No. 21-1160

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**

## REPLY BRIEF FOR PETITIONER

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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," and per the Petition, the core issue is "irreconcilable conflict" among the federal appellate courts regarding "the standards to apply to laws that burden the ability to possess or carry firearms." Pet. at 1, 3.

The District Court rejected Petitioner's argument seeking "something more rigorous than intermediate scrutiny," and using an "intermediate scrutiny" approach, it concluded that five published studies and reports demonstrated 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. 25, 28-29; *see* Pet. at 20-21. On appeal, Petitioner argued for "a more intensive form of scrutiny," but the First Circuit disagreed, concluding that Petitioner was not "categorically prohibited" and had accordingly "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; *see* Pet. at 20-21. As to the intermediate scrutiny approach the District Court had used, 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.'" *Id.* at 20 (quoting App. 12). Put simply, the First Circuit rejected a more rigorous standard of scrutiny and

then summarily upheld the District Court's intermediate scrutiny analysis.

Since Petitioner filed his Petition, this Court decided *New York State Rifle & Pistol Ass'n v. Bruen*, where it rejected the use of means-end scrutiny, regardless of whether articulated as "intermediate" or "strict" scrutiny. *See* 597 U.S. __, 142 S. Ct. 2111, 2127 (2022). Instead, this Court "h[e]ld that when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct." *Id.* at 2126. It is insufficient for the government to "simply posit that the regulation promotes an important interest"—the essential requirement in an intermediate scrutiny approach—but "[r]ather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation." *Id.*

Accordingly, both decisions below are now plainly wrong. Both the District Court and the First Circuit should have applied a more rigorous standard of scrutiny, which considered whether "the regulation is consistent with this Nation's historical tradition of firearm regulation." Beyond this, and as we explain further below, the courts also should not have premised the level of scrutiny on the view that the "core" of the Second Amendment is the bare legal ability to possess a handgun within one's home.

In response, Defendants[1] attempt to recast the First Circuit's decision as one that turned on waiver. That, however, is not accurate. While the First Circuit reasoned that Petitioner had not sufficiently developed his arguments on two points, it is indisputable that the court decided, and rejected, Petitioner's claim "that a more intensive form of scrutiny applies and that, under it, these restrictions are unconstitutional." App. 12. Indeed, the First Circuit's only reference to "waiver"—which Defendants repeatedly quote—comes from a quotation included in a parenthetical to a case citation, not from the words of the court's decision itself. And notably, while Defendants use the term "waiver" repeatedly in their brief, they also hedge themselves with more guarded characterizations, like "appellate waiver rationale." *See* Opp. Br. at 14.

In Part I of this Reply, we explain that this Court's decision in *Bruen* invalidates the decision below in at least two respects—the standard of review and the "core" of protection. As Petitioner argued, the court below should have used a more intensive form of scrutiny. In Part II, we explain that rather than being about waiver, the First Circuit's conclusions about the development of Petitioner's arguments were the result of its characterization of Petitioner's constitutional injury—and that this characterization is no longer tenable under *Bruen*.

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[1] We refer to Defendant William Lyver and Intervenor Commonwealth of Massachusetts, which have jointly filed a brief in opposition, as "Defendants."

## I) The Decision Below Directly Conflicts with a Decision of this Court

Defendants attempt to characterize *Bruen* as concerning only the issue of whether the Second Amendment secures the right to carry a gun outside the home. *See* Opp. Br. pp. 1-2, 4-5 n.3, 21-22. Alternatively, Defendants argue that *Bruen* applies only to "law-abiding, responsible citizens"—and then make the circular argument that anyone with a misdemeanor conviction that relates to firearms is not law-abiding, and thus outside the scope of protection. *See id.* at 2, 13, 22. This, of course, just begs the very question this Petition presents. Contrary to Defendants' claim, *see id.* at 21, this Court's ruling in *Bruen* directly implicates the resolution of Petitioner's Second Amendment claim in (at least) two respects.

The first is that the court below interpreted the "core" of the Second Amendment to be the bare legal ability to possess a handgun in the home. App. 13-15. This was based on First Circuit precedent providing that "the possession of operative firearms for use in defense of the home constitutes the 'core' of the Second Amendment." *See Hightower v. City of Boston*, 693 F.3d 61, 72 (1st Cir. 2012) (citing *United States v. Booker*, 644 F.3d 12, 25 n.17 (1st Cir.2011); other citations omitted); *see also Gould v. Morgan*, 907 F.3d 659, 671 (1st Cir. 2018) (citing *Hightower*, 693 F.3d at 72); App. 13, 15. However, this Court rejected that view in *Bruen*. *See Bruen*, 142 S. Ct. at 2126 (citing *Gould*, 907 F.3d at 671; other citations omitted). Rather, this Court ruled that the Second

Amendment "similarly" protects the ability to carry a handgun in public, *see id.* at 2122, and so it was incorrect to conclude that Petitioner faced no meaningful infringement to his "core" Second Amendment rights because he had the mere (and essentially theoretical) legal ability to possess a handgun at home.

