No.:

IN THE SUPREME COURT OF THE UNITED STATES

JAMES ATKINSON, *Petitioner*

v.

COMMONWEALTH OF MASSACHUSETTS, *Respondent*

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

PETITION FOR WRIT OF CERTIORARI

Derege B. Demissie
DEMISSIE & CHURCH
929 Massachusetts Avenue, Suite 101
Cambridge, MA 02139

Counsel for Petitioner

QUESTIONS PRESENTED

1. Whether Mass. Gen. Laws. ch. 140, § 131(f)—which authorizes the Commonwealth of Massachusetts to suspend a law-abiding, adult citizen's License to Carry a Firearm after a subjective determination of "unsuitability" to possess such a license—is a proper analogue to a historical firearm regulation.
2. If found not to be a proper analogue to a historical firearm regulation, whether Mass. Gen. Laws. ch. 140, § 131(f) is facially against the Second Amendment of the United States Constitution.
3. Whether Mass. Gen. Laws. ch. 269, § 10(h)(1), which explicitly criminalizes the possession of handguns and ammunition within a law-abiding, adult citizen's home, violated Petitioner's Second Amendment Rights.

PARTIES RELATED TO THE PROCEEDINGS

All parties appear in the caption of the case on the cover page.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, James Atkinson, respectfully prays that a writ of certiorari issue to review the judgment of the Massachusetts Supreme Judicial Court in this case.

OPINION BELOW

The opinion of the Massachusetts Court of Appeals denying Petitioner's direct appeal appears at Appendix A and is reported as *Commonwealth v. Atkinson*, 100 Mass. App. Ct. 1133, 185 N.E.3d 941, WL 1099451 (2022). The decision of the Supreme Judicial Court denying Petitioner's Motion for Further Appellate Review appears at Appendix A.

JURISDICTION

The Essex Superior Court had exclusive original jurisdiction under Mass. Gen. Laws. ch. 212, § (6). After being found guilty by a jury, Petitioner timely filed a direct appeal challenging his conviction. On appeal, Petitioner argued that Mass. Gen. Laws. ch. 140, § 131 (f) violates the Second and Fourteenth Amendments of the United States Constitution because it allows the government to suspend a citizen's License to Carry a Firearm ("LTC") after a subjective determination of their "unsuitability," while simultaneously triggering immediate criminal penalties for unlawful possession of firearms. On April 13th, 2022, the Massachusetts Court of Appeals denied Petitioner's appeal. *See Appendix A.* On June 30th, 2022—eight days after this Court's opinion in *New York State Rifle & Pistol Association, Inc. v. Bruen,* 142 S. Ct. 2111 (2022)—the Massachusetts Supreme Judicial Court denied Petitioner's application for further appellate review. *See Appendix B.* Accordingly, this Court has jurisdiction of this matter under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Second and Fourteenth Amendments to the United States Constitution; the relevant Massachusetts firearm statutes involved in this case; the relevant federal statutes involved in this case; and other States' relevant firearms statutes are located at Appendices D, E, F, and G respectively.

STATEMENT OF THE CASE

On December 1st, 2009, Petitioner's License to Carry a Firearm ("LTC') was suspended by his local police department. Although Petitioner was not statutorily prohibited from possessing a LTC, the police Chief suspended his license after he determined Petitioner was "unsuitable" pursuant to Mass. Gen. Laws. ch. 140, § 131 (f). *See Appendix A.* On December 6th, 2009, the police searched Petitioner's home, believing that he had not relinquished his entire arsenal to them as is required by Mass. Gen. Laws. ch. 140, § 131 (f). *See Appendix A.* The police found additional firearms and ammunition as a result of the search. Petitioner was subsequently arrested, indicted, tried, and convicted for six firearm charges because of his LTC suspension. *See Appendix A.*

Mass. Gen. Laws. ch. 140, § 131 (f) grants the Massachusetts government the extraordinary power and discretion to suspend a citizen's LTC— which is the only license the Commonwealth provides that allows one to lawfully carry a firearm in public— simply on determination of "unsuitability" to hold such a license. This standard does not rely upon objective criteria; the citizen whose license was suspended immediately faces criminal penalties for unlawful possession of the very same firearms he or she was previously allowed to possess; and to reverse a suspension, the citizen faces the heavy and unenviable burden of proving the government's decision was not rational.

Furthermore, because the Supreme Judicial Court of Massachusetts has held that a firearm license is an affirmative defense to Mass. Gen. Laws. ch. 269, § 10(h)(1), Petitioner—a law-abiding, adult citizen prior to this case—was convicted by a jury for four (4) of the six (6) charges at issue: *exclusively on the evidence that he knowingly possessed two handguns and ammunition in his home*. *See Appendix G.*

The first question for this Court to decide is whether the discretionary power that Mass. Gen. Laws. ch. 140, § 131(f) grants the Commonwealth is a proper analogue to a historical firearm regulation. If this Court finds that it is not, the second question for this Court to decide is whether the statute facially violates the Second Amendment of the United States Constitution. The final question for this Court to decide is whether, as applied to Petitioner, Massachusetts violated his Second Amendment Rights when it criminally punished him solely on the evidence that he possessed two handguns and ammunition in his home: a conduct indisputably protected by the Second Amendment.

STATEMENT OF THE FACTS

I. Massachusetts' firearm licensing scheme.

To lawfully possess a firearm in Massachusetts, the Commonwealth requires a citizen to obtain either a Firearm Identification Card ("FID") or a License to Carry ("LTC"). *See* Mass. Gen. Laws. ch. 140, § 129C.

Although the current Massachusetts statute states a FID "shall not entitle a holder thereof to possess: (i) a large-capacity firearm… or (ii) a non-large-capacity firearm[,]" *see* Mass. Gen. Laws. ch. 140, § 129B(6) the Massachusetts Supreme Judicial Court has ruled that a FID permits the possession of non-large-capacity firearms and ammunition *within* the holder's residence or place of business. *See Chardin v. Police Commissioner of Boston*,

465 Mass. 314, 316 n.5 (2013) (emphasis added). Importantly, a FID does not allow the holder to carry a firearm to or in any other place. *Id.* To obtain a FID, an application must be submitted to the "relevant licensing authority," which is defined as "the chief of police or the board or officer having control of the police in a city or town, or persons authorized by them." *See* Mass. Gen. Laws. ch. 140, § 121. The licensing authority shall issue the applicant a FID if it appears that the applicant is not a statutorily prohibited person.[1] *See* Mass. Gen. Laws. ch. 140, § 129B (1) (i-xi).

Pertinent to this Petition, Massachusetts criminalizes the possession of any firearms or ammunition within a citizen's home if they do not also possess a valid FID or LTC. *See* Mass. Gen. Laws. ch. 140, § 129C and Mass. Gen. Laws. ch. 269, § 10(h)(1). However, because a FID is an affirmative defense to Mass. Gen. Laws. ch. 269, § 10(h)(1), and not an element of the crime, a law-abiding, adult citizen in Massachusetts can be convicted under the law based on exclusively the proof that the person possessed a handgun and ammunition at home. *See Commonwealth v. Gouse*, 461 Mass. 787, 802 (2012).[2]

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[1] The statute defines a "prohibited person" based on eleven objective criteria, such as age, legal resident status, and criminal history. *See e.g.* Mass. Gen. Laws. Ch. 140 § 129B (1) (i-xi).

[2] Mass. Gen. Laws. ch. 269, § 10(h)(1) states "[w]hoever owns, possesses or transfers a firearm, rifle, shotgun or ammunition without complying with the provisions of section 129C of chapter 140 [which includes having a valid FID or LTC] 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." *Id.* Although the statute's language appears to state that not possessing a valid FID or LTC is an element of the offense, the Supreme Judicial Court has ruled the opposite, and has "long held that possession of a Massachusetts firearm license is an affirmative defense [to the statute]." *See Commonwealth v. Harris*, 481 Mass. 767, 772 (2019); *see also Commonwealth v. Johnson*, 461 Mass. 44, 53 (2011) (holding "to convict [a] defendant of unlawful possession of ammunition, the Commonwealth [is] required to prove that the defendant knowingly possessed ammunition that met the legal definition of ammunition"). Thus, as evidenced by Petitioner, a law-abiding citizen can be imprisoned simply if they knowingly possess a commonly used firearm and ammunition in their home. However, because other

Unlike a FID, a LTC allows the possession of (1) non-large-capacity-firearms, feeding devices, and ammunition and (2) large-capacity firearms, feeding devices, and ammunition inside *and* outside of the holder's home or place of business. *See* Mass. Gen. Laws. ch. 140, § 131. To obtain a LTC, an applicants must demonstrate to the relevant licensing authority (1) that they are not statutorily prohibited[3] from being issued a license and (2) that "[they have] good reason to fear injury to [themselves] or [their] property[.]"[4] *Id.*

Pertinent to this Petition, the licensing authority may suspend a LTC pursuant to Mass. Gen. Laws ch. 140, § 131(f) "upon the occurrence of any event that would have disqualified the [licensee] from being issued [a] license,"[5] or if the licensing authority believes that the licensee is "unsuitable" to possess a LTC. *See* Mass. Gen. Laws ch. 140, § 131(f). Rather than relying on objective criteria, Mass. Gen. Laws ch. 140, § 131(d) states that the licensing authority's suitability determination shall be based on the following:

> "[1] reliable and credible information that the applicant or licensee has exhibited or engaged in behavior that suggests that, if issued a license, the applicant or licensee may create a risk to public safety; or [2] existing factors that suggest that, if issued a license, the applicant or licensee may create a risk to public safety."

