No. _____

In the

Supreme Court of the United States

JOSHUA DAVOREN,

Petitioner,

v.

COMMONWEALTH OF MASSACHUSETTS

Respondent

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Is a statute that makes it a crime for every person, including responsible, law-abiding citizens, to possess a firearm, rifle, shotgun, or ammunition in their own home, facially invalid under the Second Amendment?

STATEMENT OF RELATED PROCEEDINGS

1. *Commonwealth v. Joshua Davoren*, Franklin County Superior Court of Massachusetts, Case No. 1578CR00043. Following a jury trial and verdict of guilty, the trial court entered judgment and sentenced Mr. Davoren on June 12, 2018.

2. *Commonwealth v. Joshua Davoren*, Massachusetts Appeals Court, Case No. 2019-P-0019. The Appeals Court affirmed Mr. Davoren's conviction on November 16, 2020 in an unpublished decision. *Commonwealth v. Davoren*, 98 Mass. App. Ct. 1119, 158 N.E.3d 883 (2020).

3. *Commonwealth v. Joshua Davoren*, Massachusetts Supreme Judicial Court, Case No. FAR-27965. On February 22, 2021, the Supreme Judicial Court remanded Mr. Davoren's case to the Appeals Court. *Commonwealth v. Davoren*, 486 Mass. 1115 (2021).

4. *Commonwealth v. Joshua Davoren,* Massachusetts Appeals Court, Case No. 2019-P-0019. After reconsideration, the Appeals Court affirmed Mr. Davoren's conviction on May 4, 2021 in an unpublished decision. *Commonwealth v. Davoren*, 99 Mass. App. Ct. 1123, 168 N.E.3d 376 (2021).

5. *Commonwealth v. Joshua Davoren*, Massachusetts Supreme Judicial Court, Case No. FAR-27965. On September 14, 2021, the Supreme Judicial Court denied further appellate review of Mr. Davoren's appeal. *Commonwealth v. Davoren*, 488 Mass. 1103, 173 N.E.3d 1093 (2021).

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Petitioner Joshua Davoren respectfully requests issuance of a writ of certiorari to review the judgment of the Massachusetts Appeals Court.

OPINION BELOW

The Massachusetts Appeals Court opinion at issue here is unreported, *Commonwealth v. Davoren*, 98 Mass. App. Ct. 1119, 158 N.E.3d 883 (2020), and is reproduced as Appendix A.[1] APPX/1. The order of the Massachusetts Supreme Judicial Court remanding the case to the Appeals Court is reproduced as Appendix B. APPX/9. The opinion of the Massachusetts Appeals Court issued after remand is unreported, *Commonwealth v. Davoren*, 99 Mass. App. Ct. 1123, 168 N.E.3d 376 (2021), and is reproduced as Appendix C. APPX/10. The order of the Massachusetts Supreme Judicial Court denying further appellate review is reproduced as Appendix D. APPX/13.

JURISDICTION

The Supreme Judicial Court issued its order denying further appellate review in this case on September 14, 2021. APPX/13. On November 23, 2021, Justice Breyer granted Petitioner's motion to extend the time for filing the instant Petition to February 11, 2022. The Supreme Judicial Court is the highest state court in Massachusetts and jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

[1]Citations to the separately bound Appendix appear as APPX/page #. Citations to the two volumes of trial transcript appear respectively as T1/page #, T2/page #.

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

1. The Second Amendment to the United States Constitution provides:

   "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

2. The Fifth Amendment to the United States Constitution provides in pertinent part:

   "No person…shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law…"

3. Section One of the Fourteenth Amendment to the United States Constitution provides in pertinent part:

   "No State shall . . . deprive any person of life, liberty, or property, without due process of law...."

4. Massachusetts General Laws, Chapter 269, section 10(h)(1) provides in relevant part:

   "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."

STATEMENT OF THE CASE

On March 26, 2015, Mr. Davoren was in his own bed in his own home, where he lived by himself. His loaded shotgun was nearby. T1/104-105. He had previously been the victim of a robbery, and he kept the shotgun for protection. T2/16. At 5:06 a.m., fourteen officers, without knocking, broke into his home using a "breacher" to ram open the door. Several were armed with assault rifles. T1/104, 109. Police found Mr. Davoren in bed with his hands up and arrested him without incident. T1/105. Mr. Davoren told police there was a shotgun in his bedroom and explained that he had it for protection. T1/121-122; T2/16. It contained five shotgun shells and was the only ammunition found in the home. T1/138, T2/6, 28-29. For this conduct, Mr. Davoren was charged with two counts of violating Massachusetts General Laws Chapter 269, Section 10(h)(1) (hereinafter "M.G.L. c. 269, § 10(h)(1)" or "§10(h)(1)") -- possession of the shotgun and possession of ammunition.

M.G.L. c. 269, § 10(h)(1) criminalizes the possession of a firearm, rifle, shotgun or ammunition. A violation requires the Commonwealth to prove only that the defendant knowingly possessed the relevant item. *See* Section I.B. *infra*, at pages 8-10. Mr. Davoren proceeded to trial in June 2018 without contesting that he knowingly possessed the loaded shotgun. *See* T1, T2 generally. After the first day of evidence, given the lack of any factual dispute as to the elements of the offense, the trial judge asked defense counsel, "What are we trying? . . . what are the issues? . . .I just don't know what we're trying here today." T1/144. Counsel stated that his purpose was to file a motion for required finding of not guilty under *Heller* and

McDonald. T1/144.

