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Appendix A

APPEALS COURT CLERK'S OFFICE
Dated: March 4, 2024
RE: No. 2023-P-0517
Lower Court No: 1173CR00221
COMMONWEALTH vs. JOHN E. CASSIDY
NOTICE OF DECISION

Please take note that on March 4, 2024, the Appeals Court issued the following decision in the above-referenced case:

Decision: Rule 23.0 Order entered March 23, 2023, denying motion for new trial affirmed. (Hand, Hershfang, Brennan, JJ.). *Notice.

Very truly yours,
/s/ The Clerk's Office

Appeals Court for the Commonwealth at Boston
In the case no. 23-P-517 Commonwealth. vs. John Cassidy
Pending in the Superior Court for the County of Bristol

Ordered that the following entry be made:

Order entered March 23, 2023, denying motion for new trial affirmed.

By the Court,

/s/ Assistant Clerk Date March 4, 2024

COMMONWEALTH OF MASSACHUSETTS APPEALS COURT 23-P-517

COMMONWEALTH

vs.

JOHN CASSIDY.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

After a trial in the Superior Court, the defendant was convicted of four counts of unlawful possession of a large capacity feeding device, in violation of G. L. c. 269, § 10 (m); one count of unlawful possession of a large capacity firearm, in violation of G. L. c. 269, § 10 (m); one count of unlawful possession of an assault weapon, in violation of G. L. c. 140, § 131M; and one count of unlawful possession of ammunition, in violation of G. L. c. 269, § 10 (h) (1). His convictions were affirmed by a panel of this court. See Commonwealth v. Cassidy, 91 Mass. App. Ct. 1109 (2017). The Supreme Judicial Court granted further appellate review and ultimately affirmed his convictions. See Commonwealth v. Cassidy, 479 Mass. 527 (2018) (Cassidy I). The defendant filed a petition for writ of certiorari in the United States Supreme Court, which was denied 2 on October 5, 2018. See Cassidy v. Massachusetts, 139 S. Ct. 276 (2018). The defendant subsequently filed a motion in the Superior Court entitled "pro se defendant's motion for clarification and ruling." A Superior Court judge denied the motion, and the defendant appealed. While recognizing that the defendant's motion was procedurally defective, a panel of this court

treated it as one for a new trial and affirmed the Superior Court judge's order. See Commonwealth v. Cassidy, 100 Mass. App. Ct. 1119 (2022) (Cassidy II). The defendant again exhausted all rights of appeal from the order. See Commonwealth v. Cassidy, 489 Mass. 1102 (2022). See also Cassidy v. Massachusetts, 142 S. Ct. 2712 (2022). This appeal stems from the denial of the defendant's most recent motion for a new trial, which he filed after the Supreme Court's decision in New York State Rifle & Pistol Ass'n. v. Bruen, 142 S. Ct. 2111 (2022) (Bruen). The Commonwealth argued that Bruen did not affect Cassidy's claims of error because its holding did not speak to states' authority to require firearm licenses, maintain licensing schemes, or place restrictions on certain types of firearms. Therefore, the Commonwealth maintained, whatever the effect of Bruen on District of Columbia v. Heller, 554 U.S. 570 (2008), it did not undermine Cassidy I's historical analysis of Massachusetts's firearms laws regulating "dangerous and unusual weapons" such as assault weapons and large capacity firearms. The Commonwealth also directed the defendant to Texas, where he now resides, to raise his claim that his rights are being violated because his Massachusetts felony convictions limit his right to own firearms there. A Superior Court judge (motion judge) agreed with the Commonwealth, denied the motion "for the reasons stated in the Commonwealth's opposition," and denied the defendant's request for additional time to respond to the Commonwealth's opposition, filed on the same day as the motion judge's ruling. The defendant nevertheless filed a response to the Commonwealth's opposition to his motion for a new trial. The motion

judge, "[a]fter review and consideration," again denied the motion for a new trial. We discern no abuse of discretion in the motion judge's denial of the motion for a new trial at issue in this appeal. See Commonwealth v. Duart, 477 Mass. 630, 636 (2017). The defendant's current appeal merely reiterates his arguments in Cassidy II. He acknowledged as much during oral argument. To the extent the defendant's current brief recasts, in light of Bruen, components of arguments he made in his previous appeals as challenges under Bruen, the effort is not persuasive. To the extent the defendant contends "the Second Amendment [was] [his] license [to carry firearms]," **he offered the motion judge no tenable legal support for his position**, and we are aware of none. Finally, even assuming that he was correct that the Supreme Judicial Court incorrectly determined that assault weapons are properly considered "dangerous and unusual weapons" subject to regulation under Massachusetts law, a conclusion we do not draw, we reiterate that "we are without power to reverse or modify a decision of the Supreme Judicial Court, something that the defendant acknowledges." Cassidy II, 100 Mass. App. Ct. at 1119.

Order entered March 23, 2023,
denying motion for new trial affirmed.

By the Court (Hand, Hershfang & Brennan, JJ.),

/s/

Assistant Clerk

Entered: March 4, 2024.

