No. _____

In the
Supreme Court of the United States

ALFRED MORIN,
Petitioner,

v.

WILLIAM LYVER,
Respondent.

-AND-

COMMONWEALTH OF MASSACHUSETTS,
Intervenor.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Massachusetts requires people to obtain licenses in order to possess or purchase handguns, and it disqualifies people with certain criminal convictions from obtaining licenses. Pertinently, Massachusetts law provides that an individual who has been convicted of a nonviolent misdemeanor that concerned the possession or use of a gun can obtain a license that allows him to possess a handgun at home after five years have passed. However, this same person can never obtain authorization to purchase a handgun—meaning that the only way they can obtain one is if someone leaves it to them by bequest or intestacy. The question presented is whether a state can impose a lifetime ban on purchasing handguns (but not possessing them) against anyone who has been convicted of a nonviolent misdemeanor that involved the possession or use of guns.

PARTIES TO THE PROCEEDING

Petitioner Alfred Morin applied to the police chief of Northborough, Massachusetts for a Firearms Identification Card and a permit to purchase a firearm in February 2018.

Respondent William Lyver is the chief of the Northborough, Massachusetts Police Department. Chief Lyver denied Petitioner's application for a permit to purchase on April 4, 2018.

Respondent Intervenor Commonwealth of Massachusetts intervened in the courts below to defend the constitutionality of the Massachusetts General Laws at issue.

STATEMENT OF RELATED PROCEEDINGS

There are no proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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PETITION FOR WRIT OF CERTIORARI

Over a decade ago, this Court ruled that the right to keep and bear arms protects the right to "possess and carry" modern small arms, including (specifically) handguns. *See District of Columbia v. Heller*, 554 U.S. 570, 592 (2008). This Court next ruled that the Second Amendment applies to the states, and in doing so, it rejected the proposition that the Second Amendment is "subject to an entirely different body of rules than the other Bill of Rights guarantees that we have held to be incorporated into the Due Process Clause." *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010). Notwithstanding this, the decisions of the federal appellate courts are in irreconcilable conflict when it comes to the standards to apply to laws that burden the ability to possess or carry firearms. This Court has granted certiorari in *New York State Rifle Ass'n v. Bruen*, No. 20-843, and the Court's resolution of that case will likely provide significant guidance for issues like those presented here. Yet, questions regarding both the standards of scrutiny and the level of applicable rigor will persist.

This Petition presents an excellent opportunity to provide guidance that would substantially resolve these ongoing issues. The Petitioner here can legally "possess" a handgun in Massachusetts, but because he was convicted of two nonviolent misdemeanors that involved firearms in 2004, Massachusetts law prohibits him from purchasing one—for life. Because it was possible, theoretically, for Petitioner to obtain a handgun if (and only if) someone else left one to him by bequest or intestacy, the court below concluded that

Petitioner's injury was not comparable to a "ban," and it declined to overturn the trial court's intermediate scrutiny analysis. That is, the court below characterized "the core right articulated in *Heller*" as the ability to possess a handgun at home and concluded that because Petitioner would still be able to possess a handgun if someone else chose to leave it to him at their death, the Petitioner was not "categorically prohibited," and nothing more than intermediate scrutiny applied. App. 13.

However, the Second Amendment protects more than just the abstract ability to possess a handgun inside one's home, disconnected from any practical ability to obtain one. The standard that the court below applied largely eviscerates the right to keep and bear arms. Effectively, it means that the "core" of the Second Amendment is intact so long as people have any theoretical ability to acquire a handgun, even if that ability is abstract and unlikely to ever materialize. Ultimately, the decision below represents the end result of a review standard that rewrites "the right of the people to keep and bear arms" as "the right to possess a handgun at home"—and then evaluates any restriction on handgun possession that falls short of a categorical ban by using a deferential standard of review. And as such, this Petition ties into the larger conflict of authority that has developed as to the standard of review that should apply to Second Amendment burdens.

OPINIONS BELOW

The decision of the United States Court of Appeals for the First Circuit, reprinted in the Appendix (App.)

at 1, is published at 13 F.4th 101. The decision of the United States District Court for the District of Massachusetts, reprinted at App. 17, is published at 442 F. Supp. 3d 408.

JURISDICTION

The Court of Appeals entered its judgment on September 14, 2021. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The Second Amendment to the 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.

U.S. CONST. amend. II. The Fourteenth Amendment to the Constitution provides in pertinent part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, sec. 1.

Several provisions of Massachusetts law, sometimes overlapping, are particularly pertinent to this Petition. Taken together, they prohibit people from possessing, purchasing or carrying firearms, unless they have appropriate licenses. These statutes, as applied here, allow Petitioner to "possess" a handgun, in the abstract—but render him unable to purchase one.

First, it is generally illegal to "own or possess any firearm [*i.e.* handgun], rifle, shotgun or ammunition" unless a person has either a Firearms Identification Card ("FID") or a License to Carry Firearms ("LTC"). *See* MASS. GEN. LAWS ch. 140, § 129C. There are exceptions, such as for new residents and nonresident hunters, but none are pertinent here. *See id.* § 129C(f), (j). (Note that Massachusetts law defines the term "firearm" to include handguns, but to exclude ordinary rifles and shotguns. *See id.* § 121. Federal law, in contrast, defines the term "firearm" to include all three categories of guns. *See* 18 U.S.C. § 921(a)(3).) The basic punishment for a person who "owns, possesses or transfers" a gun without a license (without additional circumstances present) is imprisonment for up to two years or a fine of up to $500. *See* MASS. GEN. LAWS ch. 10, § 269(h)(1).

By statute, a FID does "not entitle a holder thereof to possess: (i) a large capacity firearm . . . ; or (ii) a non-large capacity firearm." *See id.* ch. 140, § 129B(6). While this would appear to prohibit the possession of any handgun (whether "large capacity" or "non-large capacity"), the Supreme Judicial Court of Massachusetts has ruled that "[a]n FID card allows the holder to own or possess a firearm within the holder's

residence or place of business, but not to carry it to or in any other place." *Commonwealth v. Powell*, 946 N.E.2d 114, 128, 459 Mass. 572, 587 (2011) (citing MASS. GEN. LAWS ch. 140, § 129C; *Commonwealth v. Walker*, 456 N.E.2d 1154, 1156, 17 Mass. App. Ct. 182, 185 (1983));[1] *see also Morin v. Leahy*, 862 F.3d 123, 127 (1st Cir. 2017) (citations omitted). That aside, a FID does "not entitle any person to carry a firearm in violation of" MASS. GEN. LAWS ch. 269, § 10, which is the Massachusetts law that prohibits the unlicensed carry of handguns. *See* MASS. GEN. LAWS ch. 140, § 129C. A person who violates this statute—by possessing a handgun away from "his residence or place of business" without also holding a LTC—commits a crime that can be punished by up to four and one-half years' imprisonment. *See id.* ch. 269, § 10(a), (n). The statute requires imprisonment for a minimum of 18 months. *See id.* § 10(a).