At the close of the Commonwealth's case in chief and at the close of all evidence Davoren moved for a required finding of not guilty, arguing that to convict him under § 10(h)(1) would be unconstitutional under the Second Amendment T2/39-41; APPX/14-17. The motion relied on this Court's decisions in *District of Columbia* v. *Heller,* 544 U.S. 570 (2008); *McDonald v. Chicago*, 561 U.S. 742 (2010); and *Caetano v. Massachusetts*, 577 U.S. 411 (2016); APPX/14-17.[2] During argument on the motion, counsel argued that the existence of a state scheme for regulating possession of firearms was irrelevant to resolution of the issue because the case was tried under M. G. L. c. 269, § 10(h), "and the individual has the gun inside his house. And all the evidence is that the gun is for personal protection." T2/40. The trial judge answered, "But he had to have an FID card. He didn't have one." T2/40.[3] Trial counsel replied:

> "I understand that that's what the SJC has said, Your Honor. But I don't think that this has been something that's been examined at the federal level. I don't think that the Massachusetts statute, regarding 10H, Residential Possession of a Firearm, has been examined as to whether or not that is constitutionally valid."

T2/40. The motions were denied. T2/41, 48. The trial judge concluded that the statute was valid under *Heller*, relying on *Commonwealth v. Powell*, 459 Mass. 572, 946 N.E.2d 114 (2011); *Commonwealth v. Johnson*, 461 Mass. 44, 958 N.E.2d 25 (2011); and *Commonwealth v. Loadholt*, 460 Mass. 725, 954 N.E.2d 1128 (2011)

[2]This was the first time the Second Amendment issue was raised.
[3]"FID card" refers to a firearm identification card, which must be obtained from the local police department before an individual may keep a firearm, rifle, shotgun, or ammunition in their home. *See* M. G. L. c. 140, §§ 121, 129B, 129C.

(rejecting a Second Amendment facial challenge to § 10(h)(1)). T2/41. The jury convicted Mr. Davoren on both counts. T2/92.

On appeal, Davoren pressed his challenge to the facial validity of M. G. L. c. 269, § 10(h)(1) under the Second Amendment.[4] The Appeals Court tersely rejected the claim:

> "[T]he Supreme Judicial Court has already determined that the statute is not facially invalid. See Commonwealth v. Loadholt, 460 Mass. 723, 724-727 (2011) (facial challenge to licensing scheme). In any event, the defendant has failed to "establish that no set of circumstances exist[ ] under which the [statute] would be valid" (quotation and citation omitted). Chief of Police of Worcester v. Holden, 470 Mass. 845, 860 (2015). Nothing has changed since Loadholt to breathe new life into this claim."

APPX/1. In a footnote, the Court further explained:

> "Because compliance with the requirement to obtain an FID card allows possession of a shotgun inside one's home, so long as the individual is not statutorily precluded from obtaining a license and is otherwise suitable, see G. L. c. 140, § 129B, a set of circumstances clearly does exist that allows the exercise of the right to bear arms under the Second Amendment to the United States Constitution. See G. L. c. 140, § 129C."

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[4]The Appeals Court stated, erroneously and inexplicably, that Davoren raised the Second Amendment issues "for the first time on appeal." APPX/1. *See* T1/144, T2/39-41; APPX/14-17. Although not relevant to the facial challenge, the Appeals Court, in rejecting Davoren's Second Amendment as-applied challenge to § 10(h)(1), opined that Davoren had a criminal record that would have prohibited him from obtaining an FID card. APPX/1. No criminal record was entered in evidence, and any record would be irrelevant because "a prior felony conviction is not an element of" M. G. L. c. 269, §10(h)(1). *People v. Burns*, 79 N.E.3d 159, 164 (Ill. 2015); *see* Section I.B., *infra* at 8-10. Contrary to the Appeals Court's assertions (APPX/1, 10), the statute pursuant to which Davoren was *sentenced*, M. G. L. c. 269, § 10G, does not define a criminal offense but rather establishes sentence enhancements applicable to persons convicted under §10(h)(1). *Rivera v. Commonwealth*, 484 Mass. 1015, 1017, 140 N.E.3d 920, 922 (2020). Like the statute found facially unconstitutional in *Burns, supra,* which criminalized possession of a firearm away from home, "[t]he penalty enhancements [under M. G. L. c. 269, § 10G] are not elements of the offense. They do not come into play until after the defendant is found guilty." *Burns*, 79, N.E.3d at 164; *see Rivera*, 140 N.E.3d at 922.

APPX/7. The Appeals Court did not address Davoren's claim that even "compliance with the requirement to obtain an FID card," *id*., conferred only a fettered right to raise an affirmative defense at trial if prosecuted. *See* Section I.B., I.C. *infra* at 8-18. Mr. Davoren's convictions were affirmed, and the Massachusetts Supreme Judicial Court ("SJC") denied further appellate review. APPX/13.

REASONS FOR GRANTING THE PETITION

I. This Court should grant the petition for a writ of certiorari because the exercise of the core, Second Amendment right, even by law-abiding citizens, is a criminal offense in the state of Massachusetts; the state's arbitrary enforcement of this unconstitutional law promotes racial inequality and deters the exercise of constitutionally protected activity; and only this Court can restore the core, Second Amendment right to the people of Massachusetts.

A. *Introduction.*

Mr. Davoren was convicted for passively exercising his core, Second Amendment right under a statute that criminalizes constitutionally-protected conduct and promotes racial inequality. The core right protected by the Second Amendment is the right to keep and bear arms in one's own home for personal protection. *District of Columbia v. Heller,* 554 U.S. 570, 595 (2008); *McDonald v. City of Chicago*, 561 U.S. 742, 749 (2010). Mr. Davoren was convicted for doing just that. Under M.G.L. c. 269, § 10(h)(1), *no one* in Massachusetts – including every responsible, law-abiding citizen with a valid firearm identification card – has the "right" to keep a shotgun, rifle, handgun, or ammunition in their home. This is because an individual remains subject to prosecution and conviction merely by knowingly possessing the firearm or ammunition. *Commonwealth v. Powell*, 459

Mass. 572, 582, 946 N.E.2d 114, 124 (2011). Contrary to the view advanced by the Massachusetts Appeals Court, "compliance with the requirement to obtain" an FID card does not confer the right to possess a shotgun or any other firearm in one's home. APPX/7. Under the SJC's unconstitutional interpretation of M. G. L. c. 269, § 10(h), a valid FID card confers only the watered-down "right" to raise an affirmative defense at trial if prosecuted for gun possession. *Commonwealth v. Parzick*, 64 Mass. App. Ct. 846, 852, 835 N.E.2d 1171 (2005). As a result, law enforcement has discretion to prosecute anyone in possession of a firearm, rifle, shotgun or ammunition, including responsible, law-abiding individuals in their own home.