Appendix B

CLERK'S NOTICE
Docket Number 1173CR00221 – Trial Court

Commonwealth
v.
John E Cassidy

Bristol County Superior Court – Fall River
186 South Manin Street, Suite 202
Bristol County, Fall River, MA 02721

You are hereby notified that on 3/23/2023 the following entry was made on the above referenced docket: Endorsement on Motion for A New Trial, (#106.0):

After review and consideration of the defendant's response (paper#109), the Motion is again DENIED for *the reasons stated in Commonwealth's Opposition.*

JUDGE: Yessayan, Hon Raffi N

Dated 3/24/2023

Hon. Raffi N Yessayan /s/

Appendix C

From: SJC Full Court Clerk <SJC-CommClerk@sjc.state.ma.us>
Date: Fri, Apr 19, 2024 at 12:11 PM
Subject: FAR-29716 - Notice: FAR denied
To: <jcassidy84@gmail.com>

Supreme Judicial Court for the Commonwealth of Massachusetts
RE: Docket No. FAR-29716

COMMONWEALTH vs. JOHN E. CASSIDY

Bristol Superior Court No. 1173CR00221
A.C. No. 2023-P-0517

NOTICE OF DENIAL OF APPLICATION FOR FURTHER APPELLATE REVIEW

Please take note that on April 18, 2024, the application for further appellate review was denied. (Dewar, J., recused)

Very truly yours,
The Clerk's Office
Dated: April 19, 2024

Appendix D

Audio and video archive of Oral Arguments 12/06/2023 at Appeals Court 2023-P-0517:

https://www.youtube.com/watch?v=VW-dVprz3zQ

3rd case on docket beginning at '55 minute mark' for John Cassidy. Available through Massachusetts's court archive via the state's youtube channel.

Appendix E

COMMONWEALTH'S OPPOSITION TO DEFENDANT'S MOTION FOR A NEW TRIAL

The defendant, John Cassidy, seeks a new trial, arguing that the firearms charges against him have never been subjected to strict scrutiny. His underlying constitutional claims have been previously decided by the Supreme Judicial Court, Commonwealth v. Cassidy, 479 Mass. 527, 527-528 (2018), cert. denied, 139 S. Ct. 276 (2018), and while the intervening United States Supreme Court decision in New York State Rifle & Pistol Assn., et al. v. Bruen, 142 S. Ct. 2111 (2022), does have implications for aspects of the Massachusetts firearms regulation scheme, for the reasons explained below it does not impact the defendant's own constitutional claims. The Supreme Judicial Court's 2018 rejection of the defendant's constitutional challenges remains correctly decided, and his motion for new trial must fail. As laid out by the Supreme Judicial Court:

> The defendant lawfully purchased an AK-47-style pistol and a nine millimeter pistol in Texas and brought them with him when he moved to Massachusetts in August, 2010, to attend law school. At some point between that time and his March 11, 2011, arrest, the defendant was advised by a classmate that firearms must be registered in Massachusetts. See G. L. c. 140, §§ 129B, 131; G. L. c. 269, § 10 (a). Although he obtained the forms necessary

to register for a license to possess a firearm in Massachusetts, the defendant did not file them and did not obtain a license to carry or a firearm identification (FID) card; at trial, he testified that he could not afford to pay the registration and licensing fees. Under Massachusetts law, the nine-millimeter pistol, which could hold twelve rounds of ammunition, fell within the definition of a large capacity weapon; such a weapon has separate licensing and registration requirements in the Commonwealth. See G. L. c. 269, § 10 (m). The AK-47-style pistol met the Massachusetts definition of an assault weapon; possession of such weapons is heavily restricted in the Commonwealth. See G. L. c. 140, §§ 121, 131M. During a search of the defendant's apartment pursuant to a search warrant, police officers located the two pistols, four high-capacity magazines, several boxes of ammunition, and a bag containing loose rounds of various types of ammunition in the defendant's bedroom. He was charged with unlawful possession of these items. The defendant did not dispute that the weapons were his or that they were operable firearms; in a recorded interview, portions of which were read to the jury, he told an investigating officer that he had legally purchased the weapons in Texas and had

> brought them with him when he moved to Massachusetts. The defendant also testified similarly at trial. A Superior Court jury convicted the defendant of unlawful possession of an assault weapon, G. L. c. 140, § 131M; unlawful possession of four large capacity feeding devices, G. L. c. 269, § 10 (m); unlawful possession of a large capacity firearm, G. L. c. 269, § 10 (m); and unlawful possession of ammunition, G. L. c. 269, § 10(h).

Cassidy, 479 Mass. at 527-528.

In that appeal, the defendant raised claims including "that Massachusetts firearms statutes . . . violate his right to bear arms under the Second Amendment to the United States Constitution." Id. at 529. The Court rejected this claim, applying the United States Supreme Court's decisions in District of Columbia v. Heller, 554 U.S. 570, 635 (2008), and McDonald v. Chicago, 561 U.S. 742, 791(2010):

> In [Heller], the Supreme Court held that a complete ban on handguns and a requirement that firearms held in a home be kept unloaded and disassembled violated the Second Amendment. Two years later, in [McDonald], the Court held that the Second Amendment also applies to the States through the Fourteenth Amendment to the United States Constitution. Yet, "the right secured by the Second Amendment is not

unlimited." Heller, supra at 626. Regulations other than total handgun bans are permissible so long as they do not interfere with the Second Amendment's "core lawful purpose of self-defense." Id. at 630, 636. Since then, we have rejected challenges to Massachusetts's firearms statutes on Second Amendment and art. 17 grounds. See, e.g., Commonwealth v. Gouse, 461 Mass. 787, 800-801, 965 N.E.2d 774 (2012); Commonwealth v. Johnson, 461 Mass. 44, 57-59, 958 N.E.2d 25 (2011); Commonwealth v. Loadholt, 460 Mass. 723, 723-724, 726, 954 N.E.2d 1128 (2011); Commonwealth v. Powell, 459 Mass. 572, 573, 946 N.E.2d 114 (2011), cert. denied, 565 U.S. 1262 ... (2012). Relying on Heller, 554 U.S. at 626-627, we determined that "an individual's Second Amendment right does not prohibit laws regulating who may purchase, possess, and carry firearms, and where such weapons may be carried." Johnson, supra at 57. Furthermore, "the requirement of licensing before one may possess a firearm or ammunition does not by itself render the licensing statute unconstitutional on its face." Id. at 58, citing Loadholt, supra at 726. That ruling is dispositive here.

The assault weapon statute under which the defendant was convicted, G.

