**No. 18-**

IN THE

# Supreme Court of the United States

ARMANDO LOPEZ,

*Petitioner,*

v.

MASSACHUSETTS,

*Respondent.*

**On Petition for a Writ of Certiorari to the Appeals Court of Massachusetts**

## PETITION FOR A WRIT OF CERTIORARI


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April 8, 2019

## QUESTION PRESENTED

Does the Due Process Clause permit the Commonwealth of Massachusetts to shift the burden to criminal defendants charged with unauthorized possession of a firearm and/or ammunition to show authorization for possession?

## PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is Armando Lopez. Respondent is the State of Massachusetts. No party is a corporation.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the decision of the Appeals Court of Massachusetts.

## OPINIONS BELOW

The opinion of the Appeals Court of Massachusetts is reported at 2018 WL 3651860 and is reproduced in the appendix to this petition ("Pet. App.") at 1a–2a. The order of the Massachusetts Supreme Judicial Court denying review is reported at 480 Mass. 1111 and is reproduced at Pet. App. 3a.

## JURISDICTION

The Appeals Court of Massachusetts entered judgment on August 2, 2018, Pet. App. at 1a, and the Massachusetts Supreme Judicial Court denied Mr. Lopez's petition on November 8, 2018, Pet. App. at 3a. Justice Breyer granted Mr. Lopez's timely application to extend the time to file. This Court has jurisdiction under 28 U.S.C. § 1257.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment of the United States Constitution provides, "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

The statutory provisions involved are Mass. Gen. Laws ch. 269, § 10(h) (2015), Mass. Gen. Laws ch. 140, § 129C (2015), and Mass. Gen. Laws ch. 278, § 7 (2018), which provide [in relevant part] that:

> Whoever owns, possesses or transfers a firearm, rifle, shotgun or ammunition without complying

> with the provisions of section 129C of chapter 140 shall be punished by imprisonment in a jail or house of correction for not more than 2 years or by a fine of not more than $500.

Mass. Gen. Laws ch. 269, § 10(h) (2015).

> No person, other than a licensed dealer or one who has been issued a license to carry a pistol or revolver or an exempt person as hereinafter described, shall own or possess any firearm, rifle, shotgun or ammunition unless he has been issued a firearm identification card by the licensing authority pursuant to the provisions of section one hundred and twenty-nine B.

Mass. Gen. Laws ch. 140, § 129C (2015).

> A defendant in a criminal prosecution, relying for his justification upon a license, appointment, admission to practice as an attorney at law, or authority, shall prove the same; and, until so proved, the presumption shall be that he is not so authorized.

Mass. Gen. Laws ch. 278, § 7 (2018).

## STATEMENT OF THE CASE

Courts are deeply divided as to when, and whether, a State may require criminal defendants charged with unlawful possession of a firearm to show authorized possession in order to avoid conviction. Many courts recognize that where lack of authorization forms an ingredient of the crime, due process demands the prosecution prove that fact beyond a reasonable doubt. Yet other courts require defendants to demonstrate an initial showing of authorization to prove his or her innocence. But in many of those States, including Massachusetts, authorization is the

single defining feature that distinguishes criminal from non-criminal behavior, and, therefore, should have to be proven by the prosecution beyond a reasonable doubt under the Due Process Clause.

For its part, the Massachusetts Supreme Judicial Court ("SJC") has nullified operative language in the Commonwealth's penal statute to permit juries to presume that a criminal defendant who possesses a firearm or ammunition within his or her home does so unlawfully. That is, to obtain a conviction for unlawful possession of a firearm, the Commonwealth of Massachusetts need *not* prove a defendant lacked such authorization. *Commonwealth* v. *Jones*, 361 N.E.2d 1308, 1311 (Mass. 1977). In permitting defendants to be convicted of unlawfully possessing a firearm absent any evidence that the possession itself *is* unlawful, States, including Massachusetts, turn the presumption of innocence on its head, simply for the sake of convenience. But subjective notions of what is or is not convenient cannot override fundamental principles of fairness that govern the relationship between an accused and his accuser. See*, e.g.,* *Stanley* v. *Illinois*, 405 U.S. 645, 656 (1972) ("[T]he Due Process Clause . . . [is] designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.").