In order to lawfully purchase a handgun, a person must have a LTC, or alternatively, they can purchase a handgun with a FID if they also have a "permit to purchase." *See id.* ch. 140, § 131E(b). Concomitant with this restriction on purchasing handguns, it is illegal to

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[1] The General Court amended MASS. GEN. LAWS ch. 140, §129B to include the language restricting possession of either a "a large capacity firearm" and "a non-large capacity firearm" in 1998, but Massachusetts courts, and federal courts applying Massachusetts law, have continued to adhere to this line of authority. *See* 1998 Mass. Acts ch. 140, sec. 29; *Morin v. Leahy*, 862 F.3d 123, 127 (1st Cir. 2017) (citing *Powell v. Tompkins*, 783 F.3d 332, 337 (1st Cir. 2015); *Commonwealth v. Gouse*, 965 N.E.2d 774, 785 n.14, 461 Mass. 787, 799 n.14 (2012); *Powell*, 946 N.E.2d at 128, 459 Mass. at 587).

"sell[], rent[] or lease[]" a handgun to someone who does not have either a LTC, or a FID in conjunction with a permit to purchase. *See id.* §§ 123, 128, 128A. Separate and apart from this, it is illegal to "transfer[]" a handgun (even if it is not a sale, rental or lease) "without complying with the requirements of" MASS. GEN. LAWS ch. 140, § 129C. *See id.* ch. 269, § 10(h)(1). Section 129C restates the requirement that one have either a LTC, or a FID in conjunction with a permit to purchase, but it provides an exception for "[t]he transfer of a firearm, rifle or shotgun upon the death of an owner to his heir or legatee," provided the heir or legatee thereafter obtains a LTC or FID. *See id.* ch. 140, § 129C(n). Thus, the only way for a person to obtain a handgun if they have a FID, but neither a LTC nor a permit to purchase, if someone leaves it to them by intestacy or bequest.[2]

In order to obtain any of these licenses or permits, a person must apply to the statutory "licensing authority," which is "the chief of police or the board or officer having control of the police in a city or town, or persons authorized by them." *Id.* § 121; *see id.* §§ 129B(1), 131(d), 131A. An applicant must satisfy various requirements related to (among other things) their age and their criminal and mental health background, and they must also complete safety training. *See id.* §§ 129B(1)(i)-(xi), 131(d)(i)-(x), 131P(a). Specifically, and as is pertinent here, an individual cannot obtain either a FID or a LTC if they

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[2] A person with either a LTC or a FID can purchase a rifle or shotgun without the need for an additional permit. *See* MASS. GEN. LAWS ch. 140, § 131E(a); *see also id.* §§ 123, 128, 128A, 129C.

have been convicted of any of the following five categories of crimes:

> (A) a felony; (B) a misdemeanor punishable by imprisonment for more than 2 years; (C) a violent crime as defined in section 121; (D) *a violation of any law regulating the use, possession, ownership, transfer, purchase, sale, lease, rental, receipt or transportation of weapons or ammunition for which a term of imprisonment may be imposed*; (E) a violation of any law regulating the use, possession or sale of controlled substances, as defined in section 1 of chapter 94C, including, but not limited to, a violation under said chapter 94C; or (F) a misdemeanor crime of domestic violence as defined in 18 U.S.C. 921(a)(33)[.]

See id. §§ 129B(1)(i)-(ii), 131(d)(i)-(ii) (emphasis added). The statute governing FIDs goes on to provide that a person with an otherwise disqualifying conviction can obtain a FID after five years, so long as the conviction is not for "a felony, a misdemeanor crime of domestic violence, a violent crime or a crime involving the trafficking of controlled substance." *See id.* § 129B(1)(i)-(ii). However, the LTC statute contains no such exception. *See id.* § 131(d)(i)-(ii). Thus, a person with a misdemeanor conviction that relates to the use or possession of firearms can obtain a FID after five years (if they are otherwise qualified to obtain one), but that person can never obtain a LTC. In addition, the person is also ineligible to obtain a permit to purchase, as a person must be "qualified to be granted a" LTC in order to obtain a permit to purchase. *See id.* § 131A.

The Appendix contains the relevant portions of the statutes of the Commonwealth of Massachusetts, discussed above, as well as of the District of Columbia Code, beginning at App. 32.

STATEMENT OF THE CASE

A. After bringing his Massachusetts-licensed gun to the District of Columbia in 2004, Petitioner was convicted of two misdemeanors and lost his Massachusetts LTC gun license

Petitioner Alfred Morin, Ph.D. is a Massachusetts resident who, in October 2004, traveled to Washington, DC with a handgun. App. 3, 18. At the time, Dr. Morin had a Massachusetts License to Carry Firearms (LTC). App. 3, 18. He did not know that District of Columbia laws prohibited him from carrying his gun, notwithstanding his Massachusetts license. App. 18. At the American Museum of Modern History, he saw a sign prohibiting firearms and approached a guard to inquire about checking his gun. App. 3, 18-19. Police arrested Dr. Morin and charged him with carrying a pistol without a license, possession of an unregistered firearm and unlawful possession of ammunition. App. 3, 19.

On November 8, 2004, Dr. Morin pleaded guilty to attempting to carry a pistol without a license, in violation of D.C. Code § 22-3204(a)(1) (2004) (codified as amended at D.C. Code § 22-4504), and possession of an unregistered firearm, in violation of D.C. Code § 6-2376 (2004) (codified as amended at D.C. Code §§ 7-2502.01, 7-2507.06). App. 4, 19. The maximum

punishment for Dr. Morin's attempt crime was a fine of $1,000 and imprisonment for 180 days. *See* D.C. Code § 22-103 (2004) (codified as amended at D.C. Code § 22-1803). The maximum punishment for possessing an unregistered firearm was a $1,000 fine and imprisonment for one year. *See id.* § 6-2376 (2004). Under District of Columbia law, both crimes were misdemeanors. *See Henson v. United States*, 399 A.2d 16, 20 (D.C. 1979) (citing *Stephens v. United States*, 271 F.2d 832, 833 n.1 (D.C. Cir. 1959)). The Superior Court of the District of Columbia sentenced Dr. Morin 60 days imprisonment on each count, with execution suspended, as well as three months of supervised probation and 20 hours of community service. App. 19.