The *Bruen* decision also implicates Petitioner's case in that it abrogates the means-end scrutiny approach that the court below used.[2] Specifically, the First Circuit declined to use "strict scrutiny" or any other "more intensive form of scrutiny" because it concluded that so long as the laws at issue did not completely prohibit handgun possession in the home, "the core right articulated in *Heller* has [not] been so burdened that 'strong showing' scrutiny applies, notwithstanding [Petitioner's] previous firearms-related convictions." *See* App. 12-13. But as stated previously, the court should have addressed whether "the regulation is consistent with this Nation's historical tradition of firearm regulation." *Bruen*, 142 S. Ct. at 2126.

Moreover, these interpretive errors compounded each other. Because the court below considered the "core" to be only the bare legal ability to possess a handgun at home for the purpose of self-defense, it declined to apply a heightened level of scrutiny. Then making things worse, the

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[2] Notably, Defendants acknowledge that the court below used "the *then*-applicable two-step test for reviewing Second Amendment claims," which relied on authority this Court "abrogated" in *Bruen*. *See* Opp. Br. at 11 (*citing Gould*, 907 F.3d at 668-69) (emphasis added).

intermediate scrutiny review it upheld was invalid because it was based on "important" government interests, rather than consistency "with this Nation's historical tradition of firearm regulation." *Bruen*, 142 S. Ct. at 2126. Altogether, this compels vacatur. The decision below was the result of both rejected approaches working together.

### II) The Decision Below Turned Not on Waiver, but on a Characterization of Petitioner's Injury that is Now Untenable

The portion of the First Circuit's decision that Defendants cite to support their "waiver" argument (App. 15) in fact turned on conclusions about the scope of Petitioner's claimed constitutional injury, and certain nuances in the Massachusetts firearms licensing scheme are important to understanding these conclusions. As it is pertinent here, a license to carry ("LTC") authorizes a person to purchase, possess or carry handguns. *See* MASS. GEN. LAWS ch. 140, § 131(a); *see also* Pet. at 4-5. A different license, a firearms identification card ("FID"), as it pertains to handguns, authorizes their possession at home, alone, but does not authorize their purchase. *See* MASS. GEN. LAWS ch. 140, §§ 129C, 131E(b); *see also* Pet. at 4-5. To purchase a handgun, a person with a FID must apply for a "permit to purchase." *See* MASS. GEN. LAWS ch. 140, §§ 131A, 131E(b); *see also* Pet. at 5-6. However, to obtain this "permit to purchase," a person must be "qualified to be granted" a LTC. *See* MASS. GEN. LAWS ch. 140, § 131A; *see also* Pet. at 7.

Petitioner has been convicted of a nonviolent misdemeanor that involved the possession or use of firearms and carried a potential sentence of imprisonment. App. 4, 19; *see* Pet. at 8-9. As such, Massachusetts law allowed him to obtain a FID after five years had passed, but it barred him from obtaining a LTC forever. *See* MASS. GEN. LAWS ch. 140, §§ 129B(1)(i)-(ii), 131(d)(i)-(ii); *see also* Pet. at 7, 11. Furthermore, it barred him from obtaining a permit to purchase because he was not "qualified to be granted" a LTC. *See* MASS. GEN. LAWS ch. 140, § 131A; *see also* Pet. at 7, 12. In his first lawsuit, Petitioner challenged the denial of his application for a LTC, "arguing that [the] denial . . . violated his constitutionally protected right to possess a firearm for self-defense within the home." *Morin v. Leahy*, 862 F.3d 123, 126 (1st Cir. 2017). The First Circuit rejected his claim because "with both a FID Card and a permit to purchase, one could purchase a [handgun], have it delivered to one's home, and possess it there—without the need for a [LTC]." *Id.* at 127. The court accordingly found no infringement of the right Petitioner asserted, to wit, "the Second Amendment right to possess a firearm within one's home." *Id.*

Next, in the case at bar, Petitioner obtained a FID and tried to obtain a permit to purchase. App. 9. But because he was not "qualified to be granted" a LTC, Defendants denied his application. App. 9. Petitioner then filed suit and argued in the District Court that the pertinent statutory provisions "violate[] his Second Amendment right to possess a firearm in his home for self-defense" and "burden his

Second Amendment right because they prevent him from lawfully *obtaining* any firearm to possess within his home." App. 18, 25 (emphasis in source). The District Court applied intermediate scrutiny, rather than a heightened form of scrutiny, "because individuals convicted of weapons-related offenses punishable by a term of imprisonment are not, as a class, law-abiding and responsible citizens." App. 27.