> L. c. 140, § 131M, also is not prohibited by the Second Amendment, because the right "does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes." Heller, 554 U.S. at 625. The Second Amendment does not grant "a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." Id. at 626. A ban on assault weapons is more similar to the restriction on short-barreled shotguns upheld in United States v. Miller, 307 U.S. 174, 178 ... (1939), than the handgun ban overturned in Heller. "In the absence of any evidence tending to show that possession or use of a 'shotgun having a barrel of less than eighteen inches in length' at this time has some reasonable relationship to the preservation or efficiency of a well[-]regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument." Miller, supra. See Heller, supra at 627 (suggesting that "weapons that are most useful in military service — M-16 rifles and the like — may be banned").

Cassidy, 479 Mass. at 539-540.

The United States Supreme Court has since issued its decision in Bruen, 142 S. Ct. at 2111, which explains and expands on, but does not purport to overrule, McDonald and Heller. It clarifies the

standard of review set forth in Heller (which, as discussed further below, is not strict scrutiny), applied – as the majority saw it – that standard to public carry of handguns for self-defense outside the home, and held that state firearms licensing schemes must apply objective criteria. It did not overrule, or even call into question, the ability of states, post-Heller, to require licenses, maintain licensing schemes, and place restrictions on ownership of particular types of firearms.

As the Supreme Court explained in some detail in Heller:

> Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose. ... Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms. [FN26]

[FN26 We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive.] We also recognize another important limitation on the right to keep and carry arms. Miller said, as we have explained, that the sorts of weapons protected were those "in common use at the time." 307 U.S., at 179 ... . We think that limitation is fairly supported by the historical tradition of prohibiting the carrying of "dangerous and unusual weapons." See 4 Blackstone 148-149 (1769); 3 B. Wilson, Works of the Honourable James Wilson 79 (1804); J. Dunlap, The New-York Justice 8 (1815); C. Humphreys, A Compendium of the Common Law in Force in Kentucky 482 (1822); 1 W. Russell, A Treatise on Crimes and Indictable Misdemeanors 271-272 (1831); H. Stephen, Summary of the Criminal Law 48 (1840); E. Lewis, An Abridgment of the Criminal Law of the United States 64 (1847); F. Wharton, A Treatise on the Criminal Law of the United States 726 (1852). See also State v. Langford, 10 N. C. 381, 383-384 (1824); O'Neill v. State, 16 Ala. 65, 67 (1849); English v. State, 35 Tex. 473, 476 (1871); State v. Lanier, 71 N. C. 288, 289 (1874).It may be objected that if weapons that are most useful in military service—M-16 rifles and the like—may be banned, then the

> Second Amendment right is completely detached from the prefatory clause. But as we have said, the conception of the militia at the time of the Second Amendment's ratification was the body of all citizens capable of military service, who would bring the sorts of lawful weapons that they possessed at home to militia duty. It may well be true today that a militia, to be as effective as militias in the 18th century, would require sophisticated arms that are highly unusual in society at large. Indeed, it may be true that no amount of small arms could be useful against modern-day bombers and tanks. But the fact that modern developments have limited the degree of fit between the prefatory clause and the protected right cannot change our interpretation of the right.

Heller, 554 U.S. at 626-628 & n.26.

Ultimately, the Court in Heller concluded that "[a]ssuming that Heller is not disqualified from the exercise of Second Amendment rights, the District must permit him to register his handgun and must issue him a license to carry it in the home." Id. at 635 (emphasis added). Bruen, in turn, applied Heller: "We ... now hold, consistent with Heller and McDonald, that the Second and Fourteenth Amendments protect an individual's right to carry a handgun for self-defense outside the home." Bruen, 142 S. Ct. at 2122. It did not purport to revisit Heller's

standard for who may be "disqualified from the exercise of Second Amendment rights," and thus not "issue[d] ... a license to carry [a firearm] in the home." Heller, 554 U.S. at 635.

Bruen did hold that firearm licensure requirements must be objective, and not require the applicant to bear the burden of showing entitlement to a license:

> The parties ... dispute whether New York's licensing regime respects the constitutional right to carry handguns publicly for self-defense. In 43 States, the government issues licenses to carry based on objective criteria. But in six States, including New York, the government further conditions issuance of a license to carry on a citizen's showing of some additional special need. Because the State of New York issues public-carry licenses only when an applicant demonstrates a special need for self-defense, we conclude that the State's licensing regime violates the Constitution.

Bruen, 142 S. Ct. at 2122. The majority explained in a footnote that "nothing in our analysis should be interpreted to suggest the unconstitutionality of the 43 States' 'shall-issue' licensing regimes, under which 'a general desire for self-defense is sufficient to obtain a [permit].'" Id. at 2138 n.9, quoting Drake v. Filko, 724 F. 3d 426, 442 (CA3 2013) (Hardiman, J., dissenting). "Because these licensing regimes do not require applicants to show an atypical

need for armed self-defense, they do not necessarily prevent 'law-abiding, responsible citizens' from exercising their Second Amendment right to public carry." Id., quoting Heller, 554 U.S. at 635. "Rather, it appears that these shall issue regimes, which often require applicants to undergo a background check or pass a firearms safety course, are designed to ensure only that those bearing arms in the jurisdiction are, in fact, 'law-abiding, responsible citizens.'" Id.

Three of the majority justices further emphasize this point in concurrences. See Bruen, 142 S. Ct. at 2157 (Alito, J., concurring) ("Our holding decides nothing about who may lawfully possess a firearm or the requirements that must be met to buy a gun. ... Nor have we disturbed anything that we said in Heller or McDonald v. Chicago, 561 U. S. 742, ... (2010), about restrictions that may be imposed on the possession or carrying of guns."); 2162 (Kavanaugh, J., concurring, joined by Roberts, C.J.) ("Going forward ... the 43 States that employ objective shall-issue licensing regimes for carrying handguns for self-defense may continue to do so. Likewise, the 6 States including New York potentially affected by today's decision may continue to require licenses for carrying handguns for self-defense so long as those States employ objective licensing requirements like those used by the 43 shall-issue States.").