In February 2008, Dr. Morin submitted an application to renew his LTC to Northborough, Massachusetts Police Chief Mark Leahy. App. 4, 19. After learning of the 2004 misdemeanor convictions, Chief Leahy denied Dr. Morin's renewal application pursuant to MASS. GEN. LAWS ch. 140, § 131(d)(ii)(D), which (as stated) prohibits the issuance of an LTC to any person who "has . . . been convicted . . . of . . . a violation of any law regulating the use, possession, ownership, transfer, purchase, sale, lease, rental, receipt or transportation of weapons or ammunition for which a term of imprisonment may be imposed." App. 4, 19.

B. More than 10 years later, Petitioner sought to obtain another LTC so that he could possess a handgun at home

In February 2015, more than 10 years after his guilty pleas, Dr. Morin applied again for a LTC from

the Northborough Police Department. App. 19. He disclosed the District of Columbia misdemeanor convictions on his application, and Chief Leahy again denied the application pursuant to § 131(d)(ii)(D). App. 19-20. On March 25, 2015, Dr. Morin commenced a 42 U.S.C. § 1983 action against Chief Leahy in the United States District Court for the District of Massachusetts, contending that Chief Leahy's denial of his application pursuant to § 131(d)(ii)(D) impermissibly deprived him of his right to keep and bear arms. *See Morin v. Leahy*, 189 F. Supp. 3d 226, 230 (D. Mass. 2016), *aff'd*, 862 F.3d 123 (1st Cir. 2017). The Commonwealth of Massachusetts intervened to defend the constitutionality of § 131(d)(ii)(D), and on May 18, 2016, the district court granted summary judgment in favor of Chief Leahy and the Commonwealth. *See id.*

District Judge Timothy S. Hillman reasoned that, pursuant to the First Circuit's decision in *Hightower v. City of Boston*, 693 F.3d 61 (1st Cir. 2012), the issue was not Morin's "right to possess a firearm in the home," but was instead his ability to "to carry concealed firearms in public." *Morin*, 189 F. Supp. 3d at 234. Under *Hightower*, "the interest . . . in carrying concealed weapons outside the home is distinct from th[e] core interest emphasized in *Heller*." *Id.* at 235 (quoting *Hightower*, 693 F.3d at 72) (other citation omitted) (alterations in source). Accordingly, it was "not necessary to determine whether a complete categorical prohibition on the arms rights of individuals who have been convicted of certain weapons-related misdemeanors is constitutional, because that is not what is being challenged in this case." *Id.* at 234. Rather, the restriction was valid so

long as it served an "important purpose"—which it did, by "preventing potentially dangerous persons from carrying concealed weapons in public." *Id.* at 235. The court cited four academic articles that the Commonwealth had identified (discussed in further detail *infra*). *See id.* Furthermore, the court declined to consider Dr. Morin's individual circumstances in deciding whether the restriction was constitutional as-applied. *See id.* at 235-36.

Dr. Morin appealed, and on June 29, 2017, the Court of Appeals for the First Circuit affirmed. *See Morin v. Leahy*, 862 F.3d 123 (1st Cir. 2017). The First Circuit's essential rationale was that there was no constitutional deprivation "because a Firearm Identification Card ('FID Card'), in conjunction with a permit to purchase, allows one to acquire a firearm and to possess it in one's home, and thus to exercise the Second Amendment rights at issue in the present case." *See id.* at 125 (footnotes omitted); *see also id.* at 127 (citing *Chardin v. Police Comm'r of Boston*, 989 N.E.2d 392, 394 n.5, 465 Mass. 314, 315 n.5 (2013)). The court rejected Morin's argument that a FID did not allow the possession of a handgun at home pursuant to MASS. GEN. LAWS ch. 140, § 129B(6) because "the Massachusetts Supreme Judicial Court, and this Court interpreting Massachusetts law, have held to the contrary on numerous occasions." *Id.* (citing *Powell v. Tompkins*, 783 F.3d 332, 337 (1st Cir. 2015); *Commonwealth v. Gouse*, 965 N.E.2d 774, 785 n.14, 461 Mass. 787, 799 n.14 (2012); *Commonwealth v. Powell*, 946 N.E.2d 114, 128, 459 Mass. 572, 587 (2011)). Furthermore, while "a FID Card alone is insufficient to purchase and transport a firearm to one's home," it was

possible "to apply to a licensing authority for a permit to purchase, rent, or lease a firearm for a proper purpose." *Id.* (citing MASS. GEN. LAWS ch. 140, § 131A). If a person obtained this permit, then "the law specifically provides that she may have [a handgun] delivered to her home." *Id.* (citing MASS. GEN. LAWS ch. 140, § 123). Thus, the denial of Morin's application for a LTC "does not infringe on the Second Amendment rights he asserts in this litigation." *Id.*

C. Petitioner now has a FID gun license and can lawfully "possess" a handgun in his home—but he is unable to purchase one

On February 22, 2018, following the First Circuit's ruling, Dr. Morin submitted an application for a Firearms Identification Card and a permit to purchase to Respondent William Lyver, who had become the Chief of the Northborough Police Department. App. 20. Chief Lyver denied Dr. Morin's application pursuant to MASS. GEN. LAWS ch. 140, § 131A, which (again) provides that an applicant must be "qualified to be granted" a LTC. App. 20. However, Chief Lyver issued a FID to Dr. Morin. App. 20.

