No. 23-_____

IN THE

# Supreme Court of the United States

NICKY S. KEO,

*Petitioner*,

*vs.*

COMMONWEALTH OF MASSACHUSETTS,

*Respondent*.

ON PETITION FOR WRIT OF CERTIORARI
TO THE MASSACHUSETTS APPEALS COURT

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

The Commonwealth of Massachusetts requires its citizens to get permission from their local police departments before they can exercise their right to bear arms. Anyone who carries a firearm for self-defense without first securing a government-issued license is branded a felon and subjected to up to five years in state prison, with a mandatory minimum sentence of eighteen months that cannot be reduced or deferred in any way. This draconian punishment is imposed even on otherwise law-abiding citizens, regardless of whether they had any idea that such pre-approval was required for the exercise of their fundamental rights.

The question presented is whether the imposition of a mandatory eighteen-month jail sentence on a first offender for what might well be an entirely innocent regulatory infraction converts the Commonwealth's licensing regime from a reasonable regulation of the right to bear arms into an unconstitutional infringement thereon.

## PARTIES TO THE PROCEEDING

Petitioner, Nicky S. Keo, was the defendant-appellant in the proceedings below. Respondent is the Commonwealth of Massachusetts. No party is a corporation.

## RELATED PROCEEDINGS

Massachusetts District Court, Lowell Division:

*Commonwealth v. Keo*, No. 2111-CR-2014 (June 6, 2022)
(entering judgment of conviction)

Massachusetts Appeals Court:

*Commonwealth v. Keo*, No. 22-J-440 (Aug. 10, 2022)
(denying stay of execution of sentence)

*Commonwealth v. Keo*, No. 22-P-837 (Feb. 15, 2023)
(affirming denial of stay of sentence)

*Commonwealth v. Keo*, No. 22-P-982 (June 29, 2023)
(affirming conviction and denial of postconviction motion)

Massachusetts Supreme Judicial Court:

*Keo v. Commonwealth*, No. SJ-2022-43 (Feb. 17, 2022)
(denying relief from pretrial discovery order)

*Commonwealth v. Keo*, No. DAR-29071 (Nov. 22, 2022)
(denying pre-judgment discretionary review)

*Commonwealth v. Keo*, No. FAR-29402 (Aug. 4, 2023)
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The judgment of the Massachusetts Appeals Court affirming Petitioner's conviction and the denial of his motion to correct his sentence or withdraw his guilty plea is reported at 102 Mass. App. Ct. 1124, 211 N.E.3d 1123. That court's opinion explaining its reasoning (Pet. App. 2a) is unreported but is available at 2023 WL 4240774. The decision of the Massachusetts Supreme Judicial Court denying discretionary review (Pet. App. 1a) is reported at 492 Mass. 1104, 215 N.E.3d 393. The decision of the Lowell Division of the Massachusetts District Court denying petitioner's motion to correct his sentence or withdraw his guilty plea (Pet. App. 4a) is unreported.

## JURISDICTION

The Massachusetts Appeals Court issued a final judgment affirming petitioner's conviction and the denial of his motion to correct his sentence or withdraw his guilty plea on June 29, 2023. The Massachusetts Supreme Judicial Court denied discretionary review on August 4, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

## RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

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."

Section 1 of the Fourteenth Amendment to the United States Constitution provides, in relevant part: "No State shall make or enforce any law which shall abridge

the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law."

Section 10(a) of chapter 269 of the Massachusetts General Laws provides, in relevant part:

> Whoever … knowingly has in his possession; or knowingly has under his control in a vehicle; a firearm, loaded or unloaded, … without either:
>
> (1) being present in or on his residence or place of business; or
>
> (2) having in effect a license to carry firearms…
>
> …
>
> shall be punished by imprisonment in the state prison for not less than two and one-half years nor more than five years, or for not less than 18 months nor more than two and one-half years in a jail or house of correction. The sentence imposed on such person shall not be reduced to less than 18 months, nor suspended, nor shall any person convicted under this subsection be eligible for probation, parole, work release, or furlough or receive any deduction from his sentence for good conduct until he shall have served 18 months of such sentence…

Mass. Gen. Laws, ch. 269, § 10(a). The entirety of Mass. Gen. Laws, ch. 269, § 10, is reproduced *infra*, at Pet. App. 15a-20a.