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persons convicted under this statute could have had evidence introduced at their trial that they did not have a valid FID or LTC; or were not an adult law-abiding citizen; or were in possession of an uncommonly used firearm, Petitioner only challenges Mass. Gen. Laws. ch. 269, § 10(h)(1) as applied to him. *See infra at Part III.*

[3] Mass. Gen. Laws. ch. 140, § 131(d) lists ten (10) objective requirements for LTC applicants to not be considered a "prohibited person." *See Id.* Petitioner does not take issue with this objective firearm regulation.

[4] This portion of Massachusetts firearm regulation was overruled by this Court in *Bruen. See New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S. Ct. 2111 at 2124 fn.2 (2022).

[5] Petitioner does not take issue with this portion of the law, as it is based on the objectively defined "prohibited person."

The Massachusetts Supreme Judicial Court has ruled that the goal of the "unsuitability" standard is to "limit [the] access to deadly weapons by irresponsible persons," *see Chief of Police of Worcester v. Holden*, 470 Mass. 845, 853 (2015) (quoting *Ruggiero v. Police Commissioner of Boston*, 18 Mass. App. Ct. 256, 258 (1984)) and that the standard gives the licensing authority "considerable latitude" and "broad discretion" in making a decision. *See Chardin v. Police Commissioner of Boston*, 465 Mass. 314, 316 (2013). Relevant to this Petition, the Massachusetts Supreme Judicial Court has held that the "unsuitability" standard allows the Commonwealth of Massachusetts to suspend a LTC *in spite* of the fact that a holder has not been convicted of a crime. *See e.g. Holden*, 470 Mass. at 856 (2015) (holding "[t]he fact that there was no conviction removes the incident as a license disqualifier, but it does not remove the chief's consideration of the incident on the question of Holden's suitability"). The Massachusetts Supreme Judicial Court has also held the "unsuitable" standard passes muster under both the United States Constitution and the Massachusetts Constitution pursuant to a rational basis analysis. *See Holden*, 470 Mass. at 854.

A person whose LTC is suspended no longer has a valid FID card and must immediately "deliver or surrender, to the licensing authority [] all firearms, rifles, shotguns and machine guns and ammunition which [they] then possess[] unless an appeal is pending." *See* Mass. Gen. Laws. ch. 140, § 129D. Although Mass. Gen. Laws. ch. 140, § 129D declares that a pending appeal relieves a suspended LTC holder of his or her duty to relinquish firearms, Mass. Gen. Laws. ch. 140, § 131(f) states that "[n]o appeal or post-judgment motion shall operate to stay [a LTC] suspension." Thus, whether or not the suspended holder has decided to appeal the LTC suspension, he or she is prohibited from lawfully carrying *any firearm* outside of the home for purposes of self-defense. Furthermore,

the suspended LTC holder is also certainly deterred from attempting to do so—no matter how important the need for self-defense—given the criminal penalties attached to unlawful possession of a firearm outside of the home. *See* Mass. Gen. Laws. ch. 269, § 10.

Additionally, although filing a petition to obtain judicial review is the only option the suspended LTC holder has available to regain an ability to publicly carry a firearm for protection, *see* Mass. Gen. Laws. ch. 140, § 131(f), this "option" thrusts upon the individual the heavy burden of demonstrating that the licensing authority's decision was unreasonable, arbitrary, capricious, or an abuse of discretion. *See Id.*; *see also Hightower v City of Boston*, 693 F.3d 61, 86 (1st Cir. 2012) (citations omitted).

II. <u>The licensing regulation's impact on Petitioner.</u>

As mentioned above, although not statutorily prohibited from possessing such a license, Petitioner's LTC was suspended after his local police department found he was "unsuitable." Because Petitioner did not have a valid FID card at the time his LTC was suspended, Petitioner was required to hand over all of his firearms and ammunition to the police department. *See* Mass. Gen. Laws. ch. 140, § 129D. However, the police department did not believe that Mr. Atkinson had done so, and they subsequently searched Mr. Atkinson's home. *See Appendix A.* During the search of the home, the police found two handguns;[6] two magazines that could hold more than ten rounds of ammunition (large-capacity magazines as defined by Mass. Gen. Laws ch. 140, § 121); and ammunition associated with the two recovered magazines. *See Appendix G.* Mr. Atkinson was then

[6] The two handguns found were a .22 revolver and a .357 magnum revolver. *See Appendix G.*

arrested as he was prohibited from possessing any firearms or ammunition due to his suspended LTC and his not having a valid FID card. *See Appendix A.*

On April 4th, 2011, Petitioner was indicted with six counts of firearm violations.[7] After several delays, on February 21st, 2017, Petitioner was tried before a jury, and he was convicted on all six charges two days later. *See Appendix A.*

Because not possessing a valid FID card is not an element of the offense for unlawful possession of a handgun and ammunition in one's home, *see supra at fn. 3*, the only issue in dispute at Petitioner's trial for Counts one (1) through four (4), was whether or not Petitioner had knowledge that he possessed the two handguns and ammunition in his home. No evidence was presented to the jury that Mr. Atkinson did not have a valid FID card.[8] *See Appendix G.* Accordingly, for those four charges: Petitioner was explicitly convicted for simply possessing two handguns and ammunition in his home.

On March 30th, 2017, Mr. Atkinson was sentenced to two years of probation, and he is prohibited from applying for a FID or LTC, and thus is prohibited from possessing any firearms or ammunition for the rest of his life. After sentencing, Mr. Atkinson timely filed an appeal on June 25th, 2018.

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[7] Mr. Atkinson was charged with two counts of not being licensed or otherwise authorized by law, to own, possess, or transfer possession of ammunition without complying with the requirements relating to the firearm identification card provided for in Mass. Gen. Laws. ch. 140 § 129C (Counts 1 & 2); two counts of not being licensed or otherwise authorized by law, did own, possess, or transfer possession of a firearm without complying with the requirements relating to the firearm identification card provided for in Mass. Gen. Laws. ch. 140 § 129C (Counts 3 & 4); and two counts of knowingly possessing a large-capacity weapon or large-capacity feeding device (Counts 5 & 6) *See Appendix G.*

[8] *See Appendix G.*

On appeal, Mr. Atkinson argued that the suspension of a LTC pursuant to Mass. Gen. Laws. ch. § 131 (f)'s "unsuitability" standard, and the subsequent criminal penalties that are immediately attached after a suspension, facially violates the Second Amendment. *See Appendix A.* Petitioner also argued that Mass. Gen. Laws. ch. 269, § 10(h)(1) unconstitutionally criminalizes the possession of firearms within the home, as this is conduct protected by the Second Amendment. *See Appendix A.* After several delays, on April 13th, 2022, the Massachusetts Court of Appeals denied Mr. Atkinson's appeal. On June 30th, 2022—eight days after this Court's holding in *Bruen*—Mr. Atkinson's application for further appellate review was denied by the Massachusetts Supreme Judicial Court. *See Appendix B.*

REASONS FOR GRANTING THE PETITION

I. Mass. Gen. Laws. Ch. 140, § 131(f) violates the Second Amendment of the United States Constitution because it allows Massachusetts to suspend a law-abiding citizen's license to carry a firearm after a subjective determination of their "unsuitability."

A. The Second Amendment's plain text presumptively guarantees the conduct that Mass. Gen. Laws. Ch. 140 § 131(f) seeks to regulate.

On June 23rd, 2022, this Court announced the new standard of review for firearm regulations in *New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S. Ct. 2111 (2022).[9] After explicitly rejecting the use of means-end analysis that has been applied for Second Amendment claims by Federal Appeals Courts (and the Massachusetts Supreme Judicial Court[10]), this Court ruled:

> "[w]hen the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation. Only then may a court conclude that the individual's conduct falls outside the Second Amendment's 'unqualified command.'"

