COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SJC-13432

COMMONWEALTH OF MASSACHUSETTS,
APPELLEE

V.

DAVID E. CANJURA,
APPELLANT

BRIEF OF RIVER VALLEY TAEKWONDO AND MASSACHUSETTS ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICI CURIAE IN SUPPORT OF APPELLANT

ON APPEAL FROM A JUDGMENT OF THE BOSTON MUNICIPAL COURT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Appellate Procedure Rule 17(c)(1) and Supreme Judicial Court Rule 1:21, I certify that: (i) amicus curiae River Valley Taekwondo is a Limited Liability Corporation, does not issue any stock or have any parent corporation, and that no publicly held corporation owns stock in it; and (ii) amicus curae Massachusetts Association of Criminal Defense Lawyers is a nonprofit organization, that it does not issue any stock or have any parent corporation, and that no publicly held corporation owns stock in it.

/s/ Luke Ryan
Luke Ryan

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Arizona

Other Authorities

PREPARATION OF AMICUS CURIAE BRIEF

Pursuant to Appellate Procedure Rule 17(c)(5), I certify that (A) no party or party's counsel authored any of this brief; (B) no party or party's counsel, or any other person or entity, other than the amici curiae, their members, or its counsel, contributed money that was intended to fund the preparation or submission of this brief; and (C) 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.

/s/ Luke Ryan
Luke Ryan

STATEMENT OF INTEREST

For the last twenty-six years, **River Valley Taekwondo (RVTKD)** has offered traditional Korean martial arts training to adults in Northampton, Massachusetts. Although many East Asian martial disciplines have evolved into competitive sports, RVTKD focuses on cultivation of the self, expressed through physical defense against a powerful adversary, real or imagined in idealized form. The school also provides a significant cultural component, offering field trips to museums and Zen study centers, language and literary study, and other exposure to Korean and other East Asian values, modes of thought, and social concepts.

RVTKD introduces weapons practice to its curriculum when students have reached an advanced level. For experienced practitioners, a weapon is as a grain of sand to an oyster, or a horizontal bar, rings, beam, or pommel horse to a gymnast. By fundamentally changing the body's relation to weight, balance, and space, these tools transform the experience of training. When geometry and physics merge with the earthy tangibility of the human body in motion, the result is greater richness, depth, and beauty. These benefits are felt deeply by the practitioner and easily perceived by any observer.

Laws in Massachusetts restricting certain East Asian weapons deprive martial artists of such worthwhile experiences. For instance, RVTKD practitioners who wish to train outside the home with nunchaku (aka "nunchucks") must travel

to bordering states to legally handle an iconic Okinawan weapon ubiquitous in popular culture, used by everyone from Bruce Lee to a Teenaged Ninja Turtle.

The fact that many of these weapon restrictions are rooted in white supremacy is, as far as RVTKD is concerned, reason enough to reconsider them. Separate and apart from their legacy of racial injustice, however, these laws create a host of unintended consequences for those who dedicate years to studying the subtle nuances of culturally and historically significant self-defense tools unquestionably less dangerous than firearms.

The **Massachusetts Association of Criminal Defense Lawyers ("MACDL")** is an incorporated association of more than 1,000 experienced trial and appellate lawyers who are members of the Massachusetts Bar and who devote a substantial part of their practices to criminal defense. MACDL is dedicated to protecting the rights of the citizens of the Commonwealth guaranteed by the Massachusetts Declaration of Rights and the United States Constitution. MACDL seeks to improve the criminal justice system by supporting policies and procedures to ensure fairness and justice in criminal matters. MACDL devotes much of its energy to identifying, and attempting to avoid or correct, problems in the criminal justice system. It files amicus curiae briefs in cases raising questions of importance to the administration of justice.

INTRODUCTION

In the wake of *New York State Rifle & Pistol Assn, Inc. v. Bruen*, 142 S. Ct. 2111 (2022) (*Bruen*), courts must now consider "the historical tradition that delimits the outer bounds of the right to keep and bear arms." *Id.* at 2127. At the heart of this historical tradition are numerous arms restrictions that were enacted to disarm disfavored groups.

Take, for example, the New York law at issue in *Bruen*. "In 1911, New York's 'Sullivan Law' . . . prohibit[ed] . . . the possession of all handguns—concealed or otherwise—without a government-issued license," which could only be granted if a "person proved 'good moral character' and 'proper cause.'" *Id.* at 2122 (2022) (citations omitted).

This facially neutral licensing scheme was adopted, "in good part, as an effort to disarm Italian immigrants, whom many believed were predominately responsible for violent crime in New York City in the early 20th century."[1] During the first three years of the Sullivan Law's existence, approximately "70 percent of those arrested had Italian surnames."[2] This included the first person sentenced under the Sullivan Act – an Italian immigrant whose "fear of the Black Hand"

[1] Amici Curiae Br. of Italo-American Jurists & Attorneys, New York State Rifle & Pistol Assn, Inc. v. Bruen, No. 20-843, at 2.
[2] T. Markus Funk, *Gun Control and Economic Discrimination: The Melting-Point Case-in-Point*, 85 J. CRIM. L. & CRIMINOLOGY 764, 799 (1994-1995) (citation omitted)).

elicited no sympathy from the judge who sent him to Sing Sing to "stamp out" the gun-toting "custom" of the defendant and his "countrymen."[3]

The same discriminatory animus that inspired the arms restriction in *Bruen* led "Founding-era governments" to "disarm[] groups they distrusted like Loyalists, Native Americans, Quakers, Catholics, and Blacks." *Range v. Att'y Gen. of U.S. of America*, 69 F.4th 96, 105 (3d Cir. 2023). "After the Civil War," some "States of the old Confederacy" attempted to continue the historical tradition of "formally prohibit[ing] African-Americans from possessing firearms," as well as other weapons like the "dirk or bowie knife." *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 771 (2010) (citations omitted). While the ratification of the Fourteenth Amendment rendered these kinds of race-based statutes unlawful, it eliminated neither the social anxieties nor discriminatory animus that inspired this prior legislation.

Soon, southern lawmakers began passing facially neutral arms restrictions that were "never intended to be applied to the white population"[4] and, in fact, were selectively enforced against the Black population.[5] By the start of the 20th Century,

[3] "First Conviction Under Weapon Law," N.Y. TIMES, pg. 5 (Sept. 28, 1911).
[4] *Watson v. Stone*, 4 So.2d 700, 703 (Fla. 1941) (Buford, J., concurring).
[5] *See* Justin Aimonetti & Christian Talley, *Race,* Ramos, *and the Second Amendment Standard of Review*, 107 VIRGINIA L. REV. ONLINE 193, 210-18 (2021).

