NO. 18-191

IN THE

Supreme Court of the United States

JOHN CASSIDY,

Petitioner,

v.

COMMONWEALTH OF MASSACHUSETTS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

BRIEF OF *AMICUS CURIAE* COMMONWEALTH SECOND AMENDMENT, INC. IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF AMICUS CURIAE[1]

Commonwealth Second Amendment, Inc. (hereafter, "Amicus" or "Comm2A") is a Massachusetts based, non-profit organization dedicated to preserving and expanding the Second Amendment rights of individuals residing in New England and beyond. Comm2A works locally and with national organizations to promote a better understanding of the rights guaranteed by the Second Amendment to the United States Constitution. Comm2A has substantial expertise in the field of Second Amendment rights that would aid the Court. The Court's ruling in the current case affects Amicus Comm2A's organizational interests, as well as those of its contributors and supporters, some of whom are directly affected by the law at issue in this case and who wish to enjoy the full exercise of their fundamental Second Amendment rights.

[1] Pursuant to this Court's Rule 37.6, counsel for *amicus curiae* certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amicus curiae*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief and they have received or waived appropriate notice.

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STATEMENT OF THE CASE

Amicus Commonwealth Second Amendment references and incorporates the procedural history from Cassidy's petition restating for clarity only the convictions at issue. Mr. Cassidy was found guilty of one felony violation of M.G.L. Ch. 140, § 131M, five felony violations of M.G.L. Ch. 269, § 10(m), and one misdemeanor violation of M.G.L. Ch. 269, § 10(h)(1). Cassidy's claim before this court turns on three elements, 1) so called "Assault Weapons", 2) so-called "large capacity firearms"[2] and 3) a licensing scheme so convoluted it has three[3] separate licenses for possession of various combinations of handguns, shotguns, rifles, and "large capacity" variations thereof. A fourth license is needed for machine guns, not addressed here.

INTRODUCTION

Amicus Commonwealth Second Amendment respectfully urges that the court grant certiorari in this case to clarify and resolve the definition of what arms are protected under the Second Amendment. To this end, Amicus Commonwealth Second Amendment provides an overview of relevant MA law on the issues of firearms licensing, so-called "Assault Weapons" and "Large Capacity" firearms and ammunition

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[2] In this brief, the term firearm will be used to refer to what is generally referred to as handguns because Massachusetts statutes specifically define the term firearm as what termed elsewhere as a handgun, plus miscellaneous other types of arms such as short barreled shotguns, short barreled rifles, etc.; but not shotguns or rifles proper, nor the large capacity versions of any of these arms.

[3] Until 2021 when the two License(s) To Carry (LTC), A and B, are collapsed into one. See 2014 Mass. Acts 284 §§ 46, 47, 49, 52, 54, 55.

feeding devices. An objective test for what arms are protected by the Second Amendment is required, and a proposed test is included in this brief. Applying the subjective standard of guns "in common use" that are not "dangerous and unusual" has seen a wide variety of decisions upholding categorical bans on a wide variety of arms suitable for self-defense. Further supporting granting certiorari, the effect of these convictions against Cassidy on his personal liberty as well as the attenuated need for protection for all otherwise law-abiding gun owners here in the Commonwealth and beyond who find themselves running afoul of laws that are so broad that they are easily rewritten as needed by the Commonwealth's Attorney General or the courts. Justice further delayed is further denied.

OVERVIEW OF RELEVANT MASSACHUSETTS FIREARMS STATUTES

MA DEFINITION OF "ASSAULT WEAPONS"

The prohibition of so called "assault weapons" (hereafter AWB) is penalized in M.G.L. Ch. 140, § 131M and covers four different general categories of items, three of which are weapons and the fourth is an accessory, a detachable magazine or ammunition feeding device holding more than a proscribed number of rounds, typically ten except for five for shotgun rounds. "Assault weapon" is defined in M.G.L. Ch. 140, § 121 as [having] the same meaning as a semiautomatic assault weapon as defined in the federal Public Safety and Recreational Firearms Use Protection Act, 18 U.S.C. § 921(a)(30) as appearing in such section on September 13, 1994 (see also M.G.L. Ch. 140, § 121). That meaning was universally accepted for the ten years the federal law was in effect

as being a feature test for semi-automatic firearms with a removeable/detachable magazine, a pistol grip and two or more "features" as defined in the statute.

