COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

NO. SJC-13856

COMMONWEALTH OF MASSACHUSETTS,
Appellee,

V.

MIKAI THOMSON,
Appellant.

COMMONWEALTH'S ANSWER ON APPEAL FROM A JUDGMENT OF THE BOSTON MUNICIPAL COURT

SUFFOLK COUNTY

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ISSUES PRESENTED

I. Whether the firearms licensure statute, G. L. c. 140, § 131, that was in effect in 2021, is facially unconstitutional due to the discretionary authority it vested to deny applications to persons that did not fall into any of the ten categories of expressly prohibited persons and if so whether the problematic language is separable from the remainder of the statute?

II. Whether the statutory prohibition in G. L. c. 140, § 131, on persons under the age of twenty-one from obtaining a license to carry a firearm is unconstitutional?

STATEMENT OF THE CASE

This is the defendant's direct appeal from his convictions in the Dorchester Division of the Boston Municipal Court, No. 2107CR003507 (DA.1).[1] On December 27, 2021, a complaint issued charging the defendant with unlawfully possessing a firearm without a license, in violation G. L. c. 269, § 10(a), assault and battery on a police officer, in violation of G. L. c. 265, § 13D, carrying a loaded firearm, in violation of G. L. c. 269, § 10(n), and

[1] References to the defendant's brief will be cited as (D.Br.[page]) and his appendix will be cited as (DA.[page]). References to trial transcript will be cited as (Tr.[volume]:[page]), with volume I referring to November 9, 2023, and volume II as November 10, 2023.

possession of ammunition without a firearm identification card, in violation of G. L. c. 269, § 10(m) (Tr.1:102; DA.3).

From November 9-10, the Honorable Samir Zangori presided over the defendant's jury trial (DA.9-10). The defendant moved for a required finding of not guilty at the close of the Commonwealth's case (Tr.1:186-89). The motion was allowed as to possession of a loaded firearm and possession of ammunition but denied as to assaulting the trooper and unlawful possession of a firearm (Tr.1:196). On November 10, the jury found the defendant guilty of both remaining charges (Tr.2:58; DA.10). Judge Zangori imposed a sentence of two- and one-half years in the House of Corrections for unlawful possession of a firearm and six months in the House of Corrections for assault and battery of a police officer to run concurrently (Tr.2:62-63). The defendant's notice of appeal of his convictions was dated November 10, 2023, but was docketed on November 22, 2023 (DA.10, 14).

STATEMENT OF FACTS[2]

On December 16, 2021, Massachusetts State Police Trooper Everton DeCastro observed a Volkswagen Jetta run a red light

[2] A brief summary of facts follows merely for context as the facts of the case, beyond the existence of a conviction for unlawful possession of a firearm, are not needed to resolve the defendant's challenges to the constitutional validity of the firearm licensure scheme that he was convicted under.

on American Legion Highway heading north towards Blue Hill Avenue at about 6:20pm (Tr.1:123, 126). Trooper DeCastro pulled onto American Legion Highway, activated his lights, and pulled the car over (Tr.1:126-27). As he approached the vehicle on foot he noticed three occupants, none of which were wearing seat belts, a lit marijuana cigarette in the center console, and a large amount of marijuana in a vacuum sealed plastic bag in the back seat (Tr.1:129, 131). The driver admitted the bag contained a pound of marijuana (Tr.1:131). Trooper DeCastro, who was alone, asked if there were any weapons in the car (Tr.1:132). The defendant, sitting in the front passenger seat, twice ignored the question as he continued using his phone (Tr.1:132). Tropper DeCastro issued an exit order to the defendant (Tr.1:133). The defendant existed the vehicle, shoved the trooper, and took flight on foot towards Blue Hill Avenue (Tr.1:133). Trooper DeCastro pursued on foot (Tr.1:134). The defendant ran with one arm swinging freely and the other pinned against his waist (Tr.1:134). Trooper DeCastro lost sight of the defendant for about fifteen seconds near a house (Tr.1:134, 138). Trooper DeCastro regained sight of the defendant who was then running with both arms swinging freely (Tr.1:135). The defendant evaded apprehension (Tr.1:140-41).

Trooper DeCastro went back and canvassed the defendant's flight path (Tr.1:142). Trooper DeCastro found a semi-automatic pistol laying on the driveway of the residence where he had briefly lost sight of the defendant just moments before (Tr.1:142, 164). Massachusetts State Trooper Jason Beausoleil of the Firearms Identification Section responded to the scene and recovered the firearm (Tr.1:173). The weapon was a semi-automatic .9mm Taurus G3 (Tr.1:173, 182). There was no round in the chamber but the magazine was loaded with five rounds of ammunition (Tr.1:175-76). The parties stipulated that the Taurus G3 satisfied the legal definition of a firearm and that the rounds met the legal definition of ammunition (Tr.1:184).