Not only is the error flagrant, it is also widespread, as States prosecute hundreds of thousands of weapons-based offenses annually, making it a recurring violation. Mr. Lopez's case presents this Court with a clean vehicle to correct course.

## I. BACKGROUND OF THE CASE

### A. Factual Background

This case stems from an investigation into a murder that occurred in Chelsea, Massachusetts, on March 5, 2013. Two bullets from a revolver struck and killed an individual in what appeared to have been a gang-related attack. Pet. App. at 7a, 19a. Mr. Lopez was not present during the incident and Massachusetts did not claim that Mr. Lopez was involved in the killing. *Id.* at 19a.

Acting on a lead, police obtained and, together with a SWAT team, executed the search warrant for Mr. Lopez's place of residence. *Id.* at 20a. Police did not recover the murder weapon but did discover a separate firearm and ammunition wholly unrelated to their investigation. *Id.* at 4a–5a. That separate firearm was the subject of the subsequent charges.

### B. Proceedings Below

The Commonwealth charged Mr. Lopez with five separate crimes: possession of a firearm outside of the home or work without a license; two counts of possessing a firearm without a Firearm Identification Card ("FID") card; possession of ammunition without an FID card; and accessory after the fact to a felony. Pet. App. at 16a–17a.

Following a five-day trial, a jury found Mr. Lopez guilty of just two charges: possession of a firearm without an FID card, and possession of ammunition without an FID card, both in violation of G.L. ch. 269. *Id.* at 17a–18a. Mr. Lopez was acquitted of all other charges. For the possession of a firearm and ammunition without authorization, Mr. Lopez was sentenced to two years' incarceration followed by two years' probation. *Id.* at 18a.

On appeal, the Appeals Court of Massachusetts rejected Mr. Lopez's due process challenge in a three-sentence paragraph that relied entirely on the Massachusetts Supreme Judicial Court's ("SJC") decision in *Jones*, 361 N.E.2d at 1311.[1] Pet. App. at 1a. In *Jones* the SJC held that the "[a]bsence of a license is not 'an element of the crime' as that phrase is commonly used," and, therefore, the burden fell not to the Commonwealth, but instead to Mr. Lopez to provide evidence of authorization. *Id.* The Appeals Court further rejected Mr. Lopez's additional claims of error, and the SJC summarily denied review. Pet. App. at 2a.

## REASONS FOR GRANTING THE PETITION

### I. COURTS ARE INTRACTABLY SPLIT OVER WHETHER DUE PROCESS PERMITS SHIFTING THE BURDEN TO DEFENDANTS TO SHOW AUTHORIZATION

Among States that criminalize unauthorized possession of a firearm,[2] there is substantial disagree-

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[1] It also obliquely referenced *Commonwealth* v. *Powell*, 946 N.E.2d 114 (Mass. 2011), which itself relied primarily on *Jones*.

[2] Importantly, they do so using statutes that are identical in all material respects. *Compare* Mass. Gen. Laws ch. 269, § 10(h) ("Whoever . . . possesses . . . a firearm . . . or ammunition *without complying with* the provisions of section 129C of chapter 140 shall be punished by imprisonment . . . ." (emphasis added)) *and* N.J. Stat. Ann. § 2C:39-5b (2013) ("Any person who knowingly has in his possession any handgun . . . *without first having obtained a permit* . . . is guilty of a crime . . . ." (emphasis added)), *with* 430 Ill. Comp. Stat. 65/2 (2010) ("No person may acquire or possess any firearm . . . or . . . firearm ammunition . . . *without* having in his or her possession a Firearm Owner's Identification Card . . . ." (emphasis added)).

ment as to whether prosecutors must prove, beyond a reasonable doubt, the lack of authorization. At least eight states and two circuits understand that a lack of authorization is the critical fact that forms the basis for criminal punishment and insist it be proven beyond a reasonable doubt. Conversely, at least nine other states, including Massachusetts, and two circuits require a criminal defendant to bear an initial, affirmative burden to demonstrate that he or she was so authorized to possess the weapon. Absent that affirmative showing, the defendant is presumed guilty.