The problem with M. G. L. c. 269, § 10(h), as interpreted by the SJC, is not *just* that it criminalizes the exercise of the core, Second Amendment right; or that it violates due process by imposing a presumption of guilt even upon law-abiding citizens who comply with the state's opaque licensing scheme. A hidden, more sinister problem is that the statute, in operation, is fundamentally racist. Because *everyone's* possession of a gun is unlawful, law enforcement has total discretion against whom to enforce the law. Massachusetts' punitive gun laws are enforced primarily against people of color. *See* "Racial Disparities in the Massachusetts Criminal Justice System," Elizabeth Bishop et. al, CRIMINAL JUSTICE POLICY PROGRAM, Harvard Law School (September 2020)(hereinafter "*Racial Disparities*"). APPX/18-120. *See* Section I.D, *infra* at 18-21.

Nonetheless, as elaborated below, the SJC has repeatedly rejected or refused to hear Second Amendment challenges to the validity of § 10(h)(1), ignored the plain

statutory text, and erected procedural barriers to standing that apply only to Second Amendment claims. As a result, only this Court can restore to the people of Massachusetts their core, Second Amendment right to self-defense within their own home. *See Caetano v. Massachusetts*, 577 U.S. 411, 411 (2016) (vacating judgment of conviction where SJC's reasons for upholding a state statute prohibiting possession of stun guns were frivolous and "contradict[] this Court's precedent" under *Heller*).

B. *M. G. L. c. 269, § 10(h) is facially unconstitutional because it criminalizes the core conduct protected by the Second Amendment.*

As stated, at its core, the Second Amendment, made applicable to the States by the Fourteenth Amendment, protects the right to keep and bear arms for self-defense in one's home. *Heller,* 554 U.S. at 595, 628; *McDonald,* 561 U.S. at 749. Handguns, rifles, shotguns, and ammunition are in the category of protected arms. *See Heller,* 554 U.S. at 635; *Heller v. District of Columbia*, 670 F.3d 1244, 1259-1260 n.9 (D.C. Cir. 2011)(shotguns); cf. *Ezell* v. *City of Chicago*, 651 F.3d 684, 704 (7th Cir. 2011)(right to keep and bear arms necessarily implies "right to acquire" arms). The core conduct protected by the Second Amendment is identical to the conduct criminalized by M. G. L. c. 269, § 10(h), as that statute has long been interpreted by the SJC.[5]

Section 10(h)(1) states:

> "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."

[5]The SJC's construction of a state statute is binding on this Court. *Wisconsin v. Mitchell*, 508 U.S. 476, 483 (1993).

M.G. L. c. 269, § 10(h)(1). Although the statute's text would suggest that the failure to comply "with the provisions of section 129C of chapter 140," *id.*, is the essence of the offense, "the absence of a license is not an element of the crime." *Powell,* 946 N.E.2d at 124 (internal citation omitted). In the words of the SJC:

> "We have repeatedly affirmed that the elements of the crime of unlawful possession of a firearm are the following: 'the defendant knowingly possessed the firearm'; and 'the firearm met the requirements of a firearm as defined by G.L. c. 140, § 121' (citations omitted)."

Commonwealth v. Gouse, 461 Mass. 787, 965 N.E.2d 774, 787 n.17 (2012).[6]

The incorporation of M. G. L. c. 140, § 129C into the text of § 10(h)(1) means the scope of the statute's operation is one's home or business. *Powell*, 946 N.E.2d. at 127-128. M. G. L. c. 140, § 129C provides:

> "[n]o person...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 [G. L. c. 140, § 129B]."

M.G.L. c. 140, § 129C. "An FID card allows the holder to own or possess a firearm within the holder's residence or place of business, but not to carry it to or in any other place." *Powell*, 946 N.E.2d. at 127-128. Possession of a firearm, rifle, or shotgun *away* from one's home or business is a separate crime.[7]

To summarize, the elements of the crime defined by § 10(h)(1) are simply the

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[6]Accord *Powell*, 946 N.E.2d. at 124 ("We repeatedly have held that in prosecutions under G.L. c. 269, § 10 (*a*) and (*h*), the Commonwealth does not need to present evidence to show that the defendant did not have a license or FID card"); *Commonwealth v. Harris*, 481 Mass. 767, 119 N.E.3d 1158, 1164 (2019) ("We have long held that possession of a Massachusetts firearm license is…not an element of that offense").

[7]*See* M. G. L. c. 269, § 10(a)(1), § 10(a)(5)(1) (prohibiting, respectively, the knowing possession of a firearm and the knowing possession of a rifle or shotgun without "being present" at one's residence or place of business).

defendant's knowing possession of an item meeting the definition of firearm, rifle, shotgun, or ammunition, and the statute applies to possession occurring in one's home or business. *Powell*, 946 N.E.2d. at 127-128. The prosecution is not required to prove the defendant failed to comply with the state's licensing regime (e.g., lacked an FID card or was ineligible to obtain one), possessed the relevant arm in a prohibited time, place, or manner, or had attributes that would justify a total deprivation of the core right (such as being a felon). *See Powell*, *Harris*, *supra* at note 6. *Contrast* 18 U.S.C. § 922(g), *Rehaif v. United States*, 139 S.Ct. 2191, 2194 (2019) (outlining class of persons prohibited from possessing firearms and requiring prosecution to prove, inter alia, defendant belonged to prohibited class when he or she possessed the weapon). This renders the crime defined by § 10(h)(1) identical to the core, substantive conduct protected by the Second Amendment. In Massachusetts, even for "law-abiding, responsible citizens," *Heller,* 554 U.S. at 635, keeping a firearm, rifle, shotgun or ammunition in one's home is a crime.