ARGUMENT

I. THE STATUTORY FIREARMS LICENSURE SCHEME IS NOT FACIALLY UNCONSTITUTIONAL BECAUSE THERE ARE MANY FACTUAL SITUATIONS IN WHICH IT IS CONSTITUTIONALLY VALID AND ANY PROBLEMATIC LANGUAGE IN THE STATUTE VESTING DISCRETIONARY AUTHORITY TO DENY A LICENSE IS SEPARABLE FROM THE REMAINDER OF THE STATUTE.

The defendant claims the statutory licensing scheme for possession of firearms, found in G. L. c. 140, § 131(d), that was in effect at the time of his offense on December 16, 2021, alleging it is facially unconstitutional in light of *New York State Rifle & Pistol Ass'n v. Bruen*., 597 U.S. 1 (2022), due to the statute vesting discretionary authority to deny a

license (D.Br.11). The defendant's claim lacks merit because there are multiple sets of facts in which the licensure statute (G. L. c. 140, § 131) is constitutionally valid and any problematic language vesting discretionary authority to deny a license is separable from the rest of the statute.

A. The Firearms Licensure Statute Validly Restricts Certain Categories Of Persons From Obtaining A License.

A facial challenge to the constitutional validity of a statute attacks the statute itself rather than a particular application of a statute to a particular set of facts. *Commonwealth v. Harris*, 481 Mass. 767, 771 (2019). "A facial challenge fails when the statute at issue has a plainly legitimate sweep." *Harris*, 481 Mass. at 771 (internal quotation marks omitted). Restated, a facial challenge only prevails where no set of circumstances exist under which the statute would be valid. *Commonwealth v. Wilbur W.*, a juvenile, 479 Mass. 397, 402 n.6 (2018). "The party raising a facial challenge bears the burden of demonstrating that there are no conceivable grounds which could support the challenged statute's validity." *In the Matter of F.A.*, 494 Mass. 673, 676 n.3 (2024) (internal quotation and punctuation marks omitted).

Here, the statute at issue, G. L. c. 140, §131, is not facially unconstitutional because there are factual

circumstances where the statute that existed at the time of the defendant's offense was constitutionally sound. *Harris*, 481 Mass. at 771. The statute barred people from receiving a license if they had, among other things, been convicted of a felony or been committed to an institution for mental illness. *See* G. L. c. 140, § 131 (d) (i)-(iii) (effective January 1, 2021, through August 9, 2022). Both of those restrictions are constitutionally valid.[3] *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008) ("nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill"); *McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010) (plurality) (same); *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 72 (2022) (Alito, J., concurring) (same); *Ramirez v. Commonwealth*, 479 Mass. 331, 342 (2018) (noting portions of the licensure statute are constitutionally valid). As portions of the statute are

[3] There are many other criteria in the statute that also render an applicant a "prohibited person" from obtaining a license to carry. G. L. c. 140, § 131 (d) (iv) – (x). The Commonwealth does not waive any argument that those restrictions are also constitutionally permissible, but it need not explain how they are constitutionally valid prohibitions here in light of the United States Supreme Court having repeatedly stated that it is constitutionally permissible to restrict persons with prior criminal records and mental health issues from obtaining licenses to carry firearms as the Massachusetts statute does.

constitutionally valid, the statute is not facially unconstitutional.

B. The Discretionary Authority Is Separable From The Remainder Of The Statute.

Because at least some provisions of the licensing statute (G. L. c. 140, § 131) are constitutionally valid, the facial challenge fails as long as any unconstitutional portion of the statute is separable from the remainder of the statute. *See Harris*, 481 Mass. at 771. "Severability entails a two-step examination in which we determine, first, whether the invalid portion of the statute is capable of separation and, second whether upholding the statute as severed would frustrate the legislative purpose." *K.J. v. Superintendent of Bridgewater State Hospital*, 488 Mass. 362, 374 (2021) (internal quotation marks omitted). "When 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." *Murphy v. Commissioner of the Dep't of Indus. Accidents*, 418 Mass. 165, 169 (1994) (quoting *Massachusetts Wholesalers of Malt Beverages, Inc. v.*

Commonwealth, 414 Mass. 411, 420 (1993)). An "unconstitutional provision is separable if the remaining provisions stand alone, meaning that those provisions are not so intertwined with the invalid provision that the Legislature could not reasonably have enacted the constitutional portions without those held unconstitutional." *Commonwealth v. Brown*, 466 Mass. 676, 681 (2013) (internal quotation marks omitted).

Here, the invalid discretionary authority is capable of being separated and doing so does not frustrate the legislative purpose of the statute. The invalid portion of the statute is the permissive "may issue" language found in the introductory paragraph of G. L. c. 140, § 131 (d), which empowers a licensing authority to deny a license even if the applicant is not a prohibited person as listed in subsection (i) through (x), where the licensing authority determines the applicant lacks a "good" reason to fear injury to his person or property.[4] The arguably unconstitutional discretionary

[4] In *Bruen*, the Supreme Court struck New York's firearms licensure scheme as unconstitutional because it vested discretionary authority in the licensing authority to deny a license even where an applicant met the express statutory requirements. 597 U.S. at 11. Further, the Supreme Court noted that five other states and the District of Columbia had similar licensing schemes that vest unconstitutional discretionary authority in the licensing authority, one of which being Massachusetts. *Bruen*, 597 U.S. at 14-15. The

Supreme Court expressly cited the statutory language "good reason" found in the 2020 version of G. L. c. 140, § 131 (d) as unconstitutionally vesting discretionary authority in the licensing authority. *Bruen*, 597 U.S. at 15 n. 2.