## STATEMENT OF THE CASE

On June 16, 2021, Nicky Keo's car was pulled over in Lowell, Massachusetts. During the stop, police found a handgun in Mr. Keo's pocket. Pet. App. 6a. Mr. Keo was 19 years old and had never previously been charged with a crime. Pet. App. 6a.

The next day, a complaint issued in the Lowell Division of the Massachusetts District Court, charging Mr. Keo with unlicensed possession of a firearm in violation of Mass. Gen. Laws, ch. 269, § 10(a), and related offenses. He pleaded not guilty and was released on $500 cash bail. During the pendency of the case, Mr. Keo abided by all conditions of his release and appeared at each of his court dates. Pet. App. 14a. He

lived in Lowell with his father, stepmother, grandmother, and siblings (ages 3 and 11, for whom he helped to care). Pet. App. 14a. He was employed by an orthodontist in Burlington, Massachusetts, and he used income from that job to help his father pay the rent. Pet. App. 14a. For at least some portion of his pretrial release, he was the only member of his household who was gainfully employed. Pet. App. 7a.

On June 6, 2022, Mr. Keo changed his plea to guilty on the § 10(a) charge, and the other counts of the complaint were dismissed. Pet. App. 8a. During the sentencing proceeding, the District Court judge agreed with defense counsel that a probationary sentence "would satisfy community safety," and that "[b]ut for the mandatory minimum," Mr. Keo "would be getting probation." Pet. App. 7a. The judge also expressed his agreement with defense counsel's statements that the application of the mandatory minimum sentence in this case was "unjust" and "should be unconstitutional." Pet. App. 7a-8a. Nevertheless, in recognition of the binding Massachusetts authority upholding § 10(a)'s constitutionality, the judge reluctantly sentenced Mr. Keo to that statute's mandatory minimum term of eighteen months in jail. Pet. App. 8a.

On July 1, 2022, following the issuance of this Court's decision in *New York State Rifle & Pistol Association v. Bruen*, 142 S. Ct. 2111 (2022), Mr. Keo filed a timely notice of appeal from his conviction. On July 8, he filed a motion to withdraw his plea or correct his sentence pursuant to Mass. R. Crim. P. 30. Pet. App. 9a. That motion contended that Massachusetts's imposition of an eighteen-month mandatory minimum sentence on a first offender for the mere unlicensed possession of a firearm violated the Second Amendment to the United States Constitution, as construed by this

Court in *Bruen*. Pet. App. 10a-13a. After hearing arguments on Mr. Keo's postconviction motion, the District Court judge issued an oral ruling from the bench concluding that in light of binding Massachusetts precedent, "I can't do anything but impose the sentence that I imposed. So, the motion to correct the sentence or [for] new trial is denied." Pet. App. 4a. Mr. Keo timely filed a second notice of appeal from that denial.

The appeals from the District Court's judgment and from the denial of Mr. Keo's postconviction motion were consolidated for decision in the Massachusetts Appeals Court (MAC). A panel of that court affirmed in an unpublished memorandum and order, rejecting Mr. Keo's claim that Massachusetts's "mandatory minimum firearm sentencing scheme is unconstitutional under *Bruen* because [it has] no historical analogue in the country's history." Pet. App. 2a. The MAC did not identify any historical analogue for § 10(a)'s imposition of a mandatory 18-month sentence on a first offender for the mere unlicensed possession of a firearm. Indeed, the court did not engage in any Second Amendment analysis at all. Instead, the panel merely noted that sentencing provisions are typically reviewed under the Eighth Amendment, and that the Massachusetts Supreme Judicial Court (SJC) had previously upheld § 10(a) under that provision. Pet. App. 3a (citing *Commonwealth v. Jackson*, 369 Mass. 904, 909-916 (1976)). The panel then reasoned as follows:

> While *Bruen* provided a new analytical framework for the regulation of the possession of a firearm, it is silent on the issue of punishment. It did not change the constitutionality of existing sentencing schemes, nor discuss any change to how those sentencing schemes should be analyzed. Because nothing in *Bruen* inherently affects the Supreme Judicial Court's holding in *Jackson*, we affirm the order denying the postconviction motion.

