E. CANJURA AND REVERSAL

Daniel L. Schmutter
HARTMAN & WINNICKI, P.C.
74 Passaic Street
Ridgewood, New Jersey 07450
(201) 967-8040
dschmutter@hartmanwinnicki.com
Admission Pro Hac Vice Pending

Jason A. Guida
THE LAW OFFICE OF JASON A. GUIDA
17 Lark Avenue
Saugus, Massachusetts 01960
(617) 383-4652
jason@lawguida.com

Attorneys for Amici Curiae Knife Rights, Inc. and The Knife Rights Foundation, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 1:21, *amici curiae* Knife Rights, Inc. and The Knife Rights Foundation, Inc. state that they are non-profit organizations incorporated under the laws of the State of Arizona. Neither has any parent corporation, and no publicly held corporation owns 10% or more of their stock.

INTEREST OF *AMICI CURIAE*

Knife Rights, Inc. is a non-profit member organization incorporated under the laws of the State of Arizona. Knife Rights, Inc., through direct and grassroots advocacy, promotes legislative and legal action in support of people's ability to keep and carry knives and edged tools for all lawful purposes including self-defense.

The Knife Rights Foundation, Inc. is a non-profit organization incorporated under the laws of the State of Arizona. Knife Rights Foundation, Inc. serves knife owners and the public with a focus on protecting the rights of knife owners to keep and carry knives and edged tools for all lawful purposes including self-defense. The purposes of the Knife Rights Foundation include the promotion of education regarding local, state and federal knife laws, and the defense and protection of the civil rights of knife owners nationwide.

This case concerns *amici* because it directly impacts their members' and the public's ability to acquire, possess, keep and carry automatically opening

(switchblade) knives and to exercise their right to keep and bear arms in Massachusetts.

SUMMARY OF ARGUMENT

In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the United States Supreme Court held that the Second Amendment to the United States Constitution guarantees an individual right to keep and bear arms. In doing so, the Court held that the District of Columbia could not lawfully prohibit the possession of handguns, as handguns are "typically possessed by law abiding individuals for lawful purposes" – that is, "in common use." *Id*. at 624-25.

The Court explained that the Second Amendment covers not only firearms, but "extends, *prima facie*, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding." *Id*. at 582. Relying on that fundamental rule, this Court, in *Ramirez v. Commonwealth,* 479 Mass. 331 (2018), struck as unconstitutional a prohibition on possession of stun guns.

In *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2021), the Court held that the Second Amendment broadly guarantees the right of ordinary individuals *to carry a handgun outside the home* for self-defense.

Despite Supreme Court precedent, and the precedent of this Court, G. L. c. 269, § 10(b), makes it a crime punishable by up to five years in prison to carry an automatically opening knife, also known as a switchblade (defined as "a switch

knife, or any knife having an automatic spring release device by which the blade is released from the handle").

Massachusetts's enforcement of G. L. c. 269, § 10(b) unconstitutionally infringes on the fundamental rights of Massachusetts residents to keep and bear common, constitutionally protected arms—including automatically opening knives.

Just as the Constitution protects the possession of stun guns, it strains credulity to suppose that individuals have a fundamental constitutional right to carry a handgun outside their homes but not a vastly less lethal item such as a knife.

Just like handguns and stun guns, automatically opening knives are in common use and are useful tools for everyday carry, recreation, hunting, utility, as well as self-defense. Simply put, they are just a variation of common folding pocket knives. Despite belonging to a category of arms that are extraordinarily common in every state, Massachusetts prohibits law abiding individuals the ability to possess and carry these arms for lawful purposes, including self-defense.

Over the course of generations, Americans have purchased literally millions of automatically opening knives for myriad lawful purposes (far more numerous than the stun guns this Court already held are in common use).

Further, 42 states allow the possession of automatically opening knives; and 32 states permit the public carry of such knives.

Finally, automatically opening knives are not materially different than other folding pockets knives in how they function and are used. The only difference is how they open. Pocket knives are among the most common of tools in the United States.

It cannot be seriously denied that automatically opening knives are "typically possessed by law abiding individuals for lawful purposes"—that is, "in common use." That alone ends the constitutional inquiry. Like the carry of handguns, Massachusetts cannot prohibit the carry of knives in common use such as automatically opening knives.

Even if further historical analysis were necessary, the Commonwealth cannot satisfy *Bruen's* requirement that it demonstrate that its ban on the carry of automatically opening knives is consistent with historical tradition. It is not. Prohibitions on automatically opening knife carry simply did not exist until the mid-20th century, with the first prohibition on possession of automatically opening knives enacted in 1954.

The Commonwealth's ban on the carriage of automatically opening knives cannot survive even the most basic constitutional scrutiny. The law is unconstitutional. The judgment below should be reversed.

ARGUMENT

1. Introduction

In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the United States Supreme Court held that the Second Amendment to the United States Constitution guarantees an individual right to keep and bear arms. In doing so, the Court held that the District of Columbia could not lawfully prohibit the possession of handguns, as handguns are "typically possessed by law abiding individuals for lawful purposes" – that is, they are "in common use." *Id*. at 624-25.

The Court explained that the Second Amendment covers not only firearms, but "extends, *prima facie*, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding." *Id*. at 582. Relying on that fundamental rule of constitutional law, this Court, in *Ramirez v. Commonwealth,* 479 Mass. 331 (2018), struck as unconstitutional a Massachusetts law prohibiting the possession of electronic weapons, that is, stun guns.

In *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2021) the Court held that the Second Amendment broadly guarantees the right of ordinary individuals *to carry a handgun outside the home* for self-defense.