Petitioner appealed, arguing "that he is subject to a handgun 'ban' that he contends triggers . . . a demanding form of review." App. 13. However, the First Circuit drew a distinction between the "right to *obtain* a handgun" and the "right to *possess* a handgun," and found that Petitioner's argument on appeal concerned possession, rather than acquisition. App. 13 (emphases in source). The First Circuit then disagreed that Petitioner was "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. Moreover, the court also disagreed that the prohibition on acquisition was a "ban," instead characterizing it as a "severe though . . . not total restriction"—since a person with an FID could, at least in theory, receive a handgun by bequest (which would not require them to have a permit to purchase). App. 14-15; *see* MASS. GEN. LAWS ch. 140, § 129C(n). Thus, when the First Circuit reasoned that Petitioner could not "be said to have made" an argument "for applying that more demanding form of review to the restrictions at issue," the court was reaching the result of its subsidiary conclusions that: (1) the "core" of the Second Amendment consists of

the bare legal ability to possess a handgun in the home; and (2) there is no "ban" if there is any potential exception or avenue of relief that remains open. So, because Petitioner did not literally face an unequivocal ban on possession in the home, he had not articulated an argument for a heightened form of scrutiny.

This reasoning is no longer tenable in light of *Bruen*. The "core" of the Second Amendment is not the mere legal ability to possess a firearm in the home, and further, the government cannot sustain burdens on the right to keep and bear arms by pointing to "important" government interests. *See Bruen*, 142 S. Ct. at 2126. But even beyond this, the reasoning also fails because it is not just unequivocal, no-exception "bans" that implicate the core of the Second Amendment.

Notably, this Court's previous decisions striking down handgun "bans" in the District of Columbia and Chicago did not concern restrictions that were outright and unequivocal bans on home possession. Specifically, in *District of Columbia v. Heller*, 554 U.S. 570 (2008), the D.C. Code had made it illegal to, *inter alia*, "possess" a gun in the absence of a "registration certificate," D.C. Code § 7-2502.01(a) (2001), and it had then provided that "[a] registration certificate shall not be issued for a . . . [p]istol not validly registered to the current registrant in the District prior to September 24, 1976," *id.* § 7-2502.02(a)(4) (2001). Indeed, the relief the Court ordered was not to overturn a "ban," but was instead that "the District must permit [the plaintiff] to register his handgun[.]" *Heller*, 554 U.S.

at 635. And, in *McDonald v. City of Chicago*, 561 U.S. 742 (2010), the Court overturned a Chicago law that "prohibits registration of most handguns, thus effectively banning handgun possession by almost all private citizens who reside in the City," *id.* at 750. Specifically, Chicago had made it illegal to "possess . . . any firearm unless [a] person is the holder of a valid registration certificate," Chicago, Ill., Municipal Code § 8–20–040(a) (2009), and it had then simultaneously provided that "[n]o registration certificate shall be issued for any . . . handguns," *id.* § 8–20–050(c) (2009). Finding the Second Amendment applicable against state and local governments, the Court reversed the lower court decisions that had granted the city's motion to dismiss. *McDonald*, 561 U.S. at 791. The point, setting other issues aside, is that the local laws that this Court invalidated were not laws that categorically "banned" handguns. Rather, they were laws that prohibited people from obtaining handguns. People remained free to keep handguns they had registered in the District of Columbia before 1976, and in the City of Chicago before 1982. These exceptions were of no moment in the Court's analysis, and the Court described the restrictions as "bans" without regard to them. *See McDonald*, 561 U.S. at 786; *Heller*, 554 U.S. at 628-32.

Petitioner's description of the burden he faces was not "clearly mistaken." App. 15. Rather, the presumptive inability to obtain a handgun is a "ban" on handguns, notwithstanding the existence of a potential (albeit remote) exception, and the core of the Second Amendment is not just the bare legal

ability to possess a handgun in one's home without the threat of prosecution. Thus, Petitioner's claim called for more than intermediate scrutiny, and the distinctions the First Circuit relied upon did not actually make a material difference.

### III) Conclusion

The Court should grant the Petition and vacate the decision below. While Petitioner initially filed this Petition seeking review on the merits, and though Defendants have already put their evidentiary showing into the record, the reality is that this Court's decision in *Bruen* has completely upended the standard of review applied to Petitioner's claim. As such, rather than deciding the case on its merits, the Court should consider remanding it for further proceedings in light of *Bruen*.

Respectfully submitted,

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