In rejecting repeated challenges to state gun laws, state appellate courts have steadfastly advanced the fiction that a valid FID card or gun license confers the core, Second Amendment right. *See* APPX/7.[8] Compliance with "the provisions of section 129C of chapter 140," under M.G.L. c. 269, § 10(h)(1) *does not confer* the right to keep a gun or ammunition in one's home. A valid FID card confers only the

[8]*See e.g. Harris*, 119 N.E.3d at 1164; *Commonwealth v. Cassidy*, 479 Mass. 527, 539-540; 96 N.E.3d 691,702 (2018); *Commonwealth v. Allen*, 474 Mass. 162, 174; 48 N.E.3d 427, 438 (2016); *Gouse*, 965 N.E.2d at 785-786; *Powell*, 946 N.E.2d at 128; *Commonwealth v. Johnson*, 461 Mass. 44, 55-58; 958 N.E.2d 25, 34-7 (2011); *Commonwealth v. Loadholt*, 460 Mass. 725, 954 N.E.2d 1128, 1129-1130 (2011).

limited "right" to assert an affirmative defense in a criminal prosecution. *See Parzick*, 835 N.E.2d at 1176; *Commonwealth v. Jones*, 372 Mass. 403, 361 N.E.2d 1308, 1311 (1977); APPX/9 ("possession of an FID card is an affirmative defense"). If raised, the Commonwealth retains the opportunity to persuade the jury that "the defense does not exist." *Jones*, 361 N.E.2d at 1311. And even this watered-down version of the Second Amendment "right" is subject to the vagaries of trial practice. A defendant can lose the right to raise the affirmative defense if, for example, she fails to provide timely notice of her intent to raise it. *Parzick,* 835 N.E.2d at 1176-1177. Thus, a valid FID card does not confer the right *enumerated by the Second Amendment*, it confers merely the right to present evidence to a judge or jury that the State has granted one limited permission to exercise the Second Amendment right. Because lack of an FID card is not an element of § 10(h)(1)*, everyone* who keeps a firearm, rifle, shotgun or ammunition in their home remains eligible for prosecution. *See* note 8, *supra*. This is backwards; it is the state who must justify the deprivation of the enumerated constitutional right, not a defendant who must persuade a judge or jury she has it. *See Heller*, 554 U.S. at 634.

Consequently, there are no circumstances in which any individual in Massachusetts maintains an unfettered right to possess a firearm, rifle, shotgun, or ammunition at home. To be ineligible for punishment, even a defendant with a valid FID card, as the Commonwealth acknowledged on appeal, "must produce evidence that will exculpate him," and pray the jury believes it. Government Brief, p. 26; APPX/8; accord *Powell*, 946 N.E.2d at 124. The jury, of course, is free to reject an

affirmative defense. *See Gouse*, 965 N.E.2d at 461 Mass. at 788-791.[9] Because §10(h)(1) criminalizes the very conduct protected by the Second Amendment, it is facially invalid "[u]nder any of the standards of scrutiny that [this Court has] applied to enumerated constitutional rights." *Heller*, 554 U.S. at 627-628.[10]

C. *Where the state's licensing scheme confers only the limited Second Amendment "right" to raise licensure as an affirmative defense if prosecuted for possession of a firearm, it does not save M. G. L. c. 269, § 10(h)(1) from facial invalidity.*

Contrary to the view taken by the SJC, *see* note 8, *supra*, the existence of a state licensing regime that allows some individuals to obtain an FID card does not save the statute. To obtain the state's watered-down version of the core, Second Amendment right, a defendant must first apply for an FID card from the state's licensing authority. *See* M. G. L. c. 140, §§ 121, 129B, 129C; note 3, *supra*. The licensing authority is "the chief of police or the board or officer having control of the police in a city or town, or persons authorized by them." M. G. L. c. 140, § 121. The chief of police may deny an individual an FID card for any arguably rational reason, and appealing the denial requires the applicant to prove the denial was arbitrary or capricious. *Chief of Police of Taunton v. Caras*, 95 Mass. App. Ct. 182, 185-186; 122

[9]Although prosecutors, as a practical matter, may be unlikely to prosecute those with a valid FID card, that is a matter of prosecutorial discretion, not observance of an *enforceable* Second Amendment right. Compare *New York State Rifle & Pistol Assn., Inc. v. City of New York, New York*, 140 S. Ct. 1525, 1535 (2020)(Alito, J., in dissent)(noting plaintiffs would be entitled to nominal and potentially compensatory damages for state's violation of their Second Amendment rights).

[10]*See also Wrenn v. District of Columbia,* 864 F.3d 650, 667 (D.C. Cir. 2017) (law requiring residents to provide "good reason" to licensing authority for possessing firearm was tantamount to a ban of most D.C. residents' core, Second Amendment right and was therefore invalid under any standard of scrutiny); *Moore v. Madigan,* 702 F.3d 933, 934, 942 (7th Cir. 2012) (law that banned possession of ready-to-use firearm outside home was facially invalid under Second Amendment).