Bruen, 142 S. Ct. at 2129–30 (quoting *Konigsberg v. State Bar of California*, 366 U.S. 36 at 50 fn. 10 (1961).

In regard to the scope of its plain text, this Court held that the Second Amendment presumptively guarantees law-abiding, adult citizens a right to publicly bear firearms commonly used for self-defense. *Bruen*, 142 S. Ct. at 2126. These presumptive guarantees

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[9] The new standard of review announced by this Court invalidated Mass. Gen. Laws. ch. 140, § 131(d), which required one to demonstrate they had "good reason" for a license to carry a firearm. *See e.g. Bruen*, 142 S. Ct. at 2124 fn. 2.

[10] *See e.g. Holden*, 470 Mass. at 858 (2015) (The Massachusetts Supreme Judicial Court applying means-ends analysis to a Second Amendment claim regarding the constitutionality of Massachusetts' "unsuitability" standard).

are indisputably and explicitly regulated by Mass. Gen. Laws. Ch. 140 § 131(f)'s "unsuitability" standard.

1. Mass. Gen. Laws. ch. 140, § 131(f)'s "unsuitability" standard regulates law-abiding citizens.

As stated by this Court in *Bruen*, "law-abiding, adult citizens—are part of 'the people' whom the Second Amendment protects." *Id.* at 2134; *see also Id.* at 2131 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 635) (2008) (The Second Amendment "is the very *product* of an interest balancing by the people" and it "surely elevates above all other interests the right of law-abiding, responsible citizens to use arms" for self-defense). Contrary to this holding however, Mass. Gen. Laws. ch. 140, § 131(f) grants the Massachusetts government the incredible power to suspend *a law-abiding, adult citizen's* LTC simply if it determines that they are "unsuitable." *See* Mass. Gen. Laws. ch. 140, § 131(f). As discussed above, the "unsuitability" determination is based on: "[1] reliable and credible information that the [] licensee has exhibited or engaged in behavior that suggests the [] licensee may create a risk to public safety; or [2] existing factors that suggest that the [] licensee may create a risk to public safety." *See* Mass. Gen. Laws. ch. 140, § 131(d). Although the goal of the statute is notable, as it intends to limit "irresponsible persons" from accessing firearms, *see e.g. Ruggiero,* 18 Mass. App. Ct. at 258, it explicitly regulates *law-abiding, adult citizens.* "Irresponsible persons" are not, cannot, and should not, be considered non-law-abiding, adult citizens. *See Bruen*, 142 S. Ct. at 2134 (holding law-abiding, adult citizens are protected by the Second Amendment to carry firearms commonly used for self-defense).

Furthermore, as mentioned above, the highest court in Massachusetts has even held that the "unsuitability" standard allows the government to suspend a LTC: *in spite* of the fact that a holder is a law-abiding, adult citizen *See e.g. Holden*, 470 Mass. at 856 (2015).

Given how the statute has been interpreted by Massachusetts' highest court, along with the statute's unambiguous language, it cannot be disputed that Mass. Gen. Laws. ch. 140, § 131(f)'s "unsuitability" standard regulates *law-abiding, adult citizens*' Second Amendment right to carry firearms.

2. Mass. Gen. Laws. ch. 140, § 131(f)'s unsuitability standard regulates the public carrying of commonly used firearms.

In *Heller*, this Court ruled that the Second Amendment's Operative Clause "guarantee[s] the individual right to possess and carry weapons in case of confrontation. *See Heller,* 554 U.S. at 592 (2008); *see also McDonald v. Chicago, Illinois*, 561 U.S. 742, 767 (2010) (quoting *Heller* 554 U.S. at 592) (holding "individual self-defense is 'the central component' of the Second Amendment" and is incorporated onto the states via the Fourteenth Amendment). Although this Court in *Heller* was focused on handguns within one's home, the essential holding of the case—that the Second Amendment protects the right to possess and carry firearms for self-defense purposes—was re-affirmed in *Bruen*, when this Court ruled the Second Amendment's plain text presumptively guarantees a right to *publicly* bear arms. *See e.g. Bruen*, 142 S. Ct. at 2134 (emphasis added).

In regard to the *type* of firearms the Second Amendment's plain text presumptively guarantees a right to publicly bear, this Court has ruled that it "extends prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding." *See Heller* 554 U.S. at 582. However, as is the case for every Constitutional Right, the Second Amendment is not unlimited, and it does not protect the

carrying of "dangerous and unusual" firearms. *Heller*, 554 U.S. at 627. A firearm is "dangerous and unusual" if it is not *commonly used* for *self-defense purposes* in *contemporary America*. *See Bruen*, 142 S. Ct. at 2143 (emphasis added) (holding even if handguns were considered 'dangerous and unusual' during the colonial period, they are indisputably in 'common use' for self-defense today); *see also Caetano v. Massachusetts*, 577 U.S. 411 (2016) (holding lack of common use of stun guns at time of Second Amendment's enactment and unusual nature of stun guns as a modern invention did not preclude stun guns from being protected by Second Amendment).

Although this Court has held that firearms commonly used for self-defense are protected by the Second Amendment, this Court has only explicitly ruled one type of firearm is protected under the Amendment— the modern handgun. *See e.g. Bruen* 142 S. Ct. at 2143; *see also Heller* 554 U.S. at 629 (finding handguns are the most popular weapon chosen by Americans for self-defense in the home). A majority of this Court has also neither explicitly outlined the standard which other courts should follow when determining a firearm's common use. *See e.g. Hollis v. Lynch*, 827 F.3d 436, 449 (5th Cir. 2016) (quoting *Friedman v. City of Highland Park*, 784 F.3d 406, 409 (7th Cir. 2015) (stating "what line separates 'common' from 'uncommon' ownership is something the Court did not say [in *Heller*]"). Even in *Caetano*, where this Court reversed the Massachusetts Supreme Judicial Court and held that the modernity of a stun gun did not prevent it from receiving Second Amendment protection: the per curiam opinion did not explicitly state that "stun guns" were protected by the Second Amendment. *See Id.*

Nevertheless, Federal District and Circuit courts have held the initial burden is on the government to demonstrate that a specific firearm is not "commonly used." *See e.g. New*

York State Rifle & Pistol Association, Inc. v. Cuomo, 804 F.3d 242, 257 fn.73 (2d Cir. 2015) (holding that *Heller* "identifies a presumption in favor of Second Amendment protection, which the State bears the initial burden of rebutting"); *see also Tyler v. Hillsdale County Sheriff's Department*, 837 F.3d 678, 685-86 (6th Cir. 2016) (placing burden on government to demonstrate that the law regulates conduct outside the scope of the second amendment); *but see Hollis v. Lynch*, 827 F.3d 436, 447 (5th Cir. 2016) (holding "[t]here is no prima facie case ... when the weapon is not one 'in common use at the time"). Federal courts have held that the government can rebut this presumption by pointing to objective, statistical data that indicates a firearm is not "commonly used." *See Lynch*, 827 F.3d at 449. However, courts across the country have varied greatly in their use of statistics when making their determination. *Id.* For example, some courts make their determination based on the total number of a particular weapon. *See New York State Rifle & Pistol Association v. Cuomo*, 804 F.3d at 255 (finding magazines that hold more than ten rounds of ammunition—or "large-capacity feeding devices" as defined by Massachusetts— are commonly used because there were around 50 million of such magazines in America in the year 2000). Other courts have used proportions and percentages to make their determination. *See Kolbe v. Hogan*, 813 F.3d 160, 174 (4th Cir. 2016) (finding "AR–15s" are in common use because they made up 5.5 % of all firearms, and 14.4% of all rifles that were produced in the United States); *but see Friedman* 784 F.3d at 409 (finding "AR-15s" are not commonly used because only 9% of the nation's firearm owners have assault weapons).

In his concurring opinion in *Caetano*, which was joined by Justice Thomas, Justice Alito identified another, more appropriate way to determine if a firearm is commonly used. First, Justice Alito rejected that the total number of a particular weapon is the "relevant statistic" given that could allow states to prohibit all firearms besides handguns because

they "are the most popular weapon chosen by Americans for self-defense." *Caetano*, 577 U.S. at 420 (2016) (quoting *Heller*, 554 U.S. at 629) (Alito, J., concurring in judgment). Justice Alito then concluded the "more relevant statistic" is the fact that around 200,000 stun guns have been sold to private citizens in 45 states that do not prohibit such a weapon. *Id.*

Justice Alito's test for common-use—the counting of jurisdictions, coupled with an objectively large number of a certain firearm being lawfully possessed by citizens (i.e. 200,000)— is more appropriate than only relying on either the total number of a certain firearm or the proportional prevalence of a certain firearm for several reasons. This test will restrict the number of varied holdings by courts across the Country as to what constitutes a "commonly used" firearm. *Compare Kolbe v. Hogan*, 813 F.3d at 174 (finding AR-15s are commonly used given the objective statistics); *with Friedman v. City of Highland Park*, 784 F.3d at 409 (7th Cir. 2015) (finding Ar15s are not commonly used given the objective statistics). The limited variation will further strengthen the protection the Second Amendment provides for *all Americans*, regardless of where they live or which judge happens to preside over their case. The counting of jurisdictions also correctly applies this Court's holding that the Second Amendment does not protect "dangerous and unusual" firearms, because if these weapons were in fact "dangerous and unusual," their possession would be prohibited in a sufficient number of states, and not in a small cluster of states. *See Heller*, 554 U.S. at 627.