### A. At Least Eight States and Two Circuits Recognize Lack of Authorization as an Essential Element of Unauthorized Firearm Possession

In the 1970s, a handful of courts re-examined their states' unlawful possession statutes and concluded this Court's decision in *In re Winship* required a different approach. *Jones*, 361 N.E.2d at 1310. The SJC recognized this development but nonetheless declined to follow in the steps of the Supreme Court of Pennsylvania, the Georgia Supreme Court, the Connecticut Supreme Court, and the Fifth Circuit[3] without engaging with the courts' reasoning in those cases.

Acknowledging that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged," *In re Winship*, 397 U.S. 358, 364 (1970), each court concluded without difficulty that lack of authorization was a necessary element subject to that standard. See *Johnson* v. *Wright*, 509 F.2d 828, 830–31 (5th

[3] Now the Eleventh Circuit.

Cir. 1975) (holding due process violated when jury permitted to infer weapon is unlicensed from mere possession, and when defendant was charged with proving existence of license to carry weapon); *State* v. *Beauton*, 365 A.2d 1105, 1107–08 (Conn. 1976) (when appearing as part of enacting or prohibition clause of statute, lack of permit was a necessary element of offense to be proved beyond reasonable doubt), *superseded by statute as stated in*, *State* v. *Davis*, 155 A.3d 221, 229–31 (Conn. 2017) (continuing to recognize that a State must prove beyond reasonable doubt that defendant did not possess a permit at time of offense); *Head* v. *State*, 221 S.E.2d 435, 437 (Ga. 1975) (holding licensure was an element of the offense that required the State to introduce evidence to support conviction); *Commonwealth* v. *McNeil*, 337 A.2d 840, 843 (Pa. 1975) ("structure of the statute and nature of the prohibition" render "absence of a license [ ] an essential element of the crime" that "may not be shifted to the defendant" and must be established "beyond a reasonable doubt.").[4]

More courts concluded that lack of authorization is, in fact, an essential element of their respective offenses and not an affirmative defense or rebuttable presumption. See *United States* v. *Garcia*, 555 F.2d 708, 711 (9th Cir. 1977) (holding lack of authorization was underlying element necessary to prove carrying unlawful and finding no rational connection between

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[4] Still other courts at this time took this as a given. *People* v. *Brownlee*, 308 N.E.2d 377, 380–81 (Ill. App. Ct. 1974) (affirming a conviction for lack of possession of authorization because evidence introduced by the State was sufficient to establish guilt beyond reasonable doubt).

possession and lack of authorization);[5] *State* v. *Brust*, 974 P.2d 734, 737 (Or. Ct. App. 1999) (holding lack of authorization is an essential element of the offense because the authorization requirement "is a necessary ingredient of the definition of [the crime]"); *Sellers* v. *State*, 507 So. 2d 540, 543 (Ala. Crim. App. 1985) (holding prosecution bore burden of proof on the essential element of authorization), *rev'd on other grounds sub nom. Ex parte State*, 507 So. 2d 544 (Ala. 1986); *State* v. *Robarge*, 450 So. 2d 855, 856 (Fla. 1984) (when requirement contained in enactment clause it was an essential element of the offense), *superseded by statute recognized in Watt* v. *State*, 31 So. 3d 238 (Fla. Dist. Ct. App. 2010) (when contained in a subsequent clause as an exception, licensure is affirmative defense); *State* v. *Hodges*, 305 S.E.2d 278, 284 (W. Va. 1983) (same as *Robarge*). Consistent with *Winship*, each of those courts concluded proof of authorization may not be shifted to the defendant.

### B. At Least Nine States and Two Circuits Permit Shifting the Burden to Criminal Defendants to Show Authorization

Many States, including Massachusetts, have mislabeled the "unauthorized" element of the offense as an "affirmative defense," and relied on that mischaracterization to shift the burden of initial proof to the defendant. *Commonwealth* v. *Powell*, 946 N.E.2d 114, 124 (Mass. 2011) (ignoring phrase "without complying with" in G.L. ch. 269, § 10(h) and reiterating

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[5] The Ninth Circuit later seemed to walk back its due process concern over this California presumption, approving without discussing the due process implications of the burden shift. *See United States* v. *Mackie*, 720 F. App'x 872 (9th Cir. 2018) (mem.) ("Under California law, moreover, possession of a concealed weapon is presumptively illegal." (citing, *inter alia*, *Ross*)).