The defendant, by his own admission, was aware of but did not seek to comply with the Massachusetts licensing scheme. This prevented and continues to prevent him from challenging the constitutionality of the Massachusetts gun statutes as applied to him; and to the extent that he challenges

their facial constitutionality, Bruen also does not avail him.

"The general rule is that '[o]nly one whose rights are impaired by a statute can raise the question of its constitutionality, and he can object to the statute only as applied to him.'" Loadholt, 460 Mass. at 725 n.5, quoting Commonwealth v. Gordon, 354 Mass. 722, 725 (1968). "To hold otherwise would permit a defendant, essentially, 'to vindicate the constitutional rights of some third party.'" Id., quoting Blixt v. Blixt, 437 Mass. 649, 661 (2002). In Powell, 459 Mass. at 572, where the defendant challenged the constitutionality of age-based restrictions on obtaining Massachusetts firearms licenses, the Supreme Judicial Court held that a defendant could not bring an as-applied constitutional challenge where he never attempted to obtain a license: "Instead of applying for an FID card, the defendant chose to violate the law. In these circumstances, we conclude that he may not challenge his conviction under G. L. c. 269, § 10 (h) (1)." Id. at 589-590.

The Court has repeatedly re-affirmed this principle in the specific context of firearms licensing, including in the defendant's own case. See Cassidy, 479 Mass. at 539 n.10, Johnson, 461 Mass. at 58–59; Loadholt, 460 Mass. at 725. This settled law must be complied with by lower courts unless and until the Court itself changes it: "No matter how strongly a Massachusetts trial judge may disagree with this court on an interpretation of Federal constitutional law, or how confident a judge may be that the Supreme Court will disagree with this court on such a

question, so long as our holding has not been abrogated, it is the law the judge must apply." Commonwealth v. Vasquez, 456 Mass. 350, 357-358 (2010).

While the defendant may not challenge the constitutionality of G.L. c. 269, § 10, as applied to him, "[i]n a prosecution for violation of a licensing statute which is unconstitutional on its face, the issue of its validity is presented even in the absence of an application for a license." Loadholt, 460 Mass. at 725, quoting Gordon, 354 Mass. at 725.

"A facial challenge is an attack on a statute itself as opposed to a particular application." Commonwealth v. Harris, 481 Mass. 767, 771 (2019), quoting Los Angeles v. Patel, 135 S. Ct. 2443, 2449 (2015). "'Facial challenges are disfavored' because they 'run contrary to the fundamental principle of judicial restraint' and 'threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution' (citation omitted)." Id., referencing Washington State Grange v. Washington State Republican Party, 552 U.S. 442, 450-451 (2008). "A facial challenge fails when the statute at issue has a 'plainly legitimate sweep' (citation omitted)." Harris, 481 Mass. at 771, quoting Washington State Grange, 552 U.S. at 449. Moreover, "[w]hen a court is compelled to pass upon the constitutionality of a statute and is obliged to declare part of it unconstitutional, the court, as far as possible, will hold the remainder to be constitutional and valid, if the parts are capable of separation and are not so entwined that the Legislature could not have intended that the part otherwise valid should take effect without the invalid part." Diatchenko v.

Dist. Att'y for Suffolk Dist., 466 Mass. 655, 672 (2013), quoting Boston Gas Co. v. Department of Pub. Utils., 387 Mass. 531, 540 (1982). "As to all statutes in the Commonwealth, the Legislature has announced its own preference in favor of severability." Peterson v. Comm'r of Revenue, 444 Mass. 128, 138 (2005), citing G.L. c. 4, § 6, Eleventh ("The provisions of any statute shall be deemed severable, and if any part of any statute shall be adjudged unconstitutional or invalid, such judgment shall not affect other valid parts thereof.").

Regardless of what may be[3] – or have been[4] – the fate of some provisions of the Massachusetts

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[3] Morin v. Lyver, 13 F.4th 101 (1st Cir. 2021), remanded by the United States Supreme Court for further consideration in light of Bruen, 143 S. Ct. 69 (2022), concerns a plaintiff whose ability to carry and purchase firearms was impacted in various ways by the by Massachusetts licensing scheme, because he had two 2004 District of Columbia misdemeanor firearms convictions. 13 F.4th at 102-103. As of 2018 he "was not eligible for a license to carry because his D.C. convictions, notwithstanding their age, rendered him ineligible for that license, since Massachusetts barred anyone with prior firearms-related convictions for which a term of imprisonment could be imposed from obtaining one. See [G.L. c. 140,] § 131(d)(ii)(D)." Id. at 105. This, in turn, also resulted in his being denied a permit to purchase, as "[u]nder Massachusetts law, though, Morin could not be eligible for a permit to purchase unless he was also eligible for a license to carry. [G.L. c. 140,] § 131A." Id. Whatever the ultimate outcome in Morin, it does not have direct application to the defendant's situation, where he is being prevented by federal law from purchasing firearms in Texas as the result of his Massachusetts felony convictions. And see Heller, 554 U.S. at 626-627.

[4] Following the issuance of the Bruen decision on June 23, 2022, the Attorney General issued "Joint Advisory Regarding the Massachusetts Firearms Licensing System After the Supreme Court's Decision in New York State Rifle & Pistol Asso-

firearm licensure scheme in light of the Bruen decision, the invalidation of particular provisions does not preclude the continuing existence of a licensing scheme with objective requirements, and a continuing requirement that a person who brings firearms into Massachusetts comply with that scheme in a timely manner. For all of these reasons, the Supreme Judicial Court's core reasoning, in disposing of the defendant's constitutional claims in light of Heller, remains dispositive. Cassidy, 479 Mass. at 539-540.