"this model was followed elsewhere in the nation."[6] Instead of formally disarming racial and ethnic minorities, legislators created discretionary licensing schemes like the one in *Bruen* and/or placed restrictions on weapons these groups were believed to favor.[7]

While "the existence of racist history is not something that is unique in the Second Amendment context,"[8] that history cannot be "[l]ost in the accounting." *Ramos v. Louisiana*, 140 S. Ct. 1390, 1401 (2020). For better or worse, *Bruen* demands that judges and litigants assess the lawfulness of weapons restrictions "by scrutinizing whether [they] comport[] with history and tradition." 142 S. Ct. at 2128. Tempting as it may be to simply condemn "status-based regulations" as "repugnant (not to mention unconstitutional),"[9] these laws help explain why

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[6] Robert Cottrol & Raymond T. Diamond, *Never Intended to Be Applied to the White Population: Firearms Regulation and Racial Disparity - The Redeemed South's Legacy to a National Jurisprudence - Freedom: Constitutional Law*, 70 CHICAGO-KENT L. REV. 1307, 1333 (1995).

[7] The history of drug prohibition in this country followed a similar course. *See, e.g.*, Michael L. Rosino & Matthew W. Hughey, *The War on Drugs, Racial Meanings, and Structural Racism: A Holistic and Reproductive Approach*, 77 AM. J. ECON. & SOC. 849, 850 (2018) ("The earliest U.S. drug laws were tied to racist stereotypes and to fears about the negative habits of immigrants.").

[8] Patrick J. Charles, "Some Thoughts on Addressing Racist History in the Second Amendment Context" (Jan. 14, 2022), https://firearmslaw.duke.edu/2022/01/some-thoughts-on-addressing-racist-history-in-the-second-amendment-context/ (last visited Sept. 10, 2023).

[9] *Range v. Att'y Gen. U.S.*, 53 F.4th 262, 276 n.18 (3d Cir. 2022) (per curium), *vacated by* 56 F.4th 992 (3d Cir. 2023).

Massachusetts lawmakers have repeatedly imposed blanket bans on carrying instruments inarguably less lethal than firearms.

To be clear: "the racist history of gun control does not support the conclusion that all historical successors, including the Brady Handgun Act, the federal ban on assault weapons, current 'red flag' laws, or any other measure that neutrally regulates access to arms, violate equality rights."[10] However, some historical successors – like many of the weapon prohibitions set forth in G.L. c. 269, § 10(b) – cannot be disentangled from the sordid tradition of using arms restrictions to "keep disfavored groups from accessing instruments of power and self-defense."[11]

Removing the "discriminatory taint" of a "law's tawdry past" requires an actual confrontation with the statute's "discriminatory purpose and effects." *Ramos*, 140 S. Ct. at 1410 (Sotomayor, J., concurring). As this Court recognized three years ago, "[t]here is nothing easy" about "recogniz[ing] and confront[ing] the inequity and injustice that is the legacy of slavery."[12] However, unless and until that happens, "[t]he past is never dead. It's not even past."[13]

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[10] Timothy Zick, *Framing the Second Amendment: Gun Rights, Civil Rights and Civil Liberties*, 106 IOWA L. REV. 229, 263 (2020).
[11] Jacob C. Charles, *On Sordid Sources in Second Amendment Litigation*, 76 STAN. L. REV. ONLINE 30, 31 (2023).
[12] "Letter from the Seven Justices of the Supreme Judicial Court to Members of the Judiciary and the Bar" (June 3, 2020).
[13] WILLIAM FAULKNER, REQUIEM FOR A NUN (1951).

ARGUMENT

A. Race-Based Arms Restrictions Were a Hallmark of the Colonial Era.

Months before Massachusetts declared itself an independent state, leaders of the Massachusetts Bay colony passed a law "disarming . . . such persons as are notoriously disaffected to the cause of America." Act of Mar. 14, 1776, ch. VII, 1775-1776 Mass. Act at 31–32, 35. This arms restriction, like others of that era, was not "motivated by racism."[14] However, there is no question that "[r]acist arms laws predate the establishment of the United States."[15]

The first such law in the colonies came in 1619, when Jamestown leaders made it a capital offense to "sell or give any Indians any piece, shot, or powder, or

[14] Adam Winkler, "Gun Control is 'Racist'? The NRA would know," NEW REPUBLIC (Feb. 4, 2013). Other early restrictions that appear to be untainted by racism targeted the "slung shot." *See, e.g.*, 1850 Mass. Acts 401. Why a maritime tool once used as a fighting aid by rowdy sailors continues to be restricted in the Commonwealth is unclear – as is the more recent prohibition against wearing an "armband, made with leather which has metallic spikes, points or studs." G.L. c. 269, § 10(b). As a fashion editor for Gothic Beauty magazine once remarked in response to a spiked bracelet crackdown at an Essex County mall, "[t]hese items are fashion accessories . . . made to accentuate an outfit that would differentiate someone from general mainstream fashion. Nothing more. "District Attorney nails spiked bracelets," STANDARD-TIMES, at B5 (July 13, 2003) (noting law enforcement could not "point to a single incident where a spiked wristband hurt someone").

[15] Clayton E. Cramer, *The Racist Roots of Gun Control*, KAN. J.L. & PUB. POL'Y, at 17 (Winter 1995).

any other arms offensive or defensive."[16] In 1633, Massachusetts Bay enacted a similar law which, in pertinent part, read:

> [N]o person whatsoever . . . shall . . . sell, give or barter, directly or indirectly, any gun or guns, powder, bullets, shot, lead, to any Indian whatsoever, or to any person inhabiting out of this jurisdiction: Nor shall any amend or repair any gun belonging to any Indian, nor shall sell any armor or weapons . . . .[17]

Three years later, "great danger fro[m] the Indians" led to laws requiring Massachusetts Bay colonists to arm themselves when travelling more than a mile from home and attending public assemblies. RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND, VOL. I, 190 (1853); *see also* PLYMOUTH COMPACT, *supra*, at 102 (requiring colonists to arm themselves at churches between April and November).

As the Trans-Atlantic slave trade expanded, so too did colonial fears of armed rebellions. By the middle of the 17th century, "[t]he fear of slave insurrections had caused the colonists to exclude Negroes from military service even in Massachusetts." JOHN HOPE FRANKLIN, FROM SLAVERY TO FREEDOM: A HISTORY OF NEGRO AMERICANS 131 (3rd ed. 1969). In 1656, the Massachusetts

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[16] Robert Spitzer, *Gun Law History in the United States and the Second Amendment Rights*, 80 LAW & CONTEMP. PROBS. 55, 57 (2017).

[17] THE CHARTERS AND GENERAL LAWS OF THE COLONY AND PROVINCE OF MASSACHUSETTS BAY 133 (1814). Plymouth Colony, prior to its merger with Massachusetts Bay, also forbid its members from giving "any powder shott or ammunition" to "Indians." THE COMPACT WITH THE CHARTER AND LAWS OF THE COLONY OF NEW PLYMOUTH 129 (1836) [hereinafter "PLYMOUTH COMPACT"].