Despite Supreme Court precedent, and the precedent of this Court, G. L. c. 269, § 10(b), makes it a crime punishable by up to five years in state prison to carry an

automatically opening knife, also known as a switchblade (defined as "a switch knife, or any knife having an automatic spring release device by which the blade is released from the handle").

Massachusetts's enforcement of G. L. c. 269, § 10(b) unconstitutionally infringes on the fundamental rights of Massachusetts residents to keep and bear common, constitutionally protected arms — including automatically opening knives or switchblades.

Undoubtedly, automatically opening knives are "arms" in common use and protected under the plain text of the Second Amendment. Indeed, the Supreme Court made clear in *Bruen* that the Second and Fourteenth Amendments protect the right to acquire, possess, and carry arms for self-defense and all other lawful purposes — inside and outside the home. *Bruen*, 142 S. Ct. 2111.

To be clear, "[t]he constitutional right to bear arms in public for self-defense is not a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees." *Bruen*, 142 S. Ct. at 2156 (*quoting McDonald v. Chicago*, 561 U. S. 742, 780 (2010) [plurality opinion]). "The very enumeration of the [Second Amendment] right takes out of the hands of government"— including Massachusetts — "the power to decide on a case-by-case basis whether the right is *really* worth insisting upon." *Heller*, 554 U.S. at 635 (emphasis in original).

Automatically opening knives are in common use and are useful tools for everyday carry, recreation, hunting, utility, as well as self-defense. Simply put, they are simply a variation of common folding pocket knives. Despite belonging to a category of arms that are extraordinarily common in every state, Massachusetts prohibits law abiding individuals the ability to possess and carry these arms for lawful purposes, including self-defense.

Because the Second Amendment "elevates above all other interests the right of law-abiding, responsible citizens to use arms for self-defense," *Bruen*, 142 S. Ct. at 2118, Massachusetts's enforcement of G. L. c. 269, § 10(b) should be declared unconstitutional and the denial of Defendant-Appellant's motion to dismiss should be reversed.

2. The Bruen Framework

In *Bruen*, the Supreme Court held the Second Amendment, through the Fourteenth Amendment, "protect[s] an individual's right to carry a handgun for self-defense outside the home." *Bruen*, 142 S. Ct. at 2122. In reaching this decision, the Court reiterated the legal framework for considering Second Amendment challenges to laws restricting/prohibiting arms. In doing so, the Supreme Court decisively rejected the two-step means-end scrutiny adopted by the several courts of appeals, calling it "inconsistent with *Heller's* historical

approach." *Bruen*, 142 S. Ct. at 2129. In rejecting the interest-balancing or means-end scrutiny approach, the Supreme Court in *Bruen* held:

> While judicial deference to legislative interest balancing is understandable — and, elsewhere, appropriate — it is not deference that the Constitution demands here. The Second Amendment "is the very product of an interest balancing by the people," and it "surely elevates above all other interests the right of law-abiding, responsible citizens to use arms" for self-defense.

Bruen, 142 S. Ct. at 2118 (*citing Heller*, 554 U.S. at 635. What this means in practice is that neither legislatures nor courts may limit the fundamental right of the law abiding to keep and bear arms out of a fear of what *criminals* might do.

Rather than a two-step means-end (interest-balancing) approach, courts must "assess whether modern firearms regulations are consistent with the Second Amendment's text and historical understanding." *Bruen*, 142 S. Ct. at 2132. Stated another way, courts must first interpret the Second Amendment's text, as informed by history. When the plain text of the Second Amendment covers an individual's conduct, the Constitution presumptively protects that conduct. *Id*. at 2129–30. The burden is then placed on the government to "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.'" *Id*. at 2116, 2130. "In other words, it identifies a presumption in favor of Second Amendment protection, which the State bears the initial burden of rebutting." *New York State Rifle & Pistol Ass'n,*

Inc. v. Cuomo, 804 F.3d 242, 257 n.73 (2d Cir. 2015). If the State cannot meet its burden, the law or regulation is unconstitutional — full stop. No interest-balancing or means-end scrutiny analysis can or should be conducted. *Id*. at 2127, 2129-2130.

The Second Amendment extends to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding. *Heller* acknowledged this threshold point. *See also Caetano v. Massachusetts,* 577 U.S. 411 (2016) (unanimously vacating a lower court decision upholding a conviction based on Massachusetts' ban on stun guns).; *Ramirez,* 479 Mass. at 336); *United States v. Daniels*, 77 F.4th at 341-342 (citing *Bruen*, 142 S. Ct. at 2132, and pointing out that "the Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated").

Indeed, in affirming the decision in *Heller*, the Supreme Court in *Bruen* clarified that 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 [citation omitted]," and "[w]e have already recognized in *Heller* at least one way in which the Second Amendment's historically fixed meaning applies to new circumstances: its reference to 'arms' does not apply 'only [to] those arms in existence in the 18th century ... the Second Amendment extends, prima facie, *to all instruments that*

constitute bearable arms, even those that were not in existence at the time of the founding." *Bruen*, 142 S. Ct. at 2132 (emphasis added).

A. Automatically Opening Knives are "Arms."

The first key legal inquiry focuses on whether the possession and carry of a switchblade knife is protected by the plain text of the Second Amendment. Automatically opening knives are "arms" under the Second Amendment's plain text. *Bruen*, 142 S. Ct. at 2132. In *Heller*, the Supreme Court made clear that "[t]he 18th-century meaning [of the term "arms"] is no different from the meaning today." 554 U.S. at 581. That is to say, the term "arms" generally referred to "'[w]eapons of offence, or armour of defence.'" *Id*. (quoting 1 Dictionary of the English Language 107 (4th ed.) (reprinted 1978)). Just as with firearms in *Heller*, bladed arms facially constitute "arms" within the meaning of the Second Amendment. The term "arms" extends to "'anything that a man wears for his defence, or takes into his hands, or use[es] in wrath to cast at or strike another.'" *Id*. (cleaned up and quoting 1 A New and Complete Law Dictionary (1771)).

