Docket No. 25-5280

IN THE

SUPREME COURT OF THE UNITED STATES

PHILIP MARQUIS,

Petitioner,

v.

COMMONWEALTH OF MASSACHUSETTS,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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I. This case which impacts travelers nationwide provides an excellent vehicle for review.

Half of all state attorneys general urge this Court to grant certiorari in this case because the consequences of the Supreme Judicial Court's decision reach far beyond Philip Marquis and the Commonwealth of Massachusetts. As the New Hampshire Attorney General argues on behalf of these states: "Amici States are gravely concerned that any person who enters Massachusetts, no matter how briefly, while engaging in constitutionally protected activity—carrying a firearm for self-defense—risks being branded a felon and imprisoned unless they satisfy the State's onerous licensing requirements." (New Hampshire's and Twenty-Four States' Amicus Brief p. 6).

Massachusetts nevertheless argues that this Court should deny certiorari due to the absence of a circuit split. A denial of certiorari on that basis would shield outlier licensing regimes like Massachusetts from constitutional scrutiny. Most states have actual "shall-issue" licensing regimes, *see N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 38 n.9 (2022), whereby there can be no challenge to the licensing authority's discretion (since it is practically non-existent) or any other analogous challenge. Thus, this Court should not weigh the lack of a "split" that will never materialize against granting certiorari.[1]

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[1] *Antonyuk v. James*, 120 F.4th 941 (2nd Cir. 2024) and *Koons v. Att'y Gen. N.J.*, 156 F.4th 210 (3rd Cir. 2025) are also poor stand-ins on this issue, (*see* Comm. Br. Opp. pp. 14-15), because the decisions reviewed preliminary injunctions rather than final dispositions and the "good moral character" and "four reputable persons"

In *Wolford*, the petitioner did not identify a circuit split regarding the property default rule beyond decisions in a preliminary posture from two circuits. *Wolford v. Lopez* (No. 24-1046), Petition (filed Apr. 1, 2025) pp. 9-10 and Petitioner's Supplemental Brief on Certiorari (filed Sept. 15, 2025) pp. 1-3. *See Antonyuk v. James*, 120 F.4th 941 (2nd Cir. 2024) and *Koons v. Att'y Gen. N.J.*, 156 F.4th 210 (3rd Cir. 2025). Second Amendment challenges to the property default rule were still percolating in other circuits. *See Wolford v. Lopez* (No. 24-1046), Lopez's Opposition Brief on Certiorari (filed June 4, 2025) p. 16 (collecting cases). Yet this Court did not wait to take up this significant Second Amendment issue. The nationwide impact of the Supreme Judicial Court's decision weighs in further favor of certiorari here. Massachusetts does not dispute that "[t]ens of millions of domestic tourists visit [Massachusetts] each year" and that "[a]ny law-abiding, nonresident travelers who wish to exercise their Second Amendment rights in Massachusetts will encounter the likely unfamiliar…hurdle of suitability." (Marquis' Petition (Pet.) p. 13).

Unlike *Wolford* and other petitions that involve undeveloped records pursuant to preliminary injunction litigation, the record here is undisputed and complete. The only remaining questions are legal ones. Massachusetts states that this case presents a poor vehicle, in part, because "its posture is arguably interlocutory." (Massachusetts' Brief in Opposition to Certiorari (Comm. Br. Opp.)

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requirements, although still constitutionally problematic, involve more rigorous standards tied to actual dangerousness. *See infra* pp. 5-6.

pp. 13, 20). Because this final, published decision of the highest state court definitively disposes of Marquis' Second and Fourteenth Amendment claims and finally declares the law not only for Massachusetts but for residents of the entire nation, this Court has jurisdiction to consider them. As for the charge of possession of ammunition without an FID card under M.G.L. c. 269, § 10(h)(1), the Lowell District Court dismissed it on August 23, 2023. (Appendix (App.) pp. 47-48). The Supreme Judicial Court did not consider the M.G.L. c. 269, § 10(h)(1) dismissal because the District Court's memorandum on the motion to dismiss did not address that specific provision. (*See* App. p. 5 n.4, p. 40). Where the dismissal of the § 10(h)(1) charge thereby stands[2], it does not complicate review here. *Compare Wilson v. Hawaii*, 145 S. Ct. 18, 21 (Dec. 9, 2024) (Thomas, J., concurring) (opining that the Court may lack jurisdiction where "Wilson moved to dismiss only some of his charges, most notably leaving for trial a trespassing charge on which his Second Amendment defense has no bearing.")