Dr. Morin filed the present § 1983 action to challenge Respondent's denial of his application for a permit to purchase under MASS. GEN. LAWS ch. 140, § 131A. App. 20. Dr. Morin's Complaint alleged that "[w]ithout a License to Carry or Permit to Purchase, Dr. Morin has no lawful method to purchase a handgun for use in the home for self-defense." Complaint (Doc. No. 1) at ¶ 25, *Morin v. Lyver*, No. 4:18-cv-40121 (D. Mass. Jul. 18, 2018). The Complaint alleged further that "Defendants' actions in denying Plaintiff a Permit

to Purchase has denied Plaintiff his right to possess a firearm in his home as protected by the Second and Fourteenth Amendments to the U.S. Constitution." *Id.* ¶ 26. After providing an overview of the Massachusetts laws that govern the possession of guns and the issuance of gun licenses, the Complaint asserted that the "licensing scheme precludes Dr. Morin from lawfully obtaining a firearm to possess in the home for the purposes of self-defense." *Id.* ¶ 40. The Complaint asserted a single cause of action that reiterated the prior allegations and then concluded that "[t]he Defendant's refusal to issue a License to the defendant due to his non-violent, misdemeanor conviction involving a firearm violates Dr. Morin's individual right to possess a handgun for defense of hearth and home secured by the Second Amendment to the United States Constitution." *Id.* ¶ 42. The prayer for relief sought, pertinently, a declaration that § 131(d)(ii)(D) "violates Plaintiff's constitutional right to keep and bear arms under the Second and Fourteenth Amendments to the U.S. Constitution, to the extent they [sic] allow Defendants to prohibit otherwise qualified private citizens from purchasing and possessing 'firearms' for the purpose of self-defense in the home," as well as an injunction "requiring defendants to issue a Massachusetts LTC or Permit to Purchase to plaintiff sufficient for plaintiff to possess and purchase a firearm for the purpose of self-defense in the home." *Id.* p. 7, ¶ 1, 3. As in the prior case, the Commonwealth of Massachusetts intervened to defend the constitutionality of § 131(d)(ii)(D) and § 131A. App. 10, 20.

D. The Commonwealth relies on five publications to justify the bar at issue

Before the courts below, the Commonwealth relied on five published studies and reports to justify the restriction that § 131(d)(ii)(D) imposes. *See* Commonwealth Br. pp. 33-38, *Morin v. Lyver*, No. 20-1280 (1st Cir. Nov. 20, 2020). To reiterate, the restriction at issue operates to disqualify all individuals from obtaining handguns (except by bequest) if they have misdemeanor convictions for crimes that involved the use of possession of firearms, and which carried the possibility of imprisonment as a punishment. *See* MASS. GEN. LAWS ch. 140, § 131(d)(ii)(D). The issue arises only with respect to individuals who have misdemeanor convictions that involve firearms that are not: (1) "violent crimes"; (2) crimes of "domestic violence"; (3) crimes involving the distribution of controlled substances; or (4) punishable by more than two years' imprisonment. *See id.*; *see also id.* § 129B(1)(ii). This is because Massachusetts law would otherwise prohibit an individual in one of these categories from possessing firearms. *See id.* §§ 129B(1)(ii), 131(d)(ii)(D).

The only published report that was directly relevant was Garen J. Wintemute, et al., *Prior Misdemeanor Convictions as a Risk Factor for Later Violent and Firearm-Related Criminal Activity Among Authorized Purchasers of Handguns*, 280 J. AM. MED. ASS'N 2083 (1998) (hereinafter the "Wintemute study"). *See* Record Appendix at JA000024-28, *Morin v. Lyver*, No. 20-1280 (1st Cir. Aug. 10, 2020). That study concerned 5,923 individuals who had purchased handguns in the State

of California during the year 1977, and it addressed the relationship between various prior misdemeanor convictions and the likelihood of future criminal charges. *See id.* at JA000024. Of these individuals, 3,128 had at least one prior misdemeanor conviction. *See id.* The authors separated the individuals into three groups: (1) those involving neither firearms nor violence; (2) those involving firearms, but not violence; and (3) those involving violence. *See id.* at JA000025. The authors' general conclusion was that "[h]andgun purchasers with prior misdemeanor convictions are at increased risk for future criminal activity, including violent and firearm-related crimes." *Id.* However, the extent of that increased risk (relative to individuals with no prior misdemeanor convictions) depended to a large extent on the type of misdemeanor conviction at issue, as well as on the type of new charge at issue. As to the possibility of a new charge for a violent crime, individuals who had a prior conviction for a non-violent misdemeanor that did not involve firearms were 4.8 times more likely to be charged with a violent crime in the future. *See id.* at JA00027. Individuals with a prior non-violent misdemeanor that involved firearms were 4.4 times more likely to be charged with a new violent crime. *See id.* And finally, individuals with a prior conviction that involved violence were 8.9 times more likely to be charged with a violent crime in the future. *See id.* Thus, individuals with non-violent misdemeanor convictions that involved firearms had about the same risk of committing future violent crimes as did individuals who had non-violent misdemeanor convictions that did not involve firearms. However, individuals with misdemeanor convictions

that involved violence were significantly more likely to commit violent crimes in the future.

The other four studies had only tangential relevance (at best) because they did not focus on non-violent misdemeanors that involved firearms. For example, the study published as Mona A. Wright & Garen J. Wintemute, *Felonious or Violent Criminal Activity that Prohibits Gun Ownership Among Prior Purchasers of Handguns: Incidence and Risk Factors*, 69 J. TRAUMA 948 (2010) (hereinafter the "Wright study"),[3] looked at handgun purchasers in California in 1991 and examined whether there was a relationship between prior misdemeanor convictions of any sort and the likelihood of a charge for a violent crime in the future. *See id.* at 1. The authors' conclusion was, pertinently, that individuals with one prior misdemeanor conviction were 4.2 times more likely to be convicted of a felony or a domestic violence misdemeanor in the future. *See id.* at 5. Individuals with two prior misdemeanor convictions were 10.4 times more likely to be convicted of such a crime, and those with three or more were 13.6 times more likely. *See id.* In addition, individuals who had one or more prior arrests (without conviction) were 7.0 times more likely to have a felony or domestic violence conviction in the future. *See id.* However, although the study differentiated between "arrests" and "convictions," as well as between the number of convictions, it did not address the risk presented by different types of misdemeanors at all. *See id.*

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[3] *See* Exhibit I to the Affidavit of Julia E. Kobick (Doc. No. 25-10), *Morin v. Lyver*, No. 4:18-cv-40121 (D. Mass. Jun. 12, 2019).