Since *Heller*, the Ninth Circuit in *Teter v. Lopez*, 76 F.4th 938, 948-50 (9th Cir. 2023), held that the possession of butterfly knives was protected by the plain text of the Second Amendment. Citing *Heller*, the Ninth Circuit concluded as follows:

"We similarly conclude that, just as with firearms in *Heller*, bladed weapons facially constitute 'arms' within the meaning of the Second Amendment. Like firearms, bladed weapons fit the general definition of 'arms' as '[w]eapons of offence' that may be 'use[d] in wrath to cast at or strike another.' *Id*. (cleaned up). Moreover, contemporaneous sources confirm that, at the time of the adoption of the Second Amendment, the term 'arms' was understood as generally extending to bladed weapons. *See* 1 Malachy Postlethwayt, The Universal Dictionary of Trade and Commerce (4th ed. 1774) (including among 'arms' fascines, halberds, javelins, pikes, and swords). Because the plain text of the Second Amendment includes bladed weapons and, by necessity, butterfly knives, the Constitution 'presumptively guarantees' keeping and bearing such instruments 'for self-defense,'" *citing Bruen*, 142 S. Ct. at 2135. *Id*. *Teter*, 76 F.4th at 949 (and *see* footnote 8; at oral argument, Hawaii "conceded that 'knives, in general, can qualify as arms").

Courts have also generally ruled that knives are arms protected by the Second Amendment. *See State v. Deciccio*, 315 Conn. 79, 128, 122, 105 A.3d 165 (2014). (holding dirk knives were "'arms' within the meaning of the second amendment.") ("[T]heir more limited lethality relative to other weapons that, under *Heller*, fall squarely within the protection of the second amendment— e.g., handguns — provides strong support for the conclusion that dirk knives also are entitled to

protected status.; *State v. Delgado*, 298 Or. 395, 692 P.2d 610, 613-614 (1984) (Oregon Supreme Court held that Oregon's ban on the possession of switchblades violated the Oregon Constitution's right to arms and that a switchblade is constitutionally protected based on historical predecessors); *State v. Herrmann*, 366 Wis. 2d 312, 325, 873 N.W.2d 257, 263 (2015) (Wisconsin Court of Appeals overturned a conviction for possession of a switchblade as unconstitutional.) ("Whether knives are typically used for self-defense or home security as a general matter is beside the point. In this case, it is undisputed that Herrmann possessed his switchblade inside his home for his protection."); *State v. Montalvo*, 229 N.J. 300, 162 A.3d 270 (2017) (New Jersey Supreme Court held that machete-type knives are protected by the Second Amendment); *See also State v. Griffin*, 2011 Del Super LEXIS 193, *26 n.62, 2011 WL 2083893 (Del Super Ct., May 16, 2011) ("a knife, even if a 'steak' knife, appears to be a 'bearable arm' that could be utilized for offensive or defensive purposes.") *reversed and remanded on other grounds*, *Griffin v. State*, 47 A.3d 487 (Del. 2012); *See also City of Akron v. Rasdan*, 105 Ohio App.3d 164, 663 N.E.2d 947 (Ohio Ct. App., 1995) (holding the "right to keep and bear arms" under the Ohio Constitution extends to knives). Accordingly, knives, including automatically opening knives, are unquestionably arms protected by the plain text of the Second Amendment.

B. Automatically Opening Knives are Typically Possessed by Law Abiding Individuals for Lawful Purposes (*i.e.* in Common Use) and Therefore Cannot be Prohibited

Heller's analysis fits plainly into *Bruen's* doctrinal prescription for Second Amendment analysis. The inquiry thus proceeds to the historical analysis, which puts the burden on the government to prove that the challenged law "is consistent with this Nation's historical tradition of regulating weapons." *Bruen*, 142 S. Ct. at 2126-2127. In the case of arms bans, the Supreme Court has already completed the historical analysis.

To show consistency with historical tradition the Commonwealth would have the heavy burden to justify the law by offering appropriate historical analogues from the relevant time period, *i.e.,* the Founding era. "Much like we use history to determine which modern "arms" are protected by the Second Amendment, so too does history guide our consideration of modern regulations that were unimaginable at the founding." 142 S. Ct. at 2132.

In *Bruen*, when considering the appropriate historical analogues from the relevant period, the Court found that respondents in that case had offered historical evidence in their attempt to justify their prohibitions on the carrying of firearms in public. Specifically, they offered four categories of historical sources: "(1) medieval to early modern England; (2) the American Colonies and the early Republic; (3) antebellum America; (4) Reconstruction; and (5) the late-19th and

early-20th centuries." 142 S. Ct. at 2135-36. However, when considering the historical evidence, the Supreme Court made a fundamental distinction regarding what evidence was to be considered.

Specifically, the Court noted "not all history is created equal. 'Constitutional rights are enshrined with the scope they were understood to have *when the people adopted them.*' […] The Second Amendment was adopted in 1791; the Fourteenth in 1868." *Id*., at 2136 (citing *Heller*, 554 U.S. at 634-35 (emphasis in original). Thus, the Court cautioned against "giving post enactment history more weight than it can rightly bear." 142 S. Ct. at 2136. And "to the extent later history contradicts what the text says, the text controls." *Bruen*, 142 S. Ct. at 2137 (citation omitted). In examining the relevant history that was offered, the Supreme Court noted "[a]s we recognized in *Heller* itself, because 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 earlier sources.'" 142 S. Ct at 2137 (citing *Heller*, 554 U.S. at 614).