Marquis' case has substantively concluded due to the Supreme Judicial Court's decision. As this Court reasoned in a similar posture:

> In *Mills* v. *Alabama*, 384 U.S. 214 (1966), for example, a demurrer to a criminal complaint was sustained on federal constitutional grounds by a state trial court. The State Supreme Court reversed, remanding for jury trial. This Court took jurisdiction on the reasoning that the appellant had no defense other than his federal claim and could not prevail at trial on the facts or any nonfederal ground. To dismiss the appeal 'would not only be an inexcusable delay of the benefits Congress intended to grant by providing for appeal to this Court, but it would also result in a completely unnecessary waste of time

[2] Even if Massachusetts could attempt to revive this charge, as Marquis briefed in the Supreme Judicial Court, the dismissal would likely be affirmed because non-residents like Marquis are statutorily ineligible for FID cards. (App. pp. 137-139).

> and energy in judicial systems already troubled by delays due to congested dockets.' *Id.*, at 217-218 (footnote omitted).

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 479 (1975). Likewise, here, Marquis has no defense to this charge other than his Second and Fourteenth Amendment claims.

Marquis admitted that he had no Massachusetts temporary license for his firearm and the police officer confirmed that admission. (App. p. 74). He can claim no exception or excuse for failing to obtain a license as he was driving to work in Massachusetts, (App. p. 74), as opposed to driving through Massachusetts to another state where he may or may not be licensed. *See* 18 USCS § 926A and M.G.L. c. 140, § 129C(h) (applicable only to rifles and shotguns). Massachusetts does not need to prove that Marquis knew his firearm possession was illegal or that he knew he had to obtain a temporary license to travel with a firearm into Massachusetts. *Commonwealth v. Shaw*, 265 N.E.3d 1064, 1071-1073 (Mass. App. 2025) (further appellate review granted on a different ground, *see Commonwealth v. Shaw*, SJC-13852; FAR-30504 (order dated Nov. 14, 2025)). Nor can Marquis bring any motion to suppress statements or evidence because he volunteered that he had a firearm and freely showed it to the officer. (App. p. 74). There was not even a traffic stop because the officer arrived to assist with a car accident. (*Id.*) Where the Supreme Judicial Court's decision on Massachusetts' appeal thereby operates as a final disposition of Marquis' case, this Court has jurisdiction to review it.

II. The Supreme Judicial Court's amorphous unsuitability standard vested with a non-neutral arbiter cannot survive this Court's Second Amendment precedents.

Massachusetts contends that *Bruen* and *United States v. Rahimi*, 602 U.S. 680 (2024) control the outcome in its favor on the assumption that Massachusetts' unsuitability standard comports with the Nation's historical tradition of disarming dangerous people. As previously briefed, the historical tradition of judges depriving dangerous people of firearms after hearing from the parties and issuing neutral findings provides no analogue to police officers depriving "unsuitable" people of firearms after assessing through a law enforcement lens any information merely suggesting their risk. (Pet. pp. 4-8, 15-19). In support of its view that this Court has approved of a licensing regime like Massachusetts' regime, it cites dicta in Justice Thomas's opinion concurring in the denial of certiorari, which has no force of law. (Comm. Opp. Br. pp. 23-24). *Wilson*, 145 S. Ct. at 21 (Thomas, J., concurring). *See Hopfmann v. Connolly*, 471 U.S. 459, 461 (1985). But even taking that dicta on its terms, Justice Thomas's reference to Hawaii as presently a "shall issue" regime "at least for concealed carry", *Wilson*, 145 S. Ct. at 21, highlights the constitutional flaw within M.G.L. c. 140, § 131(d).

Although Hawaii still unconstitutionally vests a "temperament" and "essential character" judgment with the Chief of Police, Haw. Rev. Stat. § 134-9 (a)(3), the standard is not an amorphous risk assessment but a more rigorous standard whereby the licensing authority must find that "the person poses a danger of causing a self-inflicted bodily injury or unlawful injury to another person." Haw.

Rev. Stat. § 134-9(h). The authority must consider three categories of evidence when assessing the applicant's actual dangerousness. § 134-9(h)(1)-(3). By contrast, in Massachusetts, the Chief of Police has unbounded discretion to deprive an applicant of his or her Second Amendment right to carry a firearm based upon any behavior that "*suggests* that, if issued a license, the applicant or licensee *may create a risk* to public safety or a risk of danger to self or others." M.G.L. c. 140, § 131(d) (emphases added).

Massachusetts acknowledges that "suitability" cases like *Godfrey v. Chief of Police of Wellesley*, 616 N.E.2d 485 (Mass. App. 1993), which holds that a person's exercise of his or her right against self-incrimination in a serious criminal investigation is a proper ground to deem that person unsuitable for firearm possession, *Id.* at 488, have never been overruled. (Comm. Opp. Br. p. 24 n.9). Massachusetts, however, states that "those decisions pre-date this Court's decision in *Bruen* (some even pre-date [*District of Columbia v.*] *Heller*[,] [554 U.S. 570 (2008)]), as well as the Massachusetts Legislature's post-*Bruen* amendment of the suitability requirement to narrow it and focus it on public safety[.]" (*Id.*) But that is belied by *Godfrey*'s stated rationale rooted in "the safety of the public[.]" *Godfrey*, 3616 N.E.2d at 488. That rationale then fits comfortably within the current standard which denies any applicant a license upon mere suggestion of perhaps a risk to public safety, now upheld by the Supreme Judicial Court after *Bruen*.