The study Michael Siegel, et al., *The Relation Between State Gun Laws and the Incidence and Severity of Mass Public Shootings in the United States, 1976-2018*, 44 LAW & HUMAN BEHAVIOR 347 (2020) (hereinafter the "Siegel study"), examined the relationship between various state-level gun restrictions and the incidence and severity of mass shooting events. *See* Commonwealth Brief Addendum at Add. 019-20, *Morin v. Lyver*, No. 20-1280 (1st Cir. Nov. 20, 2020). This study found, pertinently, that state laws that prohibit gun ownership by individuals with "violent misdemeanor" convictions are significantly correlated with fewer and less severe mass shooting events. *See id.* at Add. 026-27. However, the Siegel study did not address the issue presented here—the likelihood that individuals with non-violent misdemeanor convictions that involve firearms will commit future crimes in the future.

Finally, two reports from the Bureau of Justice Statistics likewise have little or no direct bearing because they did not examine non-violent firearms misdemeanors in the first place, as well as because their statistical pool was individuals who were actually incarcerated—not those who had merely been convicted of any offense for which imprisonment was a possibility. Specifically, in Bureau of Justice Statistics, U.S. Dep't of Justice, *Recidivism of Prisoners Released in 30 States in 2005: Patterns from 2005 to 2010* (Apr. 2014),[4] the Bureau reported that 76.6% of state prison inmates had been re-arrested within five years of their

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[4] *See* Exhibit K to the Affidavit of Julia E. Kobick (Doc. No. 25-12), *Morin v. Lyver*, No. 4:18-cv-40121 (D. Mass. Jun. 12, 2019).

release. *See id.* at 8. The re-arrest rate was slightly higher, at 79.5%, when limited to the subset of prison inmates whose most serious offense was a "Weapons offense." *See id.* However, this lumps all "Weapons offenses" together, without making any differentiation between misdemeanor and felony offenses. *See id.* at 23.

And, the report in Bureau of Justice Statistics, U.S. Dep't of Justice, *Fact Sheet: Profile of Nonviolent Offenders Exiting State Prisons*, at 2 (Oct. 2004),[5] examined the characteristics of individuals imprisoned for non-violent offenses (both felony and misdemeanor) including, pertinently, the likelihood that they were rearrested within three years of their release. *See id.* at 2. The Bureau found that 69.1% of nonviolent releasees were rearrested within three years, and 19.9% were rearrested for a violent crime. *See id.* at 4. The report supports the proposition that individuals incarcerated for nonviolent offenses are likely to be rearrested, but it does not do anything to indicate whether individuals with nonviolent firearms misdemeanors—and for that matter, misdemeanors for which they were not incarcerated—are more likely to commit crimes (or violent crimes) in the future.

E. The District Court's summary judgment ruling

On March 4, 2020, the district court granted summary judgment to Chief Lyver and the Commonwealth. App. 18. Judge Hillman reasoned that

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[5] *See* Exhibit J to the Affidavit of Julia E. Kobick (Doc. No. 25-11), *Morin v. Lyver*, No. 4:18-cv-40121 (D. Mass. Jun. 12, 2019).

"at its core, the Second Amendment protects 'the right of law-abiding, responsible citizens to use arms in defense of hearth and home.'" App. 23 (quoting *Heller*, 554 U.S. at 635) (other citations omitted). Petitioner had a FID and could "lawfully possess a firearm [handgun] within his home," and the issue was accordingly "that Sections 131 and 131A, the provisions under which Chief Lyver denied his application, burden his Second Amendment right because they prevent him from lawfully *obtaining* any firearm to possess within his home." App. 24-25 (emphasis in source). The court "assume[d], without deciding, that [Petitioner] is correct that these provisions burden conduct falling within the scope of the Second Amendment right" and proceeded to address the level of scrutiny. App. 25 (citing *Worman v. Healey*, 922 F.3d 26, 36 (1st Cir. 2019)).

Relying on *Gould v. Morgan*, 907 F.3d 659 (1st Cir. 2018), a decision in which the First Circuit had upheld the use of license restrictions to prevent people from carrying guns for the purpose of self-protection, the district court concluded that the level of scrutiny "turns on how closely a particular law or policy approaches the core of the Second Amendment right and how heavily it burdens that right." App. 25 (quoting *Gould*, 907 F.3d at 670-71 (alteration omitted)). App. 26. "A law or policy that burdens conduct falling within the core of the Second Amendment requires a correspondingly strict level of scrutiny, whereas a law or policy that burdens conduct falling outside the core of the Second Amendment logically requires a less demanding level of scrutiny." App. 25 (quoting *Gould*, 907 F.3d at 671).

The district court rejected Petitioner's argument "that something more rigorous than intermediate scrutiny is appropriate here because the Massachusetts licensing scheme burdens the core right guaranteed by the Second Amendment." App. 25. Instead, the court reasoned that "[i]ndividuals convicted of weapons-related offenses punishable by a term of imprisonment are not the type of law-abiding, responsible citizens contemplated by the Court in *Heller*." App. 26 (citing *Heller*, 554 U.S. at 635). As to Petitioner's own otherwise lawful background, the court "decline[d] to consider Plaintiff's as-applied challenge on an individual basis." App. 26. Rather, "[t]he proper means by which to assess an as-applied challenge is to look at 'the class of persons affected, not the particular circumstances of each individual's situation.'" App. 27 (quoting *Morin v. Leahy*, 189 F. Supp. 3d 226, 236 (D. Mass. 2016). Thus, "because individuals convicted of weapons-related offenses punishable by a term of imprisonment are not, as a class, law-abiding and responsible citizens," the burden at issue did "not implicate the core of the right protected by the Second Amendment" and intermediate scrutiny was appropriate. App. 27 (citing *Worman*, 922 F.3d at 38) (other citations omitted).

Relying on First Circuit authority, the district court articulated "intermediate scrutiny" as the requirement of "a '"reasonable fit" between the restrictions imposed by the law and the government's valid objectives, such that the law does not burden more conduct than is reasonably necessary.'" App. 28 (quoting *Worman*, 922 F.3d at 38 (quoting *Gould*, 907 F.3d at 674)). The basic purpose of the Massachusetts gun licensing scheme

was "limiting the access of irresponsible individuals to deadly weapons." App. 28 (citations omitted). And as to the specific restriction at issue, the five studies and reports (discussed above) were "[a]mple empirical evidence [that] suggests that those who have been convicted of weapons-related offenses—even nonviolent offenses—are more likely to commit a crime or threaten public safety than those who have not." App. 28-29. Furthermore, the district court reasoned that the statutes at issue "do not prevent *all* individuals convicted of weapons-related offenses from purchasing firearms but instead focus on individuals convicted of offenses for which a term of imprisonment may be imposed." App. 29 (emphasis in source). Rather, the court reasoned, by excluding those who could not have been imprisoned, the statutes "avoid burdening more conduct than reasonably necessary." App. 30. Accordingly, the statutes were "substantially relate[d] to Massachusetts' interest in preventing crime and promoting public safety and [were] reasonably tailored to meet these needs." App. 30.