In Cassidy's case, the semi-auto pistol test is the only applicable element of the AWB. The AK-47 was a pistol variant and so these features would apply:

a) Magazine that attaches outside the pistol grip;

b) Threaded barrel to attach barrel extender, flash suppressor, handgrip, or suppressor;

c) Barrel shroud safety feature that prevents burns to the operator;

d) Unloaded weight of 50 oz (1.4 kg) or more;

e) A semi-automatic version of a fully automatic firearm.

The AK-47 pistol would meet the definition of an assault weapon based on the presence of features a, possibly b, c, d and e.

Cassidy was convicted of a felony because his handgun had a safety device, a magazine in a location other than in the pistol grip, was too heavy and whose firing mechanism was *not* fully automatic. Lastly, it could have possibly had a barrel that was threaded to accept an accessory. That accessory could range from a regulated sound suppressor to a muzzle brake designed to exhaust gasses in a controlled manner instead of everywhere. In other words, it easily could

have accepted something that was not otherwise illegal to utilize.

While this seemingly straightforward feature test approach is in the statute, it should be noted that in 2016 the Massachusetts Attorney General expanded the scope of § 131M to include just about every semi-automatic firearm in existence made since 1994,[4] except for a list of exempted arms. Some of which are, or operate, nearly identically to the now

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[4] See https://www.mass.gov/files/documents/2016/08/pr/assault-weapons-enforcement-notice.pdf last visited 9/12/18. (Last visited 9/13/18).

A weapon is a Copy or Duplicate and is therefore a prohibited Assault weapon if it meets one or both of the following tests and is 1) a semiautomatic rifle or handgun that was manufactured or subsequently configured with an ability to accept a detachable magazine, or 2) a semiautomatic shotgun.

1. Similarity Test: A weapon is a Copy or Duplicate if its internal functional components are substantially similar in construction and configuration to those of an Enumerated Weapon. Under this test, a weapon is a Copy or Duplicate, for example, if the operating system and firing mechanism of the weapon are based on or otherwise substantially similar to one of the Enumerated Weapons.

2. Interchangeability Test: A weapon is a Copy or Duplicate if it has a receiver that is the same as or interchangeable with the receiver of an Enumerated Weapon. A receiver will be treated as the same as or interchangeable with the receiver on an Enumerated Weapon if it includes or accepts two or more operating components that are the same as or interchangeable with those of an Enumerated Weapon. Such operating components may include, but are not limited to: 1) the trigger assembly; 2) the bolt carrier or bolt carrier group; 3) the charging handle; 4) the extractor or extractor assembly; or 5) the magazine port.

banned arms. Several suits[5] have been brought challenging the actions of the Attorney General to broadly interpret M.G.L. Ch. 140, § 131M by applying a copyright principle of Substantial Similarity to put effect to the term "copies and duplicates" so that near all semi-automatic weapons are covered, despite not being copies nor duplicates of the enumerated list of guns banned by the 1994 statute.

MA DEFINITION OF "LARGE CAPACITY" WEAPONS

Unique to Massachusetts, there is also a "Large capacity weapon," modifier that triggers different licenses needed for possession and enhanced penalties for various crimes. A weapon is "large capacity" when it is:

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[5] See Pullman Arms Inc. v. Healey, 301 F. Supp. 3d 227 (2018) and granting a Rule 12(b)(6) motion, Worman v. Healey, 293 F. Supp. 3d 251 (2018),

> The AR-15 and its analogs, along with large capacity magazines, are simply not weapons within the original meaning of the individual constitutional right to bear Arms. Both their general acceptance and their regulation, if any, are policy matters not for courts, but left to the people directly through their elected representatives. In the absence of federal legislation, Massachusetts is free to ban these weapons and large capacity magazines. Other states are equally free to leave them unregulated and available to their law-abiding citizens. These policy matters are simply not of constitutional moment. Americans are not afraid of bumptious, raucous, and robust debate about these matters. We call it democracy. Justice Scalia would be proud.