At the time the Supreme Court issued *Bruen*, on June 23, 2022, the statute, G. L. c. 140, § 131, had been amended. The statute the Supreme Court cited that was in effect in 2020 read in relevant portion, with what the Supreme Court found unconstitutional in bold, as follows:

> Any person residing or having a place of business within the jurisdiction of the licensing authority or any law enforcement officer employed by the licensing authority or any person residing in an area of exclusive federal jurisdiction located within a city or town may submit to the licensing authority or the colonel of state police, an application for a Class A license to carry firearms, or renewal of the same, which the licensing authority or the colonel **may issue** if it appears that the applicant is not a prohibited person, as set forth in this section, to be issued a license **and has good reason** to fear injury to the applicant or the applicant's property or for any other reason, including the carrying of firearms for use in sport or target practice only, subject to the restrictions expressed or authorized under this section.
>
> A prohibited person shall be a person who: . . . .

G. L. c. 140, § 131 (d) (effective until January 1, 2021).

G. L. c. 140, § 131 was subsequently amended effective January 1, 2021, and this version was in effect at the time of the defendant's offense on December 16, 2021. The language bestowing constitutionally invalid discretionary authority remained in the 2021 version. The amended statute, in effect at the time of the defendant's crime, reads as follows, with the problematic language in bold:

> A person residing or having a place of business within the jurisdiction of the licensing authority

authority the statute purports to vest, can be struck from the statute without impacting the remainder of the statute. *See Ramirez v. Commonwealth*, 479 Mass. 331, 338 (2018) ("When confronting a constitutional flaw in a statute, a court strives to limit the solution to the problem.") (internal quotation marks omitted). Restated, the phrases that provide the additional discretionary authority ("may issue" and "has good reason"), are separable from the constitutionally valid subsections expressly listing categories of prohibited

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> or any law enforcement officer employed by the licensing authority or any person residing in an area of exclusive federal jurisdiction located within a city or town may submit to the licensing authority or the colonel of state police an application for a license to carry firearms, or renewal of the same, which the licensing authority or the colonel **may issue** if it appears that the applicant is not a prohibited person as set forth in this section to be issued a license and that the applicant **has good reason** to fear injury to the applicant or the applicant's property or for any other reason, including the carrying of firearms for use in sport or target practice only, subject to the restrictions expressed or authorized under this section.
>
> A prohibited person shall be a person who: . . . .

G. L. c. 140, § 131 (d) (effective January 1, 2021).

While of no legal consequence to this case, the problematic language bestowing discretionary authority was removed in an amendment that took effect on October 23, 2024, and the categories of prohibited persons were moved to G. L. c. 140, § 121F (j).

persons. Accordingly, the statute as a whole is not facially unconstitutional and the defendant's claim fails. *Brown*, 466 Mass. at 681 (valid portions of statute should be preserved where invalid portion is severable); *see also Commonwealth v. Peace Chou*, 433 Mass. 229, 238-39 (2001) (noting statute that criminalizes broad range of conduct some of which is constitutionally protected does not invalidate the entire statute as other conduct it encompasses is separable).

To demonstrate, the version of G. L. c. 141, § 131(d) that was in effect at the time of the defendant's offense, with the problematic language in bold, and the separable portions of the statute that must be struck lined out:

> A person residing or having a place of business within the jurisdiction of the licensing authority or any law enforcement officer employed by the licensing authority or any person residing in an area of exclusive federal jurisdiction located within a city or town may submit to the licensing authority or the colonel of state police an application for a license to carry firearms, or renewal of the same, which the licensing authority or the colonel ~~**may**~~ **issue** if it appears that the applicant is not a prohibited person as set forth in this section to be issued a license ~~and that the applicant **has good reason** to fear injury to the applicant or the applicant's property or for any other reason~~, including the carrying of firearms for use in sport or target practice only, subject to the restrictions expressed or authorized under this section.
>
> A prohibited person shall be a person who: . . . .

G. L. c. 140, § 131 (d) (effective January 1, 2021).

By simply striking the word "may," the licensing authority loses the problematic discretionary authority to deny a license to a person that does not fall into one of the ten categories of prohibited persons. Striking a single word or phrase is permissible as "[t]here is not, nor should there be, any general rule that only entire sentences may be separated from otherwise valid statutes. In appropriate circumstances, individual words may be struck." *Murphy*, 418 Mass. at 170. The second struck through portion merely effectuates the discretionary authority vested by "may issue." Removing it has no impact on the statute as whole.