"the absence of a license is not 'an element of the crime' as that phrase is commonly used" (citing *Jones*, 361 N.E.2d at 1308)); *Harris* v. *State*, 716 N.E.2d 406, 411 (Ind. 1999) (holding where enactment clause includes "[e]xcept as provided," authorization is exception to illegal possession and burden falls on defendant); *State* v. *Paige*, 256 N.W.2d 298, 303 (Minn. 1977) (construing the phrase "without a permit" to be an exception to a general prohibition, rather than an element of the crime); *People* v. *Henderson*, 218 N.W.2d 2, 4 (Mich. 1974) (same).

Still other courts acknowledge that lack of authorization is an essential element of the offense, but *still* permit a jury to presume that element in the absence of evidence to the contrary. *State* v. *Ingram*, 488 A.2d 545, 549 (N.J. 1985) (holding a "jury may be permitted to infer, until the defendant comes forward with some evidence to the contrary, that the defendant does not possess the required license or permit . . . ."); *People* v. *Grass*, 79 Misc. 457, 458–59, 141 N.Y.S. 204, 206 (Co. Ct. N.Y. 1913) (observing that failure to allege each element of the crime would render an indictment defective "[b]ut whether the prosecution must make proof of every ingredient so required to be pleaded presents a different question"); *State* v. *Baych*, 169 N.W.2d 578, 585 (Iowa 1969) (proof that no permit had been issued to defendant by county of offense triggered rebuttable presumption that defendant lacked proper authority from every other county), *overruled on other grounds by State* v. *Erickson*, 362 N.W.2d 528 (Iowa 1985); see also *McCandless* v. *Beyer,* 835 F.2d 58, 61 (3d Cir. 1987) (affirming the constitutionality of *Ingram*).

The split in authority on the proof necessary for the "lack of authorization" element of an unauthorized

firearm charge is unlikely to resolve itself. While States have acknowledged the split in authority, none has departed from its own precedent in furtherance of reconciliation, see, *e.g.*, *Powell*, 946 N.E.2d at 124 ("We have declined to revisit these conclusions and find no reason to do so now." (internal citation omitted)), thus calling for this Court's intervention.

## II. THIS IS AN IMPORTANT AND RECURRING ISSUE OF LAW

While states retain some discretion to define affirmative defenses, the Constitution limits "States' authority to define away facts necessary to constitute a criminal offense." *Apprendi* v. *New Jersey*, 530 U.S. 466, 486 (2000). Among those limits is the due process protection "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. at 364 (emphasis added). Disagreement among the States over the burden of proof for an essential element like lack of authorization has the effect of ratcheting up or down a defendant's due process protections depending on the place of offense.

Moreover, statutory (mis)interpretations like those of the Massachusetts SJC have troubling implications for the constitutional right to possess in one's home for lawful purposes firearms and ammunition. See *McDonald* v. *City of Chicago*, 561 U.S. 742, 777–78 (2010). Any shift in the burden of proof necessary to impose criminal liability for unlawful possession of a firearm may have a chilling effect on constitutionally protected activity. The interstate conflict over this issue thus further leaves "the safety of all Americans . . . to the mercy of state authorities who may be more concerned about disarming the people than

about keeping them safe." *Caetano* v. *Massachusetts*, 136 S. Ct. 1027, 1033 (2016) (Alito, J., joined by Thomas, J., concurring) (concurring with the majority that a ban on stun guns is unconstitutional).

These concerns, moreover, are continuous and recurring. In 2017, law enforcement made 164,984 arrests for the carrying and/or possession of weapons. *Crime in the United States 2017: Table 29*, FBI (2018), https://ucr.fbi.gov/crime-in-the-u.s/2017/crime-in-the-u.s.-2017/topic-pages/tables/table-29. In 2018, Massachusetts alone was responsible for 1,248 charges for possession of a firearm without an FID card and 1,176 charges for possession of ammunition with an FID card. DRAP, *Massachusetts Trial Court, Charges Dashboard*, Tableau Public (Feb. 25, 2019), https://public.tableau.com/profile/drap4687#!/vizhome/MassachusettsTrialCourtChargesDashboard/Dashboard. These two crimes constituted the most frequently charged weapons-based offenses (15.8% and 14.9% respectively), with the offense of carrying a firearm without a license following closely behind (1,024 charges for 13% of weapons-based crimes). *Id.* The volume of cases, both in the Commonwealth and nationwide, underscore the need for this Court's guidance and suggest further that challenges like Mr. Lopez's will persist until such intervention occurs. See*, e.g.*, *Commonwealth* v. *Harris*, No. SJC-12607, 2019 WL 1428396, at *3–4 (Mass. Mar. 29, 2019) (denying due process challenge to shifting of burden of proof for licensure of a firearm).