In the present matter, Mass. Gen. Laws. ch. 140, § 131(f) indisputably regulates the right to publicly carry commonly used firearms. In Massachusetts, a LTC is the *only* license that allows a citizen to publicly carry either large or non-large-capacity firearms. *See* Mass.

Gen. Laws. ch. 140, § 131(a); *see also Chardin*, 465 Mass. at 316 fn. 5 (2013). A law-abiding, adult citizen deserves presumptive protection under the Second Amendment to publicly carry these firearms because—as defined by Massachusetts in Mass. Gen. Laws ch. 140, § 121[11]— they are commonly used by millions of Americans in the 21st Century. *See e.g. Bruen*, 142 S. Ct. at 2134 (emphasis added) (holding the Second Amendment's plain text presumptively guarantees a right to *publicly* bear *commonly used* firearms).

a) <u>"Non-large-capacity" firearms are commonly used.</u>

Massachusetts defines a "large-capacity firearm" as any firearm,[12] rifle,[13] or shotgun:[14]

> "[1]that is semi-automatic[15] with a fixed large-capacity feeding device;[16] [2] that is semi-automatic and capable of accepting, or readily modifiable to accept, any

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[11] Petitioner does not take issue with the regulation of any firearm that is currently prohibited: (1) by Federal Law; (2) in over 5 States *and* haven't been sold by the "hundreds of thousands" throughout the entire country, *see Caetano v. Massachusetts*, 577 U.S. 411, 420 (2016) (Alito, J., concurring in judgement); or (3) by the Massachusetts Assault Weapons ban. For example, Federal law prohibits the possession of firearms with obliterated serial numbers and machine guns or automatic weapons manufactured after May 19, 1986. *See* 18 U.S.C. § 922 (o). Petitioner does not take issue with the regulation of automatic weapons given this Federal law *and* the fact that their possession is prohibited in over 15 States. *See infra* at fn. 24.

[12] Massachusetts defines a "firearm" as "a stun gun or a pistol, revolver or other weapon of any description, loaded or unloaded, from which a shot or bullet can be discharged and of which the length of the barrel or barrels is less than 16 inches or 18 inches in the case of a shotgun as originally manufactured." *See* Mass. Gen. Laws. ch. 140, § 121.

[13] A "rifle" is defined as a weapon having a "rifled bore with a barrel length equal to or greater than 16 inches and capable of discharging a shot or bullet for each pull of the trigger." *See* Mass. Gen. Laws. ch. 140, § 121.

[14] A "shotgun", is defined as a weapon having a "smooth bore with a barrel length equal to or greater than 18 inches with an overall length equal to or greater than 26 inches, and capable of discharging a shot or bullet for each pull of the trigger." *See* Mass. Gen. Laws. ch. 140, § 121.

[15] A "semi-automatic firearm" is defined as a firearm that is "capable of utilizing a portion of the energy of a firing cartridge to extract the fired cartridge case and chamber the next round, and requiring a separate pull of the trigger to fire each cartridge." *See* Mass. Gen. Laws. ch. 140, § 121.

[16] A "large-capacity feeding device" is defined as a "fixed or detachable magazine, box, drum, feed strip or similar device capable of accepting, or that can be readily converted to accept, more than ten rounds of

> detachable large-capacity feeding device; [3] that employs a rotating cylinder capable of accepting more than ten rounds of ammunition in a rifle or firearm and more than five shotgun shells in the case of a shotgun or firearm; or [4] that is an assault weapon.[17]

See Mass. Gen. Laws. ch. 140, § 121. Accordingly, a "non-large-capacity firearm"[18] is any firearm, rifle, or shotgun that: (1) operates *manually*; (2) is semi-automatic, but *is not* able to accept a large-capacity magazine (fixed or detached); (3) does *not* employ a rotating cylinder capable of accepting more than ten rounds of ammunition in a rifle or firearm; (4) does *not* employ a rotating cylinder capable of accepting more than five shotguns shells; or (5) is *not* an assault weapon. These types of firearms are neither dangerous nor uncommon, as evident by their being lawfully allowed and possessed throughout an overwhelming majority of the country. *See Caetano*, 577 U.S. at 420 (2016) (Alito, J., concurring) (finding stun guns were commonly used given their being allowed in 45 states and the total number of stun guns sold was greater than 200,000).

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ammunition or more than five shotgun shells; or (ii) a large-capacity ammunition feeding device as defined in … 18 U.S.C. § 921(a)(31)." *See* Mass. Gen. Laws. ch. 140, § 121. 18 U.S.C.A. § 921 (a)(31) defines a large-capacity feeding device as "a magazine, belt, drum, feed strip, or similar device manufactured after the date of enactment of the Violent Crime Control and Law Enforcement Act of 1994 that has a capacity … to accept, more than 10 rounds of ammunition; but [] does not include an attached tubular device designed to accept, and capable of operating only with, .22 caliber rimfire ammunition. *See* 18 U.S.C.A. § 921 (a)(31).

[17] As discussed *supra* at fn. 12, Petitioner does not take issue with an assault weapon being classified as a large-capacity weapon as he is not challenging the regulation of these firearms.

[18] Massachusetts does not explicitly define a "non-large-capacity firearm." *See* Mass. Gen. Laws. ch. 140, § 121. However, Massachusetts does state that a firearm will not be considered "large-capacity" if: (1) it was manufactured in or prior to the year 1899; (2) it operates by manual bolt, pump, lever or slide action; (3) it is a single-shot weapon; (4) it has been modified so as to render it permanently inoperable or otherwise rendered permanently unable to be designated a large-capacity weapon; or (5) it is an antique or relic, theatrical prop or other weapon that is not capable of firing a projectile and which is not intended for use as a functional weapon and cannot be readily modified through a combination of available parts into an operable large-capacity weapon. *See* Mass. Gen. Laws. ch. 140, § 121.

For example, no state currently prohibits the possession of *manual* firearms, rifles, or shotguns incapable of accepting a large-capacity feeding device, unless (1) the barrel length is less than 16 inches in the case of a rifle (29 states)[19] or (2) the barrel length is less than 18 inches in the case of a shotgun (35 states).[20]

Additionally, according to a study conducted by the National Institute of Justice ("NIJ"), out of the estimated 65 million handguns that were privately owned in 1994: 60% operated *manually* (around 39 million).[21] The NIJ also estimated that out of the 70 million rifles that were privately owned in 1994: 60% did not operate semi-automatically (around 42 million).[22] Although the NIJ did not have an estimate as to how many shotguns operated

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[19] *See* Code §§ 13A-11-62,63 (Alabama); Alaska Stat. §§ 11.61.200(h)(1)(A-D) (Alaska); AZ Rev Stat § 13-3101 (Cum. Supp. 2021) (Arizona); CA Penal Code § 33210 (2021) (California); CO Code § 18-12-102 (2021) (Colorado); Fla. Stat. Ann. § 790.221 (2021) Florida); Ga. Code Ann. §§ 16–11–121, 23 (Supp. 2021) (Georgia); HI Rev Stat § 134-8 (Cum. Supp. 2021) (Hawaii); Ill. Comp. Stat., ch. 38, § 24/1 (2021) (Illinois); Iowa Code § 724.1C (2021) (Iowa); MD. Public Safety Code Ann. § 5-203 (2021) (Maryland); Mich. Comp. Laws § 750.224b (2021) (Michigan); MS Code § 97-37-31 (2020) (Mississippi); Mo. Rev. Stat. § 571.020 (2021) (Missouri); Mont. Code Ann. § 45-8-340 (2021) (Montana); Neb. Rev. Stat. § 28-1203 (2021) (Nebraska); Nev. Rev. Stat. § 202.275 (2021) (Nevada); N. C. Gen. Stat. Ann. § 14–288.8 (2021) (North Carolina); N. D. Cent. Code Ann. § 62.1–02–03, 05-01 (2021) (North Dakota); Ohio Rev. Code Ann. §§ 2923.11, 17 (2021) (Ohio); Okla. Stat., Tit. 21, § 1289.18 (2021) (Oklahoma); Ore. Rev. Stat. § 166.272 (2021) (Oregon); R. I. Gen. Laws §§ 11–47–8 (2021) (Rhode Island); SC Code §§ 16-23-210, 230 (2021) (South Carolina); SD Codified L §§ 22-1-2, 14-6 (2021) (South Dakota); Tenn. Code Ann. § 39–17–1302 (2021) (Tennessee); Tex. Govt. Code Ann. § 46.05 (2021) (Texas); Wash. Rev. Code Ann. § 9.41.190(1) (2021) (Washington); Wis. Stat. § 941.28 (2021) (Wisconsin).