Nor does removing the discretionary "may" issue authority frustrate the legislative purpose of the statute. The purpose of this regulatory licensure statute is to limit access to licenses for firearms, a general welfare and public safety purpose. *See Commonwealth v. Jackson*, 396 Mass. 904, 916 and 918 (1976) (recognizing the statutory penalty provision for violating the firearms licensure scheme was designed by Legislature to further public welfare and safety goals). The legislative purpose is clear from the placement of the statute within the entire statutory scheme as well as the body the statute itself. The statute was placed within "Title XX," titled, "Public Safety and Good Order." The

statute itself expressly prohibits categories of persons from obtaining a license to carry a firearm, labelling them "prohibited persons." There are ten categories of prohibited persons expressly listed in the statute. The problematic discretionary authority empowers the licensing authority to restrict even more persons than just those ten categories expressly prohibited from obtaining a license, essentially creating an eleventh category of prohibited persons. Removal of that eleventh category of prohibited persons from the statute does not impact the expressly listed ten remaining categories. *Contra Commonwealth v. Donnell*, 495 Mass. 471, 484-85 (2025) (noting entire non-resident licensure statute, section 131F, dependent on discretionary may issue authority). Removal of the eleventh category here, the discretionary authority to deny licenses, does not frustrate the intent of the legislature, which was clearly to limit persons with access to a license to carry a firearm.

The Legislature expressly stated its intent that statutes are to be construed as severable such that if a portion of a statute is struck the remainer shall remain in effect. G. L. c. 4, § 6, Eleventh ("The provisions of any statute shall be deemed severable, and if nay part of any statute shall be adjudged unconstitutional or invalid, such judgment shall not affect other valid portions thereof").

Here, removing the discretionary authority to restrict licenses beyond just the ten expressly listed categories does not frustrate the legislature's public welfare and safety intent of absolutely preventing certain categories of persons from gaining access to firearms. As such, the discretionary authority is separable from the remainder of the statute. The defendant's claim fails because the statute is not facially unconstitutional.[5]

II. THE DEFENDANT LACKS STANDING TO CHALLENGE THE LICENSURE STATUTE AS APPLIED TO HIM BUT EVEN IF HE HAD STANDING THE RESTRICTION ON PERSONS UNDER THE AGE OF TWENTY-ONE FROM OBTAINING A LICENSE TO CARRY A FIREARM IS CONSISTENT WITH THE NATION'S HISTORY AND TRADITION OF FIREARM REGULATIONS.

The defendant next alleges the that the firearms licensure statute, G. L. c. 140, § 131, is unconstitutional as applied to him because subsection (d)(iv) prohibits

[5] A panel of this Court recently issued an unpublished opinion concluding that the version of G. L. c. 140, § 131(d) that was in effect in 2018 is not facially unconstitutional. *Commonwealth v. Mancevice*, 2023-P-0909, 104 Mass. App. Ct. 1111 (January 21, 2025). The 2018 version of the statute did have the ″may issue″ discretionary authority language but the issue in the case was the discretionary authority to suspend a license after it had been given in another portion of the statute. However, while not expressly stated in the opinion, inherent in concluding the statute was not facially unconstitutional, a panel of this Court concluded the "may issue" language in the 2018 version of the statute that remained in the version of the statute at issue here, did not render the statute facially unconstitutional.

persons under the age of twenty-one from obtaining a license to possess a firearm (D.Br.22).[6] The defendant's as applied challenge to the statute fares no better. First, as the defendant failed to establish that he sought and was denied a license, he is precluded from challenging the validity of the licensure statute as applied to him. Second, even if he was not precluded from challenging the statute as applied to him, the age-based regulation preventing persons under the age of twenty-one from carrying firearms does not violate the Constitution as it is consistent with the nation's historic tradition of firearms regulations.

First, in order to challenge a licensure statute as unconstitutional as applied to him, a defendant must establish standing to raise the challenge. To have standing, a defendant must show that he applied for and was denied

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[6] The relevant portion of G. L. c. 140, § 130 reads as follows:

> (d) A person residing or having a place of business within the jurisdiction of the licensing authority or any law enforcement officer employed by the licensing authority or any person residing in an area of exclusive federal jurisdiction located within a city or town may submit to the licensing authority or the colonel of state police an application for a license to carry firearms . . .
>
> A prohibited person shall be a person who: . . . (iv) is younger than 21 years of age at the time of the application; . . . .

licensure under the statute. *Commonwealth v. Powell*, 459 Mass. 572, 590 (2011) (defendant who was not denied a license cannot challenge constitutional validity of G. L. c. 269, § 10(a)). "Because the defendant never applied for a firearm license, the defendant does not have standing to bring an as-applied challenge." *Commonwealth v. Donnell*, 495 Mass. 471, 475 n.4 (2025). Here, as noted in *Donnell*, the defendant lacks standing to bring this as applied challenge because he failed to establish he ever sought and was denied a license.

Even if the defendant had standing to raise the challenge, the claim still fails. There is a two-step analysis for deciding constitutional challenges pursuant to the Second Amendment. *Bruen*, 597 U.S. 1 (2022); *United States v. Connelly*, 117 F.4th 269, 274 (5th Cir. 2024). First, the defendant bears the burden of establishing that the challenged statute regulates conduct that falls within the plain text of the Second Amendment. *Bruen*, 597 U.S. at 17 & 24; *see also United States v. Jackson*, 138 F.4th 1244, 1251 (10th Cir. 2025) ("At the first step, the party asserting the right must establish the plain text of the Second Amendment covers their conduct."). If the conduct falls within the plain text, "the Constitution presumptively protects that conduct." *Bruen*, 597 U.S. at 17 & 24. If the defendant meets the initial burden, the burden shifts to the Commonwealth to show

that the statute is in line with the historical tradition of firearm regulations in this Nation. *Id*.