any firearm, rifle or shotgun: (i) that is semiautomatic with a fixed large capacity feeding device; (ii) that is semiautomatic and capable of accepting, or readily modifiable to accept, any detachable large capacity feeding device; (iii) that employs a rotating cylinder capable of accepting more than ten rounds of ammunition in a rifle or firearm and more than five shotgun shells in the case of a shotgun or firearm; or (iv) that is an assault weapon. The term 'large capacity weapon' shall be a secondary designation and shall apply to a weapon in addition to its primary designation as a firearm, rifle or shotgun and shall not include: (i) any weapon that was manufactured in or prior to the year 1899; (ii) any weapon that operates by manual bolt, pump, lever or slide action; (iii) any weapon that is a single-shot weapon; (iv) any weapon that has been modified so as to render it permanently inoperable or otherwise rendered permanently unable to be designated a large capacity weapon; or (v) any weapon that is an antique or relic, theatrical prop or other weapon that is not capable of firing a projectile and which is not intended for use as a functional weapon and cannot be readily modified through a combination of available parts into an operable large capacity weapon. (See also M.G.L. Ch. 140, § 121).

As evidenced by the definition, this modifier essentially brings any semi-auto gun with a detachable magazine into the territory of the "large capacity" modifier as any gun can easily be altered with an aftermarket extended magazine.[6] Though limited by the roster published by the state[7] and 501 Code of Mass. Regs. § 7.02 (2007), this has effectively meant that any semi-auto gun could be covered sans the presence of a "large capacity magazine," upon an altered regulatory definition.

By being tagged with the "large capacity" modifier, owners, possessors lose the ability to move into MA with these arms,[8] get enhanced penalties for various crimes, including unsafe storage[9] and whose possession of "large capacity" firearms is not covered by a license worthy of constitutional protections.[10] The licensing scheme in MA along with the various bans of particular variations of firearms serves to severely limit the exercise of the right inside its borders.

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[6] One quick example of an aftermarket extended magazine is this 15rd magazine for the 107 yr old Colt M1911. https://www.cheaperthandirt.com/product/promag-1911-magazine-45-acp-15-rounds-blued-finish-col-a5-708279006883.do (Last visited 9/13/18).

[7] https://www.mass.gov/files/documents/2017/12/01/Large%20Capacity%20Firearms%20Roster%2002-2015.pdf (Last visited 9/13/18).

[8] Commonwealth v. Cornelius, 78 Mass. App. Ct. 413 (2010).

[9] M.G.L. Ch. 140, § 131L, imposing a potential penalty of 1 ½ years imprisonment for improperly storing a weapon, but 12 years imprisonment for improperly storing a large capacity weapon.

[10] Morin v. Leahy, 862 F.3d 123, 125 (2017).

POSSESSION LICENSING SCHEME

What follows is an overview of the firearms licensing scheme in MA as written in the statutes. There is still some confusion as to whether one can possess a handgun in the home on an Firearms ID card or does one require a License to Carry, simply for possession of a handgun in the home. A discussion on that point follows.

An inconsistency exists in the law whereby an FID Card does not permit the holder to possess a handgun in the home, but M.G.L. Ch. 269, § 10(h) exempts FID Card holders from criminal penalties for possession of a handgun in the home.

The Commonwealth's gun laws are impossibly confusing until viewed in historical context. There are two basic gun licenses in Massachusetts, one of which has two variants. 1) The Firearms Identification Card (FID Card) issued under (M.G.L. Ch. 140, § 129B). It allows you to purchase, possess and carry ammunition and non-large capacity rifles and shot guns. 2) The so-called License to Carry issued under M.G.L. Ch. 140, § 131, Class A and B respective, allows one to purchase, possess and carry handguns and high capacity rifles and shotguns.

The term "firearm" in state law, is defined as a handgun. M.G.L. Ch. 140, § 121. Before 1906, the state had no restrictions on owning or carrying guns. 1906 Mass. Acts 172, allowed justices, mayors, or boards of police to authorize a person to carry a loaded pistol or revolver "if it appears that the applicant had good reason to fear an injury to his person or property, and that he is a suitable person to be so licensed." Carrying a loaded handgun without a permit was punishable by up to one year in jail. The 1906 law is

codified at M.G.L. Ch. 140, § 131 (licensing) and Ch. 269, § 10 (punishment for unlicensed possession). 1911 Mass. Acts 548, § 1, removed the word "loaded," thus punishing carrying of unloaded handguns without a license. 1919 Mass. Acts 207, § 1, added after the word "property," the words "or for any other proper purpose." 1922 Mass. Acts 485 licensed gun dealers and restricted "unnaturalized foreign born" from having a license. 1925 Mass. Acts 284, § 4, prohibited aliens and minors under the age of 15 from having a license. 1926 Mass. Acts 395, § 3 (now M.G.L. Ch. 140, § 131A), allowed an unlicensed person to obtain a temporary license to buy a handgun to possess in his/her home or place of business. 1927 Mass. Acts 326, § 5, Tenth, punished carrying a handgun, loaded or unloaded. There was no distinction between carrying openly or concealed. Over the years specific classes of people prohibited from having a license has grown.