Bruen noted an "ongoing *scholarly* debate on whether courts should primarily rely on the prevailing understanding of an individual right when the Fourteenth Amendment was ratified in 1868 when defining its scope (as well as the scope of the right against the Federal Government)." 142 S. Ct. at 2138 (emphasis added). At the same time, the Court found that it had "generally assumed that the

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 2137 (citations omitted). And while the Court in *Heller* itself had reviewed materials published after adoption of the Bill of Rights, it did so to shed light on the public understanding in 1791 of the right codified by the Second Amendment, and only after surveying what it regarded as a wealth of authority for its reading — including the text of the Second Amendment and state constitutions. "The 19th-century treatises were treated as mere confirmation of what the Court had already been established." *Id*. (citing *Gamble*, 139 S. Ct. at 1976).

Therefore, under binding Supreme Court precedent, 1791 must be the controlling time for the constitutional meaning of Bill of Rights provisions incorporated against the States by the Fourteenth Amendment because, as in *Heller*, the Court has looked to 1791 when construing the Bill of Rights against the federal government and, as in *McDonald*, the Court has established that incorporated Bill of Rights provisions mean the same thing when applied to the States as when applied to the federal government. *See McDonald*, 561 U.S. at 765. *Bruen* did not disturb these precedents.

Bruen also made clear that 20th-century historical evidence was not to be considered. *Id*., at 2154, n.28 ("We will not address any of the 20th-century historical evidence brought to bear by respondents or their amici. *As with their*

late-19th-century evidence, the 20th-century evidence presented by respondents and their amici *does not provide insight into the meaning of the Second Amendment when it contradicts earlier evidence*.") (emphasis added).

In sum, under *Bruen*, some evidence cannot be appropriate historical analogues, such as late 19th-century and 20th-century laws rooted in racism, laws that have been overturned (such as total handgun bans), and laws that are inconsistent with the original meaning of the constitutional text. *Bruen*, 142 S. Ct at 2137 ("post-ratification adoption or acceptance of laws that are inconsistent with the original meaning of the constitutional text obviously cannot overcome or alter that text.") (citing *Heller v. District of Columbia* (*Heller II*), 670 F.3d 1244, 1274 n.6 (D.C. Cir. 2011) (Kavanaugh, J., dissenting)). These sources of evidence must be disregarded.

But *Heller* already has done the relevant historical analysis to determine what types of bearable arms fall outside the Second Amendment's "unqualified command:" those that are "dangerous and unusual" at the time of the analysis— a category that necessarily excludes firearms that are in "common use." *Id*., at 2126, 2143.

The Second Amendment preludes the government from prohibiting arms that are "typically possessed by law abiding individuals for lawful purposes." *Heller*, 554 U.S. at 625. The concept of "dangerous and unusual" is simply the flip side of

"common use." *Heller*, 554 U.S. at 627. Thus, to understand whether an arm is "dangerous and unusual" the question to ask is, is it typically possessed by law abiding individuals for lawful purposes. If so, it is not "dangerous and unusual" and cannot be prohibited. Automatically opening knives are typically possessed by law abiding individuals for lawful purposes and are therefore "in common use."

Automatically opening knives were first produced in the 1700s. RICHARD V. LANGSTON, THE COLLECTOR'S GUIDE TO SWITCHBLADE KNIVES at 5-6 (2001); *see also* TIM ZINSER ET AL., SWITCHBLADES OF ITALY at 7 (2003). By the mid-nineteenth century, factory production of automatically opening knives made them affordable to everyday customers. *See* LANGSTON at 7. "George Schrade was one of the most prolific and influential inventors in American cutlery history. In 1892-93, he introduced his Press-Button knife. It was the first switchblade suited to mass production methods, although automatically opening knives made by hand had been around for more than a century." Pocket Knives: The Collector's Guide to Identifying, Buying, and Enjoying Vintage Pocket Knives at 40. Indeed, millions of automatically opening knives have been in common use for decades.

Notably, automatically opening knives are in "common use" along multiple criteria. First, they are numerically common. That is, large numbers of people throughout the United States own them for ordinary lawful purposes (such as work,

crafts, self-defense, and otherwise) and have done so for generations ("numerically common").

Second, automatically opening knives are lawfully possessed in the vast majority of U.S. states ("jurisdictionally common").

And, third, automatically opening knives are categorically indistinguishable from ordinary pocket knives from a functional perspective. That is, other than the mechanism of how they open, they are identical to the most common of common folding knives millions of Americans carry with them every day ("categorically common").

Thus, the commonality of automatically opening knives is both broad and deep.

1. Numerical Commonality and the History of Automatically Opening Knives.

By the 1890s, automatically opening knives were in mass production and "fast becoming the most useful cutting tool one could carry and gaining in popularity and public acceptance." MARK ERICKSON, ANTIQUE AMERICAN SWITCHBLADES at 6. "Over a 50-year period from the mid-1890s to the mid-1940s, there had been approximately 20 different companies who had manufactured switchblades knives in this country." *Id*. "There were switchblades specifically designed for hunters, fishermen, soldiers, farmers, veterinarians, mechanics, office workers, seamstresses, high school girls, Boy Scouts, and also for Girl Scouts." *Id*.

"By the nineteenth century, the design of the knife changed, offering a more pocket-friendly style that gained widespread popularity in Europe. Over time, several variations of the switchblade were created by French, Spanish, Italian, and American Knifemakers, each offering their own unique variations on how the blade would be exposed. KNIFE BIBLE A. J. CARDENAL, KNIFE BIBLE: HISTORY AND MODERN KNOWLEDGE at 107.

"With the arrival of the Industrial Revolution, switchblades began to be mass produced and sold at lower costs, therefore making them more readily available. In the early 1900s, George Schrade, Founder of Geo. Schrade Knife Co., dominated the American switchblade market, with his automatic version of jackknives and pocketknives." *Id*. "When the mid-1900s rolled in, these knives were mass produced by various companies worldwide, and advertised as "compact, versatile multi-purpose tools." *Id*.

