No. 18-8739

IN THE

Supreme Court of the United States

ARMANDO LOPEZ,

Petitioner,

v.

MASSACHUSETTS,

Respondent.

On Writ of Certiorari to the Appeals Court of Massachusetts

REPLY BRIEF OF PETITIONER

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INTRODUCTION

The Commonwealth does little to address the question of whether courts may relieve a State from proving beyond all reasonable doubt an essential element of a crime by shifting an evidentiary burden onto the criminal defendant. Rather, the Commonwealth proceeds in two steps and, at each, fails to address the ultimate question, assuming what it instead must prove. First, the Commonwealth attempts to diminish the split in authorities down to a matter of state statutory construction shielded from this Court's review. However, the Commonwealth fails to address the disparate nature of that construction across materially similar language, particularly in view of the constitutional limits this Court has placed on States to define elements and defenses, despite the Supreme Judicial Court (SJC) acknowledging the existence of a due process concern. *Commonwealth* v. *Jones*, 361 N.E.2d 1308, 1312 (Mass. 1977).

Second, the Commonwealth fails to reconcile *Jones* and its progeny with the legislative text or the SJC's own Fourth Amendment jurisprudence. The Commonwealth's wholly unsupported assumption forms the basis for the remainder of its argument, which is devoted to consideration of affirmative defenses. In other words, the Commonwealth has no answer for—and, indeed, does not even address—the propriety under *Winship* of shifting the burden on an element of an offense. Far from presenting no substantial federal question, Mr. Lopez's case concerns the varying scope of due process protection in connection with a common element of a crime. Moreover, under the Commonwealth's reading, the Massachusetts statute could be read to outright prohibit constitutionally

protected conduct. For those reasons, it is deserving of this Court's attention.

I. THE SPLIT IS BETWEEN JURISDICTIONS PLACING THE BURDEN ON DEFENDANTS AS TO AN ELEMENT OF A CRIME

The Commonwealth principally argues that the burden-shifting scheme under consideration is, in effect, not a single constitutional issue, but rather a slew of unconnected, independent readings of individual state laws. Opp. at 8–10. But closer inspection reveals that the statutes implicate a common federal question by dint of materially similar language that embeds the question of authorization in the prohibition or enactment clause. Compare Mass. Gen. Laws ch. 269, § 10(h)(1) ("Whoever . . . possesses . . . a firearm . . . or ammunition *without complying with* the provisions of section 129C of chapter 140 shall be punished by imprisonment . . . ." (emphasis added)), with Conn. Gen. Stat. § 29-38(a) ("Any person who knowingly has . . . any weapon . . . *for which a proper permit has not been issued* . . . shall be guilty of a class D felony . . . ." (emphasis added)), and 18 Pa. Cons. Stat. § 6106(a)(1) ("[A]ny person who carries a firearm . . . *without a valid and lawfully issued license* . . . commits a felony of the third degree." (emphasis added)).

The materially similar language renders authorization a fact necessary to obtain a conviction under each of those statutes, and this Court has been unequivocal that due process protects "against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which [a defendant] is charged." *In re Winship*, 397 U.S. 358, 364 (1970). Massachusetts itself, in its principal case on this issue, acknowledged the possibility that due process considerations constrain States' ability to as-

sign this burden to defendants, *Jones*, 361 N.E.2d at 1312, a possibility which it now blithely rejects. Opp. at 8 ("There is no disagreement . . . on any federal question."); *id.* at 12 ("Th[e]se states . . . are simply exercising their prerogative to define their own crimes.").

Despite the material similarities in statutory language, courts and jurisdictions are split as to whether a criminal defendant may, consistent with the federal constitution, bear an evidentiary burden on the fact of authorization. Pet. at 6–10 (detailing differing state treatment on the fact of authorization). Thus, contrary to the Commonwealth's contention, the issue cannot be one of statutory construction, because each of the statutes contain the same material structure and so implicate the same due process issue. In essence, despite the fact of authorization playing the same substantive role in each of these statutes, certain jurisdictions have relieved the State of the burden of proving that fact beyond a reasonable doubt.