General Court ordered "that henceforth no negroes or Indians . . . shall be armed or permitted to train" with the militia.[18]

In 1664, New York made it illegal for slaves to "have or use any gun, pistol, sword, club or any other kind of weapon whatsoever, but in the presence or by the direction of his her or their Master or Mistress."[19] "By 1680, a Virginia statute prohibited Negroes, slave and free, from carrying weapons, including clubs." Cottrol & Diamond, *supra*, at 325 (citation omitted).

A 1704 Maryland statute provided that "no Negro or other Slave within this Province shall be permitted to carry any Gunn or any other Offensive Weapon from off their Masters land without lycense from their said Master."[20] South Carolina passed a law in 1740 that made it unlawful for "any slave, unless in the presence of some white person, to carry or make use of firearms or any offensive weapon whatsoever, unless such negro or slave shall have a ticket or license in

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[18] RECORDS OF THE GOVERNOR AND COMPANY OF MASSACHUSETTS BAY IN NEW ENGLAND, Vol. III, 397 (1854); *see also* Cottrol & Diamond, *supra* at 325-26 (noting that "free Negroes" in Massachusetts denied the right to "participate in militia drills" were instead "required to perform substitute service on public works projects").

[19] THE COLONIAL LAWS OF NEW YORK FROM THE YEAR 1664 TO THE REVOLUTION, INCLUDING THE CHARTERS TO THE DUKE OF YORK, THE COMMISSIONS AND INSTRUCTIONS TO COLONIAL GOVERNORS, THE DUKES LAWS, THE LAWS OF THE DONGAN AND LEISLER ASSEMBLIES, THE CHARTERS OF ALBANY AND NEW YORK AND THE ACTS OF THE COLONIAL LEGISLATURES FROM 1691 TO 1775 INCLUSIVE, at 687 (1894).

[20] PROCEEDINGS AND ACTS OF THE GENERAL ASSEMBLY SEPTEMBER 5, 1704-APRIL 19, 1706, at 261.

writing from master, mistress, or overseer . . . ."[21] The following year, North Carolina prohibited slaves from possessing any "Gun, Sword, Club or other weapon . . . upon any pretense whatsoever" without a "Certificate" from their master.[22]

A 1751 Louisiana law required white colonists to stop and, "if necessary," beat "any black carrying any potential weapon, such as a cane."[23] In 1768, Georgia made it illegal for slaves "to carry any gun, cutlass, pistol, or other offensive weapon, abroad at any time between Saturday evening after sunset and Monday morning before sun rise."[24]

B. States Continued to Enact Race-Based Arms Restrictions Following the Ratification of the Second Amendment.

In 1792, Congress passed the Uniform Militia Act which required "the enrollment of every free, able-bodied *white* male citizen between the ages of eighteen and forty-five."[25] That same year, Virginia enacted legislation providing

[21] 1731-43 S.C. Acts 168, § 23.
[22] 1741 N.C. Sess. Laws 201, ch. 24, § 40.
[23] Thomas N. Ingersoll, *Free Blacks in a Slave Society: New Orleans, 1718-1812*, 48 WM. & MARY Q. 173, 178-79 (1991).
[24] A DIGEST OF THE LAWS OF THE STATE OF GEORGIA. FROM ITS FIRST ESTABLISHMENT AS A BRITISH PROVINCE DOWN TO THE YEAR 1798, INCLUSIVE, AND THE PRINCIPAL ACTS OF 1799: IN WHICH IS COMPREHENDED THE DECLARATION OF INDEPENDENCE; THE STATE CONSTITUTIONS OF 1777 AND 1789, WITH THE ALTERATIONS AND AMENDMENTS IN 1794. ALSO THE CONSTITUTION OF 1798, at 153-154 (1800).
[25] Act of May 8, 1792, ch. 33, § 1, 1 Stat. 271.

that "[n]o negro or mulatto whatsoever shall keep or carry any gun, powder, shot, club, or other weapon whatsoever, offensive or defensive."[26]

A 1797 Delaware law forbid "any Negro or Mulatto slave" from carrying "any guns, swords, pistols, fowling pieces, clubs, or other arms and weapons whatsoever, without his master's special license for the same."[27] A year later, Kentucky made it illegal for a "negro, mulatto, or Indian whatsoever, [to] keep or carry any gun, powder, shot, club, or other weapon whatsoever, offensive or defensive."[28]

In 1819, Iowa lawmakers authorized white citizens "to disarm and imprison such negro or mulatto, as may be found with a belt or butcher-knife, dirk, sword, or pistol."[29] Whereas Tennessee's 1796 Constitution protected the right of "freemen of this State . . . to keep and bear arms," a 1834 amendment restricted this right to "free white men."[30] A year later, Tennessee made it illegal for "[a]ny free person"

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[26] COLLECTION OF ALL SUCH ACTS OF THE GENERAL ASSEMBLY OF VIRGINIA, OF A PUBLIC AND PERMANENT NATURE, AS ARE NOW IN FORCE; WITH A NEW AND COMPLETE INDEX. TO WHICH ARE PREFIXED THE DECLARATION OF RIGHTS, AND CONSTITUTION, OR FORM OF GOVERNMENT, at 187 (1803).
[27] 1797 Del. Laws 104, An Act For the Trial Of Negroes, ch. 43, §6.
[28] 1798 Ky. Acts 106, § 5. Between 1799 and 1818, Mississippi, Indiana, and Missouri passed a nearly identical laws that did not apply to Native Americans. *See* 1799 Miss. Laws 113, A Law For The Regulation Of Slaves; 1804 Ind. Acts 108, A Law Entitled a Law Respecting Slaves, § 4.
[29] ORDINANCES OF THE BOROUGH OF VINCENNES, WITH THE ACT OF INCORPORATION AND SUPPLEMENT THERETO, at 54-55 (1820).
[30] Cramer, *supra* (citations omitted).

to "sell, loan or give to any slave, any gun, pistol, sword, or dirk" absent "the consent of the owner."[31]

In 1841, Delaware passed a law requiring "free negroes and free mulattoes" to obtain a permit "to have, own, keep, or possess any gun [or] pistol."[32] An 1860 Georgia statute made it illegal to "sell or furnish to any slave or free person of color, any gun, pistol, bowie knife, slung shot, sword cane, or other weapon used for the purpose of offence or defence."[33]

Pursuant to a North Carolina statute from that same year "any free negro" could no longer "wear or carry about his person or keep in his house any shot gun, musket, rifle, pistol, sword, sword cane, dagger, bowie knife, powder or shot."[34] By the start of the Civil War in 1861, "[t]he fear of armed blacks had become so extreme that *dogs* were considered weapons."[35]

C. Following the Ratification of the Fourteenth Amendment, Proponents of White Supremacy Selectively Enforced Facially Neutral Arms Restrictions.