Pet. App. 3a. The SJC denied further appellate review. Pet. App. 1a.

## REASONS FOR GRANTING THE PETITION

**Massachusetts's strict-liability imposition of a mandatory eighteen-month jail sentence on a first offender for the mere unlicensed carrying of a firearm—which has no precedent anywhere in our Nation's history prior to its enactment in 1974—renders that State's regulatory firearms licensing regime an unconstitutional infringement on the right to bear arms.**

The sole question presented in this case is whether the Second and Fourteenth Amendments permit the Commonwealth of Massachusetts to impose an eighteen-month mandatory minimum sentence on someone who has never previously been accused of a crime for the mere act of peaceably carrying a handgun. Mr. Keo does not challenge Massachusetts's ability to regulate the right to bear arms by conditioning public carrying on licensure. Nor does he challenge the Commonwealth's procedures or criteria for obtaining a license to carry. And he does not here deny that he failed to comply with that regulatory regime. He therefore concedes that the Commonwealth could constitutionally impose *some* punishment for this regulatory infraction.[1]

According to the courts below, that is the end of the matter. The MAC did not contend that the statute under which Mr. Keo was convicted and sentenced could withstand scrutiny under the framework set out by this Court in *Bruen*. Instead, it held that the *Bruen* framework simply does not apply to that statute. On this view, it does not matter that (as discussed below) Massachusetts's regulatory regime, in

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[1] Although Mr. Keo's constitutional challenge is principally directed at the mandatory sentencing aspect of Massachusetts's licensing regime, the relief he sought below included the withdrawal of his guilty plea. *See* Pet. App. 9a (requesting "a new trial" under Mass. R. Crim. P. 30(b)). *Cf. Commonwealth v. Resende*, 475 Mass. 1, 12 (2016) ("A motion to withdraw a guilty plea is treated as a motion for a new trial pursuant to Mass. R. Crim. P. 30(b)"). Thus, although the State courts refused to stay the execution of Mr. Keo's mandatory sentence during the pendency of his appeal, the case will not become moot upon his completion of that sentence; he will have a continuing interest in withdrawing his plea due to the "continuing collateral consequences" of the felony conviction. *See Spencer v. Kemna*, 523 U.S. 1, 7-8 (1998) (citing *Sibron v. New York*, 392 U.S. 40, 55-56 (1968)).

light of the challenged provision, is not "consistent with this Nation's historical tradition of firearm regulation." *Bruen*, 142 S. Ct. at 2126. Rather, so long as the Commonwealth does not offend the Eighth Amendment's narrow prohibition of "gross disproportionality," *see Ewing v. California*, 538 U.S. 11, 30 (2003) (opinion of O'Connor, J.), it may impose whatever punishment it chooses for what the SJC itself has described as a "passive and victimless" "regulatory crime." *Commonwealth v. Kelly*, 484 Mass. 53, 58 (2020) (quoting *Commonwealth v. Young*, 453 Mass. 707, 714 (2009)).

But this "regulatory" statute makes a felony of what otherwise would be the exercise of a fundamental constitutional right. And as explained below, it requires no criminal intent—nor even any awareness of any wrongdoing whatsoever. The statute thus imposes a mandatory eighteen-month sentence on a potentially well-meaning, otherwise law-abiding citizen merely for carrying a handgun for self-defense—conduct which is not only "usually licit and blameless," *Staples v. United States*, 511 U.S. 600, 613 (1994), but which in fact resides within the core of the Second Amendment's protection. *See Bruen*, 142 S. Ct. at 2135 (citing *District of Columbia v. Heller*, 554 U.S. 570, 599 (2008)). The MAC's conclusion that the Second Amendment has nothing to say about such a statute is not tenable.