Before 1968 Massachusetts did not require a license to possess any type of gun in your home or place of business or to carry a rifle or shotgun outside your home. Only carrying a handgun outside the home or business was licensed. 1968 Mass. Acts 737, § 7, (now M.G.L. Ch. 140, §§ 129B, 129C and 129D), enacted the Firearms Identification (FID) Card law which required citizens to have a license to possess a rifle, shotgun, or handgun in his/her own home or to carry a rifle or shotgun outside of his/her own home. The FID Card listed specific disqualifications for persons who wished the license. If you were not disqualified, you were "entitled" to the license. At that time the penalty section, (M.G.L. Ch. 269, § 10) was changed to distinguish between "carrying" a handgun outside of the home (requiring a § 131 license) and possessing a handgun inside the home

without an FID Card. 1968 Mass. Acts 737. (Now at G.L. c. 269, §§ 10(a), 10(h)).

1975 Mass. Acts 113, § 2 created a one-year mandatory sentence for **carrying a gun** of any kind outside the home without the proper license (M.G.L. Ch. 269, § 10(a)). It made no difference if the gun were loaded, unloaded, in the open or concealed. Carrying was a felony. At that time the sections of Ch. 269, § 10 were renumbered. The penalty for **"possession" of a gun** without a license was placed in § 10(h). A conviction under § 10(h) was a misdemeanor without a mandatory sentence. People charged with "carrying" would admit to "possession" without an FID Card under § 10(h) to avoid the mandatory sentence. Temporary possession of a gun was not enough to prove the crime of "carrying" a gun without a license. Com. v. Osborne, 5 Mass. App. Ct. 657 (1977). Osborne, held that a § 131 license was not needed to possess a handgun in your home or place of business. Only an FID Card was needed. Id. at 649. See also Commonwealth. v. Seay, 376 Mass. 735 (1978) (being in the hall outside your apartment was not in your home) and Commonwealth v. Morse, 12 Mass. App. Ct. 426 (1981) (contrasted the separate crimes carrying and possession without an FID Card).

1990 Mass. Acts 511, § 2, rewrote M.G.L. Ch. 269, § 10 by **changing the word "carry" to "possesses."** Police complained that it was too hard to prove someone outside a home was "carrying" if the police did not observe movement. At the same time, M.G.L. Ch. 269, § 10(a)(1) was added to make it clear that the mandatory penalties of § 10(a) did not apply to people in their own home or place of business. Section 10(h) imposed a lesser penalty on people who had a gun in

their home or place of business without complying with the FID Card law.

In December of 1997 you could own a rifle, shotgun or handgun in your home or place of business and carry a rifle or shotgun outside of the home on an FID Card. A handgun could not be outside the home without a § 131 LTC. Carrying, that is movement, was no longer an element of the crime. Seay, 376 Mass. at 742. You were entitled to an FID Card if you were not a disqualified person. You could buy a handgun with a permit to purchase and possess the handgun in your home or place of business for protection without a § 131 LTC. The law made no distinction between carrying a handgun openly or concealed.

1998 Mass. Acts 180 made major changes to the law which were, for the most part, the law in effect when this action arose. One major change was that you could no longer possess a handgun in your home under an FID card. The new M.G.L. Ch. 140, § 129B(6)(ii) only allowed possession of a handgun with an FID Card on a licensed gun range.

After Cassidy was charged, there was yet another change in the law. (2014 Mass. Acts 284 hereinafter called "2014 change"). The Class B license was eliminated leaving only the former Class A license (§ 46). The police were also empowered to bring an action to have a person declared "unsuitable" to be given an FID Card (§ 30(1½)). The term "unsuitable" was defined as being someone who would be a "risk to public safety" if licensed (§ 48(d)(x)). The law did not address as to the LTC whether the "risk" was a subjective determination by the police or an objective standard; who has the burden of proof in an

appeal; what evidence is acceptable; and what the standard of review for the District Court would be (§ 51).