"After the Civil War, many of the over 180,000 African-Americans who served in the Union Army returned to the States of the old Confederacy, where

[31] 1835-36 Tenn. Pub. Acts 168, An Act to Amend the Penal Laws of the State, ch. 58, § 1.
[32] Ch. 176, § 1, 8 Laws of the State of Del. 208 (1841).
[33] 1860 Ga. Laws 56.
[34] 1860-1861 N.C. Sess. Laws 68.
[35] Cramer, *supra* (emphasis in original) (citing Mississippi's outright ban against "ownership of a dog by a black person").

systematic efforts were made to disarm them and other blacks." *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 771 (2010) (citations omitted). Congress responded by enacting the Civil Rights Act of 1866, which guaranteed the right "to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens." Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27.

"[T]o incorporate the guaranties of the Civil Rights Act of 1866 in the organic law of the land," Congress also proposed what became the Fourteenth Amendment. *Gen. Building Contractors Assn., Inc. v. Pennsylvania*, 458 U.S. 375, 385 (1982) (citation omitted). During his introductory remarks in support of this new amendment, Representative Thaddeus Stevens offered this explanation of its purpose:

> [W]hatever law punishes a white man for a crime shall punish the black man precisely in the same way and to the same degree. Whatever law protects the white man shall afford "equal" protection to the black man.[36]

This promise of equal protection went unfilled with respect to the post-Reconstruction enforcement of southern arms restrictions. As Ida B. Wells noted in 1900: "There is a law in the south against carrying concealed weapons. White men

[36] CONG. GLOBE, 39TH CONG., 1ST SESS. 2459 (1866) (Statement of Rep. Stevens).

carry them with impunity, but if the negro is caught with a gun[,] he is fined $50 and put in the chain gang for 60 days."[37]

Support for Wells' claim of selective enforcement can be found in numerous contemporary sources. "[T]housands of the so called 'best men' of every community" were only prosecuted "at rare intervals" for their "daily" possession of the "faithful revolver" they placed "in the pistol pocket,"[38] while state laws "against carrying concealed weapons" were "enforced almost exclusively against negroes."[39] "[R]oundup[s] of [the] lawless negro class" with "concealed weapons in their possession"[40] were not only routine; they took place in the aftermath of lynchings and resulted in the "culprits" being dealt with "severely" under facially neutral laws.[41] In 1893, one critic noted that a dozen Black inmates were serving ten-year sentences "in the South Carolina penitentiary for the simple offense of

[37] "The Anti-Lynching Crusaders," FREDERICK NEWS (Feb. 17, 1900) (quoting Ida B. Wells).
[38] Justin Aimonetti & Christian Talley, *Race,* Ramos, *and the Second Amendment Standard of Review*, 107 VIRGINIA L. REV. ONLINE 193, 212 (2021) (quoting "Concealed Weapons," THE AGE HERALD, pg. 4 (Oct. 10, 1897)).
[39] *Id.* at 215 (quoting "Elections a Farce: The Republicans of South Carolina Issue a Strong Address to Congress," THE INDIANAPOLIS JOURNAL, pg. 7 (Jan. 18, 1889).
[40] *Id.* at 217 (quoting "Police Start on Roundup of Lawless Negro Class," THE REPUBLIC, pg. 5 (May 11, 1903)).
[41] *Id.* at 215 (quoting "Another Race Riot is Feared in Norfolk," THE EVENING JOURNAL, pg. 1 (Oct. 26, 1904)).

carrying concealed weapons, a thing that about every white man in the state does."[42]

The existence of this double standard was neither a secret nor source of shame. One South Carolina paper readily acknowledged "[t]here are laws upon the statute books against the carrying of concealed weapons, and occasionally some insignificent 'n——r' is haled before the courts . . . but it is very rare that a white man is made to pay the penalty."[43] The *Houston Daily Post* practically boasted: "There is one law for the 'n——r and the Chinaman' who tote pistols . . . and there is another law for the gentleman who arms himself[.]"[44] Another Southern commentator aptly described what had become a policy of *de facto* discrimination:

> It has not as yet been shown that the Afro-American is more addicted to the habit of pistol-toting than his white brother, but it is evident that he is much more liable to arrest. For centuries, all over the world, it has been regarded as the prerogative of a gentleman to carry arms and a Southern gentleman knows that, in such case, no peace officer is apt to interfere with him. Indeed, one of the class, when challenged for violating the law against carrying concealed weapons remarked, very truthfully, "That law was made for n——rs."[45]

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[42] *Id.* at 216 (quoting "Outrages on the Negro: Rev. Dr. Seaton Says that They Must be Stopped, What Prison Records Show," THE EVENING STAR, pg. 7 (Aug. 14, 1893)).
[43] *Id.* at 217 (quoting "The People Alone Responsible," THE MANNING TIMES, pg. 8 (Nov. 1, 1911) (censoring racial slur)).
[44] *Id.* (quoting "The Gentleman Outlaw," HOUSTON DAILY POST, pg. 4 (Aug. 2, 1902) (censoring racial slur)).
[45] *Id.* at 218 (quoting "The Pistol-Toters," THE APPEAL, pg. 2 (July 2, 1910) (censoring racial slur)).

D. During the Gilded Age, Lawmakers Passed Facially Neutral Arms Regulations Designed to Disarm Italian Immigrants.

The Post-Reconstruction method for disarming Blacks did not go unnoticed by Nativists. Indeed, "[t]here are indications" that this method became a "model" for "the treatment of southern and eastern European immigrants to America."[46] Take, for example, restrictions pertaining to the stiletto – a knife with a long slender blade and needle-like point it is illegal to carry in the Commonwealth pursuant to G.L. c. 269, § 10(b).

In 1879, New Orleans passed an ordinance banning the sale of these weapons.[47] The aim of this facially neutral regulation was not to disarm the population at large: city leaders consciously targeted what had come to be known as "the favorite weapon of the Sicilians."[48]

The story of Italian immigrants in New Orleans is somewhat unique insofar as they were initially welcomed after having been "successfully recruited to replace slave labor on sugarcane, strawberry, and cotton plantations."[49] Eventually, this "romance with Italian labor began to sour when the new immigrants balked at

[46] Cottrol & Diamond, *supra*, at 1333.
[47] "City Hall Affairs," THE NEW ORLEANS DEMOCRAT, pg. 8 (May 14, 1879).
[48] "Local Intelligence," NEW ORLEANS REPUBLICAN, pg. 5 (June 1, 1873).
[49] Jennifer Barbata Jackson, *Before the Lynching: Reconsidering the Experience of Italians and Sicilians in Louisiana, 1870s-1890s*, at 324, LOUISIANA HISTORY: THE JOURNAL OF THE LOUISIANA HISTORICAL ASSOCIATION VOL. 58, NO. 3 (Summer 2017).

low wages and dismal working conditions."[50] By the time New Orleans decided to regulate stilettos, the "northern/national press rhetoric" had cast "Italian immigrants . . . as unassimilable, undesirable, and largely criminal."[51]