N.E.3d 1073 (2019); *Chief of Police of Shelburne v. Moyer*, 16 Mass. App. Ct. 543, 546; 453 N.E.2d 461 (1983) ("The burden is upon the applicant to produce substantial evidence that he is a proper person to hold a license to carry a firearm"); *see* M. G. L. c. 140, § 129B. This procedure itself violates the Second Amendment because more than a rational basis is required to deprive a defendant of Second Amendment rights. "If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect." *Heller,* 554 U.S. at 629 n.27

Furthermore, under § 10(h)(1) specifically, requiring the defendant to "come forward with [] evidence" of a valid FID card, *Powell*, 946 N.E.2d at 124, as a condition for avoiding criminal conviction for gun possession violates the presumption of innocence and improperly allocates and lowers the state's burden of proof. *See Simmons v. United States*, 390 U.S. 377, 394 (1968) ("we find it intolerable that one constitutional right should have to be surrendered in order to assert another"). This Court reversed a defendant's conviction under a statute that operated similarly. *See Haynes v. United States*, 390 U.S. 85, 95 (1969) (reversing defendant's conviction for possession of *unregistered* firearm where, under the criminal statute, "possession shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such possession to the satisfaction of the jury"). The D.C. Court of Appeals has deemed a similar law unconstitutional, explaining:

> "Where the Constitution—in this case, the Second Amendment—imposes substantive limits on what conduct may be defined as a crime, a legislature may not circumvent those limits by enacting a statute that presumes criminality from constitutionally-protected conduct and puts the burden of persuasion on the accused to prove facts necessary to establish innocence."

Herrington v. United States, 6 A.3d 1237, 1244 (D.C. App. 2010). *See also Conley v. United States*, 79 A.3d 270, 272-273 (D.C. App. 2013) (invalidating statute criminalizing voluntary presence in a vehicle containing a firearm where, "instead of requiring the government to prove that the defendant's continued presence was voluntary [the statute] requires the defendant to shoulder the burden of proving, as an affirmative defense, that his presence in the vehicle was involuntary").

Under state law, the burden imposed on a defendant to produce evidence of an FID card has been treated as both an affirmative defense and an evidentiary presumption of unlawful possession. *See Jones*, 361 N.E.2d at 1311 (valid firearm license "is an affirmative defense"); *Parzick*, 835 N.E.2d at 1176 (until defendant shows proof of valid FID card, a "presumption remains in effect that he was not licensed").

> "If licensure is an affirmative defense under the Massachusetts scheme, that scheme must accord with the Supreme Court's doctrine on affirmative defenses. On the other hand, if licensure is an element of the offense that is subject to proof by presumption under the Massachusetts scheme, that scheme must accord with the Supreme Court's doctrine on presumptions."

Powell v. Tompkins, 783 F.3d 332, 350 (1st Cir. 2015) (Torruella, J., dissenting from denial of habeas on due process grounds where defendant was convicted for violating § 10(h)(1)). Section 10(h)(1) complies with neither.

Treating a defendant's "compl[iance] with the provisions of section 129C of chapter 140," § 10(h)(1) as an affirmative defense offends due process. Due process

"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). "[U]nlawfulness is essential for conviction." *Martin v. Ohio*, 480 U.S. 228, 235 (1987).[11] An affirmative defense establishes the existence of "exculpatory or mitigating circumstances affecting the degree of culpability or the severity of the punishment" attributable to an *unlawful* act. *Patterson v. New York*, 432 U.S. 197, 207 (1977). In *Patterson*, this Court held that it was constitutionally permissible to require a defendant to prove by a preponderance of the evidence that she was operating under a severe emotional disturbance in order to reduce the crime of murder to manslaughter. *Id*. at 209-210. This burden was lawful, the Court reasoned, because:

> "in each instance of a murder conviction under the present law New York will have proved beyond a reasonable doubt that the defendant has intentionally killed another person, *an act which it is not disputed the State may constitutionally criminalize and punish."*

Id. at 209 (emphasis added). Unlike intentionally killing another person, passively keeping a firearm or ammunition at home is not inherently harmful or blameworthy; it involves no culpable act whatsoever. More importantly, unlike killing another person, the right to keep arms at home is an enumerated constitutional right. It is conduct that "the State may [not] constitutionally criminalize and punish." *Id*. *See McDonald*, 561 U.S. at 767-768. To avoid criminalizing conduct protected by the Second Amendment, the necessary

[11]Compare *United States v. Apfelbaum,* 445 U.S. 115, 131 (1980) ("In the criminal law, both a culpable *mens rea* and a criminal *actus reus* are generally required for an offense to occur").

ingredient of unlawfulness under § 10(h)(1) would have to stem from the defendant's failure to comply with the requirement of obtaining an FID card (as the text of the statute would indeed suggest), and due process demands that the State prove that which renders the defendant's conduct unlawful.[12] *In Re Winship*, 397 U.S. at 364; *see Patterson*, 432 U.S. at 209-210. Because lack of a valid FID card is not an element of the offense, the Commonwealth is not required to prove any unlawful act to obtain a conviction -- that is, any act the state may constitutionally criminalize and punish. Thus, treating as an affirmative defense the only fact that could render the conduct unlawful – lack of a valid FID card - violates due process. *See In Re Winship*, 397 U.S. at 364; *Patterson*, 432 U.S. at 209-210; *Herrington*, 6 A.3d at 1244; *Conley,* 79 A.3d at 272-273.

Treating a defendant's passive possession of the relevant arm at home as presumptively unlawful also violates due process and imposes a presumption of guilt upon the exercise of the core Second Amendment right. Due process places limits on a state's power "to make the proof of one fact or group of facts evidence of the existence of the ultimate fact on which guilt is predicated." *Tot v. United States*, 319 U.S. 463, 467 (1943). At the very least,

> "a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience."

[12]Whether, consistent with the Second Amendment, the state could criminalize the failure to register a rifle or shotgun one keeps only at home is a separate, unanswered question. *See Heller,* 801 F.3d at 273 ("Registration requirement for long guns lacks [the] historical pedigree" of registration requirement for handguns, and is not presumptively constitutional).