In the United States, "knives have played an important role in American life, both as tools and as weapons. The folding pocketknife, in particular, since the early 18th Century has been commonly carried by men in America and used primarily for work, but also for fighting." *Delgado*, 692 P.2d at 613-614; *see also* David B. Kopel, Clayton E. Cramer, & Joseph Edward Olsen, *Knives and the Second Amendment* 47 U. OF MICH. J. OF LAW REFORM 167 at 212. At the time of the Revolutionary War, they were apparently used by a great majority of soldiers to

serve their numerous personal needs." GEORGE G. NEUMANN, SWORDS & BLADES OF THE AMERICAN REVOLUTION at 231 ("NEUMANN").

In fact, automatically opening knives have been in common use in the United States for at least a century. According to Senate Report No. 1980, "Switchblade Knives" submitted by Mr. Magnuson, from the Committee on Interstate and Foreign Commerce, "In the United States, 2 manufacturers have a combined production of over 1 million switchblade knives a year." Senate Report No. 1980 to the Committee on Interstate and Foreign Commerce, July 28, 1958 at 2.

Thus, the question of whether automatically opening knives are in common use has already been answered, as this same report also states "[i]t is estimated that the total traffic in this country in switchblade knives *exceeds 1,200,000 per year*." *Id*. (emphasis added); *See also* Paul A. Clark, *Criminal Use of Switchblades: Will the Recent Trend Towards Legalization Lead to Bloodshed?,* 132 CONN. PUB. INT. L.J. 229 at 238. "After World War 2, the popularity of the switchblades exploded. Department stores such as Macy's were selling them. Every kid and young man wanted one if they didn't already have one." LATAMA CUTLERY, A BRIEF HISTORY OF LATAMA CUTLERY: THE LEGEND CONTINUES at 5. "[T]he Italian switchblade stiletto has had a renaissance and is nearly as popular today [in the U.S.] as it first was in the 1950s." *Id*. at 6. By comparison, the commonality of automatically

opening knives in 1958 dwarfs the number used to establish the commonality of stun guns in *Caetano*. 577 U.S. at 420.

The legislative history of the Federal Switchblade Act ("FSA") also establishes the commonality of automatically opening knives.[1] The very purpose of the FSA was to reduce the number of "switchblades" that were in circulation in the United States because, according to the Subcommittee on Juvenile Delinquency of the Senate Committee on the Judiciary, they were too common. "In the area of Fort Bliss, Tex., alone, there are more than 20 establishments selling these knives." Report No. 1429 of the Committee on the Judiciary Made by Its Subcommittee on Juvenile Delinquency, March 27, 1958 at 7. The Senate report acknowledges that at the time, that just mail order services and magazines were "sending out about "3,000 or 4,000 of these knives out each month." *Id*. at 95.

Notably, the Subcommittee's concern of criminal use cannot overcome the many lawful uses of automatically opening knives. "If use by criminals could justify a weapon's ban, it would amount to something like a disfavored 'heckler's veto.' We might call it the 'criminal's veto.'" *See e.g., Santa Monica Nativity Scenes Comm. v. City of Santa Monica*, 784 F.3d 1286, 1292-93 (9th Cir. 2015) (explaining "heckler's veto" doctrine) ("If speech provokes wrongful acts on the

[1] The FSA is also being challenged on the same grounds by Amicus Knife Rights, Inc, in the United States District Court for the N.D. Tex (4:23-cv-00547-O) (*see, e.g.*, Dkt. No. 20 – summary judgment motion).

part of hecklers, the government must deal with those wrongful acts directly; it may not avoid doing so by suppressing the speech."). *Miller v. Bonta*, 542 F. Supp. 3d 1009, 1039 (S.D. Cal. 2021), *vacated and remanded*, No. 21-55608, 2022 WL 3095986 (9th Cir. Aug. 1, 2022). "In New York City alone in 1956, there was an increase of 92.1 percent of those under 16 arrested for the possession of dangerous weapons, one of the most common of which is the switchblade knife." Senate Report 1980 at 6. "But "the enshrinement of constitutional rights necessarily takes certain policy choices off the table." *Heller*, 554 U.S. 570, 636 (2008).

Indeed, the Department of Commerce explicitly recognized the common usage of switchblades in testimony relating to the FSA.

> While *this proposed legislation recognizes that there are legitimate uses that have need for switchblade knives*, the exemptions would appear to assume that the most significant of those uses lie in Government activities. To us, this ignores the needs of those who derive and augment their livelihood from *the "outdoor" pursuits of hunting, fishing, trapping, and of the country's sportsmen, and many others*. In our opinion, there are sufficient of these that their needs must be considered. . . . For these reasons, the Department of Commerce feels it cannot support enactment of H. R. 7258.

See Senate Report No. 1980 at 7-8 (emphasis added).

In establishing whether an arm is "in common use," "[s]ome courts have taken the view that the total number of a particular weapon is the relevant inquiry." *Hollis v. Lynch*, 827 F.3d 436, 449 (5th Cir. 2016). Using that metric, the legislative history of the FSA establishes that automatically opening knives were in

common use when that law went into effect. In fact, the FSA was enacted for the very reason that automatically opening knives were in common use. According to Senate Report No. 1980, "In the United States, 2 manufacturers have a combined production of over 1 million switchblade knives a year." *Id*. at 2. Thus, this report concedes that in 1958, the United States produced more than one million automatically opening knives per year. *Id*.