In short, the MAC's analysis is flatly contrary to this Court's decisions in *Bruen* and *Heller*. A proper analysis under this Court's precedents reveals that § 10(a)'s draconian mandatory penalty provision converts what might otherwise be a reasonable regulation of the right to bear arms into an unconstitutional infringement thereon. This Court should grant certiorari and reverse.

1. *The Second Amendment prohibits Massachusetts from imposing a burden on the right to bear arms that is not relevantly comparable to those imposed by the historical regulations that define the scope of that right.*

The Second and Fourteenth Amendments "protect an individual right to keep and bear arms for self-defense." *Bruen*, 142 S. Ct. at 2125. Last year in *Bruen*, this Court clarified the standards by which State gun control regulations are to be evaluated under these provisions. In the process, this Court repudiated the prevailing approach in the lower courts (including Massachusetts's), which accorded insufficient weight to "the Second Amendment's 'unqualified command.'" *Id.* at 2126 (quoting *Konigsberg v. State Bar of California*, 366 U.S. 36, 50 n.10 (1961)).

Prior to *Bruen*, the lower courts generally had settled on "a two-step framework for evaluating whether a firearm regulation is consistent with the Second Amendment." *Id.* at 2174 (Breyer, J., dissenting). That test began by consulting "text and history" to determine "whether the regulated activity falls within the scope of the Second Amendment." *Id.* (quoting *Ezell v. Chicago*, 846 F.3d 888, 892 (7th Cir. 2017)). If so, courts would move to the second step, considering "'the strength of the government's justification for restricting or regulating' the Second Amendment right." *Id.* (quoting *Ezell*, *supra*). "In doing so, they appl[ied] a level of 'means-end' scrutiny 'that [was] proportionate to the severity of the burden that the law impos[ed] on the right': strict scrutiny if the burden [was] severe, and intermediate scrutiny if it [was] not." *Id.* (quoting *NRA v. ATF*, 700 F.3d 185, 195, 198, 205 (5th Cir. 2012)).

In *Bruen*, this Court rejected that two-step test, concluding that it had "one step too many." *Id.* at 2127 (opinion of the Court). The test's first step may have been "broadly consistent" with this Court's decisions in *Heller*, *supra*, and *McDonald v.*

*Chicago*, 561 U.S. 742 (2010), which "demand a test rooted in the Second Amendment's text, as informed by history." *Bruen*, 142 S. Ct. at 2127. But "*Heller* and *McDonald* do not support applying means-end scrutiny in the Second Amendment context." *Id.* "Instead, the government must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." *Id.* In general, this will require the State to identify historical regulations of the right to bear arms that were "relevantly similar" to the modern regulation at issue. *Id.* at 2132. If the State fails to meet its "burden to identify an American tradition justifying" the modern regulation, that regulation cannot constitutionally be enforced. *Id.* at 2156.

*Bruen* did not purport to "provide an exhaustive survey of the features that render regulations relevantly similar under the Second Amendment." *Id.* at 2132. But it did give some guidance, explaining that "when a challenged regulation addresses a general societal problem that has persisted since the 18th century, the lack of a distinctly similar historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment." *Id.* at 2131. "Likewise, if earlier generations addressed the societal problem, but did so through materially different means, that also could be evidence that a modern regulation is unconstitutional." *Id.* The "'central' considerations" in conducting this analogical historical inquiry are "whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified." *Id.* at 2133 (quoting *McDonald*, 561 U.S. at 767).