And while Bruen clarified the standard of review set forth in Heller, it did not do so in a way that undermines the correctness of the Court's decision in Cassidy, which rested on the fact that Massachusetts is entitled to have a licensing scheme (which the defendant was aware of but did not comply with), and on the particular sorts of firearms the defendant was charged with possessing. It did not discuss any level of scrutiny, whether intermediate or strict.

Bruen now clarifies that neither intermediate nor strict scrutiny is the correct test: "Whether it

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ciation v. Bruen" instructing licensing authorities to cease enforcing the portion of the Massachusetts licensing scheme that required that a defendant demonstrate "good reason" to obtain a license, a requirement in effect at the time of the defendant's arrest. Id. at p 2 ("Authorities should no longer deny, or impose restrictions on, a license to carry because the applicant lacks a sufficiently good reason to carry a firearm. An applicant who is neither a "prohibited person" or "unsuitable" must be issued an unrestricted license to carry.") Available at https://achives.lib.state.ma.us/handle/2452/859989. The statue was amended shortly thereafter to conform with the holding in Bruen, Acts of 2022, c. 175, §§ 4-22, (amending G.L. c. 140, §§ 131&131F) (effective August 10, 2022).

came to defining the character of the right (individual or militia dependent), suggesting the outer limits of the right, or assessing the constitutionality of a particular regulation, Heller relied on text and history. It did not invoke any means-end test such as strict or intermediate scrutiny." Bruen, 142 Mass. at 2129. "In keeping with Heller, we hold that when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's 'unqualified command.'" Id. at 2126.

The Court emphasized that the circumstances of the past and the present may not be identical, and the focus of the analysis should be on historical analogy(as with Heller's determination that handguns were the modern equivalent of the "arms" contemplated in the Second Amendment). Bruen, 142 U.S. at 2132. It further cautioned:

> To be clear, analogical reasoning under the Second Amendment is neither a regulatory straightjacket nor a regulatory blank check. On the one hand, courts should not "uphold every modern law that remotely resembles a historical

> analogue," because doing so "risk[s] endorsing outliers that our ancestors would never have accepted." Drummond v. Robinson, 9 F. 4th 217, 226 (CA3 2021). On the other hand, analogical reasoning requires only that the government identify a well-established and representative historical analogue, not a historical twin. So even if a modern-day regulation is not a dead ringer for historical precursors, it still may be analogous enough to pass constitutional muster.

Id. at 2133.

As discussed above, the ability of Massachusetts to have a licensing scheme is not placed in question by Bruen. And in the case of the defendant's high capacity charges, the historical case for placing those weapons outside the scope of the Second Amendment was laid out in Heller itself, with lengthy citation to sources and analogy to the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'" Heller, 554 U.S. at 627-628.

Finally, to the extent that the defendant argues that his rights are violated because "as a felon he cannot ever exercise his future right to own firearms" (emphasis removed), this cannot be a function of the Massachusetts firearms licensing scheme, because he currently lives in Texas. He writes that he "cannot obtain any arms legally, as it would result in automatic denial by a federal firearms license holder

during the disclosure of his status initially or during the paperwork process of filling out an ATF-4473 form for purchase." To the extent that other jurisdictions have laws under which the defendant's Massachusetts felony convictions preclude him from firearm purchase or ownership in those jurisdictions, he is free to challenge those laws in the appropriate courts. But see Heller, 554 U.S. at 626-627.

CONCLUSION

For all of these reasons, the defendant's motion for new trial should be DENIED.
RESPECTFULLY SUBMITTED,
THOMAS M. QUINN III

BY: /s/ Shoshana Stern
Assistant District Attorney
Shoshana E. Stern BBO# 667894
Date: February 24, 2023

Appendix F

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT
SJC-13562
COMMONWEALTH OF MASSACHUSETTS,
Plaintiff-Appellant,
v.
PHILIP J. MARQUIS,
Defendant-Appellee
On Direct Appellate Review From A Judgment of The Lowell District Court
BRIEF OF AMICI CURIAE
by
SIX NEW HAMPSHIRE STATE REPRESENTATIVES
In Support of Defendant-Appellee For Affirming The Order of Dismissal
The Fourth of July, 2024
New Hampshire House of Representatives
107 N. MainStreet, Concord, N.H., 03301
Phone: 603-271-2548
Rep. Jason Gerhard Jason.Gerhard@leg.state.nh.us
Rep. Matthew Coulon Matthew.Coulon@leg.state.nh.us
Rep. Tom Mannion Tom.Mannion@leg.state.nh.us
Rep. Nikki McCarter
Nikki.McCarter@leg.state.nh.us
Rep. Diane Kelley Diane.Kelley@leg.state.nh.us
Rep. Leah Cushman Leah.Cushman@leg.state.nh.us
Supreme Judicial Court for the Commonwealth Full Court: SJC-13562 Filed: 7/4/2024 11:00 AM

*TABLE OF CONTENTS &TABLE OF AUTHORITIES (*intentionally removed by filer*)*

Statement and Interest of Amici Curiae

We, the undersigned, are each elected members of the New Hampshire House of Representatives. Our interest is to keep the people we serve from harm and injustice, and to support and defend our constitutional form of government. This case, along with Commonwealth v. Dean Donnell, Jr., SJC-13561, raises serious questions regarding the lawfulness of the Massachusetts firearms licensing scheme as applied to these people, in the light of the Constitution, substantive due process, and apparent conflict of interest concerns. As amici curiae, this brief seeks to bring these factors to the Court's notice, in order to promote public trust and ensure the fair and impartial administration of justice.