Today, automatically opening knives are widely possessed and used for lawful purposes across much of the Country. "Push button knives are 'some of the more popular types of pocketknife made today.'" AMERICAN KNIVES at 138. In fact, today, there are at least 25 United States companies that produce automatically opening knives on a commercial scale.[2]

---

[2] Ashville Steel / Paragon https://www.ashevillesteel.com/
Bear & Son https://bearandsoncutlery.com/
Benchmade Knife Co. https://www.benchmade.com/
Bladerunners Systems https://www.bladerunnerssystems.com/
Boker USA https://www.bokerusa.com/
Buck Knives https://www.buckknives.com/
CobraTec Knives https://cobratecknives.com/
Colonial Knife Corp. https://www.colonialknifecorp.com/
Gerber https://www.gerbergear.com
GT Knives https://www.gtknife.com/
Guardian Tactical https://www.guardiantacticalusa.com/
Heretic Knives https://hereticknives.com/
Hogue https://www.hogueinc.com/knives
Kershaw https://kershaw.kaiusa.com/
Medford Knife https://medfordknife.com/
Microtech Knives https://microtechknives.com/
Pro-Tech Knives http://www.protechknives.com/

2. Jurisdictional Commonality

As of April 2023, at least 42 states allow the possession of automatically opening knives; and at least 32 states permit the public carry of such knives in some manner. American Knife & Tool Institute, State Laws Regarding Auto-Open Knives, https://www.akti.org/state-laws-regarding-automatics/.

Thus, separate and apart from the absolute number of automatically opening knives possessed by Americans nationwide, the ubiquity of such knives across jurisdictions speaks volumes as to their commonality.

3. Categorical Commonality and the History of Knives in America

The automatically opening knives prohibited by Massachusetts are like other constitutionally protected knives that do not have the blade fixed in place in all relevant respects: They have a blade, a handle or grip, and the blade rests within the handle or grip of the knife when closed or collapsed, and when open or extended is "fixed" into a usable position and may be used in the same manner as

---

RavenCrest Tactical https://ravencresttactical.com/
Rick Hinderer Knives https://www.rickhindererknives.com/
Shrade https://www.schrade.com/
SOG Knives https://sogknives.com/
Southern Grind https://southerngrind.com/
Spartan Blades https://spartanbladesusa.com/
Spyderco https://www.spyderco.com/
Templer Knife https://templarknife.com/

any other common knife. That is, they are simply pocket knives that open in a certain specific way.

The American Heritage Dictionary defines switchblade knife as "[a] pocketknife having a spring-operated blade that opens instantly when a release on the handle is pressed. https://ahdictionary.com/word/search.html?q=switchblade.

Merriam-Webster dictionary defines "pocketknife" as "a knife that has one or more blades that fold into the handle and that can be carried in the pocket." http://www.merriam-webster.com/dictionary/pocketknife.

Using older terminology, automatically opening knives are categorically "jackknives." A "jackknife" is "a knife with the blade pivoted to fold into a recess in the handle." https://www.thefree dictionary.com/jackknife. Such a knife is also sometimes referred to as a "penknife," which is simply "any knife with the blade folding into the handle, some very large." *Mackall v. State*, 283 Md. 100, 387 A.2d 762, 769 n.13 (1978).

If an arm is categorically analogous or similar enough to a protected arm that is lawful to be sold to private citizens in the majority of states, then the arm is common. In this instance, automatically opening knives have no practical or constitutional distinction from other folding pocket knives that use a spring to open the knife with one hand (e.g., assisted opening knives) or manual one-handed opening knives. These knives are indistinguishable in their function and use.

Because folding knives are legal in all 50 states, they are unquestionably in common use.

Indeed, these banned "switchblades" are common in all respects: they are common categorically and functionally, they all operate as folding pocket knives that can be opened with one hand. They are all commercially popular types of folding knives with a blade that folds into its handle and contains a spring that aides in the opening of the blade.

Accordingly, automatically opening knives are simply a subcategory of ordinary, common pocket knives. Thus, automatically opening knives — a mere variation of the folding pocket knife — must also be considered in common use.

And, in fact, the history of knives in America bears out the general principle and illustrates why the Commonwealth cannot prevail under *Bruen* and *Heller*. And even if the question of what types of arms may be banned were an open one, the Commonwealth has not, and cannot, historically support the law at issue here.

"Specimens of folding pocket knives have been discovered in Roman archeological sites, indicating that such knives were popular at least from the first century A.D.… One of the most common of the specific named knives is the jackknife… which was a large single-bladed folding knife, ranging in size from four to seven inches when closed." *State v. Delgado*, 298 Or. 395, 402 (1984); *see*

also HAROLD L. PETERSON, AMERICAN KNIVES: THE FIRST HISTORY AND COLLECTORS' GUIDE at 129.

In the United States, "knives have played an important role in American life, both as tools and as weapons. The folding pocketknife, in particular, since the early 18th Century has been commonly carried by men in America and used primarily for work, but also for fighting." *Delgado*, 692 P.2d at 613-614; *see also Knives and the Second Amendment* at 212. "Contemporary references call them 'pocket knives,' 'jackknives,' (origin of this name uncertain), 'clasp knives,' 'spring knives,' and 'folding knives.' At the time of the Revolutionary War, they were apparently used by a great majority of soldiers to serve their numerous personal needs." NEUMANN at 231.