An FID Card does not allow you to possess a handgun in your own home. M.G.L. Ch. 140, § 129B(6)(ii). Rifles and shotguns owned on an FID Card must be: locked up when at home (M.G.L. Ch. 140, § 131L) unless carried or under the direct control of the license holder; and, unloaded and cased on a public way except when hunting (M.G.L. Ch. 269, § 12D). There is no self-defense exemption to c. 269, § 12D.

M.G.L. Ch. 140, § 131(f) provides for an appeal from a denial or revocation of a license, the statute reads:

> If after a hearing a justice of the court finds that there was no reasonable ground for denying, suspending, revoking or restricting the license and that the petitioner is not prohibited by law from possessing a license, the justice may order a license to be issued or reinstated to the petitioner or may order the licensing authority to remove certain restrictions placed on the license.

Case law allows hearsay evidence with the weight and credibility of the evidence for the trial judge in deciding whether the police had any reasonable ground for refusing to grant the license. Chief of Police of Shelburne v. Moyer, 16 Mass. App. Ct. 543, 545, 547 (1983).

Moyer established a three-step inquiry: first, is the applicant disqualified; second, does the applicant have a proper purpose; and third, is the applicant a suitable person. Id. at 545.

Moyer treated a M.G.L. Ch. 140, § 131 appeal as a review of an administrative hearing even although there is no prior hearing, thus no record, to review. Moyer placed the burden on the Plaintiff to establish that the refusal to issue was arbitrary, capricious, or an abuse of discretion, that there was no reasonable ground for the denial. Moyer, 16 Mass. App. Ct. at 546; Godfrey, 35 Mass. App. Ct. at 46.

Although the District Court holds an evidentiary hearing, under Godfrey v. Chief of Police of Wellesley, 35 Mass. App. Ct. 42, 45 (1993), the hearing is not "*de novo*." It does not permit a reversal of a chief's decision based upon a difference of opinion as to how "he [the chief] should have exercised the broad discretion conferred upon him by s. 131." Godfrey, 35 Mass. App. Ct. at 45.

The issuing authority is not required to disclose the facts supporting its conclusions. Many courts hold that there is no right to discovery in a license appeal under the Rules of Civil Procedure. Mass. R. Civ. P. 81, notes, 1996. (Permission of the court must be sought). Information on who has been given or denied a license is not a public record (M.G.L. Ch. 4, § 7(26)(j)). There is little accountability in the application process.

The Godfrey standard of review, makes the District Court appeal almost meaningless. See Gemme v. Smith, 30 Mass. L. Rep. 439 (2012); Gemme v. Gallo, 26 Mass. L. Rep. 287 (2009).

Moyer is the basis for all case law pertaining to the issuance of § 131 licenses. It stated:

> **There is no right under Art. 17 of the Declaration of Rights . . . [for a] citizen to keep and bear arms and thus to require that a citizen has a license to do so is not unconstitutional**, (Com. v. Davis, 369 Mass. 886 [1976]); nor is there any question of property right or deprivation of liberty involved in the statutory procedures for obtaining a license to carry firearms. **The full panoply of procedures usually available at a trial is not required in the review by a District Court in a case of this nature.** (Emphasis added).

Moyer, however, was decided before a § 131 license was needed to own a handgun in your home.

Based on Moyer, case law developed saying the police had "considerable latitude" in licensing. MacNutt v. Police Commmr. of Boston, 30 Mass. App. Ct. 632, 635 (1991).

Moyer rested on the Davis, supra case. Davis was premised on the belief that not only is there no right to have a handgun under state law, but there is no right under federal law. Due to the United States Supreme Court's ruling in Heller and McDonald, supra, Davis, and any case law based on Davis, including Moyer, is suspect.

COURTS AROUND THE COUNTRY AT ALL LEVELS ARE IGNORING THE SECOND AMENDMENT

Amicus Commonwealth Second Amendment urges the court to grant certiorari in this case and resolve the question of what arms are protected by the Second Amendment. The subjective test based on a relativistic characteristic, i.e.; an arm "in common use at the time" District of Columbia v. Heller, 554 U.S. 570, 624 (2008), that is also not both "dangerous and unusual" District of Columbia v. Heller, 554 U.S. 570, 627 (2008) (equally as relativistic in addition to being subjective) has proven itself to not be an adequate definition, nor an objective test of what defines an arm covered by the Second Amendment that can be reliably articulated and applied by district courts.