The second step of the *Bruen* analysis requires the Commonwealth to prove that the challenged statute is "part of the historical tradition" of firearms regulation. *Bruen*, 597 U.S. at 10. *Bruen* requires only that a regulation is "consistent" with this tradition, not that it be a perfect match. *Id*. at 2; *see also Antonyuk v. James*, 120 F.4th 941, 990 (2d Cir. 2024), cert. denied, No. 24-795 (2025) ("*Bruen* instructs us to determine whether a given modern law is part of the Nation's tradition of firearm regulation, not the sum of it.").

"Determining whether a historical regulation is a proper analogue for a distinctly modern firearm regulation requires a determination of whether the two regulations are relevantly similar." *Bruen*, 597 U.S. at 28-29 (internal quotation marks omitted). Meaning, are the two similar in a manner that is relevant to the issue at hand. The Commonwealth does not have to show an identical statute or "historical twin". *Bruen*, 597 U.S. at 30. *Bruen* identifies "two metrics" by which regulations are to be compared: "*how* and *why* the regulations burden a law-abiding citizen's right to armed self-defense." *Id*. at 29 (emphasis added). The individual right to self-defense is "the central component" to the Second

Amendment. *Heller*, 554 U.S. at 599. "Therefore, whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified are 'central' considerations when engaging in an analogical inquiry." *Bruen*, 597 U.S. at 20 (emphasis in original).

"If laws at the founding regulated firearm use to address particular problems," then "that will be a strong indicator that contemporary laws imposing similar restrictions for similar reasons fall within a permissible category of regulations." *Commonwealth v. Marquis*, 495 Mass. 434, 451 (2025) (quoting *United States v. Rahimi*, 602 U.S. at 680, 692 (2024)). When comparing the how, "the Second Amendment permits more than just those regulations identical to ones that could be found in 1791. Holding otherwise would be as mistaken as applying the protections of the right only to muskets and sabers." *Bruen*, 597 U.S. at 30.

"[W]hen it comes to interpreting the Constitution, not all history is created equal. 'Constitutional rights are enshrined with the scope they were understood to have when the people adopted them.'" *Id*. at 4 (quoting *Heller*, 554 U.S. at 634–635) (emphasis in original). "The Commonwealth may meet its burden by pointing to analogous regulations enacted close in time to the ratification of either the Second

Amendment in 1791 or the Fourteenth Amendment in 1868." *Commonwealth v. Canjura*, 494 Mass. 508, 514 (2024) (citing *Bruen*, 597 U.S. at 17). "Historical evidence that long predates or postdates either time may not illuminate the scope of the right." *Bruen*, 597 U.S. at 4.

Age based restrictions on the sale and transfer of firearms to persons under the age of twenty-one were common around the adoption of both the Second and Fourteenth Amendments. *See United States v. Rene E.*, 583 F.3d 8, 14 (3d Cir. 2009) (collecting cases showing longstanding historical tradition of states regulating access to firearms by juveniles). In 1776, Massachusetts passed an act that in order to possess a firearm, "every Male Person above sixteen Years of Age" had to take a loyalty oath to the American colonies – failure to do so resulted in disarmament. The Second Amendment And The Future Of Gun Regulation: Historical, Legal, Policy, and Cultural Perspectives, 73 Fordham L. Rev. 487, 507 (Nov. 2024) (quoting Ch. VII, 1775-1776 Mass. Act at 31). The point being, there were age based restrictions in Massachusetts on firearms as far back as 1776. Then, by the end of the 19th century, nineteen states and the District of Columbia had laws that restricted persons under

the age of twenty-one from purchasing or using firearms.[7] *NRA of Am. v. Bureau of Alcohol*, 700 F.3d 185, 202 (5th Cir. 2012). Further, a treatise issued in 1883, cited as an authority by the Supreme Court in *Heller*, 554 U.S. at 616, states, "the State may prohibit the sale of arms to minors pursuant to its police power." Thomas M. Cooley, Treatise on Constitutional Limitations, 740 n.4 (5th Ed. 1883). Further, in 1878, the Tennessee Supreme Court affirmed a conviction for transferring a pistol to a minor, defined as a person under twenty-one, where the defendant argued the law violated the Second Amendment because every citizen had the right to keep and bear arms. *State v. Callicutt*, 69 Tenn. 714, 714-15 (1878); *see also Coleman v. State*, 32 Al. 581, 582-83

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[7] The nineteen state statutes restricting persons under the age of twenty-one from possessing firearms are as follows:

> 1856 Ala. Acts 17; 16 Del. Laws 716 (1881); 27 Stat. 116-17 (1892) (District of Columbia); 1876 Ga. Laws 112; 1881 Ill. Laws 73; 1875 Ind. Acts 86; 1884 Iowa Acts 86; 1883 Kan. Sess. Laws 159; 1873 Ky. Acts 359; 1890 La. Acts 39; 1882 Md. Laws 656; 1878 Miss. Laws 175-76; Mo. Rev. Stat. § 1274 (1879); 1885 Nev. Stat. 51; 1893 N.C. Sess. Laws 468-69; 1856 Tenn. Pub. Acts 92; 1897 Tex. Gen. Laws 221-22; 1882 W. Va. Acts 421-22; 1883 Wis. Sess. Laws 290; 1890 Wyo. Sess. Laws 1253. Alabama, Georgia, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, North Carolina, Tennessee, Texas, and Wyoming had Second Amendment analogues in their respective constitutions at the time they enacted these regulations.

NRA v. Bureau of Alcohol, 700 F.3d at 202 n.14.

(1858) (Alabama Supreme Court affirming conviction for violating state law prohibiting transfer of a pistol to a person under twenty-one); *State v. Allen*, 94 Ind. 441, 442 (1884) (reversing dismissal of charge for selling a revolver to a person under twenty-one). There is a longstanding tradition of regulating access to firearms by persons under the age of twenty-one.

The firearms licensure statute's prohibition on persons under twenty-one is not a novel or overreaching infringement upon the right to bear arms. Instead, it embodies a principle deeply rooted in this Nation's history: the right to bear arms has always been subject to reasonable regulations where public safety demands it. The Supreme Judicial Court has repeatedly recognized the differences in the brains of emerging adults, noting they are not yet fully formed and are akin to that of children, and as such are treated differently. *Commonwealth v. Mattis*, 493 Mass. 216, 225 (2024). Restricting their access to firearms does not violate the Constitution because from the founding era onward, state governments have regulated firearm possession by individuals under the age of twenty-one.

CONCLUSION

For the foregoing reasons, the Commonwealth respectfully requests that this Honorable Court affirm the defendant's convictions.

Respectfully submitted
FOR THE COMMONWEALTH,

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September 14, 2025

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ADDENDUM

G. L. c. 4, § 6. Rules for Construing Statutes.

In construing statutes the following rules shall be observed, unless their observance would involve a construction inconsistent with the manifest intent of the law-making body or repugnant to the context of the same statute:

First, . . .

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.

G. L. c. 140, § 121F. Firearm Licensing and Permitting Procedures.

(a) A licensing authority shall, within 40 days from the date of receipt of a completed application for any firearm license, card or permit issued under sections 122, 122B, 122D, 129B, 131 or 131F, or renewal of the same, either approve the application and issue the permit, card or license or deny the application and notify the applicant of the reason for such denial in writing; provided, however, that no permit, card or license shall be issued unless the colonel of the state police has certified that the information available indicates that issuing the permit, card or license is not in violation of state or federal law.

. . .

(h) A licensing authority shall record in books, forms or electronic files kept for that purpose on the premises, and on the electronic firearms registration system created by the department of criminal justice information services pursuant to section 121B when produced or received, all: (i) license, permit and card applications, receipts, fees, affidavits, license location transfers and training certificates; (ii) issued licenses, permits and cards, and denials, revocations and suspensions of the same; (iii) decisions of the firearm licensing review board; and (iv) firearm transfers, including deliveries, seizures, surrenders, loss or theft or disposals. The department shall ensure automatic notification to the licensing authority of the existence of any disqualifying condition discovered or occurring subsequent to the issuance

of said permit, card or license and a notice of the expiration of the same not more than 5 days after the expiration including the expiration date of the permit, card or license and the name and address of the licensee.

(v)
(1) Any applicant or licensee aggrieved by a denial, revocation or suspension of a license to sell under section 122 or section 122B may appeal such denial, revocation or suspension by: (i) applying to the colonel of state police for said license within 10 days of a denial, revocation or suspension, who may direct the licensing authority to grant said license if, after a hearing, the colonel determines that there were no reasonable grounds for the denial, suspension or revocation and that the applicant is not barred by law from holding such a license, or (ii) filing an appeal with the district court having jurisdiction pursuant to paragraph (2) of this subsection.

(2) Any applicant or license, card or permit holder aggrieved by a denial, revocation or suspension of a permit, card or license issued under sections 122, 122B, 122D, 129B, 131 or 131F may, unless a hearing has previously been held pursuant to section 131S or 131T, chapter 209A or chapter 258E, within either 90 days after receiving notice of the denial, revocation or suspension or within 90 days after the expiration of the time limit during which the licensing authority shall respond to the applicant, file a petition to obtain judicial review in the district court having jurisdiction in the city or town in which the applicant filed the application or in which the permit, card or license was issued.

(3) The district court may order a permit, card or license be issued or reinstated upon a finding that there was no reasonable ground for denying, suspending or revoking the permit, card or license and that petitioner is not prohibited by law from possessing the permit, card or license.

G. L. c. 140, § 131. Firearms – Possession – License to Carry. (in effect from January 1, 2021 until August 9, 2022, when the next amendments took effect)

The issuance and possession of a license to carry firearms shall be subject to the following conditions and restrictions . . .