Appeals Court Rule 17(c)(5) Declaration

We each, the undersigned, declare that: (A) No party or a party's counsel authored this brief in whole or in part. (B) No party or a party's counsel, or any other person or entity, other than the amici curiae, contributed money that was intended to fund the preparation or submission of this brief. (C) No amicus curiae has represented one of the parties to the present appeal in another proceeding involving similar issues, or was a party or represented a party in a proceeding or legal transaction that is at issue in the present appeal.

ARGUMENT

Nature of this constitutional challenge:

"In accordance with canons of statutory construction, a statute is presumed to be constitutional. "Commonwealth v. McGhee, 472 Mass. 405, 412

(2015). "The presumption, indeed, must always be in favour of the validity of laws, if the contrary is not clearly demonstrated." Cooper v. Telfair, 4 U.S. 14, 18 (1800).

"'Facial challenges are disfavored' because they 'run contrary to the fundamental principle of judicial restraint' and 'threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution'. ... A facial challenge fails when the statute at issue has a 'plainly legitimate sweep' (citation[s] omitted)." Commonwealth v. Harris, 481 Mass. 767, 771 (2019).

As the Commonwealth correctly points out, for a facial challenge to prevail, "A defendant ... must show that the statute is unconstitutional on its face in every circumstance." Commonwealth's Appellant Brief, Doc No. 4, p. 27. In other words, if a statutory scheme is constitutional for at least one circumstance, then the statute is constitutional on its face. But if a person's conduct does not implicate any of the circumstances to which the statute is constitutionally applied, then the statute is unconstitutional as applied to that person's particular conduct. Thus, "when the constitutionality of a statute is challenged, the question to be decided is whether the statute is unconstitutional as applied in the particular case." (citation omitted) Commonwealth v. Feliz, 481 Mass. 689, 696 (2019).

As applied in this particular case, the circumstances summarized according to the Commonwealth's Appellant Brief, Doc No. 4, p. 12-14 are: While traveling from Rochester, New Hampshire to

his job in Massachusetts, Philip Marquis was involved in a car crash around the city of Lowell. When officers responded to the scene, he removed a 9mm pistol from his pocket and stated: "I just want to let you know that I have this." When asked if it was loaded, Marquis racked the slide in full view of the Trooper to show it was unloaded. The Trooper then instructed him to secure the weapon back in his pocket and sit on the guardrail. At the conclusion of the encounter, the Trooper seized the 9mm pistol and 12 rounds of ammunition, cited Marquis for a civil motor vehicle infraction, and summoned him to face charges for the unlicensed possession of a firearm and ammunition under G. L. c. 269, §§ 10(a) and § 10(h)(1).

Nothing from this record suggests that Marquis was carrying out a criminal act, carrying a firearm in the performance of a duty for hire or reward, carrying on a business as a gunsmith, attempting to sell, rent or lease a firearm, had a firearm with a defaced serial number, a stolen firearm, or otherwise unlawfully or illegally obtained a firearm, such as with funds received from the department of transitional assistance. Further, the fact that the Trooper instructed Marquis "to secure the weapon back in his pocket and sit on the guardrail" indicates that he was not a threat, and that he did not disturb the public peace. Because Marquis's conduct did not implicate any of the circumstances to which the licensing scheme applies, the statutes are unconstitutional as applied in his particular case.

(I) Chapter 269 and Chapter 140 are misapplied:

Preliminarily, the Court must avoid constitutional questions when ordinary rules of construction

would suffice. "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality...unless such adjudication is unavoidable.... Before deciding the constitutional question, it was incumbent on [lower] courts to consider whether the statutory grounds might be dispositive." N.Y.C. Transit Authority v. Beazer, 440 U.S. 568, 582 (1979). Also, "The Court will not pass upon a constitutional question, although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. ... Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter." Ashwander v. Tenn Valley Authority, 297 U.S. 288, 347 (1936), Hagans v. Lavine, 415 U.S. 528, 547 (1974).

A person committing a felony may be lawfully arrested without a warrant, Commonwealth v. Grise, 398 Mass. 247 (1986). Since Marquis was not arrested, and nothing suggests that he had in fact disturbed the public peace, there's no reason to presume that Chapter 269 should even apply. Indeed, the title of Chapter 269 is "Crimes Against Public Peace." Although not dispositive, "'[T]he title of a statute and the heading of a section' are 'tools available for the resolution of a doubt' about the meaning of a statute." Almendarez-Torres v. United States, 523 U.S. 224, 234 (1998).

Likewise, Chapter 140 "Licenses" presumably applies to "Administration of the Government" for the "Public Safety and Good Order," as the titles for Part I and Title XX of the General Laws imply.

Chapter 140 licenses activities which in fact effect the "Public Safety and Good Order," including licenses for —

> "innholders or common victuallers...sale of certain non-intoxicating beverages" § 1, "dispense food and beverages" § 21E, "lodging houses" § 23, "public lodging houses" § 34, "recreational camps, overnight camps or cabins, motels or manufactured housing communities" § 32B, an "employment agency" § 46D, "coffee and tea houses" § 47, "to maintain a vehicle for the sale of food" § 49, "for vapor, pool, shower or bath houses" § 51, for "collectors of, dealers in or keepers of shops for the purchase, sale or barter of junk, old metals or second hand articles (junk dealers)" § 54, for "automobile graveyard" § 54A, for the sale of various vehicles and "for a motor vehicle junkyard" § 57, § 58, § 59, and § 59A, "to carry on the business of pawnbrokers" § 70, for a "small loans business" § 96, "for furnaces or steam engines" § 115, and...

Additionally, a licensing authority, described as one "with the authority to impose occupational fees or licensing requirements on a profession" G. L. c. 6, § 172N, may issue licenses "to conduct a shooting gallery" § 56A, to store and use various weapons, including large capacity weapons by an incorporated "club or facility with an on-site shooting range or gallery" § 131(b), "to sell, rent or lease firearms ... or to

be in business as a gunsmith" § 122, to "sell ammunition" § 122B, "to purchase, rent or lease firearms" § 131A, and for the certification of "firearms safety instructors" § 131P(b).