But States cannot avoid *Winship*'s obligation to prove all necessary facts by such formalistic expedients. "If *Winship* were limited to those facts that constitute a crime as defined by state law, a State could undermine . . . [*Winship*] . . . without effecting any substantive change to its law. It would only be necessary to redefine the elements that constitute different crimes[.]" *Mullaney* v. *Wilbur*, 421 U.S. 684, 698 (1975); *Jones* v. *United States*, 526 U.S. 227, 240–41 (1999) (explaining that the Court in *Mullaney* "declined to accord the State th[e] license to recharacterize" the element of malice aforethought as a defense, "in part because an unlimited choice over characterizing a stated fact as an element would leave the State substantially free to manipulate its way out of *Winship*."); *Apprendi* v. *New Jersey*, 530 U.S. 466, 486

(2000) (holding that the State must prove facts that lead to or increase a defendant's sanctions because the Constitution limits "States' authority to define away facts necessary to constitute a criminal offense").

Nowhere does the Commonwealth defend its statutory construction—only that the construction has persisted over time, as if that were sufficient to sustain it in perpetuity, regardless of the underlying merits. See Opp. at 12–15 (referring to Massachusetts' burden-shifting rule as "long held," "long-established," based on "historical practice," and arguing that similar rules regarding licenses have been "codified since 1859"); cf. *Payne* v. *Tennes*see, 501 U.S. 808, 828 (1991) ("Stare decisis is not an inexorable command."). The Commonwealth's position is needlessly formalistic and does nothing to address the crux of Mr. Lopez's argument—that *Winship* and its progeny require the State to bear the full burden of proof—including the initial introduction of some evidence on critical facts necessary to constitute an offense.

II. THE QUESTION IS RIPE FOR CONSIDERATION

The Commonwealth contends that sheer inertia counsels against the Court taking up Mr. Lopez's petition to review the constitutionality of Massachusetts's burden-shifting scheme. However, the mere fact that the constitutional error has been persistent does not make it any less subject to judicial scrutiny. And while the Commonwealth takes great pains to emphasize that the Court has previously denied certiorari to review the statutory presumption at issue, Opp. at 4–6, "[t]he denial of a writ of certiorari imports no expression of opinion upon the merits of the case." *Missouri* v. *Jenkins*, 515 U.S. 70, 85 (1995)

(quoting *United States* v. *Carver*, 260 U.S. 482, 490 (1923) (alteration in original)); *Maryland* v. *Balt. Radio Show*, 338 U.S. 912, 917 (1950) (Frankfurter, J.) (op. respecting the denial of petition for writ of certiorari) (denial of certiorari "simply means that fewer than four members of the Court deemed it desirable to review a decision of the lower court as a matter 'of sound judicial discretion'"). Moreover, none of those cases present the specific facts of Mr. Lopez's case—the possession of a firearm in the defendant's own home, where the Second Amendment right is at its apex, *District of Columbia* v. *Heller*, 554 U.S. 570, 635–36 (2008). See *Commonwealth* v. *Colon*, 866 N.E.2d 412 (Mass. 2007) (firearm used in public shooting and recovered outside the victim's residence); *Commonwealth* v. *Powell*, 946 N.E.2d 114 (Mass. 2011) (possession of firearm in public); *Powell* v. *Tompkins*, 783 F.3d 332 (1st Cir. 2015) (same).

That three petitions for certiorari have been previously filed since 2007 regarding the Commonwealth's burden-shifting scheme only serves to underscore the recurring and important nature of the question presented. Within that same period, the legal landscape governing the right to possess firearms in the home for purposes of self-defense has dramatically changed. See *Heller*, 554 U.S. 570; *McDonald* v. *City of Chicago*, 561 U.S. 742 (2010). Over the past two decades, the Court has also stressed the supervisory function of the jury and "has not hesitated to strike down other innovations that fail to respect the jury's supervisory function." *United States* v. *Haymond*, 139 S. Ct. 2369, 2377 (2019) (plurality opinion).