Id. at 468. *See also County Ct. of Ulster County, N. Y. v. Allen*, 442 U.S. 140, 156(1979) (presumption is constitutional only if it does "not undermine the factfinder's responsibility at trial…to find the ultimate facts beyond a reasonable doubt"). Under this standard, the *Tot* Court invalidated a statute which presumed, from proof of the defendant's prior conviction of a crime of violence and present possession of a firearm, that the firearm was "received by him in interstate or foreign commerce" after the effective date of the statute. The Court concluded that the facts proved lacked a rational connection to the facts presumed. *Tot*, 319 U.S. at 466. Likewise, here, proof that the defendant knowingly possessed a firearm does not support a reasonable inference (never mind proof beyond a reasonable doubt) of the presumed fact -- that she lacked a valid FID card. "[T]his alleged connection is not rational. To see this error, one need only consider that the act of performing surgery does not suggest that the surgeon lacks a medical license." *Powell*, 783 F.3d at 361 (Torruella, J., dissenting). *See also Morrison v. People of State of California*, 291 U.S. 82, 90 (1934). In *Morrison*, a state statute made it a crime to possess land if one was both a noncitizen and ineligible for citizenship. *Id*. at 83-84. The statute required the state to prove only that the defendant possessed the land and placed on the defendant "the burden of proving citizenship." *Id*. at 84. This Court held the statute created an unconstitutional presumption of guilt, where the conduct the state was required to prove "conveys no hint of criminality." *Id*. at 94, 96.

Section 10(h)(1) operates the same way. The knowing possession of a firearm within one's own home "conveys no hint of criminality." *Id*. Therefore, a

presumption of unlawfulness from the "naked fact" of possession is unconstitutional under due process protections and the Second Amendment. *Id.*; *see Sandstrom v. Montana,* 442 U.S. 510, 524 (1979).

As illustrated above, the existence of a licensing scheme that allows some people to obtain an FID card does not save the statute under the Second Amendment because a valid FID card does not confer the core, Second Amendment right. Ostensibly, "[t]he goal of firearms control legislation in Massachusetts is to limit access to deadly weapons by irresponsible persons." *Ruggiero v. Police Commissioner of Boston*, 18 Mass. App. Ct. 256, 464 N.E.2d 104, 106 (1984). Section 10(h)(1) does not target the possession of firearms by "irresponsible persons," *id.*, "felons and the mentally ill," or possession in "sensitive places." *Heller*, 554 U.S. at 626. It targets *everyone*. "A statute which, under the pretence of regulating, amounts to a destruction of the right...would be clearly unconstitutional." *Heller*, 554 U.S. at 629, citing *State v. Reid*, 1 Ala. 612, 616-617 (1840). *See McDonald*, 561 U.S. at 749 (striking down ordinance that prohibited possession of firearm without registration certificate, where registration requirements effectively banned possession). Like the laws struck down in *Heller* and *McDonald*, under the pretense of regulating the possession of firearms, § 10(h)(1) effectively bans the exercise of the core, Second Amendment right.

D. M. G. L. c. 269, § 10(h)(1) promotes racial inequality and deters the exercise of the constitutional right.

As this Court has often recognized, laws that place little or no limits on police or prosecutorial discretion risk arbitrary and discriminatory enforcement. *See City*

of Chicago v. Morales, 527 U.S. 41, 53, 56 (1999); *Kolender v. Lawson*, 461 U.S. 352, 358 (1983). Because § 10(h)(1) prohibits *everyone's* possession of firearms, rifles, shotguns, and ammunition, law enforcement has "virtually complete discretion" against whom to enforce the law. *Id*. at 358. Massachusetts gun laws are enforced primarily against Blacks and Hispanics. *See generally Racial Disparities* (APPX/18-120).

"Over 70% of the people charged with both carrying a firearm without a license and leaving a firearm unattended are Black or Latinx." APPX/70. The criminal offense with the highest share of Black and Latinx defendants is carrying a firearm without a license as a second offense; nearly 90% of such defendants are Black or Latinx. APPX/42. Blacks comprise 6.5% of the state population (APPX/33), but in 2010 accounted for 18.2% of convicted defendants overall and 51.4% of defendants convicted of a firearm offense carrying a mandatory minimum sentence. APPX/70. In the majority of those firearm cases – over 70% - the governing offense was carrying a firearm without a license. APPX/70. Black and Latinx defendants charged with firearm offenses "are more likely to be convicted and sentenced to incarceration and they also receive substantially longer incarceration sentences than similarly situated White defendants." APPX/64. In Massachusetts, disparities in the incarceration rates of Whites compared to Blacks and Hispanics are shocking; Blacks are incarcerated at 7.9 times the rate of Whites, while the disparity between

Hispanics and Whites is 4.9 to 1, the worst in the nation.[13]

There is no evidence that Massachusetts' exceptionally restrictive, punitive gun laws, including § 10(h)(1), serve any public safety interest. APPX/71-72 at n. 76. Just the opposite. Non-FID cardholders are members of the public whose health, safety and welfare matters. Spending years in jail or prison for exercising a core, constitutional right to protect one's family, self, and home does not serve the safety of this public. And § 10(h)(1) arguably poses a greater threat to public safety than the conduct it renders a crime, where it bans and deters the exercise of self-defense and defense of others at home.