Despite "Heller's clear statement that the Second Amendment extends . . . to . . . arms . . . that were not in existence at the time of the founding." Caetano v. Massachusetts, 136 S. Ct. 1027, 1028 (citing Heller 2008), courts around the country have almost universally applied either rational basis or intermediate scrutiny in review of any laws restricting the most commonly sold guns in the US. See Friedman v. City of Highland Park, 784 F.3d 406, 419 (2015); Heller v. District of Columbia, 670 F.3d 1244, 1256 (2014). In the rare instance where a court invalidates a statute restricting so called "assault weapons" or "large capacity magazines," the issue has been overturned by the full circuit as in Kolbe v. Hogan, 849 F.3d 114 (2017) or the case is pending appeal as is Wiese v. Becerra, 306 F. Supp. 3d 1190 (2018). In other cases involving arms that are not firearms there has been some more nuanced results where courts have applied some level of constitutional

scrutiny to bans of classes of arms and invalidated these statutes, in whole or in part. See People v. Yanna (Mich. Ct. App. June 26, 2012). In State v. Deciccio, 315 Conn. 79 (2014), the court chose to apply a form of intermediate scrutiny to invalidate outright bans on dirk knives and batons in a car solely because the defendant in the case made a showing that he was moving from one residence to another.

Some courts have expressed significant reticence at the prospect of invalidating bans on even less-lethal arms. See Ramirez v. Commonwealth, 479 Mass. 331 (2018). Read in the inverse, the enumeration of elements that would not have triggered an invalidation of M.G.L. Ch. 140, § 131J in the Ramirez decision is a road map of everything that would not be invalidated by the current jurisprudence of the Second Amendment as applied by that court and courts nationwide. The decision even goes so far as to claim licensing of stun guns, and any conceivable time, manner and place restrictions will not be invalidated. Despite no such claims being raised, nor any relevant fact record having been properly before the court.

> Therefore, under the Second Amendment, the possession of stun guns may be regulated, but not absolutely banned. Restrictions may be placed on the categories of persons who may possess them, *licenses may be required for their possession*, and those licensed to possess them may be barred from carrying them in sensitive places, such as schools and government buildings.

Ramirez v. Commonwealth, 479 Mass. at 337.

Despite a compelling law review article from 1994 making the argument that AWBs should be invalidated on a rational basis alone,[11] this is clearly not the case in practice 24 years later. Much of the problem stems from a combination of a vague definition on what arms are covered by the Second Amendment and courts that appear unwilling to reach on the issue beyond the four corners of the Heller decision itself.

AN OBJECTIVE TEST FOR WHAT ARMS ARE COVERED BY THE SECOND AMENDMENT

In the absence of an objective categorical test for what is an arm covered, courts will continue to apply means-end testing despite Heller's clear warning to the contrary District of Columbia v. Heller, 554 U.S. 570, 634 (2008), that the "very enumeration of the right takes out of the hands of government--even the Third Branch of Government--the power to decide on a case-by-case basis whether the right is really worth insisting upon." ibid.

Given the reticence of the judiciary to date on this issue, Amicus Commonwealth Second Amendment proposes an objective test that does not rely on a subjective or relative measure. This test could reasonably be called the Discrete Action, Discriminate Effect test (hereafter referred to as the Discrete Test). The Discrete Test simply states that any arm where the discrete action of a user results in a discriminate effect on a single target is constitutionally protected under the Second Amendment. Heller supports this categorical approach by both rejecting "freewheeling interest-

[11] *Journal of Contemporary Law*, vol. 20, 1994. Pg. 381-417.

balancing" ibid while also making clear that "if weapons that are most useful in military service--M-16 rifles and the like--may be banned…" ibid 627. In practice, this would suggest that weapons that allow a user to engage in a single action, i.e.; trigger pull, and have multiple effects on a single target or multiple targets, the arm can be banned. Then the inverse must be true. Arms that will have a discriminate singular effect on the target per the discrete action of operating the weapon (ex.; pulling the trigger), would be considered protected under the Second Amendment.

Some examples of arms that would fail this test are anything designed with explosives to radiate energy and/or material from the locus of combustion. A hand grenade would fail this test, as would an RPG, Bazooka, and similar arms. An example that is less *Reductio ad absurdum* is flash bangs, or otherwise known as a stun grenade. This type of device has an indiscriminate effect on the surroundings of it's target. It is not an adequate self-defense item and it is also regulated by the ATF as an explosive.