III. THE MASSACHUSETTS APPEALS COURT'S DECISION WAS INCORRECT

While the Commonwealth attempts to shelter behind the SJC's longstanding interpretation of author-

ization as an affirmative defense, that interpretation is not only belied by the legislative text, it also is at odds with how the SJC defines the offense for purposes of Fourth Amendment protections. Moreover, any "general prohibition" against possessing a firearm in one's home or place of business encroaches upon Second Amendment considerations, placing the Commonwealth's definition of the offense in further constitutional peril.

The Commonwealth makes much of the Court's deference to States in defining the elements of an offense and affirmative defenses to those offenses, Opp. at 13–14; but, as discussed *supra* at 3–4, state law must adhere to federal constitutional limits, and States are not permitted to "define away facts necessary to constitute a criminal offense." *Apprendi*, 530 U.S. at 486. It is axiomatic that an "essential element" is a "fact necessary to constitute the crime with which [the defendant] is charged." *In re Winship*, 397 U.S. at 364. The plain text of the statute does not criminalize mere possession of a firearm; rather, as set forth in the prohibition clause itself, the statute criminalizes possession "without complying with the provisions of section 129C of chapter 140." Mass. Gen. Laws ch. 269, § 10(h)(1); see also *State* v. *Robarge*, 450 So. 2d 855, 856 (Fla. 1984) (exception included within enactment clause is an element rather than a defense). Consistent with the text of the statute, Mr. Lopez's indictment alleged a charge of "Possession of Firearm Not Having Been Issued Firearm Identification Card," and included, within the text of that indictment, the purported failure to "comply[] with the requirements relating to the firearm identification card." Pet. App. 5a.

Moreover, as discussed in Mr. Lopez's petition, the SJC does not consider the mere possession of a fire-

arm to give rise to a reasonable suspicion of criminal activity. Pet. at 13 (citing cases). The Commonwealth dismisses this fundamental disconnect, claiming those cases "addressed the very different question of whether the presence of a firearm, without more, furnished probable cause or reasonable suspicion sufficient to justify a police officer's seizure." Opp. at 17. That question, the Commonwealth continues, has no bearing on the essential elements of the offense of unlawful possession of a firearm or the allocation of burden in a criminal trial and the SJC has "confronted the purported 'inconsistency'" and "definitively resolved any confusion" on the subject. *Id.* (citing *Commonwealth* v. *Gouse*, 965 N.E.2d 774, 787 n.17 (Mass. 2012)).

Although *Gouse* acknowledged the inconsistency the SJC failed to explain why the presence of two facts sufficient on their own to convict a defendant of the offense of unlawful possession of a firearm—(1) knowing possession; (2) of a firearm that meets the statutory definition—are otherwise insufficient to raise a reasonable suspicion of criminal activity. *Gouse*, 965 N.E.2d at 787 n.17; see also *Commonwealth* v. *Alvarado*, 667 N.E.2d 856, 858 (Mass. 1996) (investigatory stop justified when "police had a reasonable suspicion" that individual was committing or about to commit a crime). To say that a criminal defendant who "has had every opportunity to respond to the Commonwealth's charge that the defendant was unlawfully carrying a handgun," is materially different than "a defendant who, having merely been seen in public with a handgun, and without any opportunity to respond as to whether he has a license," *Gouse*, 965 N.E.2d at 787, n.17; *Commonwealth* v. *Couture*, 552 N.E.2d 538, 541 (Mass. 1990), confuses the contours of the prohibited conduct and highlights the due

process implications of the SJC's inconsistent treatment of the elements of the crime.

Finally, any interpretation of the SJC that would treat unlawful possession of a firearm as a "general prohibition" would, at least in Mr. Lopez's case, raise considerable Second Amendment concerns.[1] *Jones* and its progeny would require facts demonstrating only knowing possession of a firearm or firearm ammunition. *Gouse*, 965 N.E.2d at 787 n.17. But, taken together, these facts show only that an individual was engaged in constitutionally protected conduct, particularly when, as was the case for Mr. Lopez, that knowing possession is *within the confines of one's home*. See *McDonald*, 561 U.S. at 777–78. While not an independent question raised by Mr. Lopez's petition, the Second Amendment concerns illustrate the absurdity of the result urged by the Commonwealth.