Section 10(h)(1) not only promotes discriminatory enforcement, there is reason to believe it deters the lawful exercise of the core, Second Amendment right. Criminal statutes "that make unlawful a substantial amount of constitutionally protected conduct may be held facially invalid even if they also have legitimate application." *City of Houston, Tex. v. Hill*, 482 U.S. 451, 459 (1987). *Hill* held an ordinance prohibiting any conduct that interrupted a police officer engaged in her duties was facially invalid under the First Amendment in part because it chilled a form of lawful speech – challenging police action - that was central to the purpose of the First Amendment. *Hill*, 482 U.S. at 462-463. While this Court has not applied the First Amendment "overbreadth" doctrine to Second Amendment claims, §10(h)(1) gives rise to similar concerns, where it criminalizes a broad expanse of

[13]Massachusetts Sentencing Commission, Selected Race Statistics, September 27, 2016, p.2; The Sentencing Project, "The Color of Justice, Racial and Ethnic Disparity In State Prisons" (2021), page 5.

constitutionally protected conduct, and where Massachusetts has the lowest rate of gun ownership in the nation, a fact suggesting that the statute has chilled the very conduct the Second Amendment was designed to protect from state interference.[14]

E. Only this Court can restore to the people of Massachusetts their core, Second Amendment right.

For several reasons, it appears that the SJC has engaged in a "subterfuge to control or dissuade" exercise of the Second Amendment right, *Hill*, 402 U.S. at 459, and that only this Court can restore the core, Second Amendment right to the people of the Commonwealth.

First, the SJC's interpretation of § 10(h)(1) ignores the plain text of the statute, thereby overriding legislative intent. *See Powell*, 783 F.3d at 352 (Torruella, J., dissenting) (opining that SJC's interpretation of § 10(h)(1) defies the statute's plain meaning).

> "[The] very text make[s] clear that it the possession or carrying of a firearm *without a license* that constitutes the essential element of the crimes codified in Massachusetts General Laws chapter 269, section 10(a) and (h)."

Powell v. Tompkins, 926 F. Supp. 2d 367, 375 (D. Mass. 2013), aff'd, 783 F.3d 332 (1st Cir. 2015)(emphasis in original). Eliminating the operative phrase of § 10(h)(1) not only makes it easier to obtain a conviction, it renders all possession unlawful such that law enforcement can arrest, charge, and prosecute anyone possessing a gun or ammunition, even in their own home. That the purpose of the SJC's

[14]Schell, Terry L., Samuel Peterson, Brian G. Vegetabile, Adam Scherling, Rosanna Smart, and Andrew R. Morral, State-Level Estimates of Household Firearm Ownership, Santa Monica, CA: RAND Corporation, 2020 at Figure 2, page 21. Available at https://www.rand.org/pubs/tools/TL354.html.

interpretation is to avoid enforcing the Second Amendment is substantiated by the fact that the SJC applies an unconstitutional presumption of unlawfulness only in the Second Amendment context;[15] and further, by the fact that advocates continue to raise the same constitutional challenges to state gun laws, and the SJC steadfastly rejects them by adhering to a transparently unconstitutional analysis. *See* note 8, *supra*; discussion infra at 22-24. *See also Caetano,* 577 U.S. at 415 (Alito, J., concurring) (noting each step of SJC's analysis of defendant's Second Amendment claim defied this Court's reasoning in *Heller*).

Second, the SJC has erected an unconstitutional rule of standing that applies only to Second Amendment claims. Those convicted for the exercise of *this* Constitutional right (but not of others) are generally deprived of standing to claim on appeal that they were engaging in constitutionally protected activity. *See Powell*, 946 N.E. at 129 ("Instead of applying for an FID card, the defendant chose to violate the law. In these circumstances, we conclude that he may not challenge his conviction under G. L. c. 269, § 10(*h*)(1)"). Under the SJC's rule:

> "I]t is well-established that where, as here, a defendant opts to violate the law rather than apply for (and be denied) an FID card, he may not challenge his conviction pursuant thereto as unconstitutional under the Second Amendment."

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[15]*Contrast Commonwealth v. Munoz*, 384 Mass. 503, 507; 426 N.E.2d 1161, 1163-1164 (1981)(in prosecution for driving without insurance, reversing conviction where jury instruction imposed burden on defendant to present evidence he had insurance); *Commonwealth v. Oyewole*, 470 Mass. 1015, 1016; 21 N.E.3d 179, 181 (2014) (in prosecution for operating vehicle after license had been suspended for operating under the influence, which required proof defendant had notice of license suspension, Commonwealth "may not rely on a[n evidentiary] presumption…as a substitute for proving an element of its case beyond a reasonable doubt").

Commonwealth v. Brito, 83 Mass. App. Ct. 1127, 986 N.E.2d 895, 895 (2013) (unpublished), citing *Powell*, 946 N.E. at 129; *Loadholt*, 954 N.E.2d at 1129; *Johnson*, 958 N.E.2d at 37. *See also Harris*, 119 N.E.3d at 1163 n.5 (2019).[16] Presenting evidence of the denial of an FID card is an incriminating admission in the context of a prosecution for gun possession; hence, to gain standing to raise a Second Amendment claim, a defendant must opt to incriminate himself in the lower court. This rule of standing violates the privilege against self-incrimination, the presumption of innocence, and the right to appeal in one specific, judicially-designated context – the exercise of 2nd Amendment rights. *See* section I.B, *supra; Simmons*, 390 U.S. at 391 (standing to raise Fourth Amendment claim cannot be conditioned on surrender of Fifth Amendment privilege against self-incrimination).