Knives in general are indisputably "bearable arms" commonly possessed for "lawful purposes." As such, automatically opening knives are necessarily "bearable arms." *Bruen* acknowledges this fact that knives are protected arms noting that "[i]n the medieval period, '[a]lmost everyone carried a knife or a dagger in his belt.'" *Bruen*, 142 S. Ct. at 2140, *quoting* H. PETERSON, DAGGERS AND FIGHTING KNIVES OF THE WESTERN WORLD at 12 (2001). "While these knives were used by knights in warfare, '[c]ivilians wore them for self-protection,' among other things." *Bruen*, at 2140. *See also Heller*, 554 U.S. at 590 ("in such circumstances the temptation [facing Quaker frontiersmen] to seize a hunting rifle

or knife in self-defense… must sometimes have been almost overwhelming."). In early colonial America, "edged weapons were also absolutely necessary." HAROLD L. PETERSON, ARMS AND ARMOR IN COLONIAL AMERICA 1526-1783 at 69. "[T]he the sword and dagger were the most commonly used edged weapons." *Id*.

The prevalence of knives as common arms during the American colonial era cannot be questioned. "During the American colonial era, every colonist had a knife." *Delgado*, 692 P.2d at 613-614. Indeed, the federal Militia Act of 1792 required all able-bodied free white men between 18 and 45 to possess, among other items, "a sufficient bayonet…." *See* Militia Act, 1 Stat. 271-04 (1792). And notably, "around the late eighteenth century" some of the first spring-operated knives (i.e., "switchblades") "were used as folding spike bayonets, also referred to as 'pigstickers' on flintlock guns." A. J. CARDENAL, KNIFE BIBLE: HISTORY AND MODERN KNOWLEDGE at 107.

Since the Colonial Era, knives have been considered arms protected by the Second Amendment. *See* David B. Kopel & Joseph G. S. Greenlee, *The Second Amendment Rights of Young Adults*, 43 SOUTH. ILL. UNIV. L.J. 495 at 518-519. At the time of the Second Amendment's ratification, every state required ordinary citizens to own some type of edged weapon as part of the militia service laws. *Id*. at 537-38.

In other words, automatically opening knives are no different from any other folding pocket knife, other than the minor difference in the manner in which it is opened (*e.g.*, pushing a button verse pushing on the blade of the knife). *Id*. There is no constitutionally relevant distinction between a folding knife that is opened manually and one that is opened by pushing a button located on the handle of the knife. *See Delgado*, 298 Or. at 403 ("The only difference is the presence of the spring-operated mechanism that opens the knife. We are unconvinced by the state's argument that the switchblade is so 'substantially different from its historical antecedent' (the jackknife) that it could not have been within the contemplation of the constitutional drafters.")

In fact, firearms and cutting weapons were ubiquitous in the colonial era, and a wide variety existed of each. The historical record up to 1800 provides no support for general prohibitions on any type of arms or armor. David B. Kopel & Joseph G. S. Greenlee, *The History of Bans on Types of Arms Before 1900*, 50 J. OF LEGISLATION at 47 (Forthcoming 2004) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4393197. ("*History of Bans*") In fact, during the colonial era, there were no bans on knives of any kind. *Id*.

Specifically, the first ban on the sale, possession, and carry of any kind of knife was enacted in 1837. An 1837 Georgia statute made it illegal for anyone "to sell, or to offer to sell, or to keep or to have about their persons, or elsewhere" any:

"Bowie or any other kinds of knives, manufactured and sold for the purpose of wearing or carrying the same as arms of offence or defence; pistols, dirks, sword-canes, spears, &c., shall also be contemplated in this act, save such pistols as are known and used as horseman's pistols. *Id*. at 69. While already beyond the relevant Founding era, this ban was also later invalidated as unconstitutional in 1846 by the Georgia Supreme Court with regard to the sales ban, possession ban, and open carry ban and provides no justification for Massachusetts. *See Nunn v. State*, 1 Ga. 243 (1846); *see also History of Bans* at 61. *Heller* "extolled *Nunn* because the "opinion perfectly captured the way in which the operative clause of the Second Amendment furthers the purpose announced in the prefatory clause." *Heller*, 554 U.S. at 612; *History of Bans* at 61-62. As such, it provides no justification for the law at issue.

In 1838, Tennessee followed Georgia by enacting a ban on the sale or transfer of "any Bowie knife or knives, or Arkansas tooth picks, or any knife or weapon that shall in form, shape or size resemble a Bowie Knife or any Arkansas tooth pick. *Id*. at 91. Notably, this early knife ban did not attempt to prohibit any kind of folding knife or pocket knife. Nor did it prohibit any knife based on the manner in which it is opened or drawn. Both the 1837 Georgia statute and the 1838 Tennessee statute were outlier restrictions on large, fixed-blade knives. Other than these two statutes (one of which was invalidated), bans on the sale or possession of

arms for adults were non-existent until after the end of the Civil War approximately 30 years later. *Id*. at 61. For example, in 1866, New York enacted a ban on the use, concealing, and possession of certain arms (including "dirk[s] or dagger[s]"). *Miller v. Bonta,* No. 19-cv-01537, Dkt. No. 163-1 "Defendants Survey of Relevant Statutes (Pre-Founding – 1888). From 1866 to 1888, there were merely six other statutes put into effect that prohibited the manufacture, sale, possession of any kind of arm. *Id*. However, three of these statutes regulated only "slungshots" and "metallic knuckles" but not knives. *Id*. In fact, after the 1866 New York prohibition, there were only three bans on certain knives which were enacted in 1867 and 1885— and none of them prohibited automatically opening knives. *Id*.

In fact, the first state to enact any kind of prohibition on automatically opening knives, or "switchblades," occurred in 1954 in New York. Clark at 219. From 1954 to 1958, approximately nine states enacted prohibitions on switchblades. *Id*. As such, prohibitions on automatically opening knives, or any knife in general, have not established relevant historical pedigree of any kind that could justify the Massachusetts knife ban.

Heller and *Bruen* made it clear, such a small sample of statutes far removed from the founding era cannot establish the necessary historical tradition that would justify the law at issue here. While there were a number of state and territorial legislatures that enacted laws about the *mode* of carry of Bowie knives, as well as

dirks and daggers, the vast majority of these restrictions did not prohibit the manufacture for sale, sale, transfer, acquisition, general possession or "open carry" of them. *History of Bans* at 160.