[20] *See supra* at fn. 19; *see also* 11 DE Code § 1444. (2021) (Delaware); Kan. Stat. Ann. § 21–6301(a)(5) (2021) (Kansas); Minn. Stat. § 609.67 (2021) (Minnesota); N. J. Stat. Ann. § 2C:39-3 (2021) (New Jersey); 18 Pa. Cons. Stat. § 908 (2021) (Pennsylvania); S. D. Codified Laws § 22-14-6 (2021) (South Dakota).

[21] *See* Philip J. Cook and Jens Ludwig, *Guns in America: National Survey on Private Ownership and Use of Firearms*, National Institute of Justice, (May 1997), https://www.ojp.gov/pdffiles/165476.pdf.

[22] *See supra* at fn. 21. Although the NIJ study did not state that the non-semi-automatic rifles operated "automatically" or "manually," a 2020 report by Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") estimated that 726,951 machine guns (i.e. automatic weapons) were registered nationally. *See* United States

semi-automatically out of the 49 million that were privately possessed in 1994, the National Shooting Sports Foundation ("NSSF") has estimated that between 1990 and 2018, around 12 million *semi-automatic shotguns* were available for Americans to purchase legally.[23] Using these numbers, it is not unreasonable to assume that *millions* of *manual* shotguns were privately owned in 1994, and are currently owned.

In regard to *semi-automatic* firearms, rifles, or shotguns that *cannot accept large-capacity feeding devices*, no state currently prohibits their possession unless the barrel length is as short as described above. As for firearms and rifles that *do not* employ a rotating cylinder capable of accepting more than ten rounds of ammunition, and shotguns and firearms that *do not* employ a rotating or revolving cylinder capable of accepting more than five rounds of shotgun shells— currently no state prohibits their possession, unless they operate automatically (15 states)[24] or the barrel length is as short as described above.

Department of Justice Bureau of Alcohol, Tobacco, Firearms, and Explosives, *Firearms Commerce in the United States Annual Statistical Update 2020*, (2020), https://www.atf.gov/file/149886/download. Thus, it is not unreasonable to assume that out of the 42 million rifles that did not operate semi-automatically in 1994: *millions* operated manually.

[23] See National Shooting Sports Foundation, Firearm Production in the United States, (2020) https://www.nssf.org/wp-content/uploads/2020/11/IIR-2020-Firearms-Production-v14.pdf.

[24] CA Penal Code § 32625 (2021) (California); CO Code § 18-12-102(1),(3) (2021) (Colorado); HI Rev Stat § 134-8 (Cum. Supp. 2021) (Hawaii); Ill. Comp. Stat., ch. 720, § 5/24-1(7)(i) (2021) (Illinois); Iowa Code § 724.3 (2021) (Iowa); La. Rev. Stat. § 40:1752(1) (Louisiana); MD. Public Safety Code Ann. §§ 4-404, 4-405 (2021) (Maryland); Mass. Gen. Laws ch. 140, § 121(o) (2021) (Massachusetts); Minn. Stat. § 609.67 (2021) (Minnesota); Mont. Code Ann. §§ 45-8-303, 45-8-304 (2021) (Montana); N. J. Stat. Ann. §§ 2C:39-5(a) (2021) (New Jersey); N.Y. Penal Law §§ 265.02(2), 265.02(3)(1)(a) (2021) (New York); R.I. Gen. Laws §§ 11-47-8(a) (Rhode Island); Va. Code §§ 18.2-289, 18.2-290 (Virginia); Wis. Stat. § 941.26(1g)(a) (2021) (Wisconsin).

Accordingly, any non-large-capacity firearm, rifle, or shotgun that neither (1) operates automatically nor (2) contains any of the above-mentioned, prohibited features *should be* considered commonly used under the Second Amendment because in *every state, a law-abiding citizen* is not completely prohibited from possessing them. *Cf. Caetano*, 577 U.S. at 420 (Alito, J., concurring) (finding stun guns were commonly used given their being allowed in 45 states). Furthermore, because this Court has ruled that the Second Amendment "extends prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding," *see Heller*, 554 U.S. at 582, the burden is on the Commonwealth to demonstrate that non-large-capacity firearms are not in common use. *See e.g. New York State Rifle & Pistol Association, Inc. v. Cuomo*, 804 F.3d at 257 fn. 73 (2d Cir. 2015) (holding that *Heller* "identifies a presumption in favor of Second Amendment protection, which the State bears the initial burden of rebutting").

b) **"Large-capacity" Firearms are commonly used.**

(1) **Semi-automatic firearms that have the ability to hold large-capacity feeding devices are commonly used in contemporary America.**

In Massachusetts, the first and second types of firearms that are considered "large-capacity," are ones that: (1) can fire semi-automatically *and* (2) have a fixed large-capacity feeding device or can accept a detachable large-capacity feeding device. *See* Mass. Gen. Laws ch. 140, § 121. Both semi-automatic firing capability and large-capacity feeding device compatibility are extremely common features of modern firearms that deserve Second Amendment protection. *See Heller*, 554 U.S. at 582 (rejecting the argument that only those arms in existence in the 18th century are protected by the Second Amendment).

For example, currently only seven states—including Massachusetts— limit *all* firearms to 10 rounds of ammunition (thus prohibiting large-capacity feeding devices).[25] But according to the NSSF, in America between 1990 and 2018, approximately 106 million pistol magazines held 10 rounds or less, and 71 million pistol magazines held more than 10 rounds.[26] Thus in that time frame: around 40% of all pistol magazines in America would be considered "large-capacity feeding devices." In the same time frame, around 37 million rifle magazines held 10 rounds of ammunition or less; around 9 million rifle magazines held 11 to 29 rounds; and around 79 million rifle magazines held 30 or more rounds of ammunition. Thus, around 70% of all rifle magazines in America would be considered "large-capacity feeding devices."[27] Furthermore, although seven states currently prohibit "large-capacity feeding devices," which is two states greater than the five that prohibited stun gun possession in *Caetano*: this *slight* departure from the facts seen in *Caetano* should not stop this Court from finding that "large-capacity feeding devices" are presumptively protected under the Second Amendment. Unlike in *Caetano*, where Justice Alito found stun-guns were commonly used given "hundreds of thousands" were lawfully possessed in 45 states, here, *millions* of large-capacity feeding devices are lawfully possessed in 43 states.

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[25] *See* Cal. Penal Code § 16350, 16740, 16890, 32310-32450 (California); *see also* Conn. Gen. Stat. §§ 53-202w, 53-202q (Connecticut); see also Haw. Rev. Stat. Ann. § 134–8(c) (Hawaii); *see also* Md. Code Ann., Crim. Law § 4-305 (Maryland); Mass. Gen. Laws ch. 140, § 131M (Massachusetts); *see also* N.J. Stat. Ann. §§ 2C:39-1(y), 2C:39-3(j), 2C:39-9(h) (New Jersey); *see also* N.Y. Penal Law §§ 265.00(23), 265.02(8), 265.10, 265.11, 265.20(7-f), 265.36-265.37 (New York). Colorado limits firearms to 15 rounds of ammunition. *See* Colo. Rev. Stat. §§ 18-12-301, 302, 303. Vermont limits long guns to 10 rounds of ammunition, and handguns to 15 rounds of ammunition. *See* Vt. Stat. Ann. tit. 13, § 4021.

[26] See National Shooting Sports Foundation, Firearm Production in the United States, (2020) https://www.nssf.org/wp-content/uploads/2020/11/IIR-2020-Firearms-Production-v14.pdf.

[27] See supra at fn. 25.

See Caetano, 577 U.S. at 420 (2016) (Alito, J., concurring in judgement). Additionally, other federal courts have correctly found that large-capacity feeding devices are presumptively protected under the Second Amendment, and this Court should hold similarly. *See Heller v. District of Columbia*, 670 F.3d 1244, 1261 (D.C. Cir. 2011) (holding that it is "clear enough… that magazines holding more than ten rounds are indeed in 'common use,' …given 18 percent of all firearms owned by civilians in 1994 were equipped with [such] magazines); *see also New York State Rifle & Pistol Association, Inc. v. Cuomo*, 804 F.3d at 255 (finding magazines that hold more than ten rounds of ammunition are in common use because there were around 50 million of the magazines in America in the year 2000).