(d) A person residing or having a place of business within the jurisdiction of the licensing authority or any law enforcement officer employed by the licensing authority or any person residing in an area of exclusive federal jurisdiction located within a city or town may submit to the licensing authority or the colonel of state police an application for a license to carry firearms, or renewal of the same, which the licensing authority or the colonel may issue if it appears that the applicant is not a prohibited person as set forth in this section to be issued a license and that the applicant has good reason to fear injury to the applicant or the applicant's property or for any other reason, including the carrying of firearms for use in sport or target practice only, subject to the restrictions expressed or authorized under this section.

A prohibited person shall be a person who:

(i) has, in a court of the commonwealth, been convicted or adjudicated a youthful offender or delinquent child, both as defined in section 52 of chapter 119, for the commission of (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 a controlled substance as defined in section 1 of chapter 94C including, but not limited to, a violation of said chapter 94C; or (F) a misdemeanor crime of domestic violence as defined in 18 U.S.C. 921(a)(33);

(ii) has, in any other state or federal jurisdiction, been convicted or adjudicated a youthful offender or delinquent child for the commission of (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 a controlled substance as defined in said section 1 of said chapter 94C including, but not limited to, a violation of said chapter 94C; or (F) a misdemeanor crime of domestic violence as defined in 18 U.S.C. 921(a)(33);

(iii) is or has been (A) committed to a hospital or institution for mental illness, alcohol or substance abuse, except a commitment pursuant to sections 35 or 36C of chapter 123, unless after 5 years from the date of the confinement, the applicant submits with the application an affidavit of a licensed physician or clinical psychologist attesting that such physician or psychologist is familiar with the applicant's mental illness, alcohol or substance abuse and that in the physician's or psychologist's opinion, the applicant is not disabled by a mental illness, alcohol or substance abuse in a manner that shall prevent the applicant from possessing a firearm, rifle or shotgun; (B) committed by a court order to a hospital or institution for mental illness, unless the applicant was granted a petition for relief of the court order pursuant to said section 36C of said chapter 123 and submits a copy of the court order with the application; (C) subject to an order of the probate court appointing a guardian or conservator for a incapacitated person on the grounds that the applicant lacks the mental capacity to contract or manage the applicant's affairs, unless the applicant was granted a petition for relief of the order of the probate court pursuant to section 56C of chapter 215 and submits a copy of the order of the probate court with the application; or (D) found to be a person with an alcohol use disorder or substance use disorder or both and committed pursuant to said section 35 of said chapter 123, unless the applicant was granted a petition for relief of the court order pursuant to said section 35 and submits a copy of the court order with the application;

(iv) is younger than 21 years of age at the time of the application;

(v) is an alien who does not maintain lawful permanent residency;

(vi) is currently subject to: (A) an order for suspension or surrender issued pursuant to sections 3B or 3C of chapter 209A or a similar order issued by another jurisdiction; or (B) a permanent or temporary protection order issued pursuant to said chapter 209A or a similar order issued by another jurisdiction, including any order described in 18 U.S.C. 922(g)(8);

(vii) is currently the subject of an outstanding arrest warrant in any state or federal jurisdiction;

(viii) has been discharged from the armed forces of the United States under dishonorable conditions;

(ix) is a fugitive from justice; or

(x) having been a citizen of the United States, has renounced that citizenship.

Commonwealth v. Mancevice.

Appeals Court of Massachusetts

January 21, 2025, Entered

23-P-909

Reporter

2025 Mass. App. Unpub. LEXIS 39 *; 105 Mass. App. Ct. 1111; 250 N.E.3d 601; 2025 LX 49162; 2025 WL 250177

COMMONWEALTH *vs*. DEREK MANCEVICE.

Notice: Summary decisions issued by the Appeals Court pursuant to *M.A.C. Rule 23.0*, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as *rule 1:28*, as amended by 73 Mass. App. Ct. 1001 [2009]), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to *rule 23.0* or *rule 1:28* issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See *Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4, 881 N.E.2d 792 (2008)*.

PUBLISHED IN TABLE FORMAT IN THE MASSACHUSETTS APPEALS COURT REPORTS.

PUBLISHED IN TABLE FORMAT IN THE NORTH EASTERN REPORTER.

Subsequent History: Appeal denied by *Commonwealth v. Mancevice., 2025 Mass. LEXIS 322 (Mass., June 26, 2025)*

Judges: Sacks, Englander & Grant, JJ. **[*1]**

Opinion

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The defendant, Derek Mancevice, appeals from his conviction of possession of ammunition without a license, pursuant to *G. L. c. 269, § 10 (h) (1)*. His principal argument is that he was convicted in violation of the *Second Amendment to the United States Constitution*, because he had a lawfully issued license to carry firearms and ammunition that he claims was wrongfully suspended by the licensing officer, the chief of police of Barre, six days before the defendant was found to be still in possession of ammunition. Relying on *New York State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 142 S. Ct. 2111, 213 L. Ed. 2d 387 (2022)* (*Bruen*), the defendant argues that the suspension violated the *Second Amendment* because the "suitability" requirement of *G. L. c. 140, §§ 131 (d)* and *(f)*, and related provisions (as in effect in 2018), granted too much discretion to the licensing authorities to suspend firearm licenses, and thus were unconstitutional either on their face or as applied.[1]