2. *The statute under which Petitioner was convicted imposes severe mandatory criminal penalties on conduct within the core of the Second Amendment right without requiring any consciousness of wrongdoing.*

There can be little doubt that the Massachusetts statute here at issue imposes "a burden on conduct falling within the scope of the Second Amendment's guarantee." *Bruen*, 142 S. Ct. at 2126 (quoting *United States v. Boyd*, 999 F.3d 171, 185 (3d Cir. 2021)). As in *Bruen*, there has never been any dispute in this case that Mr. Keo is "part of 'the people' whom the Second Amendment protects." *Id.* at 2134 (citing *Heller*, 554 U.S. at 580). And the regulated conduct is precisely what this Court confirmed in *Bruen* is presumptively protected: "carrying handguns publicly for self-defense." *Id.*

As noted, the statute under which Mr. Keo was prosecuted renders it a felony for any person to carry a firearm in public "without … having in effect a license to carry firearms" issued by a local police department under the Commonwealth's regulatory scheme. Mass. Gen. Laws, ch. 269, § 10(a).[2] *See* Mass. Gen. Laws, ch. 140, § 131 (setting forth procedures and criteria for obtaining such a license). It imposes a sentence of up to five years in state prison upon a first offender,[3] with a mandatory minimum sentence of not less than eighteen months in a county jail. *See* § 10(a), *supra*.[4] The minimum term is truly mandatory; an unlicensed possessor of a firearm is ineligible for probation and may not be released on parole, furloughed, or have his sentence reduced for any reason until the full eighteen months have been served. *Id.*

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[2] Massachusetts law provides for certain exceptions or exemptions to this general rule, none of which are relevant for present purposes. *See* Mass. Gen. Laws, ch. 269, § 10(a), *infra*, Pet. App. 15a-16a.

[3] A second offense carries a mandatory sentence of five to seven years; a third offense, seven to ten years; and a fourth offense, ten to fifteen years. Mass. Gen. Laws, ch. 269, § 10(d), *infra*, Pet. App. 17a.

[4] The statute also imposes an additional consecutive sentence of up to thirty months in jail if the gun was loaded. *See* Mass. Gen. Laws, ch. 269, § 10(n), *infra*, Pet. App. 20a.

Notably, the statute "does not even require proof that a defendant knowingly failed to acquire or maintain a license." *Young*, 453 Mass. at 714 (citing *Jackson*, 369 Mass. at 917). Its harsh mandatory penalties thus apply "regardless whether an individual has acquired a firearm for an illicit or lawful purpose, or simply allowed a license to lapse." *Id. See also id.* at 715 ("The elements of unlicensed possession of a firearm … do not require proof that a defendant purposefully evaded firearm licensing requirements, … let alone proof that a defendant's failure to obtain a license was motivated by a desire to use the firearm for an illicit purpose"). *Cf. Staples*, 511 U.S. at 618 (discussing the incongruity of felony punishment for an offense that "would require the defendant to have knowledge only of traditionally lawful conduct").

3. *The Massachusetts Appeals Court contravened this Court's clear precedent by failing to conduct any Second Amendment analysis whatsoever.*

In sum, Massachusetts ("unjust[ly]," according to the sentencing judge, Pet. App. 7a) imposed this mandatory sentence on Mr. Keo without requiring the prosecution to show that he had done anything more than "carrying handguns publicly"—conduct that "the plain text of the Second Amendment protects." *Bruen*, 142 S. Ct. at 2134. Subjecting presumptively constitutionally protected conduct to criminal sanction obviously burdens that conduct. And the greater the punishment, the greater the burden. Nevertheless, the MAC made no attempt to engage in the analogical historical reasoning this Court has held required in assessing gun control statutes. The panel's decision did not so much as passingly address the extent of the "burden on the right of armed self-defense" imposed by § 10(a)'s harsh mandatory sentence for this "passive and victimless" "regulatory crime." *Kelly*, 484 Mass. at 58. Much less did it

attempt to discern whether that burden is "comparable" (or "comparably justified") to those imposed by permissible "historical regulations." *Bruen*, 142 S. Ct. at 2133.