Under a legitimate application of this doctrine, one who has not applied for and been denied a license generally lacks standing to challenge a *licensing regime* because a federal court's subject-matter jurisdiction turns on the existence of a bona fide case or controversy. *See Hamilton v. Pallozi*, 848 F.3d 614, 619-620 (4th Cir. 2017). One who has not been denied a license may not have suffered a judicially cognizable harm. *Id*. But, contrary to the reasoning advanced by the SJC, an appeal from a conviction under § 10(h)(1) is not a challenge to a licensing regime nor even

[16]Applying this principle in other contexts reveals its absurdity. Imagine a defendant convicted for shoplifting a pen being denied standing to challenge his life sentence as unconstitutional under the 8th Amendment because he "chose to violate the law," *Powell,* 946 N.E. at 129; or a defendant suspended from school for criticizing her school on social media being denied standing to challenge the suspension under the First Amendment because she "chose to violate" a school policy. *See Mahanoy Area School District v. B.L. and through Levy*, 141 S.Ct. 2038, 2042 (2021)(holding suspension from school cheering squad for posting profanity to personal social media account violated First Amendment).

to the denial of an FID card; it is a challenge to a criminal conviction. *See Dearth v. Holder*, 641 F.3d 499, 502 (D.C. Cir. 2011) (explaining the distinction). The state provides defendants a right to appeal, M. G. L. c. 278, §28, and a potentially wrongful conviction is a justiciable harm, so a defendant is entitled to claim on appeal that his acts "do not constitute a crime." *Commonwealth v. Hinds*, 101 Mass. 209, 210 (1869); *see Class v. United States*, 138 S.Ct. 798, 802-803 (2018) (guilty plea does not waive defendant's right to assert on direct appeal that the statute under which he was convicted violates the Second Amendment and Due Process clause). The SJC's reasoning for denying standing to defendants who claim their conduct was protected by the Second Amendment "border[s] on the frivolous," *Caetano*, 577 U.S. at 414, citing *Heller*, 554 U.S. at 582. *See* note 16, *supra*.

Third, the state's criminalization of Second Amendment activity ranks as extreme. *See e.g. Commonwealth v. Tout-Puissant*, 96 Mass. App. Ct. 1103, 1103; 137 N.E.3d 1077 (2019) (unpublished). There, the Appeals Court held the unit of prosecution for possession of ammunition under § 10(h)(1) is per unit of ammunition, which means Davoren could have been convicted of five counts of violating § 10(h)(1) and faced a decade of jail time just for possessing the shells found in his shotgun. *See also Commonwealth v. Kelly*, 484 Mass. 53, 138 N.E.3d 364 (2020). There, a Maine resident was convicted under § 10(h)(1) for momentarily handling a firearm at his father's home in Massachusetts, even though father and son were both lawful gun owners. *Id*. at 377-378. At issue on appeal was a statutory exemption to conviction under § 10(h)(1) which provides that a defendant may

temporarily hold or handle a firearm "in the presence of a holder of a license to carry firearms." *Id.* at 376-377, citing M.G.L. c. 140, § 129C(m). The exemption is an affirmative defense. *Id.* at 377. The defendant invited a friend to his father's house to see the firearm; the defendant could legally own a gun in Maine, and his father and his friend were both licensed to carry firearms in Massachusetts. *Id.* at 367. The SJC held the affirmative defense did not apply: where the defendant carried the gun (in a locked case) from the hallway to the bedroom *by himself*, and removed the handgun from the case before his friend arrived in the bedroom, *id.* at 367, 378, the defendant's possession was neither temporary nor "exclusively in the presence of a holder of a license to carry." *Id.* at 377.

In light of the foregoing, it appears the SJC has singled out core, Second Amendment rights as less worthy of judicial enforcement. And the limitations the SJC imposes on standing in the Second Amendment context "appear[] to be an obvious subterfuge to evade consideration of a federal issue," *Mullaney v. Wilbur*, 421 U.S. 684, 691 & n.11 (1975), namely, whether § 10(h)(1) violates the Second Amendment. How else to explain that the elements of § 10(h)(1) differ depending on which constitutional right the court is enforcing? When considering reasonable suspicion under the Fourth Amendment, lack of an FID card *is* an element of § 10(h)(1). *See Commonwealth v. Couture*, 407 Mass. 178, 183, 552 N.E.2d 538, 540 (1990). Under the Second Amendment, it is not.[17] *See* note 8, *supra.*

[17]*See Powell,* 783 F.3d at 340-341 ("in Massachusetts, the baseline of lawful possession afforded to an individual for Fourth Amendment purposes falls away in a criminal prosecution"); *but see id.* at 353 (Torruella, J., dissenting)("I do not see how...a state court,

CONCLUSION

Unlike the SJC, "[t]he Constitution does not rank certain rights above others." *Peruta v. California*, 137 S.Ct. 1995 (2017) (Thomas, J., dissenting from denial of certiorari). Like keeping a firearm at home, driving requires a license too, and poses at least as grave a threat to public safety,[18] but neither police nor courts presume everyone driving a car is driving without a license. *See Commonwealth v. Larose*, 483 Mass. 323, 326, 137 N.E.3d 360, 364 (2019).[19] When it comes to the Second Amendment, "[t]he reasoning of the Massachusetts court poses a grave threat to the fundamental right of self-defense," *Caetano*, 577 U.S. at 421 (Alito, J., concurring). The state's disregard for this fundamental right is further illustrated by the prosecutor's modest proposal, presented to Davoren's jury in closing argument, that, if Davoren felt unsafe at home, "[h]e could have moved." T2/62-63. The responsible, law-abiding people of Massachusetts who want to ensure the safety of themselves and their family in their own home should not have to choose between moving or facing a criminal prosecution under M. G. L. c. 269, § 10(h)(1). For all of the foregoing reasons, this Court should grant the petition for a writ of certiorari.

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consistent with due process [can] interpret a criminal statute to have three elements in one context but to have only two elements in another").

[18]See CDC National Vital Statistics Reports, Vol. 68, No. 9 (June 24, 2019), Table 7 (showing that in 2017 motor vehicle accidents caused slightly more deaths per capita than all firearm related deaths).

[19]It is also worth noting that, "in stark contrast to the lenient dispositions assigned to people convicted of [operating under the influence], people convicted of firearm possession offenses face" lengthy, mandatory minimum sentences," APPX/68; meanwhile, the vast majority of defendants who benefit from the lenient disposition attendant to drunk driving offenses are White. APPX/69.

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Respectfully submitted,

/s/ Jessica LaClair

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