The SJC's Fourth Amendment definition of the offense—*unlawful* possession of a firearm—is not only far more consistent with the legislative text, it also avoids a constitutionally infirm result. And while the Commonwealth makes cursory reference to the SJC's and First Circuit's dismissal of such Second Amendment concerns, Opp. at 19 n.14, its back-of-the-hand treatment overlooks a critical distinction between this case and *Powell*—namely, that the defendant in *Powell* was convicted of possession of a firearm in public, whereas Mr. Lopez was convicted of the same in his own residence. *Powell*, 783 F.3d at 346–47.

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[1] The Commonwealth declined to substantively engage with this point, claiming instead that Mr. Lopez failed to raise this argument on appeal and that the argument was not addressed below. Opp. at 19. But on appeal Mr. Lopez expressly asserted that failure to treat authorization as an element of the offense would effectively criminalize constitutionally protected behavior. Pet. App. 21a–25a.

The First Circuit was dubious as to whether "the safe haven of the Second Amendment" reached the carrying of a firearm "beyond the hearth and home." *Id.* at 347, 348 n.10. In Mr. Lopez's circumstances, there is no such uncertainty, making it incumbent upon the Commonwealth to affirmatively show such possession was, in fact, unlawful.

The Commonwealth's remaining arguments collapse. For instance, the Commonwealth's generally applicable procedural rule for allocating the burden (whether of production or proof) on affirmative defenses gives way to *Winship*'s constitutional requirement that all elements be proven beyond a reasonable doubt, making any separate due process analysis of that procedural rule, see Opp. at 14–16 (evaluating the fundamental fairness of Mass. Gen. Laws ch. 278, § 7), irrelevant. Similarly, the law governing burden-shifting for affirmative defenses is equally inapplicable. See Opp. at 13 (citing *Smith* v. *United States*, 568 U.S. 106, 110 (2013)) (where affirmative defenses *excuse* conduct that is otherwise punishable rather than negate an element of the offense, government has no duty to overcome defense beyond reasonable doubt); *Parker* v. *Matthews*, 567 U.S. 37, 42, n.1 (2012) (discussing generally that government is not required to introduce negating evidence when burden of production is assigned to defendant); *Gilmore* v. *Taylor*, 508 U.S. 333, 341 (1993) (recognizing that states must prove elements of a charged offense beyond reasonable doubt but may place the burden of proving affirmative defenses on defendants).

Moreover, while the Commonwealth defends *Jones*' reliance on *Morrison* v. *California*, 291 U.S. 82 (1934)—a case that examined the constitutionality of a burden-shifting statute that required criminal defendants to prove citizenship or eligibility of citizen-

ship to overcome a prohibition against such persons possessing, occupying, or using land for agricultural purposes—as a "cornerstone" of due process and the allocation of the burdens of proof, Opp. at 18, this Court later made clear that to the extent "the *Morrison* cases are understood as approving shifting to the defendant the burden of disproving a fact necessary to constitute the crime," such shifting "could not coexist" with *In re Winship* and *Mullaney*. *Patterson* v. *New York*, 432 U.S. 197, 203 n.9 (1977).[2] And for the reasons described in Mr. Lopez's petition, the statutory presumption advanced by the SJC in *Jones* is incompatible with this Court's decision in *Tot* v. *United States*, 319 U.S. 463 (1943), which requires a statutory presumption to bear at least a rational connection between the fact proved and the ultimate fact to be presumed. Pet. at 16–17. The Commonwealth does not offer such a connection, and "[t]he fundamental principle that one is innocent until proven guilty would be weak indeed if one's failure to present a defense was sufficient to imply proof of guilt." *Powell*, 783 F.3d at 361 (Torruella, J., dissenting).

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[2] By "the *Morrison* cases," the Court means *Morrison*, 291 U.S. 82 (1934), and its precursor, *Morrison* v. *California*, 288 U.S. 591 (1933).

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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