Instead, as noted *supra*, the panel simply observed that challenges to sentencing schemes are often brought under the Eighth Amendment, and that the SJC had sustained § 10(a) against such a challenge soon after the original enactment of that statute's mandatory minimum sentence. Pet. App. 3a (citing *Jackson*, 369 Mass. at 909-916). Concluding that "nothing in *Bruen* inherently affects [the SJC's] holding in *Jackson*," the MAC affirmed Mr. Keo's conviction and sentence. Pet. App. 3a.

But Mr. Keo has no quarrel with *Jackson* and made no request for its holding to be disturbed. He did not press an Eighth Amendment claim; caselaw under that provision is inapposite. An Eighth Amendment analysis asks whether a given punishment is consistent with "the evolving standards of decency that mark the progress of a maturing society." *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)). That is precisely the type of analysis this Court has disavowed under the Second Amendment, whose "meaning is fixed according to the understandings of those who ratified it." *Bruen*, 142 S. Ct. at 2132. Indeed, the SJC's Eighth Amendment analysis in *Jackson* was accomplished through "means-end scrutiny" of precisely the sort eschewed by *Bruen*. *See* 369 Mass. at 910 (declining to disturb the balance struck by the legislature where "the nature of the penalty is rationally directed to achieve the legitimate ends of punishment").[5]

[5] The defendant in *Jackson* also raised a due process challenge to the statute, which the SJC similarly rebuffed through traditional means-end scrutiny. *See Jackson*, 369 Mass. at 918 ("our standard of review in considering the mandatory minimum one-year sentence is whether the statute bears a reasonable relation to a permissible legislative objective").

Moreover, the MAC's assertion that this Court's Second Amendment caselaw is "silent on the issue of punishment," Pet. App. 3a, is simply wrong. Although the narrow holdings of *Heller* and *Bruen* relate to the substantive scope of the regulations at issue in those cases, the *historical analyses* undertaken in both cases explicitly addressed the degree of punishment those regulations imposed.

In *Heller*, this Court concluded that the historical regulations cited in Justice Breyer's dissenting opinion did not support the constitutionality of Washington D.C.'s regulatory scheme in part because of the consequences imposed on violators. Historical punishments included "a small fine and forfeiture of the weapon (or in a few cases a very brief stay in the local jail), not … significant criminal penalties." *Heller*, 554 U.S. at 633. Those historical regulations were thus "akin to modern penalties for minor public-safety infractions like speeding or jaywalking." *Id.* As a result, they could not serve as valid historical analogues for the District's challenged regulation, which, "far from imposing a minor fine, threaten[ed] citizens with a year in prison (five years for a second violation)." *Id.* at 634. And this Court picked back up on this thread in *Bruen*, concluding that antebellum statutes levying monetary sanctions of uncertain size did not impose a burden on the right to bear arms comparable to that imposed by a New York statute whose violation "can carry a 4-year prison term or a $5,000 fine." *Bruen*, 142 S. Ct. at 2149 (citing *Heller*, 554 U.S. at 633-634).

The MAC thus erred in failing to conduct the required historical analysis. Had it done so, it would have found that the burden imposed on the right to bear arms by § 10(a) is not "comparable" to that imposed by permissible historical regulations.

4. *Neither the Commonwealth nor the courts below have ever identified any historical gun control regulation that imposed a burden on the right to bear arms remotely comparable to that imposed by Massachusetts's regulatory regime and its mandatory minimum sentencing scheme.*