F. The proceedings before the Court of Appeals

The Court of Appeals for the First Circuit affirmed the district court's memorandum and order on September 14, 2021. App. 1. The First Circuit's decision began by reviewing Petitioner's prior case and its own conclusion, in that case, that because Petitioner "could purchase a firearm, have it delivered to [his] home, and possess it there," the inability to obtain a LTC "does not infringe upon the Second Amendment right to possess a firearm within one's home." App. 7

(quoting *Morin*, 862 F.3d at 127). After summarizing this history, the First Circuit began its analysis began by addressing the standard of review and the level of scrutiny. App. 11-12.

The First Circuit reasoned that Petitioner had "develop[ed] no argument that, insofar as intermediate scrutiny does apply, the District Court erred in upholding the restrictions." App. 12. Rather, the court characterized Petitioner as advocating "only that a more intensive form of scrutiny applies and that, under it, these restrictions are unconstitutional." App. 12. And on that point, the court reasoned that because Petitioner was not "categorically prohibited" from obtaining a handgun—in that someone could choose to leave one to him in their will—he had "failed to describe how the core right articulated in *Heller* has been so burdened that 'strong showing' scrutiny applies, notwithstanding his previous firearms-related convictions." App. 13. Thus, according to the court, Petitioner "is not subject to a ban on handgun possession for the purposes of self-defense in the home, because his FID Card permits him to possess a handgun for just that purpose." App. 14. The court acknowledged that Petitioner's inability to obtain a handgun in any manner except by inheritance was a "severe though (if Massachusetts is right about how the Commonwealth treats the inheritance of a handgun) not total restriction on acquisition of a handgun" and that it might not be constitutional. App. 15. But, because Petitioner had "described" the restrictions as a "ban," the court's view was that "no such argument has been advanced to us." App. 15. There was, according to the First Circuit, "no basis for overturning

the District Court's grant of summary judgment to the defendants." App. 16.

However, it must be noted that the Petitioner had certainly argued that the Commonwealth's showing of justification was insufficient to uphold the restriction imposed on him. The "argument" section of Petitioner's brief began by asserting that the statistical evidence that the Commonwealth relied upon was insufficient because it "lumps all misdemeanors together" and that "[a] substantially more reliable study would analyze Massachusetts residents who's [sic] first foray with the law is one of these disqualifying offenses to determine if those individuals had a substantially higher rate of criminal activity than those with no prior criminal history." Appellant's Br. p. 10, *Morin v. Lyver*, No. 20-1280 (1st Cir. Aug. 7, 2020). True, Petitioner argued that the First Circuit should apply an analysis that focused on "text, history, and tradition' or, at a minimum, . . . something more rigorous than the scrutiny applied in" *United States v. Skoien*, 614 F.3d 638 (7th Cir. 2010) (en banc), and *United States v. Booker*, 644 F.3d 12 (1st Cir. 2011). *Id.* p. 13. But the point of this argument was that the Commonwealth had failed to meet its "burden of establishing at least a strong public interest" in support of the restriction and "a close fit between" that strong interest and the restriction—not to make the constitutionality of the restriction dependent on the label applied to a court's analysis. *See id.* pp. 13-14. Indeed, in response to this argument, the Commonwealth had argued that Petitioner's claim "must be evaluated under, at most, intermediate scrutiny because [the laws at issue] do not heavily burden the core Second Amendment right

of law-abiding, responsible citizens to possess a gun in the home for self-defense." *See* Commonwealth Br. pp. 16-17, *Morin v. Lyver*, No. 20-1280 (1st Cir. Nov. 20, 2020); *see also id.* pp. 17-18, 20, 28, 31-32 (urging the court to uphold the restriction at issue using an "intermediate scrutiny" standard). Notably, the First Circuit acknowledged, in a footnote, that the Petitioner's stated position at oral argument was that "it's the government that bears the burden of showing that the burden is justified, and the statistical evidence we've got doesn't meet that showing." App. 12-13 n.5. But, the court did not address whether the statistical evidence actually justified the burden at issue. Indeed, the First Circuit's decision did not even cite the studies and reports that the parties had cited, and that the district court had relied upon.

REASONS FOR GRANTING THE WRIT

I. The federal appellate courts are in conflict as to the extent of the government's burden to justify prohibitions on the right to keep and bear arms

The trial court accepted the government's argument that the studies and reports, discussed above, were sufficient to justify the denial of Petitioner's application for a purchase to permit, which left him unable to obtain a handgun, except by the fortuity that someone might leave one to Petitioner by bequest. The district court found it sufficient that "empirical evidence suggests that those who have been convicted of weapons-related offenses—even nonviolent offenses—are more likely to commit a crime or threaten public safety than those who have not." App.

28. Unfortunately, this generalized contention ignores the actual import and nuance of the cited empirical evidence.

The first empirical source the district court cited was the Wintemute study, which (as stated) is the only study or report that had direct relevance to the burden at issue—a firearms prohibition tied to a nonviolent misdemeanor that concerned the possession or use of firearms. App. 29. The district court's conclusion was that the Wintemute study supported the proposition that "purchasers who had prior convictions for nonviolent firearm-related offenses . . . were at increased risk for later violent offenses," and that denying such individuals handguns served to "reduce[] the incidence of subsequent criminal activity." App. 29 (quoting Wintemute study). And to be sure, the Wintemute study does support this general proposition—but much more pertinent is that it provides significant additional detail about the *extent* to which such individuals pose an increased risk. Specifically, the Wintemute study indicates that individuals with nonviolent firearms misdemeanors are no more dangerous than other individuals with nonviolent misdemeanors—and that they pose significantly less risk than individuals with convictions for violent misdemeanors. Thus, by extension, it would be constitutional to prohibit (or essentially prohibit) handguns to all individuals with nonviolent misdemeanor convictions (since they pose the same threat). But this would turn this Court's discussion of "longstanding restrictions" that are "presumptively lawful" on its head, effectively rewriting it to indicate that prohibitions on convicted misdemeanants (vis-à-

vis convicted felons) are presumptively lawful. *See Heller*, 554 U.S. at 626-27 & n.26.