Other examples of "arms" that would not be covered[12] are bio and nuclear weapons, booby traps, and any sort of energy dissipating weapon that radiates energy beyond the size of a man-sized target within its effective range as none of these are discrete in their targeting nor in their impact/effect on target.

One example of weapons technology that can straddle the two ends of the Discrete Action test is

[12] Not that the succeeding list are all arms by definition per se, but they can clearly be considered weapons in some form or another.

pepper spray or oleoresin capsicum (OC). By itself, it can be an aerosol, wet or dry, and in a confined space effect large numbers of people, say if spread through the ventilation system of a building. But when combined with a gel, or other binding agent, this becomes an effective less-lethal self-defense tool.

Another example of technology that straddles both protected and unprotected classes is technology that has made the news recently over its use against US diplomats in Cuba.[13] Sonic weaponry used by police and military[14] allows for sound to be directed at groups of protestors to temporarily incapacitate them. But a smaller, directed weapon employing the same technology but directed into the target size of a human being may well be covered under this test if its range and power is held to a level suitable for use in self-defense.

Applied to firearms, any arm that operated by expelling a single bullet by way of a single pull of the trigger would be protected by the Second Amendment under this test. As would knives, contact weapons, and more importantly directed energy weapons such as lasers, and any future technology not yet conceived or developed that could be targeted to a reasonably small, distinct and discriminate size target.

The only caveat with the Discrete Test approach is what is known as "over penetration," whereby the projectile penetrates the intended target

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[13] https://www.theguardian.com/world/2017/sep/14/mystery-of-sonic-weapon-attacks-at-us-embassy-in-cuba-deepens (Last visited 9/12/18)

[14] https://www.lradx.com/lrad_products/lrad-500x/ (Last visited 9/12/18)

and continues on to impact another, possibly unintended target. Over penetration has been a problem for weapons designers, those using the weapons and for those targeted by weapons since at least the founding of this nation.[15] In short, weapons designers want as little over penetration as possible in order to transfer the kinetic energy of the projectile to the target, but enough penetration to reach deep enough into the target to reach vital organs.[16] Given the history and tradition of the use of arms, that an arm can over penetrate in some cases under some circumstances, while under penetrate in other cases under other circumstances, should be seen as well within the nature of arms capable of deadly force as understood at the time of the founding of this country.

The Discrete Test approach approximates the characteristics of arms that are useful for self-defense, a principle that is embedded in the Common Use doctrine laid out in Heller. Those engaging in self-defense "[are] privileged to use such force as reasonably appears necessary to defend him or herself against an apparent threat of unlawful and

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[15] See Rule #2 of the original 28 Rogers's Rules of Ranging, as written by Major Robert Rogers, Kings Rangers in 1957 http://www.rogersrangers.org/rules/index.html. (Last visited 9/12/18). These rules are still in use today by the US Army Rangers and the march rules is codified as rule #6 of the current standing orders of the US Army Rangers (https://fas.org/irp/ doddir/army/ranger.pdf). (Last visited 9/12/18) See also https://www.army.mil/ranger/heritage.html (Last visited 9/12/18) and https://www.army.mil/article/33174/the_rules_of_ ranging. (Last visited 9/12/18)

[16] https://www.hornady.com/team-hornady/ballistic-calculators/ballistic-resources/terminal-ballistics (Last visited 9/12/18).

immediate violence from another."[17] Arms that operate in a manner that focus force on specific individuals engaging in unlawful and immediate violence are arms that are suitable for self-defense. Categorical bans of arms that are suitable for self-defense, regardless of how they can be abused, should not be held constitutional but can be regulated by time, manner and place restrictions. The statutes at question in Massachusetts move well beyond a level of reasonable regulation.

CONCLUSION

Amicus Commonwealth Second Amendment asserts that the Second Amendment protects all arms that meet the described Discrete Action, Discriminate Effect test, including those arms once possessed by the petitioner, and urges this Court to strictly scrutinize the imposition of criminal penalties for the exercise of a fundamental right.

Respectfully submitted,

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[17] George E. Dix, Gilbert Law Summaries: Criminal Law xxxiii (18th ed. 2010) (original emphasis); see generally David C. Brody & James R. Acker, Criminal Law 130 (2014).