Besides the activities specified in Chapter 140, police officers, sheriffs, and other state employees carry weapons "in the performance of their duties" G. L. c. 41, § 98 and G. L. c. 147, § 8A. So do public safety and security personnel who must obtain "professional licensing" 803 CMR 2.01 in "specified occupations" G.L. c. 6, § 172B.5 from the Executive Office of Public Safety and Security, such as private investigators, watchmen, guards, private patrolmen, and others that protect persons or property for hire or reward in G. L. c. 147, § 22, and carry firearms or guns "in the performance of his duties" in G. L. c. 147, §§ 29 and § 29A.

While imposing licensing requirements on a person carrying a firearm "in the performance of his duties," is certainly within the State's constitutional powers to preserve the "Public Safety and Good Order," nothing in the record suggests that Marquis was actually engaged in such conduct. The record merely shows Marquis bearing arms for his personal use, and this "presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." Coffin v. United States, 156 U.S. 432, 453 (1895).

As to whether if G. L. c. 140, §§ 131 or § 129B licenses are a "licensing requirement on a profession" G. L. c. 6, § 172N, or if they are restrains on a right presumptively secured by "the Second Amendment's 'unqualified command,'" New York State Rifle

& Pistol Assn., Inc. v. Bruen, No. 20-843, 14 (U.S. Jun. 23, 2022), "Any doubt on the issue of statutory construction should ... be resolved in favor of avoiding the question, under the rule that, 'where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [this Court's] duty is to adopt the latter.' United States v. Delaware & Hudson Co., 213 U. S. 366, 408. pp.239-252." Jones v. United States, 526 U.S. 227, 228 (1999).

Finally, as to the question of statutory construction, the licensed activities specified in Chapter 140 are entitlements[5], which this Court has equated with a "privilege," see Commonwealth v. Harris, 481 Mass. 767, 775 (2019). These statutory privileges are obtained through an application and in consideration for the payment of fees[6], which is in essence the making of contracts with the government: "Our statute books are filled with acts authorizing the making of contracts with the government through its various officers and departments," The Floyd Acceptances, 74 U.S. 666, 680 (1868); and "In general, a statute is itself treated as a contract when the language and circumstances evince a legislative intent to create private rights of a contractual nature enforceable against the State." United States Trust Co. v. New Jersey, 431 U.S. 1, Footnote 14 (1977).

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[5] G. L. c. 140, § 131: "A license shall entitle a holder thereof...to...possess and carry firearms."

[6] Fee: "A charge fixed by law for services of public officers or for use of a privilege under control of government." Black's Law Dictionary, 4th Edition, Page 740.

To apply "a literal construction" to the firearms licensing statutes "would yield an absurd or unworkable result," Commonwealth v. Millican, 449 Mass. 298, 300, 301 (2007), because it would require Marquis to contract with the state and pay for an entitlement in order to exercise his rights freely granted by the Constitution; and this unworkable result has long been prohibited: "A person cannot be compelled 'to purchase, through a license fee or a license tax, the privilege freely granted by the constitution.'" Murdock v. Pennsylvania, 319 U.S. 105, 114 (1943).

(II) Conflict of interest undermines the integrity of the proceeding:

According to data published by the Firearms Records Bureau at https:// www.mass.gov/info-details/data-about-firearms-licensing-and-transactions, there were 101,950 firearm license applications in 2023, estimated at over $10 million in collected fees. Of which, 50 percent "shall be deposited into the general fund of the Commonwealth," see G. L. c. 140, § 131(i). Thus, the Commonwealth is materially incentivized to market and to impose its licensing scheme upon all persons for all purposes, and to disregard the actual "Purpose and Scope" 803 CMR 2.01 of the application. This not only exceeds the limits of executive power, but also violates due process of law, as a reasonable person would question the state's impartiality when it stands to profit by imposing the license through the threat of prosecution.

"An error is fundamental if it undermines confidence in the integrity of the criminal proceeding. ... The appointment of an interested prosecutor raises such doubts. Prosecution by someone with conflicting

loyalties 'calls into question the objectivity of those charged with bringing a defendant to judgment.' Vasquez, supra, at 474 U. S. 263. It is a fundamental premise of our society that the state wield its formidable criminal enforcement powers in a rigorously disinterested fashion, for liberty itself may be at stake in such matters." Young v. United States ex rel. Vuitton et Fils, 481 U.S. 787, 811 (1987). Please also see conflict of interest laws G. L. c. 268A, § 2(b) and G. L. c. 268A, § 23(b)(3); and a licensing authority's attempt to extort money or any pecuniary advantage with intent to compel a person to do any act against his will, G. L. c. 265, § 25.

(III) Violation of Article V subverts the principal-agency relationship:

Article V of the Massachusetts Declaration of Rights provides that all power reside originally in the people, are derived from them, and that the officers of government are their substitutes and agents and are at all times accountable to them. That is, "The Government of the United States is a Government of delegated powers; it has only such powers as are expressly conferred upon it by the Constitution and such as are reasonably to be implied from those expressly granted." United States v. Butler, 297 U.S. 1, 62, 63 (1936). And "there is no such thing as a power of inherent sovereignty in the government of the United States. It is a government of delegated powers, supreme within its prescribed sphere but powerless outside of it." Legal Tender Cases, 110 U.S. 421, 467 (1884).