Soon, Louisiana newspapers followed suit.[52] One story reported on "the dark dago who creeps stealthily down a black alley and buries his stiletto in the bosom of an enemy."[53] Another matter-of-factly noted that "every Sicilian carries a long, sharp knife for family purposes as he generally has a vendetta or two on hand."[54]

On the night of October 15, 1890, the New Orleans Police Chief was shot by five men while on his way home from work.[55] Before succumbing to his injuries, the chief allegedly pinned the blame on "Dagoes."[56] This prompted an order from the Mayor of New Orleans to "[s]cour the whole neighborhood" and "[a]rrest every Italian."[57] Nineteen were eventually charged with participating in the murder. As the accused awaited trial, newspapers across the country ran lurid

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[50] "How Italians Became 'White,'" N.Y. TIMES (Oct. 12, 2019).
[51] Jackson, *supra*, at 304.
[52] *See, e.g.*, "Good Friday Night in the Slums," NEW ORLEANS BULLETIN (Mar. 27, 1875) (reporting on a tour of an Italian neighborhood where "the stiletto . . . has never failed to accomplish its work"); "The Sicilian and the Knife," NEW ORLEANS BULLETIN (July 14, 1874) ("[A] Sicilian by birth . . . had been stabbed with a stiletto . . . inflicting a fearful gash.").
[53] Jackson, *supra*, at 321 (quoting DAILY PICAYUNE (Nov. 4, 1888)).
[54] "How to Eat an Orange," SAINT LANDRY DEMOCRAT, pg. 4 (Mar. 1890).
[55] RICHARD GAMBINO, VENDETTA: THE TRUE STORY OF THE LARGEST LYNCHING IN U.S. HISTORY 1-2 (2000).
[56] *Id.* at 4.
[57] *Id.* at 7.

stories connecting them with secret Sicilian societies whose members were quick to "plunge[] the stiletto into [a] doomed man's heart."[58]

On March 13, 1891, a New Orleans jury acquitted six of the first nine defendants to face trial and reported that they could not agree on a verdict for the other three.[59] The next day, a mob broke into the prison where the accused were being held and lynched eleven Italians.[60]

Most newspapers endorsed the lynching,[61] including the *Boston Globe*, which ran a front-page story with this headline:


STILETTO RULE.

New Orleans Arose to Meet the Curse.

After informing readers that "the bodies of 11 swarthy Italians" were "cold in death, riddled by the bullets of angry citizens," the *Globe* made it clear that "[t]his was not a wild uprising of a crazy mob" but "the calm, deliberate action of

[58] "The Dreaded Mafia: Something About the Italian Assassins in New Orleans," CHILLICOTHE CONSTITUTION, pg. 3 (Nov. 23, 1890).
[59] "How Italians Became 'White,'" *supra*.
[60] *Id.*
[61] *See, e.g.*, "Chief Hennessy Avenged!," N.Y. TIMES (Mar. 15, 1891); "Deferred Justice Comes at Last," FELICIANA SENTINEL (Mar. 21, 1891); "'Vengeance!'" AUSTIN WEEKLY STATESMAN, pg. 2 (Mar. 19, 1891).

the best element of the city."[62] This "court of last resort . . . knew that those [acquitted] were murderers."[63] Members of the lynch mob therefore "took the law into their own hands, and who can blame them?"[64]

While the xenophobia of the *Globe*'s article could not be clearer, stiletto references in the headline and a sub-heading ("An Unseen Thrust of a Stiletto") remain confusing. Neither the police chief's slaying nor the lynching involved the use of that weapon. Why, then, the ham-handed effort to raise the specter of the stiletto? This may have been nothing more than a product of unfamiliarity with the group the paper was attempting to defame; at the time, the Italian population in Massachusetts had only recently begun to grow.[65]

The absence of a sizable Italian community had not stopped Boston papers from previously fearmongering about the "Stabbing Propensities of Italians."[66] But

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[62] "Stiletto Rule: New Orleans Arose to Meet the Curse," BOSTON GLOBE, pp. 1, 6 (Mar. 16, 1891).
[63] *Id.* at 6.
[64] *Id.* A week later, Massachusetts representative Henry Cabot Lodge expressed his sympathy for the grievances of the lynch mob. "Such acts as the killing of these eleven Italians do not spring from nothing without reason or provocation," Lodge wrote. Hon. Henry Cabot Lodge, *Lynch Law & Unrestricted Immigration*, THE NORTH AMERICAN REVIEW, Vol. 152, No. 414, 602 (May 1891) For the future senator, "[l]awlessness and lynching" were "evil things, but a popular belief that juries cannot be trusted" was "even worse." *Id.* at 603.
[65] William Stilwell, "Italian Americans at Faneuil Hall" (noting that the Boston population of Italians "stood at around 1,200 people in 1880, growing to over 25,000 by 1905), https://www.nps.gov/articles/000/italian-americans-at-faneuil-hall.htm (last visited Sept. 16, 2023).
[66] "Howard's Gossip," BOSTON DAILY GLOBE, pg. 1 (Sept. 15, 1885).

such reporting almost inevitably consisted of stories from other places (like New York) about the "Danger of the Stiletto in the Hands of Hot-Tempered Italians."[67]

As more and more Italians settled in the North End of Boston during the 1890s and early 1900s, their contribution to the city's crime rate was unremarkable.[68] But whenever given the chance, the *Globe* and other Massachusetts newspapers filled their pages with graphic caricatures of Italians as hot-blooded, stiletto-wielding assassins. The following list of headlines from that era is by no means exhaustive:

- "Italian Plunges Stiletto to Heart of His Sister-in-Law," BOSTON DAILY GLOBE, pg. 1 (Mar. 30, 1891);

- "A Coward's Work. Stiletto Thrusts Killed Gaetano Malfitano. Was it Amante's Work?" BOSTON POST, pg. 1 (Mar. 16, 1892);

- "Used his Stiletto. Milford Italian, Enraged with Jealously, Attacks One of His Countryman and Wounds Him Severely," BOSTON DAILY GLOBE, pg. 11 (May 2, 1892);

- "Boiler and Stiletto: Serious Affray Among Italians in Haverhill," BOSTON DAILY GLOBE, pg. 3 (June 27, 1892);

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[67] *Id.*; *see also* "Crowd Held Him at Bay," BOSTON DAILY GLOBE, pg. 13 (Dec. 29, 1890) ("[A] swarthy Italian" in a New York "tenement adjoining police headquarters . . plunged a stiletto into the left breast of . . . a youth of 15 . . . .").

[68] *See* Frederick A. Bushee, "Italian Immigrants in Boston," THE ARENA, at 724 (1897) ("The North End is actually as safe for a well-behaved person as any other part of the city."); *see also* ELIOT LORD ET AL., THE ITALIAN IN AMERICA 209-10 (1905) (citing a 1903 study of arrest records from cities with large Italian-American communities which showed the rate of crime for Italian immigrants crime was comparable to crime rates for other immigrants groups and those born in the United States).