## III. THE DECISION BELOW IS INCORRECT

### A. Lack of Authorization Is an Essential Element of The Offense

A host of considerations that include the plain text of the statute, how the Commonwealth defines the

offense in other contexts, and constitutional concerns all firmly undermine the SJC's (mis)characterization of authorization as an affirmative defense.

The text of the statute itself refers to a lack of authorization for the weapon. An "essential element" of a crime is a "fact necessary to constitute the crime with which [the individual] is charged." *In re Winship*, 397 U.S. at 364. Possession of a firearm and/or ammunition are facts that are not, by themselves, the basis for punishment under the relevant statute: "Whoever owns, possesses, or transfers a firearm, rifle, shotgun or ammunition *without complying with* the provisions of section 129C of chapter 140 shall be punished by imprisonment . . . ." Mass. Gen. Laws ch. 269, § 10(h) (emphasis added). Rather, all of the qualifying language in the statutory offense constitutes necessary facts that the prosecution must prove. Compare *Mullaney* v. *Wilbur*, 421 U.S. 684, 686 n.3, 704 (1975) (holding that defining the crime of murder as unlawfully killing a human being "with malice aforethought" required the prosecution prove the defendant did not act in the heat of passion), *with Patterson* v. *New York*, 432 U.S. 197, 199 n.3, 216 (1977) (holding that defining murder as simply killing another person "with intent to" do so permitted the State to not have to prove the absence of an extreme emotional disturbance beyond a reasonable doubt); see also*, e.g.*, *Hodges*, 305 S.E.2d at 284 (where condition contained in the enactment portion of the statute, condition constituted element of offense).

Moreover, the indictment and Fourth Amendment contexts confirm the understanding that lacking an FID card is a fact "necessary to constitute the crime." In Massachusetts, all indictments must contain "a plain, concise description of the act which constitutes

the crime or an appropriate legal term descriptive thereof." Mass. R. Crim. P. 4(a). A cursory search of Massachusetts law, and this case, reveals that the charged offense is always "possession of a firearm and/or ammunition *without FID card*," see*, e.g.*, *Commonwealth* v. *Tavernier*, 922 N.E.2d 166, 174 (Mass. App. Ct. 2010) (emphasis added), not simply "possession of a firearm and/or ammunition." Pet. App. at 4a–5a.

Similarly, the SJC itself has recognized lack of authorization *is* a traditional element of the crime for purposes of the Fourth Amendment. The mere carrying of a weapon does not give rise to a reasonable suspicion of criminal activity, *i.e.*, the *unlawful possession* of a weapon. See *Commonwealth* v. *Alvarado*, 667 N.E.2d 856, 859 (Mass. 1996) (citing cases). As the SJC stated then: "Carrying a gun is not a crime. Carrying a firearm without a license (or other authorization) is." *Id.* (citing to the relevant statute); see also *Commonwealth* v. *Couture*, 552 N.E.2d 538, 540 (Mass. 1990) ("[K]nowledge that an individual is carrying a handgun, in and of itself, does not furnish probable cause to believe that the individual is illegally carrying that gun."); *Commonwealth* v. *Toole*, 448 N.E.2d 1264, 1268 (Mass. 1983) ("But carrying a .45 caliber is not necessarily a crime. A possible crime was carrying a gun without a license to carry firearms."). Treating lack of authorization as an element that defines criminal behavior in some circumstances while ignoring it for liability purposes in another offends the very notion of due process, confirming it as a fact necessary to criminality. See *Powell* v. *Tompkins*, 783 F.3d 332, 353 (1st Cir. 2015) (Torruella, J., dissenting).