To preserve the public safety and security, the "powers and duties" of police officers at G. L. c. 41, § 98, and the colonel of state police at G. L. c. 22C, § 3,

by whom and for whom all government exists and acts." Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

Where as here, "The core of the relationship between an agent and his or her principal is a duty of loyalty that the former owes the latter: the law 'demands that the agent shall work with an eye single to the interest of his principal. It ... forbids him from acting adversely to his principal, either for himself or for others. ...Under art. 5, all governmental officials in the Commonwealth, as agents of the people, are bound to 'work with an eye single to the interests' of their principal, the public." 1A Auto, Inc., and another v. Director of the Office of Campaign and Political Finance, 480 Mass. 423, 444-445 (2018).

Consequently, when an officer of the Commonwealth prosecutes the people, a class of persons to whom Marquis undoubtedly belongs, for the exercise of his rights secured by the Constitution, he subverts the principal-agency relationship inherent in our established form of government in violation of Article V by acting adversely to his principal. Thus, Marquis "is exempt from suit not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends, ... A suit presupposes that the defendants are subject to the law invoked. Of course, it cannot be maintained unless they are so." Kawananokoa v. Polyblank, 205 U.S. 349, 353 (1907).

(IV) Violation of Article VII is contrary to the common good:

The Attorney General's Office is "The People's Law Firm," with its stated goals of "being an advo-

cate and resource for the people of Massachusetts...including protecting consumers, combating fraud and corruption, investigating and prosecuting crime." https://www.mass.gov/orgs/office-of-the-attorney-general. This includes prosecuting all persons, regardless of Citizenship, who breach the public trust by failing to obtain the proven qualifications required by a license. District of Columbia v. Heller, 554 U. S. 570, 580 (2008): The term [people] unambiguously refers to all members of the political community, not an unspecified subset. As we said in United States v. Verdugo-Urquidez, 494 U. S. 259, 265 (1990): "...'the people' protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community."

When the Commonwealth prosecutes persons who breach the public trust by failing to obtain the "proven qualifications" necessary for a license to carry firearms, it stands for the "preservation of public health, safety, and welfare," see Chardin, supra. But this power must be wielded in the "faithful execution" of the laws, see the Preamble, and government "can exercise no power which they have not, by their Constitution, entrusted to it; all else is withheld. ... If the power is not in terms granted and is not necessary and proper for the exercise of a power which is thus granted, it does not exist." Legal Tender Cases, supra, at 467-468.

By prosecuting Marquis for the peaceful exercise of his individual right to bear arms, government officers exceeded their statutory powers and violated "the Second Amendment's 'unqualified command.'" Bruen, supra. Additionally, as there is no reasonable showing here that this particular prosecution promotes the common good, the protection, safety, prosperity or happiness of the people, it violates Article VII, wherein "Government is instituted for the common good; for the protection, safety, prosperity and happiness of the people; and not for the profit, honor, or private interest of any one man, family, or class of men ..."

Indeed, the misapplication of statutes, due process violations, and possible profit motive makes it difficult to escape the conclusion that certain executive officers have turned the state's firearms regulations into a tool of exaction and control for their own profit or private interests, which they deploy under color of law, to chill the exercise of a fundamental right in violation of the common good, the protection, safety, prosperity and happiness of the people.

(V) Taking of private property violates substantive due process:

According to the CDC's data on "Homicide Mortality by State[3]," in 2022 4 Massachusetts had 171 homicides, verses 25 in New Hampshire. So when Marquis crossed the border into Massachusetts in September 2022, his chance of being a victim of violent crime skyrocketed. Yet, Marquis's arms for personal use were taken from him by the Trooper,

[3] https://www.cdc.gov/nchs/pressroom/sosmap/homicide_mortality/homicide.htm

who upon leaving, not only deprived Marquis of his ability to effectively defend himself, but also his private property.

The United States Supreme Court "has held that the Due Process Clause protects individuals against two types of government action. So-called 'substantive due process' prevents the government from engaging in conduct that 'shocks the conscience,' Rochin v. California, 342 U.S. 165, 342 U.S. 172 (1952), or interferes with rights 'implicit in the concept of ordered liberty,' Palko v. Connecticut, 302 U.S. 319, 302 U.S. 325-326 (1937)." United States v. Salerno, 481 U.S. 739, 746 (1987). And of course, "the right to keep and bear arms [is] among those fundamental rights necessary to our system of ordered liberty" McDonald v. City of Chicago, 561 U.S. 742, 780 (2010).

Be as it may that "a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause," DeShaney v. Winnebago County DSS, 489 U.S. 189, 197 (1989), but "when the State, by the affirmative exercise of its power, so restrains an individual's liberty that it renders him unable to care for [or to defend] himself, and at the same time fails to provide for his basic human needs — e.g., food, clothing, shelter, medical care, and reasonable safety — it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause." Id. at 200.

In this case, not only have officers so restrained an individual's liberty that it renders him unable to defend himself, but they have taken his private property in violation of Article X and the

Fifth Amendment. While officers may seize a firearm under G. L. c. 269, § 10(a) or defined by G. L. c. 140, § 121, criminal prohibitions and professional regulations do not infringe on constitutional rights. Marquis did not in fact have a firearm "As used in sections 122 to 131Y, inclusive...," G. L. c. 140, § 121, for carrying out the performance of duties, carrying out a crime, or carrying on business as a gunsmith; he did not steal or illegally purchase a firearm, deface its serial number, or engage in conduct subject to any regulation, see amicus brief by Rep. Gerhard, in Commonwealth v. Dean F. Donnell, Jr., SJC-13561, Doc. No. 12, p. 32-34. Marquis merely kept "arms for personal use," see G. L. c. 62C, § 55A, among his "personal effects" and private property, of which he may not be deprived without due process of law or just compensation.

Conclusion

For the forging reasons, including all those contained in the amicus curiae brief filed by Rep. Jason Gerhard in the companion case of Commonwealth v. Dean F. Donnell, Jr., SJC-13561, Doc. No. 12, the Court must DISMISS this action.

Fourth of July, 2024,

Respectfully Submitted,

Rep. Jason Gerhard /s/
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