Second, similar to large-capacity feeding devices, millions of Americans possess "semi-automatic" firearms throughout the Country. According to the NSSF, between 1991 and 2019, approximately 213.0 million total firearms have been made available to the U.S. market. Of those 213 million firearms—around 144 million of them were semi-automatic.[28] However, unlike large-capacity feeding devices (which are currently banned in seven states), not a single state currently prohibits a firearm *solely* because it is capable of firing semi-automatically.[29] Furthermore, one member of this Court—Justice Kavanaugh—has already correctly held that semi-automatic firearms are constitutionally protected given: (1) they are in common use; (2) they have not been traditionally banned; and (3) the vast majority of modern day firearms are semi-automatic. *See Heller v. District of Columbia*, 670 F.3d at 1269 (D.C. Cir. 2011) (Kavanaugh, J., dissenting). Accordingly, the evidence also demonstrates semi-automatic firearms are commonly used by millions of Americans

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[28] *See* National Shooting Sports Foundation, Firearm Production in the United States, (2020).

[29] *See Appendix F.*

and deserve presumptive protection under the Second Amendment, that can only be rebutted by the Commonwealth proving that they are not "commonly used."

Furthermore, a firearm combined with the two features (semi-automatic firing capability and the ability to hold more than 10 rounds of ammunition) does not transform it into an "uncommon" one. Apart from the seven aforementioned states that currently prohibit large-capacity feeding devices, *no other state* currently prohibits possession of a firearm because it is also capable of firing semi-automatically.[30] A firearm that simply contains these two features thus deserves presumptive protection under the Second Amendment given their common use.

(2) Firearms that employ a rotating cylinder capable of accepting more than ten rounds of ammunition in a rifle, or five rounds of ammunition in a shotgun are commonly used in contemporary America.

The third type of firearm that is considered a "large-capacity weapon," is one that employs a rotating cylinder capable of accepting more than ten rounds of ammunition or more than five shotgun shells. *See* Mass. Gen. Laws. ch. 140, § 121. This definition simply encompasses *manual* firearms that can accept large-capacity feeding devices.[31] These firearms are also extremely common.

Currently, apart from the seven aforementioned states that prohibit possession of feeding devices capable of accepting more than ten rounds of ammunition: not another state prohibits the possession of a *manual* firearm simply because it employs a *rotating cylinder*

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[30] *See Appendix F.*

[31] It does so because this definition does not require the firearm to be semi-automatic. Assuming *arguendo* that this definition also encompasses automatic weapons, Petitioner does not take issue with the regulation of automatic weapons. *See supra* at fn. 11.

capable of accepting more than ten rounds of ammunition.[32] As for shotguns that employ a rotating cylinder, only 6 states— Connecticut,[33]New Jersey,[34] New York,[35] Massachusetts,[36] Maryland,[37] and California[38]— currently ban with that feature. Additionally, no other states ban shotguns because they employ rotating cylinders that also hold more than five shells.[39] Accordingly, these firearms also deserve prima facie protection under the Second Amendment due to their common use which must be rebutted by the Commonwealth of Massachusetts.

B. Mass. Gen. Laws. ch. 140, § 131(f) is inconsistent with the nation's historical tradition of firearm regulations.

Given that the Second Amendment's plain text presumptively guarantees the conduct that Mass. Gen. Laws. ch. 140, § 131(f)'s "unsuitability" standard seeks to regulate (law-abiding, adult citizens' Second Amendment right to publicly carry commonly used firearms): Massachusetts must "justify [the] regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *See Bruen*, 142 S. Ct. at 2129–30.

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[32] *See supra* at fn. 29.

[33] *See* CT Gen Stat § 53-202a(1)(E)(vii).

[34] *See* N.J. Stat. Ann. § 2C:39-1(w)(3)

[35] *See* N.Y. Penal Law § 265.00(22)(d)

[36] *See* Mass. Gen. Laws. ch. 140, § 121.

[37] *See* MD Crim Law Code § 4-301 (e)(1)(vi)

[38] *See* Cal. Penal Code § 30515(a)(8)

[39] *See Appendix F.*

To demonstrate this, the Commonwealth must show the regulation is a "proper analogue" to a historical regulation. *Id.* at 2132. Although a "historical twin" is not required, this Court has stated:

> "[W]e do think that *Heller* and *McDonald* point toward at least two metrics: how and why the regulations burden a law-abiding citizen's right to armed self-defense. As we stated in *Heller* and repeated in *McDonald*, individual self-defense is the central component of the Second Amendment right. Therefore, whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified are central considerations when engaging in an analogical inquiry."

Bruen, 142 S. Ct. at 2148. Furthermore, this Court has held that firearm licensing schemes that contain "narrow, objective, and definite standards" to guide licensing officials (such as background checks and firearms safety training), as opposed to schemes that "requir[e] the appraisal of facts, the exercise of judgment, and the formation of an opinion" are facially constitutional. *See Bruen*, 142 S. Ct. at 2138 fn.9 (citations omitted); *see also Id.* at 2162 (Kavanaugh, J., concurring) (stating the objective licensing schemes in 43 States that do not grant licensing officials "open-ended" discretion to deny an applicant a license to carry a firearm are facially constitutional).

In the present matter, Mass. Gen. Laws. ch. 140, § 131(f)'s "unsuitability standard" was designed to limit firearm access to "irresponsible persons." *See Holden*, 470 Mass. at 853. The rationale for the standard—limiting firearm access to certain persons— is similar to the rationale behind the historical "Surety Statutes"[40] identified and constitutionally

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[40] The 1836 Massachusetts law highlighted by this Court reads as follows:

> "If any person shall go armed with a dirk, dagger, sword, pistol, or other offensive and dangerous weapon, without reasonable cause to fear an assault or other injury, or violence to his person, or to his family or property, he may, on complaint of any person having reasonable cause to fear an injury, or breach of the peace, be required to find sureties for keeping the peace, for a term not exceeding six months, with the right of appealing as before provided."

upheld by this Court. *See Bruen*, 142 S. Ct at 2148. However, in comparison to the Surety Statutes, Mass. Gen. Laws. ch. 140, § 131(f)'s "unsuitability standard" imposes a far greater burden on Massachusetts citizens' right of armed self-defense and thus should not be considered a proper historical analogue.

First, under the Surety Statutes, one's "suitability" to publicly carry a firearm did not fall on the broad, subjective discretion of the local government, but rather required an objective, reasonable accusation that one might injure someone or breach the peace.[41] *Bruen*, 142 S. Ct. at 2148. In contrast, Mass. Gen. Laws. ch. 140, § 131(f) grants the government broad discretion to suspend an LTC, solely after a subjective determination of one's "suitability." *See e.g. Chardin*, 465 Mass. at 316 (noting the "considerable latitude" and "broad discretion" licensing authorities have when making an "unsuitability" determination). It is subjective because instead of being based on objective criteria, such as one's age or criminal history, the "unsuitability" determination is based on:

> "(i)reliable and credible information that the applicant or licensee has exhibited or engaged in behavior that suggests that, if issued a license, the applicant or licensee may create a risk to public safety; or (ii) existing factors that suggest that, if issued a license, the applicant or licensee may create a risk to public safety."

See Mass. Rev. Stat., ch. 134, § 16 (1836).

[41] Regardless of whether the term "reasonable cause" would encompass either "probable cause" or "reasonable suspicion" that one might injure someone or breach the peace is irrelevant. This is because both "probable cause" and "reasonable suspicion" are determined via an *objective* inquiry. *See Whren v. United States*, 517 U.S. 806, 813 (1996). Moreover, assuming *arguendo* that the "unsuitability" standard is *the exact same* as the "reasonably suspected to breach the peace or injure another person" standard: as discussed below, the burden the Surety Statutes imposed on citizens is incomparable to the burden that Mass. Gen. Laws. ch. 140, § 131(f)'s "unsuitability" standard imposes on citizens.

See Mass. Gen. Laws. ch. 140, § 131(d). Furthermore, along with not being similarly objective like the 19th century Surety Statutes: Mass. Gen. Laws. ch. 140, § 131(f)'s "unsuitability" determination completely contradicts this Court's holding in *Bruen* because the scheme does not guide licensing officials with "narrow, objective, and definite standards," but rather "requir[es] the appraisal of facts, the exercise of judgment, and the formation of an opinion." *Cf. Bruen*, 142 S. Ct. at 2138 fn.9 (citations omitted). This inherently subjective inquiry is also completely inapposite to the objective licensing schemes enacted by 43 States that do not have an "unsuitability" standard. *See Bruen*, 142 S. Ct. at 2162 (Kavanaugh, J., concurring) (stating the objective licensing schemes in 43 States that do not grant licensing officials "open-ended" discretion to deny an applicant a license to carry a firearm are facially constitutional).