- "Used a Stiletto. Stabbed Station Agent at Tower Hill. Italian Fled to Woods and is being Hunted," BOSTON DAILY GLOBE, pg. 16 (Aug. 15, 1892);

- "For Woman," BOSTON DAILY GLOBE, pg. 1 (July 19, 1893) ("Jealously and stiletto figure in North end row; Italian captured after long chase.");

- "Killed a Maniac," LOWELL DAILY SUN, pg. 5 (Sept. 7, 1893) ("This morning Policeman Beckner . . . shot a maniac who was running toward him with a stiletto in his hand. The man was Italian and insane.");

- "Death Thrust. John McEleney Dies from a Stiletto Wound. Was Stabbed Saturday Night on Haverhill St. An Italian is Charged with the Deed." BOSTON DAILY GLOBE, pg. 14 (July 9, 1894);

- "Stiletto Cut. Near the Heart of Michel Santa Maria," BOSTON DAILY GLOBE, pg. 1 (Aug. 21, 1894);

- "The Mafia at Work," BOSTON SUNDAY POST, pg. 24 (Feb. 24, 1895) ("The official weapon of the Mafia is the stiletto . . . .");

- "Deadly Stiletto: Two Sisters Stabbed on the Street of New York by Love-Crazed Italian," BOSTON POST, pg. 1 (Aug. 9, 1895);

- "Lavorano Convicted: Stabbed and Almost Killed Mr. and Mrs. Russo with Stiletto," BOSTON POST, pg. 6 (Dec. 11, 1895);

- "Feared the Deadly Stiletto: Engineer Whom Italians Think Responsible for the Death of Pasquale Soragos Has Left Brockton," BOSTON SUNDAY GLOBE, pg. 36 (Jan. 5, 1896);

- "Stiletto's Point. Ferocious Duel Between Former Friends. Two Italians of Providence Fight Over a Game of Cards," BOSTON DAILY GLOBE, pg. 7 (Oct. 1, 1896);

- "Frightened Women. Men, Too, Were Scared by Man with a Stiletto," BOSTON DAILY GLOBE, pg. 4 (Nov. 27, 1896) ("[A]n Italian stood in the center of the place brandishing a stiletto.");

- "Goaded to Murder," FITCHBURG DAILY SENTINEL, pg. 5 (Dec. 17, 1896) ("Goaded by rough handling by three men an Italian" drew a "stiletto" and "plung[ed] it into Prescott's breast");

- "At Carmelo's: Saturday Night Hotter than Usual," BOSTON DAILY GLOBE, pg. 4 (Mar. 15, 1897) ("No one is quite so easy to insult as a drunken Italian. Accuse him of cheating in a domino game . . . and if a stiletto does not appear a revolver will.");

- "He Used a Stiletto. Affray Between Two New York Italians Resulted in a Probably Fatal Stabbing Last Night," BOSTON GLOBE, pg. 20 (Aug. 8, 1898);

- "Bullet Proof," BOSTON DAILY GLOBE, pg. 5 (Sept. 2, 1899) ("[A]n East Boston Italian . . . first tried to end [the gun shot victim's] life with a stiletto.");

- "Italian's Crime," BOSTON DAILY GLOBE, pg. 5 (Apr. 16, 1900) ("Some of these are victims of a revolver and some of the deadly stiletto . . . .");

- "Mellea Held in $800," BOSTON GLOBE, pg. 17 (Mar. 18, 1901) (reporting on "alleged attempted assault on another Italian . . . with a stiletto");

- "Officer O'Brien: Stabbed by an Italian in Charlestown," LOWELL SUN, pg. 14 (June 18, 1901) ("[A]n Italian organ grinder . . . pulled a stiletto . . . and thrust it into the policeman's side.");

- "Michael Manfra Sent to Prison for 12 Years. The Charge was Manslaughter. He Used a Stiletto on Another Italian." LOWELL SUN, pg. 30 (Jan. 28, 1902);

- "Stiletto Work: Pasquale Debuona of Fall River Wounded," BOSTON DAILY GLOBE, pg. 3 (Sept. 15, 1902);

- "Murder Ends North End Row," BOSTON POST, pg. 1 (Feb. 18, 1903) ("[T]he deadly stiletto got in its work" by a "Western End Italian.");

- "Held Stiletto to his Throat," BOSTON POST, pg. 7 (Mar. 18, 1904) ("While one Italian blew out the gas, another pricked with a stiletto . . . .");

- "Stabbed for Money. Russo Attacked with Stiletto on Steps of Police Station," BOSTON DAILY GLOBE, pg. 1 (July 18, 1904);

- "Tried to Kill. Italian Used Stiletto on His Wife." BOSTON DAILY GLOBE, pg. 4 (June 28, 1904);

- "Thirty Shots Fired Over a Girl. Little Italy in a Ferment While Revolvers and Stilettoes are Busy." BOSTON GLOBE, pg. 1 (Apr. 17, 1905);

- "Carrying Dangerous Weapons. Capt. Kimball Starts Reform in Little Italy with 3 Arrests," BOSTON POST, pg. 9 (Apr. 19, 1905) ("Nearly every Italian in the North End is armed with a stiletto or a revolver," said Captain Kimball, "and some carry both.");

- "Italian's Stiletto Used," BOSTON GLOBE, pg. 28 (Oct. 14, 1905);

- "Put up a Fight. Italian had a Bomb and a Stiletto," LOWELL SUN, pg. 5 (Feb. 2, 1906).

Even when Italians used stilettos in self-defense, reporters tended to depict the victims as the aggressors. *See, e.g.*, "Robber Rescued: Man He Held up Drew Stiletto," LOWELL SUN, pg. 10 (Oct. 17, 1904); "Attacked with Shovels," BOSTON GLOBE, pg. 17 (Apr. 22, 1905) (reporting on "little" man attacked by "a gang of about 20 [fellow] Italians" who "whipped out a stiletto . . . and made a vicious lunge at the foremost shovel wielder").