The other empirical evidence that the district court relied upon was essentially inapposite. The Wright study showed that individuals with unspecified "misdemeanor offenses" were "five times more likely to commit future crimes that would disqualify them from possessing firearms under federal and state law." App. 29 (quoting Wright study). However, the prohibition here is not tied to the bare existence of a misdemeanor conviction—and indeed, it is doubtful that the existence of a nonviolent misdemeanor conviction would justify a broad preclusion on ownership. The Wright study did not examine the import of a misdemeanor conviction that concerned nonviolent conduct involving a firearm—which is the issue presented here. Finally, the district court cited to the Bureau of Justice Statistics reports discussed previously, which showed "high recidivism rates among individuals serving a prison term for a weapons-conviction." App. 29-30 (citations omitted). But again, that's not the issue. The prohibition set forth in MASS. GEN. LAWS ch. 140, § 131(d)(ii)(D) does not turn on whether someone was incarcerated, and statistics about individuals who are imprisoned for both felonies and misdemeanors have little import.

The appellate court, for its part, did not evaluate the empirical evidence at all. Rather, the appellate court found it sufficient that Petitioner "provides us with no basis for overturning the District Court's grant of summary judgment to the defendants." App. 16.

The resolution of this case highlights one of the most substantial conflicts that has arisen in the wake of *Heller* and *McDonald*—the actual rigor and scrutiny that a court should apply to laws that restrict the ability to keep and bear arms. Can the government justify a restriction that applies to a class of people by pointing to characteristics that apply to other classes of people (*e.g.* those who have been incarcerated) or to larger classes of people (*e.g.* anyone with a misdemeanor conviction)? Or, does the government need to justify the specific restriction at issue and show why individuals within it are particularly dangerous?

A decision from the Court of Appeals for the Third Circuit highlights the extent of this conflict. In *Binderup v. Attorney General*, 836 F.3d 336 (3d Cir. 2016) (en banc), the court addressed the constitutionality of the federal law that prohibits individuals from possessing firearms if they have been convicted of a putative "misdemeanor" that "punishable by" imprisonment for more than two years. *See* 18 U.S.C. §§ 921(a)(2)(B), 922(g)(1); *see Binderup*, 836 F.3d at 339. One of the plaintiffs in the consolidated appeal had a Pennsylvania "misdemeanor" conviction for corruption of minors, punishable by imprisonment for up to five years, while the other had a Maryland "misdemeanor" conviction for carrying a handgun without a license, which had been punishable by up to three years' imprisonment. *See Binderup*, 836 F.3d at 340 (citing MD. CODE ANN. ART. 27, § 36B(b) (1990) (codified as amended at MD. CODE ANN. CRIM. LAW § 4-203); PA. CONS. STAT. §§ 6301(a)(1), 1104).

The en banc court found both prohibitions unconstitutional. *See id.* at 339. Seven of the 15 judges on the panel joined the first part of Judge Ambro's opinion, which reasoned that an individual could prevail on an as-applied challenge by "(1) identify[ing] the traditional justifications for excluding from Second Amendment protections the class of which [the individual] appears to be a member, and then (2) present[ing] facts about [the individual] and his background that distinguish his circumstances from those of persons in the historically barred class." *Id.* at 347 (op. of Ambro, J.) (citing *United States v. Barton*, 633 F.3d 168, 173-74 (3d Cir. 2011)). From here, the en banc court diverged. Judge Ambro, joined by two other judges, applied an intermediate scrutiny approach. *See id.* at 353-56 (op. of Ambro, J.). Under this approach, "the Government bears the burden of proof on the appropriateness of the means it employs to further its interest." *Id.* at 353 (op. of Ambro, J.) (citations omitted). And on this point, Judge Ambro found that the government had failed to meet its burden. *See id.* at 353-54 (op. of Ambro, J.). The statistical studies that the government relied upon were "off-point." *See id.* (op. of Ambro, J.). Specifically, "studies [that] estimate the likelihood that incarcerated felons will reoffend after their release from prison"—including, notably, one of the Bureau of Justice Statistics reports discussed above—were not pertinent because "[t]he Challengers were not incarcerated and are not felons under state law; they are state-law misdemeanants who spent no time in jail." *Id.* at 354 (op. of Ambro, J.) (citations omitted). Moreover, studies that addressed recidivism during the years immediately following release from prison were of little import not just

because the individuals in the case had not been imprisoned, but also because they been convicted many years prior, without reoffending in the interim. *See id.* (op. of Ambro, J.) (citation omitted). Because there was no "evidence in the record to show why people like [the plaintiffs] remain potentially irresponsible after many years of apparently responsible behavior," there was no "substantial fit between the continuing disarmament of the Challengers and an important government interest." *Id.* at 356 (op. of Ambro, J.).

In a separate opinion, joined by a total of five judges, Judge Hardiman rejected the use of means-end scrutiny with respect to a law that operates as a flat bar on "exercising the core Second Amendment right . . . once it has been determined that the challenger's circumstances distinguish him from the historical justifications supporting the regulation." *Id.* at 363 (op. of Hardiman, J.). Judge Hardiman's analysis focused on "traditional justifications" that had a "'historical pedigree.'" *See id.* at 366 (op. of Hardiman, J.) (quoting *Barton*, 633 F.3d at 172). Judge Hardiman found that historical sources from the time of ratification "indicate[] that the right to keep and bear arms was understood to exclude those who presented a danger to the public." *Id.* at 368 (op. of Hardiman, J.). However, the breadth of 18 U.S.C. § 922(g)(1), "and particularly the inclusion of nonviolent offenses, constitutes a significant departure from earlier understandings of a 'felony.'" *Id.* at 370 (op. of Hardiman, J.). Beyond this, Judge Hardiman found that both individuals had "distinguish[ed] themselves and their circumstances from those of persons not entitled to keep and bear arms because of their propensity for violence" and

shown they were "'no more dangerous than a typical law-abiding citizen.'" *Id.* at 374 (op. of Hardiman, J.) (quoting *Barton*, 633 F.3d at 174). Like Judge Ambro, Judge Hardiman found the government's empirical evidence was insufficient. *See id.* at 377-78 (op. of Hardiman, J.) (citations omitted). Specifically, studies that addressed recidivism among incarcerated inmates were mostly "irrelevant" because the plaintiff challengers "were not convicted of felonies and have never been incarcerated." *Id.* at 379 (op. of Hardiman, J.).