Second, the 19th century Surety Statutes *did not completely deprive a law-abiding citizen of their right to armed self-defense in public*, but simply required that the individual post a bond or demonstrate that they had a "special need" for the firearm. *See Bruen*, 142 S. Ct. at 2148. In contrast, if one's LTC is suspended pursuant to Mass. Gen. Laws. ch. 140, § 131(f)'s "unsuitability" determination, they are completely deprived of their right to carry any firearm in public.[42] On top of this complete deprivation, the government's decision is only subject to a rational-basis review. *See Holden,* 470 Mass. at 859-62 (2015) (holding government's decision must be rational and the burden is on the citizen to present evidence

[42] Although Mass. Gen. Laws. ch. 140, § 129D declares that a pending appeal relieves a suspended LTC holder of their duty to relinquish their firearms: Mass. Gen. Laws. ch. 140, § 131(f) states that "[n]o appeal or post-judgment motion shall operate to stay [a LTC] suspension." Thus, whether or not the suspended holder has decided to appeal their LTC suspension, they are prohibited from lawfully carrying *any firearm* outside of their home for purposes of self-defense.

that demonstrates they are "suitable" to hold a license to carry a firearm, or that the action of the licensing authority was arbitrary or capricious, or an abuse of discretion). This limited standard of review, that is deferential to the government's decision, is another substantial burden on an individual's right to armed self-defense that is incomparable to the burdens imposed by the Surety Statutes. *See Bruen*, 142 S. Ct. at 2124 (highlighting the additional burden that New York's "proper-cause"[43] requirement had on its citizens because courts deferred to officers' decisions to deny an application under rational basis review).

Third, the Supreme Court found that the burdens the Surety Statutes imposed on an individual's Second Amendment right to armed self-defense was incomparable to the burden New York's "proper-cause" requirement had on its citizens, given a failure to comply with the Surety Statutes unlikely deterred citizens from carrying firearms. *See e.g. Bruen*, 142 S. Ct. at 2149 (holding that the Surety Statutes' bond requirement was an unlikely deterrent to carry a firearm because the penalties for violating the law were not criminal). In contrast, suspension of a LTC pursuant to Mass. Gen. Laws. ch. 140, § 131(f)'s "unsuitability" determination most certainly deters one from exercising their Second Amendment right to carry a firearm given: (1) it requires the individual to transfer all of their firearms to the government; (2) the individual cannot repossess their firearms until they file a petition for judicial review;[44] and (3) the individual is subject to imprisonment for violating the suspension order. *See* Mass. Gen. Laws. ch. 140, § 131(f).

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[43] This "proper cause" requirement is analogous with Massachusetts' "good reason" requirement that was struck down by this Court. *See Bruen*, 142 S. Ct. at 2124.

[44] Furthermore, because these actions are civil in nature, if the licensee cannot afford counsel, they must proceed *pro se*, which of course is an additional burden. *See Scott v. Illinois*, 440 U.S. 367, 373–74 (1979) (holding the right to counsel only applies if a term of imprisonment is imposed).

In conclusion, the Surety Statutes and Mass. Gen. Laws. ch. 140, § 131(f) both similarly attempt to control certain persons from obtaining firearms. However, the Surety Statutes impose a substantially easier burden on law-abiding citizens' Second Amendment rights compared with Mass. Gen. Laws. ch. 140, § 131(f)'s "unsuitability" standard. Thus, the modern regulation is not a proper analogue to the historical Surety Statutes and is unconstitutional.

II. This court should declare that Mass. Gen. Laws. Ch. 140 § 131(f) is facially unconstitutional because no set of circumstances exist under which the statute would be valid.

This Court has held that a law is facially unconstitutional if the party seeking relief can establish that "no set of circumstances exists under which the [statute] would be valid"). *See United States v. Salerno*, 481 U.S. 739, 745 (1987). Although this standard is "the most difficult ... to mount successfully, *see Id.*, "[w]hen assessing whether a statute meets this standard, th[is] Court has considered only applications of the statute in which it actually authorizes or prohibits conduct." *City of Los Angeles, California v. Patel*, 576 U.S. 409, 418 (2015).

For example, in *Patel*, this Court held that a statute authorizing warrantless searches was facially invalid. *Id.* This Court rejected the government's argument that because a search warrant authorized pursuant to the statute would still be *constitutionally* valid if the police conducted a search after receiving consent, the statute could not be invalid in all circumstances. *Id.* at 418. The Court reasoned:

> "the proper focus of the constitutional inquiry is searches that the law actually authorizes, not those for which it is irrelevant. If exigency or a warrant justifies an officer's search, the subject of the search must permit it to proceed irrespective of whether it is authorized by statute. Statutes authorizing warrantless searches also do no work where the subject of a search has consented. Accordingly, the constitutional "applications" that petitioner claims prevent facial relief here are irrelevant to our analysis because they do not involve actual applications of the statute."

Patel, 576 U.S. at 419. This Court's ruling in Patel is extremely instructive in showing how Mass. Gen. Laws. ch. 140, § 131(f)'s "unsuitability" standard is facially unconstitutional.

For example, the authorization to suspend one's LTC based on their "unsuitability" cannot be saved by hypothetical scenarios, such as when a licensee has been lawfully

convicted of a crime[45] or has a license to carry an uncommonly used firearm.[46] Similarly to *Patel*, where the *constitution*—and not a statute—authorized the hypothetical searches, in scenarios such as these, the suspension would be authorized by the *constitution*, and not because of the "unsuitability" standard. That is because either suspension would be based on constitutionally allowed, objective criteria[47] or the individual's conduct would not be protected by the Second Amendment, *see Bruen*, 142 S. Ct. at 2126 (emphasis added) (holding the Second Amendment's plain text presumptively guarantees law-abiding citizens' a right to bear *commonly used* arms in public for self-defense).

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[45] This would be a firearm regulation based on objective criteria, which is constitutionally allowed on its face. *See e.g. Bruen*, 142 S. Ct. at 2138 fn.9 (citations omitted); *see also Id.* at 2161–62 (Kavanaugh, J., concurring).

[46] As stated by this Court in *Bruen*, the Second Amendment protects the public carrying of commonly used firearms. *See Bruen*, 142 S. Ct. at 2134. And as discussed *supra*, a LTC grants a holder the right to carry large and non-large-capacity firearms, ammunition, and devices: all of which are commonly used in modern America and presumptively protected under the Second Amendment absent the Commonwealth demonstrating otherwise.

[47] Such as one being convicted of a crime.

III. Massachusetts has violated Petitioner's Second Amendment rights because it has criminally punished him for merely possessing ammunition and two handguns in his home.

A. The Second Amendment's plain text presumptively guaranteed the conduct that Petitioner was convicted for.

Although this Court in *Bruen* was focused on the extent to which the Second Amendment protects carrying commonly used firearms outside of one's home, this Court also reaffirmed the holdings in *Heller and McDonald* that the Second and Fourteenth Amendments protect the right of an ordinary, law-abiding citizen to possess a handgun in their home for self-defense. *See e.g. Bruen*, 142 at 2122. Furthermore, while this Court has not specifically ruled that it is protected under the Second Amendment, Federal Courts have ruled that ammunition is protected under the Second Amendment. *See Herrington v. United States*, 6 A.3d 1237, 1243 (D.C. 2010) (holding that the Court's reasoning in *Heller* "logically follows that the right to keep and bear arms extends to the possession of handgun ammunition in the home; for if such possession could be banned (and not simply regulated), that would make it 'impossible for citizens to use [their handguns] for the core lawful purpose of self-defense'"); *see also New York State Rifle & Pistol Association v. Cuomo*, 804 F.3d at 255 (finding magazines that hold more than ten rounds of ammunition are protected under the Second Amendment). Accordingly, it cannot be disputed that the Second Amendment's plain text protects the right to possess a handgun and its ammunition in one's home. *See also Heller*, 554 U.S. at 629 (holding handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid).

In the present matter, for four (4) the six (6) charges at issue, Petitioner—who was a law-abiding citizen prior to this case—was indicted, tried, and convicted by a jury exclusively on the evidence that he possessed two handguns (a .22 revolver and a .357 magnum revolver) and ammunition in his home pursuant to Mass. Gen. Laws. ch. 269, § 10(h)(1).[48] *See Appendix G.* It was irrelevant that no evidence was presented to the jury that Petitioner did not have a valid FID,[49] because the Supreme Judicial Court of Massachusetts has ruled "that possession of a [valid FID] is an affirmative defense [to the statute]." *See Harris*, 481 Mass. at 772; *see also Johnson*, 461 Mass. at 53 (holding "to convict [a] defendant of unlawful possession of ammunition, the Commonwealth [is] required to prove that the defendant knowingly possessed ammunition that met the legal definition of ammunition"). Thus, Petitioner was convicted for the exact conduct that is presumptively protected by the Second Amendment. *See e.g. Bruen*, 142 at 2122; *see also Heller*, 554 U.S. at 629; *see also Herrington*, 6 A.3d at 1243.