By the start of the 20th Century, anti-Italian prejudice had become so pervasive in Boston, leaders in the Italian American community were asked by the *Globe* to pen responses to this prompt: "Is the Italian more prone to violent crime than any other race?"[69]

Years before, the paper had taken the position that "some law should be enacted and enforced to stop th[e] practice of wearing the stiletto."[70] According to the Globe,

> It would not be too much of an imposition upon personal rights to invest policemen with the authority to search the persons of Italians of the class in question whenever there is reason to suspect that they are armed with the favorite and dangerous weapon of the race.[71]

When Massachusetts lawmakers finally made it illegal to carry certain weapons in 1906, the stiletto was first on the list. *See* 1906 Mass. Acts 150, ch. 172; *see also Commonwealth v. Miller*, 22 Mass. App. Ct. 694, 694 n.1 (1986) *(*characterizing this statute as "[t]he earliest antecedent of what is now Section 10 (b)"). After the law went into effect on April 16, 1906, one Massachusetts paper stated that "[t]he need of such a law has been felt for some time."[72] "Particularly among certain classes of foreigners," the paper wrote, "these weapons have been

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[69] "Is the Italian more prone to violent crime than any other race?" BOSTON GLOBE, pg. 1 (Aug 4, 1901).
[70] "Howard's Gossip," BOSTON DAILY GLOBE, pg. 1 (Sept. 15, 1885).
[71] *Id.*
[72] "On Carrying Weapons," GREENFIELD GAZETTE & COURIER, pg. 11 (June 16, 1906).

much in evidence, with no law to regulate the carrying of the same."[73] One of the first individuals to lose their liberty for violating the new law was an Italian immigrant found guilty of carrying a stiletto. "Labor Men in Court at Dedham," BOSTON GLOBE, pg. 5 (Aug. 18, 1906).[74]

E. Compelling Evidence Suggests Prejudice Has Played a Prominent Role in the Enactment, Retention, and Enforcement of Modern Arms Restrictions.

The dictionary defines "nunchaku" or "nunchucks" as "a weapon of Japanese origin that consists of two sticks joined at their ends by a short length of rawhide, cord, or chain."[75] This "harmless-looking object, appearing more like a toy than a weapon, originated as a southeast Asian agricultural flail." DONN F. DRAEGER & ROBERT SMITH, ASIAN FIGHTING ARTS 64 (1969). "The basic technique of handling nunchaku is based on a centrifugal force which is made by swinging one handle."[76]

> These lightweight and graceful instruments are used in many martial arts disciplines[, including] Okinawan Kobudo[,] . . . karate . . . Taekwondo, Hapkido, Kung Fu and to some degree in Jeet Kune Do. . . . There's even a martial art form dedicated solely to its use,

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[73] *Id.*

[74] As noted at the outset, the same discriminatory animus that inspired the Commonwealth's stiletto regulation subsequently resulted in even more impactful legislation passed by lawmakers in New York.

[75] "Nunchaku" MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/nunchaku.

[76] David Stainko, "History of the Nunchaku," BLACK BELT MAGAZINE (June 9, 2021).

> nunchaku-do, and freestyle performance incorporates skills that show off its capability for visually stunning displays.[77]

Nunchaku can be purchased on-line[78] and at martial arts supply stores across the country.[79] "Sales data from six American nunchaku distributors" indicate that "at least 64,890 metal and wood nunchakus were sold to individuals in the United States between 1995 and 2018." *Maloney v. Singas*, 351 F. Supp. 3d 222, 228-29 (E.D.N.Y. 2018) (citations omitted).[80]

Carrying nunchaku to a martial arts class is now an unremarkable, everyday occurrence in forty-nine states; in Massachusetts, it is a crime punishable "by imprisonment for not more than two and one-half years in a jail or house of correction." G.L. c. 269, § 10(b).

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[77] "From East to West: A Quick History of the Nunchaku" (Sept. 26, 2019), https://blog.centurymartialarts.com/from-east-to-west-a-quick-history-of-the-nunchaku (last visited Sept. 17, 2023). The World Nunchaku Associations has representatives and partnerships in over dozen countries, including the United States. *See* World Nunchaku Association, https://www.nunchaku.org/country-representatives/; https://www.nunchaku.org/partnerships/ (last visited Sept. 17, 2023).

[78] *See, e.g.*, American Nunchaku, https://usanunchaku.com/buy-nunchucks/ (last visited Sept. 17, 2023).

[79] *See, e.g.*, Rhingo, https://rhingousa.com/collections/nunchaku (last visited Sept. 17, 2023).

[80] *See also id.* at 229 n.10, 238 n.27 (noting that of "17 nunchaku distributors" that received subpoenas for sales figures, only seven responded and one company's data was not considered because its "nunchakus are used exclusively by law enforcement").

When Massachusetts criminalized the carrying of nunchaku (and other Asian martial arts weapons)[81] in 1975, *see* St. 1975, c. 585, it followed a trail blazed by lawmakers in California, New York, and Arizona, *see* CA Pen. Code, §§ 22010, 22015, 22090; N.Y. Penal Law §§ 265.01(1), 265.00(14); AZ Revised Statutes § 13-3101. These bans were "spurred by media reporting and political rhetoric following the popularization of Kung Fu and Bruce Lee, who first used nunchucks on film in Green Hornet in 1966, and into the early 1970s."[82]

One particular "piece of journalism" had a "profound impact on the law."[83]

On October 15, 1973, *Newsweek* published a 360-word article in the "Life and Leisure" section.[84] "Killer Sticks" claimed that a "deceptively easy motion" empowered a "nunchaku wielder" to "bash or strangle his victim."[85] This, "of course, pose[d] a problem for the police," including Baltimore officers who

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[81] The other Asian martial arts weapons restricted by the statute are "shuriken or any similar pointed starlike object intended to injure a person when thrown" and "manrikigusari or similar length of chain having weighted ends." G.L. c. 269, § 10(b). Like nunchaku, shuriken and manrikigusari can be used for self-defense and have martial arts dedicated to their use. *See, e.g.*, SERGE MOL, CLASSICAL WEAPONRY OF JAPAN SPECIAL WEAPONS AND TACTICS OF THE MARTIAL ARTS 177-80 (2003) (discussing the traditional art of throwing shuriken).

[82] Senate Bill Policy Committee Analysis, SB 827, pg. 3 (July 13, 2021), https://billtexts.s3.amazonaws.com/ca/ca-analysishttps-leginfo-legislature-ca-gov-faces-billAnalysisClient-xhtml-bill-id-202120220SB827-ca-analysis-341732.pdf (last visited September 18, 2023).

[83] "Weapons and the Law," BLACK BELT, Vol. 20, No. 1, pg. 20 (Jan. 1982) [hereinafter "Weapons and the Law"].

[84] "Killer Sticks," NEWSWEEK, pg. 67 (Oct. 15, 1973).