The decision below stands in marked contrast to this approach. The trial court relied on empirical evidence—including some of the same empirical evidence that the *Binderup* court rejected—that had only, at best, tangential relevance. The Wintemute study was the only publication that was on-point, and it showed only that individuals with nonviolent firearm misdemeanors were no more dangerous than other individuals with nonviolent misdemeanor convictions. The appellate court then declined to conduct a new analysis, tacitly finding the trial court's approach to be sufficient.

II. The federal appellate courts are in irreconcilable conflict over the import of the "presumptively lawful regulatory measures

In *Heller*, this Court emphasized that it did not intend "to cast doubt on" three categories of firearms restrictions, specifically: (1) "longstanding prohibitions on the possession of firearms by felons and the mentally ill"; (2) "laws forbidding the carrying of firearms in sensitive places such as schools and

government buildings"; and (3) "laws imposing conditions and qualifications on the commercial sale of arms." *Heller*, 554 U.S. at 626-27. Immediately following this caveat, the Court stated in a footnote that it "identified these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive." *Id.* at 627 n.26. The Court reiterated this caveat in *McDonald*. *See McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010) (quoting *Heller*, 554 U.S. at 626-27). Whether intended by the Court or not, many lower courts have focused on this portion of the Court's decision when ruling on the constitutionality of restrictions on the right to keep and bear arms. For example, as of December 13, 2021, Westlaw's Shepards citation service reports 2,504 judicial decisions that cite *Heller*—for any reason. Of these cases, 943, or 37.7%, contain the phrase "longstanding restrictions."

Courts have split over whether these "presumptively lawful" examples illustrate things that fall *inside* or *outside* the scope of constitutional protection. Specifically, the Courts of Appeals for the Third, Sixth, Ninth and Eleventh Circuits have concluded that these examples are generally outside the scope of protection, meaning that there is no need to subject these types of measures—or for that matter, things considered to be their analogues—to any constitutional review at all. *See Jackson v. City & County of San Francisco*, 746 F.3d 953, 960 (9th Cir. 2014) (*citing United States v. Chovan*, 735 F.3d 1127, 1137 (9th Cir. 2013)); *United States v. Greeno*, 679 F.3d 510, 520-21 (6th Cir. 2012); *United States v. Marzzarella*, 614 F.3d 85, 91 (3d Cir. 2010); *United*

States v. White, 593 F.3d 1199, 1206 (11th Cir. 2010). In addition, both the Fifth and Eighth Circuits have suggested they would "likely" take this view. *See United States v. McGinnis*, 956 F.3d 747, 755 (5th Cir. 2020) (quoting *NRA of Am. v. BATFE*, 700 F.3d 185, 197 (5th Cir. 2012)); *United States v. Bena*, 664 F.3d 1180, 1183 (8th Cir. 2011).

On the other hand, the Fourth, Sixth and Seventh Circuits have all rejected this approach and instead concluded that the "presumptively lawful regulatory measures" are examples of things that are within the scope of protection, but which are likely to pass muster on review. *See Tyler v. Hillsdale Cnty. Sheriff's Dep't*, 837 F.3d 678, 686-87 (6th Cir. 2016) (subject to as-applied challenge) (en banc) (op. of Gibbons, J.); *United States v. Chester*, 628 F.3d 673, 679 (4th Cir. 2010) (same); *United States v. Williams*, 616 F.3d 685, 692 (7th Cir. 2010) (same). The Tenth and D.C. Circuits have taken a somewhat hybrid approach under which there is a rebuttable presumption that the "presumptive lawful" examples are outside the scope of the Second Amendment. *See Bonidy v. United States Postal Serv.*, 790 F.3d 1121, 1129 (10th Cir. 2015); *Heller v. District of Columbia*, 670 F.3d 1244, 1253 (D.C. Cir. 2011).

The First Circuit has not taken a position on the question of whether the examples are inside or outside the scope of protection, but its approach to the examples has shifted over time. In its first discussion of the right to keep and bear arms after this Court decided *Heller*, the First Circuit focused on the "presumptively lawful" examples to decide the

constitutionality of 18 U.S.C. § 922(x)(2)(A), which generally prohibits individuals under the age of 18 years from possessing handguns. *See United States v. Rene E.*, 583 F.3d 8, 12-16 (1st Cir. 2009). However, the court did not focus on whether the examples were inside or outside the scope of protection, but instead on whether the prohibition at issue was historically analogous to the examples. *See id.* at 12. The court's conclusion was that the prohibition on juvenile possession was something "the founding generation would have regarded such laws as consistent with the right to keep and bear arms," and that as such, it "does not offend the Second Amendment." *Id.* at 16 (citing *Heller*, 554 U.S. at 626-27). Later, the First Circuit adopted a means-end intermediate scrutiny approach that requires that the "fit" between means and ends "need only be substantial." *Gould v. Morgan*, 907 F.3d 659, 674 (1st Cir. 2018) (*Kachalsky v. County of Westchester*, 701 F.3d 81, 91 (2d Cir. 2012); *United States v. Booker*, 644 F.3d 12, 26 (1st Cir. 2011)).

Regardless of whether the "presumptively lawful" examples are inside or outside the scope of protection, some courts place less significance on them than others. Notably, the Seventh Circuit has reasoned that it does "not think it profitable to parse these passages of *Heller* as if they contained an answer." *United States v. Skoien*, 614 F.3d 638, 640 (7th Cir. 2010) (en banc). Likewise, the Second Circuit has remarked that it does "not view this language as a talismanic formula for determining whether a law regulating firearms is consistent with the Second Amendment." *Kachalsky*, 701 F.3d at 90 n.11.

The import of this issue is substantial. If a court says (for example) that the "presumptively lawful" examples are outside the scope of protection, then the probable result is a watered-down review standard that begins from the premise that a different sort of restriction may not be protected at all. On the other hand, if a court says that the examples are within the scope of protection, the court is likely to subject that restriction to a more searching inquiry.

CONCLUSION

The Petition should be granted.

Respectfully submitted,

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