"Prior to amendment in 1974," Mass. Gen. Laws, ch. 269, § 10, made the unlawful possession of a firearm by someone with no prior felony convictions a misdemeanor, punishable by "a fine of not more than $50 or imprisonment not exceeding two and one-half years." *Jackson*, 369 Mass. at 907.[6] The 1974 amendment—known at the time as the "Bartley-Fox" amendment—imposed a one-year mandatory minimum sentence (since increased to eighteen months), even upon a first offender. *See id.* at 907-908; James A. Beha II, *"And* Nobody *Can Get You Out": The Impact of a Mandatory Prison Sentence for the Illegal Carrying of a Firearm on the Use of Firearms and on the Administration of Criminal Justice in Boston—Part I*, 57 B.U. L. REV. 96, 98 (1977). The Bartley-Fox amendment "attracted a great deal of local and national attention" as a novel "experiment in mandatory sentencing." Beha, *supra*, at 98. Indeed, as the SJC recognized, it made Massachusetts the first jurisdiction anywhere in the Nation to impose a mandatory minimum sentence on a first offender for the mere possession of a firearm. *See Jackson*, 369 Mass. at 913.

The novelty of the Bartley-Fox penalty provision dooms it under *Heller* and *Bruen*. In *Jackson*, the SJC upheld § 10(a)'s (then one-year) mandatory minimum sentence based on its view that "our Legislature must be able to experiment in finding solutions to [the] pervasive problem" of urban crime. *Jackson*, 369 Mass. at 911. But

[6] Massachusetts law defines a misdemeanor as any crime not punishable by a state prison sentence; the maximum sentence for such an offense is thirty months in county jail. *See DiMasi v. Secretary of the Commonwealth*, 491 Mass. 186, 198 n.6 (2023) (citing Mass. Gen. Laws, ch. 274, § 1).

*Bruen* explains that the Second Amendment does not permit such experimentation at the expense of "the right of armed self-defense." *Bruen*, 142 S. Ct. at 2133. *See id.* at 2131 (confirming that the "societal problem" of "firearm violence in densely populated communities" was one faced by the Founders, and that solutions to that problem therefore require "distinctly similar" historical analogues in order to pass muster). Unless the Commonwealth can "affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms," that regulation may not constitutionally be enforced. *Id.* at 2127.

The Commonwealth cannot make that showing, and the MAC erred in failing to hold it to its burden. As this Court noted in *Heller*, historical regulations dealing with the mere possession or storage of firearms punished violators only with "a small fine and forfeiture of the weapon[7] (or in a few cases a very brief stay in the local jail), not with significant criminal penalties." *Heller*, 554 U.S. at 633. This is consistent with historical understandings of permissible punishments for acts *mala prohibita*. *See Staples*, 511 U.S. at 616-618. *See also Kelly*, 484 Mass. at 58 (recognizing that the conduct regulated by § 10(a) is not "inherently harmful"). It is *not* consistent with § 10(a)'s severe mandatory penalties. Those "materially different means" of addressing a "societal problem" confronted by the Founders provide "evidence that [the] modern regulation is unconstitutional." *Bruen*, 142 S. Ct. at 2131.

In short, "the historical record … does not demonstrate a tradition," *id.* at 2138, of lengthy mandatory jail sentences for the mere possession of a handgun based on

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[7] *Cf.* Mass. Gen. Laws, ch. 269, § 10(e), *infra*, Pet. App. 17a (providing for forfeiture of unlawfully possessed weapons upon conviction under any subsection of the statute).

potentially unwitting regulatory infractions by otherwise law-abiding citizens. Indeed, the Commonwealth has never identified any "historical regulation" that even *remotely* resembles the Bartley-Fox amendment, let alone one that is "distinctly similar." *Id.* at 2131. And under *Bruen*, it is the Commonwealth's burden to place its regulatory regime within "the Nation's historical tradition of firearm regulation." *Id.* at 2130. The Commonwealth's failure to do so here renders § 10(a)'s mandatory minimum sentencing provision unconstitutional.

## CONCLUSION

The petition for a writ of certiorari should be granted. Because the decision of the Massachusetts Appeals Court is so plainly contrary to this Court's precedents, Petitioner suggests that it may be appropriate for this Court summarily to vacate the judgment and remand for that court to conduct the Second Amendment analysis this Court has held required. *Cf. Caetano v. Massachusetts*, 577 U.S. 411, 412 (2016).

Respectfully submitted,

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