[85] *Id.*

allegedly had been "attacked several times with nunchakus [*sic*]."[86] According to the anonymous author, this "Oriental import" seemed almost certain to spawn an outbreak of gang violence since the weapon was "selling like egg rolls."[87]

> About a month later, California Attorney General Evelle Younger published an opinion on nunchaku, stating that he considered the possession of the sticks a felony. (He specifically cited *Newsweek*.) A few months later, Assemblyman Louis Pagan introduced a bill in the California legislature to prohibit any possession of either nunchaku or shuriken. (He also cited *Newsweek* in the Senate Judiciary hearing held on the subject later. . . .) . . .
>
> In a matter of months, a hitherto legal martial arts training aid was outlawed – on the assumption, propagated by a single newsweekly, that the weapon was a serious threat to law and order, a dangerous and common implement in gang warfare.[88]

According to Professor Terry Park, "the reaction to the popularity of nunchaku spoke to 'latent anti-Asian anxieties' that have repeatedly played out in the United States."[89] "Just the name 'killer sticks' calls for the residues of yellow peril and how Asian-ness gets imagined in the U.S.."[90]

In 2018, a federal judge declared New York's nunchaku ban "an unconstitutional restriction on the right to bear arms under the Second

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[86] *Id.*
[87] *Id.*
[88] "Weapons and the Law," *supra*, at 21.
[89] "Nunchuck Bans Are Falling. 2 Remain." N.Y. TIMES, Section A, pg. 29 (May 23, 2019).
[90] *Id.*

Amendment." *Maloney*, 351 F. Supp. 3d at 241 (citations omitted).[91] The following year, Arizona passed a bill "removing nunchucks from a list of prohibited weapons."[92] In 2021, California did the same. *See* Cal. Pen. Code § 22010, *repealed by* Stats 2021 ch. 434 (SB 827), § 24, eff. (Jan. 1, 2022).

In addition to having the nation's last remaining nunchaku restriction, Massachusetts is one of the few remaining states that still criminalizes carrying switchblades – the weapon at issue in the case at bar. Many switchblade prohibitions were enacted late 1950s by lawmakers who, the story goes, were "spooked" by "the fictional Jets and Sharks street gangs in the legendary Broadway musical 'West Side Story.'"[93]

While the inter-ethnic violence featured in this musical may help explain the actions of legislators in other jurisdictions, it almost certainly had no impact here.

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[91] More recently, the Ninth Circuit struck down a Hawaii ban on the possession of butterfly knives, finding them to be "an integral part of the [F]ilipino martial art called Escrima," as well as potentially useful "for self-defense." *Teter v. Lopez*, 76 F.4d 938, 950 (9th Cir. 2023).

[92] "In Arizona, It's No Longer A Felony To Own Nunchucks," NPR (May 12, 2019).

[93] "Colorado considers ending longtime switchblade ban inspired by 'West Side Story,'" NEW YORK DAILY NEWS (Jan. 28, 2019); *see also* "'West Side Story' Hysteria? Bill Would Repeal Montana's Switchblade Ban," MISSOULA CURRENT (Jan. 21, 2019).

The switchblade restriction in Massachusetts was approved on August 21, 1957, five weeks before "West Side Story" opened in New York.[94]

This is not to say that the Massachusetts act is untainted by discriminatory animus. Days before Massachusetts lawmakers voted to criminalize the carrying of switchblades, newspapers across the country ran a story about efforts by the Senate Juvenile Delinquency Subcommittee to pass federal legislation outlawing the weapon. *See, e.g.*, "Can Switchblades Be Outlawed," FITCHBURG SENTINEL, pg. 10 (Aug. 20, 1957).[95] Unlike prior reporting,[96] the article did not explicitly link switchblades with any particular racial or ethnic group. However, when the piece pointed out that "not *all* these knives go to back-alley *slum kids*," *id.* (emphasis added), the message was clear.

[94] *See* St. 1957, c. 688, § 23, approved Aug. 21, 1957; "West Side Story: 1957 Original Broadway Production" (noting an opening date of September 26, 1957), https://www.westsidestory.com/1957-broadway (last visited Sept. 18, 2023).
[95] *See also* "Can Teen's Switchblade by outlawed? LAUREL-LEADER CALL, pg. 16 (Aug. 16, 1957); "Can Teen's Switchblade by outlawed? MOUNT VERNON REGISTER NEWS, pg. 7 (Aug. 19, 1957). It is perhaps worth noting that when a federal switchblade regulation was passed the following year, it contained an exemption for "any individual who has only one arm." 15 U.S. Code § 1244; Pub. L. 85–623, § 4, Aug. 12, 1958, 72 Stat. 562.
[96] *See, e.g.*, "Stabs Four with Knife," KENOSHA EVENING NEWS, pg. 2 (July 17, 1952) ("Police held a Puerto Rican dishwasher today after he ran amok and slashed four persons with a switch blade knife.").

As one scholar has noted, "the rhetorical association between slums and . . . blacks increased slowly until the 1940s, and more quickly thereafter."[97] By 1957, "slums were increasingly defined in terms of race rather than place" and "[u]rban blacks and Hispanics were increasingly distinguished from previous minority groups that had passed through the slums on their way to better lives."[98]

CONCLUSION

In 2017, when Michigan representatives voted 106 to 1 to repeal the state's switchblade ban, they not only acknowledged that it was "outdated"; they admitted that the statute was "unevenly enforced."[99]

As the foregoing makes clear, the uneven enforcement of arms restrictions dates back centuries. Post-*Bruen*, this historical tradition of disfavoring marginalized groups has forced some courts to either "rely on relevant but undeniably heinous laws or allow . . . regulations supported by empirical evidence to be felled."[100]

The case at bar presents no such dilemma. The statute in question is neither a response to "empirical evidence" nor "narrowly tailored to accomplish the most

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[97] Amanda Rowe Tillotson, *Pathologizing Place and Race: The Rhetoric of Slum Clearance and Urban Renewal, 1930-1965*, AGORA J. OF URBAN PLANNING & DESIGN, at 17 (2010).
[98] *Id.*
[99] "How They Voted," ESCANABA DAILY PRESS, pg. 4 (July 4, 2017).
[100] Jacob C. Charles, *On Sordid Sources in Second Amendment Litigation*, 76 STAN. L. REV. ONLINE 30, 31 (2023).

compelling of governmental interests."[101] On the contrary, the restrictions set forth in G.L. c. 269, § 10(b) are largely a reflection of the irrational fears and prejudices that defined "our less equal past."[102]

Amici therefore respectfully urge this Court to reverse the judgment of the Boston Municipal Court and declare G.L. c. 269, § 10(b) unconstitutional.

Respectfully submitted,

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[101] *Id.* at 31, 44 (citation omitted).
[102] *Id.* at 32.

CERTIFICATION OF COMPLIANCE

I hereby certify that, to the best of my knowledge, this brief complies with the Massachusetts Rules of Appellate Procedure Rules 16(a)(13) (addendum), 16(e) (references to the record), Rule 20, and Rule 21, that pertain to the filing of briefs. Exclusive of the exempted portions of the brief, as provided in Mass. R. App. P. 20(a)(2)(D), the brief contains 7,491 words. The brief has been prepared in proportionally spaced typeface using Microsoft Word, version 1808, build 10730.20205 in 14 point Times New Roman font. The undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

November 20, 2023 *<u>/s/ Luke Ryan</u>*
Luke Ryan

CERTIFICATE OF SERVICE

Pursuant to Massachusetts Appellate Rule of Procedure 13(2), I certify that on November 20, 2023, I made service of this brief upon the attorneys of record for each party via the Electronic Filing System and first-class mail.

November 20, 2023 *<u>/s/ Luke Ryan</u>*
Luke Ryan