Against this backdrop, the Appeals Court's reliance on *Jones* to conclude, "'[a]bsence of a license is not an element of the crime, as that phrase is commonly used, of possession of a firearm or ammunition without an FID card," Pet. App. at 1a–3a (citing *Jones*, 361 N.E.2d at 1311), cannot bear its own weight. States may not manipulate the definition of a crime for purposes of burden shifting. That would be tantamount to declaring a defendant guilty, or presumptively guilty of a crime, which stretches beyond the Constitution's limits. *Patterson*, 432 U.S. at 210; see also *Crawford* v. *Washington*, 541 U.S. 36, 62 (2004) (The Constitution does not permit "dispensing with [a] jury trial because a defendant is obviously guilty."). Instead, due process requires the "prosecution [to] prove beyond a reasonable doubt '*all* of the elements included in the definition of the offense of which the defendant is charged.'" *Patterson,* 432 U.S. at 221 n.3 (emphasis added).

Moreover, the SJC's inconsistent treatment raises additional concerns, because it covers constitutionally protected activity. *McDonald*, 561 U.S. at 791 (plurality opinion) (Second Amendment right to bear arms incorporated against the states); see also *Silvester* v. *Becerra*, 138 S. Ct. 945, 952 (2018) (Thomas, J., dissenting from denial of cert.) (Second Amendment right to bear arms not a "second-class right," that can be "singled out for special—and specially unfavorable—treatment"). Construing the statute as a "general prohibition against carrying a firearm," to which authorization is an affirmative defense, permits a jury to presume guilt from a defendant's mere possession of a firearm and/or ammunition *in his own home*. *Jones*, 361 N.E.2d at 1310–11. However, this would, in effect, criminalize constitutionally protected behavior. See *McDonald*, 561 U.S. at 767–68. Such a

construction would be plainly unconstitutional, at least as applied to Mr. Lopez, if not more broadly. See *Herrington* v. *United States*, 6 A.3d 1237, 1243–44 (D.C. 2010) (conviction based solely on constitutionally protected activity without evidence of defendant's disqualification from exercise of Second Amendment rights rendered statute unconstitutional as applied). The SJC's Fourth Amendment interpretation of the statute is far more consistent with the plain text and further avoids constitutional concerns. See *Voisine* v. *United States*, 136 S. Ct. 2272, 2290–91 (2016) (Thomas, J., dissenting) (determining best interpretation of statute avoids Second Amendment constitutional problem); *Douglas* v. *N.Y., New Haven & Hartford R.R. Co.*, 279 U.S. 377, 386 (1929) (holding that "[i]f [a] word in [a state] statute must be so construed in order to uphold the act or even to avoid serious doubts of its constitutionality we presume that the [courts of the state] would construe it in that way").

### B. Presuming this Essential Element Is Satisfied by the Mere Presence of a Firearm or Ammunition in the Home Violates Mr. Lopez's Due Process Rights

The Massachusetts Appeals Court's rationale for shifting the burden (the same rationale as *Jones*) is both out of step with due process jurisprudence and also wildly outdated.

In considering whether it was permissible to presume lack of authorization from mere possession, *Jones* omitted from its analysis a critical threshold issue: whether the fact to be presumed is sufficiently related to the fact(s) proven. See *Tompkins*, 783 F.3d at 357–59 (Torruella, J., dissenting) (describing the landscape of federal presumption law). Instead, in

determining whether the presumption complied with minimum due process protections, *Jones* looked exclusively to considerations of convenience. *Jones*, 361 N.E.2d at 1312 (comparing an "extravagant burden" to the Commonwealth to "a very simple task" by the defendant). Convenience alone, however, is constitutionally deficient. See *Tot* v. *United States*, 319 U.S. 463, 469 (1943) ("Nor can the fact that the defendant has the better means of information, standing alone, justify the creation of such a presumption.").

Rather, there must be *at least* a "rational connection between the facts proved and the ultimate fact presumed." *Id.* at 467.[6] Only then may courts consider whether "the defendant has more convenient access to proof" and if "requiring him to go forward with proof will not subject him to unfairness or hardship." *Id.* at 469–70.