Notably, the prohibitory laws for these various knives are fewer than the number of bans on carrying handguns. *Id*. at 168. In fact, the jurisdictions that entirely banned carry of Bowie knives, daggers, or other arms are almost entirely the same as those that banned handgun carry. *Id*. However, *Heller* held that these laws did not establish a historical tradition to justify a ban on handguns. *Heller*, 554 U.S. 570. Nor did these restrictions on the mode of carry of certain arms justify a ban on the carry of handguns. *Bruen*, 142 S. Ct. 2111. The Supreme Court has already conducted the historical analysis and held that these restrictions are not sufficient to justify a ban on arms protected by the plain text of the Second Amendment.

Thus, automatically opening knives are in common use no matter which way one looks at the concept of "in common use." They are numerically common. They are common across the vast majority of U.S. jurisdictions. And they are simply one example of an even more numerous and common category of knife—the pocket knife.

It cannot be seriously denied that automatically opening knives are "typically possessed by law abiding individuals for lawful purposes"—that is, "in common

use." That alone ends the constitutional inquiry. Like the carry of handguns, Massachusetts cannot prohibit the carry of knives in common use such as automatically opening knives.

Even if further historical analysis were necessary, the Commonwealth cannot satisfy *Bruen's* requirement that it demonstrate that its ban on the carry of automatically opening knives is consistent with historical tradition. It is not. Prohibitions on automatically opening knife carry simply did not exist until the mid-20th century, with the first prohibition on possession of automatically opening knives enacted in 1954.

Both the clarity of "common use" and the direct historical *Bruen* analysis set forth above makes clear that Massachusetts may not constitutionally restrict automatically opening knives in the manner challenged herein.

C. There Are No "Unprecedented Societal Concerns" or "Dramatic Technological Changes" That Affect the Historical Analysis Dictated by *Bruen*.

In discussing the historical analysis that must be conducted in these Second Amendment challenges, the Supreme Court in *Bruen* acknowledged that when the challenged law addresses "unprecedented societal concern[]" or involves "dramatic technological changes," the historical analysis may be less straightforward. *Bruen*, 142 S. Ct. at 2132. In these cases, "th[e] historical inquiry that courts must conduct will often involve reasoning by analogy." *Id*., at 2132. "[D]etermining whether a

historical regulation is a proper analogue for a distinctly modern firearm regulation requires a determination of whether the two regulations are 'relevantly similar.'" *Id*. (*quoting* C. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 773 (1993)). The Court clarified that the controlling "metric" in that analysis is "whether modern and historical regulations impose a comparable burden on the right of armed self-defense, and second, whether that regulatory burden is comparably justified." *Id*. at 2133. However, this inquiry "does not mean that courts may engage in independent means-end scrutiny under the guise of an analogical inquiry." *Id*., at 2133, n. 7.

Regardless, there is no need for such an inquiry in this case as there is no "unprecedented social concern" or "dramatic technological changes" with respect to knives. The fundamental characteristics of knives in general, and more specifically folding pocket knives, are negligible. Knives have been in common use well before this Country's founding and have long been acknowledged as arms within the meaning of the Second Amendment. The misuse of knives, or any arm, is no different now than it was at the founding. Just as in the founding era, knives can be used for many lawful purposes including self-defense or they can be used for unlawful violence. The common use of switchblades — confirms the unconstitutionality of G. L. c. 269, § 10(b), as Massachusetts has no authority to prohibit common arms under the Second Amendment.

CONCLUSION

Based on the foregoing, this Court should reverse the judgment below.

Respectfully submitted,

s/ Jason A. Giuda

Daniel L. Schmutter
HARTMAN & WINNICKI, P.C.
74 Passaic Street
Ridgewood, New Jersey 07450
(201) 967-8040
dschmutter@hartmanwinnicki.com
Admission Pro Hac Vice Pending

Jason A. Guida
THE LAW OFFICE OF JASON A. GUIDA
17 Lark Avenue
Saugus, Massachusetts 01960
(617) 383-4652
jason@lawguida.com

Attorneys for Amici Curiae Knife Rights, Inc. and The Knife Rights Foundation, Inc.

CERTIFICATION OF COMPLIANCE

This brief complies with the rule of court that pertaining to the filing of briefs, including, but not limited to Rule 16(a)(13); Rule 16(e); Rule 18; Rule 20; and Rule 21. This brief complies with the length limitations of Rule 20 because it contains 7,499 words, as measured by the parts set forth in Rule 16(a)5-11 and as determined by Microsoft Word 2016. This brief complies with the typeface and type style requirements of Rule 20 because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

Dated: November 13, 2023

s/ Daniel L. Schmutter
Daniel L. Schmutter
Pro hac vice pending

DECLARATION

No party or party's counsel authored this brief in whole or in part.

No party or party's counsel, or any other person or entity, other than the amici curiae, their members, or their counsel, contributed money that was intended to fund the preparation or submission of the brief.

Neither amici curiae nor their counsel represents or has represented one of the parties to the present appeal in another proceeding involving similar issues, or was a party or represented a party in a proceeding or legal transaction that is at issue in the present appeal.

Dated: November 13, 2023

s/ Daniel L. Schmutter
Daniel L. Schmutter
Pro hac vice pending

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the eFileMa system will be sent electronically to the registered participants as identified on the eFileMa Party Information.

Dated: November 13, 2023

s/ Jason A Guida
Jason A. Guida (BBO# 667252)
The Law Office of Jason A. Guida P.C.
17 Lark Avenue
Saugus, MA 01960
(617) 383-4652
jason@lawguida.com