B. <u>Criminalizing the mere possession of a handgun and ammunition is inconsistent with the Nation's historical tradition of firearm regulations.</u>

Given that the Second Amendment's plain text presumptively guarantees the conduct that Petitioner was criminally convicted for: Massachusetts must "justify [Mass. Gen. Laws. ch. 269, § 10(h)(1)] by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *See Bruen,* 142 S. Ct. at 2129–30. As discussed above, the Commonwealth must show the regulation is a "proper analogue" to a historical regulation. *Id.* at 2132; *see also Id.* at 2148 (holding "whether modern and historical regulations impose

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[48] Unlike Petitioner's facial challenge of the "unsuitability" standard, *see Parts I & II*, Petitioner challenges the constitutionality of Mass. Gen. Laws. ch. 269, § 10(h)(1) as applied to him.

[49] *See Appendix G.*

a comparable burden on the right of armed self-defense and whether that burden is comparably justified are central considerations when engaging in an analogical inquiry"). Additionally, historical firearm regulations that pass constitutional muster can: (1) limit the intent or manner one carries arms, *see Bruen*, 142 S. Ct. at 2156; or (2) outline the "exceptional circumstances" where and when one cannot carry arms, *see Id.*; or (3) prohibit the possession of firearms by felons and the mentally ill, *see Heller*, 554 U.S. at 626–27; or (4) forbid the carrying of firearms in "sensitive places," *see Id.*; or (5) impose conditions and qualifications on the commercial sale of arms, *see Id.*[50]

In the present matter, unlike Mass. Gen. Laws. ch. 140, § 131(f)'s "unsuitability" standard, which was designed to limit firearm access to "irresponsible persons," and thus is *slightly* analogous to the historical "Surety Statutes" identified by this Court in *Bruen*: there is no historical regulation even remotely analogous to the burden Mass. Gen. Laws. ch. 269, § 10(h)(1) imposes on law-abiding citizen's because the statute *criminalizes* conduct presumptively guaranteed by the Second Amendment. *See generally Bruen*, 142 S. Ct. 2111 (2022) (reaffirming the Second Amendment presumptively guarantees law-abiding, adult citizens a right to possess firearms commonly used for self-defense in their home).

For example, Mass. Gen. Laws. ch. 269, § 10(h)(1) did not limit the "intent or manner" by which Petitioner could possess his handguns and ammunition. Mass. Gen. Laws. ch.

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[50] Furthermore, although this Court in *Bruen* stated that licensing schemes which contain "narrow, objective, and definite standards," are facially constitutional, *see Bruen*, 142 S. Ct. at 2138 fn.9 (citations omitted), this holding is inapplicable here because Mass. Gen. Laws. ch. 269, § 10(h)(1) is a criminal statute and thus should not be considered a licensing scheme. Even assuming that Mass. Gen. Laws. ch. 269, § 10(h)(1) is an objective licensing scheme, this should not stop the Court from ruling on Petitioner's as applied challenge. *See Bruen*, 142 S. Ct. at 2162 (Kavanaugh, J., concurring) (stating objective licensing schemes can be constitutionally challenged as-applied).

269, § 10(h)(1) states "[w]hoever owns, possesses or transfers a firearm, rifle, shotgun or ammunition without complying with the provisions of section 129C of chapter 140 [which includes having a valid FID] 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." *Id.* Thus, as explicitly stated by the statute, Mass. Gen. Laws. ch. 269, § 10(h)(1) criminalized Petitioner's possession of two handguns and ammunition: *regardless of their use or purpose*. *Cf. Bruen*, 142 S. Ct. at 2156. Furthermore, because the statute only required the government to prove that Petitioner knowingly possessed a firearm and ammunition, and not that he knowingly possessed a firearm or ammunition *absent the appropriate license*, Mass. Gen. Laws. ch. 269, § 10(h)(1) cannot be considered a limitation on the "manner" by which Petitioner could possess his handguns.[51]

Second, the criminal statute did not outline the "exceptional circumstances" or the "sensitive places" where and when Petitioner could not carry his two handguns—unless of course possessing a handgun in his home is considered an "exceptional circumstance" or a "sensitive place." *Cf. Bruen*, 142 S. Ct. at 2156 and *Heller*, 554 U.S. at 626–27. Third, as evident by Petitioner's current situation, Mass. Gen. Laws. ch. 269, § 10(h)(1) applies to all law-abiding citizens, and not simply felons or the mentally ill. *Cf. Heller*, 554 U.S. at 626–27. And finally, Mass. Gen. Laws. ch. 269, § 10(h)(1) cannot be considered a presumptively lawful firearm regulation that imposes "conditions and qualifications on the commercial sale

[51] Specifically, if the statute required the government to prove that Petitioner *knowingly possessed a firearm or ammunition absent the appropriate license*, this should be considered an appropriate limitation on the *manner* in which he would be allowed to possess his handgun.

of arms," specifically because the statue does not relate to the commercial sale of handguns, but rather to the mere possession of handguns.

Furthermore, this Court should follow the Court of the Appeals for the District of Columbia's decision in *Herrington*, 6 A.3d 1237 (D.C. 2010), when it struck down a conviction under a D.C. law that is more or less the same as Mass. Gen. Laws. ch. 269, § 10(h)(1). Just like the statute at issue here, the statute in *Herrington* made it a crime "to possess ammunition of any kind anywhere, regardless of its use or purpose; and the prosecution may obtain a conviction under the statute without having to prove that the possessor violated any registration, licensing or regulatory requirement or was otherwise disqualified from exercising his Second Amendment right." *See* Herrington, 6 A.3d at 1243.[52] The court in *Herrington* went on to conclude that:

> "where nothing more was proved at trial to show that the defendant was disqualified from exercising his Second Amendment rights—there was no evidence, for example, that he possessed the ammunition for an illegal purpose or that he had failed to comply with applicable registration requirements for a firearm corresponding to the ammunition—the UA statute is unconstitutional as applied."

Id. The court then reasoned that since the D.C. law regulated constitutionally protected conduct (the right to possess a handgun and ammunition in one's home), the fact that a valid firearm license was an affirmative defense "only compound[ed] the problem." The court stated:

> "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. While legislatures do have leeway to reallocate burdens of proof so as to require the accused to prove some facts as affirmative defenses … there are obviously constitutional limits beyond which [a legislature] may not go in this regard.

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[52] Thus, like Mass. Gen. Laws. ch. 269, § 10(h)(1), a conviction under the D.C. law at issue in *Herrington* "could have been based solely on proof that the defendant possessed handgun ammunition in his home [or] on proof of conduct protected by the Second Amendment." *See Herrington*, 6 A.3d at 1243.

> 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, 6 A.3d at 1244–45 (D.C. 2010) (citations and quotations omitted).

In the present matter, just like the defendant in *Herrington*, Petitioner was convicted for merely possessing two handguns and ammunition in his home. Just like the defendant in *Herrington*, there was no evidence at Petitioner's trial that he had a prior felony conviction or that he was mentally ill; or that he had an unlawful purpose to use the handguns and ammunition; or that did not have valid FID[53] card: all of which could be appropriately used as evidence that he was disqualified from exercising his Second Amendment rights. *See* Herrington, 6 A.3d at 1243. Additionally, just like the defendant in *Herrington*, the fact that a valid FID card is an affirmative defense to a prosecution under Mass. Gen. Laws. ch. 269, § 10(h)(1), only "compounds the problem," as Massachusetts has effectively made possessing a firearm and ammunition in one's home—conduct that is protected by the Second Amendment—presumptively a crime that *must* be rebutted by a defendant in order for them to avoid imprisonment.

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[53] Although the jury was made aware that Petitioner's LTC was suspended, this is irrelevant because his LTC was suspended unconstitutionally, and thus should not be seen as evidence that Petitioner was disqualified from exercising his Second Amendment rights. *See Appendix G.*

CONCLUSION

For all of the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

/s/ *Derege B. Demissie*

DEREGE B. DEMISSIE
DEMISSIE & CHURCH
929 Massachusetts Avenue, Suite 101
Cambridge, MA 02139
Ph: (617) 354-3944
Fax: (617) 354-0985
BBO# 637544
dd@demissiechurch.com

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