Here, *Jones* would "withdraw [the issue of authorization] from consideration by the jury" in the "absence of any evidence on that issue." *Jones*, 361 N.E.2d at 1313. All that would need to be proven is (1) possession of (2) a firearm. *Commonwealth* v. *Gouse*, 965 N.E.2d 774, 787 n.17 (Mass. 2012). Indeed, the instructions in Mr. Lopez's case omit any reference to lacking an FID card. Pet. App. at 11a–13a.[7] However, "reason and experience," *Tot*, 319

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[6] Other decisions by this Court have suggested an even stronger connection is required; for instance, that the presumed fact must be "more likely than not" to flow from the proved fact on which it depends, or that the presumption itself must satisfy the "beyond reasonable doubt" standard. *See Tompkins*, 783 F.3d at 358–59 (Torruella, J., dissenting) (collecting and describing cases).

[7] Count 2 (firearm possession in the home):

U.S. at 467, do not support the inference, let alone presumption, that mere possession of a firearm is also *unauthorized* possession. See *Tompkins*, 783 F.3d at 360 (Torruella, J., dissenting) (presumption that "one's performance of conduct requiring a license rationally implies the lack of a license" is not rational); *Garcia*, 555 F.2d at 711; *Johnson*, 509 F.2d at 831. The SJC has admonished law enforcement authorities for making that exact leap in the Fourth Amendment context. See III. A.

Because there is no "rational connection" between the proven and the presumed facts, considerations of convenience are irrelevant. But even so, "proving a negative [is not] unique in our system of criminal jurisprudence." *Mullaney*, 421 U.S. at 702. And considering the advent of the internet and other electronic means of collecting, storing, and sharing data, it is far less burdensome for a State to offer evidence concerning lack of authorization now than in 1970.[8]

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> [The Commonwealth] only has to show, or it has to show the elements, first that this weapon, this item was a firearm as I've defined it for you, that the defendant was in possession of it and here the Commonwealth is proceeding on a theory of actual possession, that he took physical possession of it, and third, that he knew that the item was indeed a firearm.

Count 5 (ammunition possession):

> First, that the item in question was ammunition. Second, the defendant possessed that item. Third, that he did so knowingly and intentionally.

[8] Moreover, the presence of a "central data repository" whereby the State may access proof of lack of licensure, *Commonwealth* v. *Capua*, 75 N.E.3d 1147 (Mass. App. Ct. 2017), *review denied*, 80 N.E.3d 979 (2017), belies any factual reliance on the convenience of proof. *See, e.g.*, *Hodges*, 305 S.E.2d at 285 (holding that a prima facie case can be met by introducing evidence of a negative search of a similar central data repository).

A continued adherence to *Jones* deprives thousands of criminal defendants of a basic tenet of due process: conviction only on proof beyond a reasonable doubt of all elements of a crime. As Judge Torruella succinctly stated, "I am unable to perceive a reading of the SJC's disposition of [the defendant's] due process claim that does not contradict clearly established federal law as determined by the Supreme Court." *Tompkins*, 783 F.3d at 361 (Torruella, J., dissenting). The SJC's unwillingness to reconsider the legitimacy of *Jones*, see *Powell*, 946 N.E.2d at 124 ("We have declined to revisit these conclusions and find no reason to do so now" (internal citation omitted)), offer no indication of course correction in the near future.

## IV. THIS IS A CLEAN VEHICLE

At each stage of appellate proceeding, Mr. Lopez carefully preserved the issue presented here. The Appeals Court relied almost entirely on the SJC's decision in *Jones*, 361 N.E.2d 1308 (and its progeny), which passed upon the question presented at length and acknowledged the conflict in authorities on this question.

The question presented is also wholly dispositive of Mr. Lopez's case. Shifting the burden of proof to the defendant on authorization relieved the Commonwealth from having to prove beyond reasonable doubt an essential element of the crime of conviction. Mr. Lopez's case squarely presents the issue.

This issue is over-ripe for review. The *Jones* decision dates from 1977. The split acknowledged by that decision has only grown wider in the years since, and the seriousness has not diminished. "The 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." *Tomp-*

*kins*, 783 F.3d at 361 (Torruella, J., dissenting). The role of authorization in the manner of criminal weapons proceedings in the Commonwealth of Massachusetts remains unsettled and is well within this Court's purview to review.

## CONCLUSION

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

Respectfully submitted,

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