But this Court need not rely solely on pre-*Bruen* cases like *Godfrey* to take the true measure of M.G.L. c. 140, § 131(d)'s unsuitability definition. It may weigh

several scenarios in which a non-neutral arbiter like a Chief of Police may deny an applicant as "unsuitable" but a neutral arbiter like a judge may not. For example, a police officer may find that a person's association with a known gang member makes that person unsuitable. That association *suggests* that the person is a risk to public safety or is engaging in behavior that *may* lead to violence against others. A judge, however, may find that this association, without more, is protected First Amendment conduct that does not justify depriving one's Second Amendment rights. Or the judge would at least require the police officer to prove the extent of that association and why it should preclude the applicant from carrying a firearm.

Another example would be a police officer relying upon allegations that triggered an arrest or a criminal charge that was later dismissed as proof of unsuitability. By contrast, a judge would likely scrutinize such allegations with greater care and caution. *See United States v. Marrero-Pérez*, 914 F.3d 20, 22 (1st Cir. 2019) ("no weight should be given in sentencing to arrests not buttressed by convictions or independent proof of conduct.") The Massachusetts Legislature grants the Chief of Police the exclusive authority at the application stage to determine the credibility and reliability of any allegation or accusation. "The 'suitable person' standard 'confers upon a licensing authority considerable latitude or broad discretion in making a licensing decision' (quotations omitted)." *Chief of Police of Wakefield v. DeSisto*, 173 N.E.3d 38, 41 (Mass. App. 2021) (citations omitted). After an application's denial, the only recourse is the daunting arbitrary or capricious standard. *See DeSisto*, 173 N.E.3d at 43 (concluding that the District

Court judge was wrong to reevaluate the evidence and decide that it was " 'too thin' and 'too stale' to constitute a palpable risk") and *Bruen*, 597 U.S. at 13. Like the Supreme Judicial Court, Massachusetts ignores the fundamental problem that an Executive Branch official, empowered with overbroad discretion, is for all practical purposes the final arbiter of an applicant's ability to exercise his or her Second Amendment right to carry a firearm in Massachusetts. *See Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130 (1992) (facially striking down county ordinance which allowed administrator to adjust permitting fees for assemblies and parades, reasoning that in order to comply with the First Amendment, the permitting scheme "may not delegate overly broad licensing discretion to a government official.")

III. Alternatively, this Court should hold this petition until after it decides *United States v. Hemani*, No. 24-1234 and *Wolford v. Lopez*, No. 24-1046.

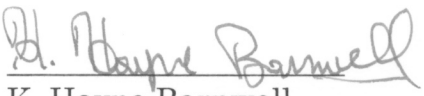
After Marquis filed his petition for a writ of certiorari, this Court granted two petitions, *United States v. Hemani*, No. 24-1234 and *Wolford v. Lopez*, No. 24-1046, that involve Second Amendment claims directly relevant to this case. The *Hemani* case asks whether punishing a person's firearm possession due to his or her potentially risky conduct – specifically habitual drug use – comports with the Nation's historical tradition even where the person was not under the influence of any drugs at the time of the firearm possession. *See United States v. Connelly*, 117 F.4th 269, 275-276 (5th Cir. 2024) ("[j]ust as there is no historical justification for disarming citizens of sound mind, there is no historical justification for disarming a

sober citizen not presently under an impairing influence.") This Court's decision in *Hemani*, which will necessarily address potentially risky behavior versus actually dangerous behavior, would thus pertain to Massachusetts's unsuitability determination that rests upon any potential risk to public safety. In *Wolford*, Hawaii conditions one's firearm carriage upon a private property owner's discretion to affirmatively consent to the individual's firearm possession on or in the owner's property. *See Wolford v. Lopez*, No. 24-1046, Petitioner's Brief (filed Nov. 17, 2025) pp. 18-19, citing Haw. Rev. Stat. § 134-9.5. This Court's decision in *Wolford* would then also pertain to the Massachusetts licensing scheme which conditions a traveler's or non-resident's firearm possession upon a colonel's discretionary judgment as to that individual's suitability. Thus, if this Court does not find Marquis' case appropriate for full review at this time, then it should hold Marquis' petition until after its disposition of *Hemani* and *Wolford*.

CONCLUSION

For the reasons set forth above and those raised in his petition, the petitioner respectfully prays this Court to issue a writ of *certiorari* and to grant further relief or hold this petition until after this Court decides *Hemani* and *Wolford*.

Petitioner
Philip Marquis
By his Attorney



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