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[1] As discussed in more detail *infra*, the defendant's arguments focus in particular on the "may issue" language of *§§ 131 (d)* and *(f)*, as those sections existed in 2018 and were applicable to his case. The "may issue" language has since been removed from the statute by amendment, although the "suitability" requirement remains. See St. 2022, c. 175, §§ 7, 9, 10, 12. This memorandum and order addresses the statutes as they existed at the time of the defendant's license

For the reasons that follow, we affirm the defendant's conviction. As to the defendant's facial challenge, to be unconstitutional on their face, G. L. c. 140, §§ 131 (d) and (f), would have had to violate the Second Amendment in all of their applications. See United States v. Rahimi, 602 U.S. 680, 693, 144 S. Ct. 1889, 219 L. Ed. 2d 351 (2024). The statutes did not fail under this test, because they provided for suspension of licenses for many valid reasons, such as when a person has been convicted **[*2]** of a felony or determined to be a threat to another person pursuant to G. L. c. 209A. See G. L. c. 140, §§ 131 (d), (f), as amended through St. 2018, c. 123, §§ 11-12. Licenses to carry may certainly be suspended for those reasons, or any time the license holder has been "found by a court to pose a credible threat to the physical safety of another," as the United States Supreme Court recently held in Rahimi, supra at 702.

Nor has the defendant mounted a meritorious as-applied challenge, because as framed his as-applied challenge is not materially different from his facial challenge. Put differently, the defendant has not raised a specific challenge to the *reason* for the suspension. And in any event, here the defendant's license to carry was suspended under G. L. c. 140, § 131 because he was charged with the crime of witness intimidation, G. L. c. 268, § 13B, and also, apparently, because a few weeks after he was charged with witness intimidation, he was involved in an altercation at a local market, at which he brandished a firearm. Suspending a license to carry under those circumstances fits comfortably within the Supreme Court's approval of "firearm laws [that] . . . prevent[] individuals who threaten physical harm to others from misusing firearms," Rahimi, 602 U.S. at 690. Accordingly, the defendant has shown no **[*3]** constitutional infirmity in his conviction. As we discern no merit in the other arguments the defendant raises, we affirm.

Background. In 2018, the defendant Mancevice had a license to carry firearms issued by the police chief of Barre. On July 3, 2018, Mancevice was charged with intimidation of a witness under G. L. c. 268, § 13B. A separate incident occurred a few weeks later, on August 25, 2018, when witnesses claimed Mancevice was involved in an altercation in which he brandished a firearm.

The Barre chief of police suspended Mancevice's license to carry two days after the second incident, on August 27, 2018. The chief of police did so through a notification sent by certified mail, which Mancevice received on September 6. The notification stated that the reason for the suspension was that Mancevice was "deemed to be an unsuitable person" because "[l]icensee has been charged with a felony under [G. L. c. 268, § 13B]." Mancevice was informed that he was required to turn over to the Barre police department "*without delay*, your firearms license(s) and all firearms, rifles, shotguns, machine guns, large capacity feeding devices, and ammunition which you have in your possession or which are owned by you" (emphasis added). **[*4]** The notification further informed Mancevice that his failure to do so would be a crime.

On September 10, four days after receiving the notice, Mancevice went to the Barre police station and turned over various firearms. He did not at that time turn over his license to carry, nor any ammunition. On September 11, Mancevice returned to the police station, where a Barre police officer, William Recos, informed Mancevice that he still needed to turn over his license to carry. Mancevice then tendered his license to carry, stating he was

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suspension and criminal acts in 2018.

doing so "under protest." After Mancevice left, Recos printed a list of all firearms registered to Mancevice and determined that there were six firearms still outstanding. Recos thereafter received a report that Mancevice was attempting to transfer certain firearms and ammunition to others. Based on this information, Recos obtained a search warrant for Mancevice's residence.

The Barre police executed the search warrant on September 12. The police found alleged ammunition strewn throughout Mancevice's apartment, as well as pieces of firearms including barrels, stocks, and receivers. During the search, Mancevice arrived and was advised of his Miranda rights. Mancevice **[*5]** was asked why he had not turned over his ammunition, and he responded that he was not able to turn over "every little piece that he owned." Mancevice was also asked what "without delay" meant to him, and he stated "as soon as humanly possible."

Mancevice was charged with multiple counts of (1) failure to surrender firearms and failure to surrender a license to carry or possess firearms, *G. L. c. 269, § 10 (i)*, as amended through St. 2014, c. 284, § 90, and (2) possession of ammunition without a firearm identification (FID) card, *G. L. c. 269, § 10 (h) (1)*, as amended through St. 2014, c. 284, § 90.[2] Mancevice filed two separate motions to dismiss the charges, each of which raised arguments based on the *Second Amendment*, and each of which was denied. In April of 2019 — prior to the Supreme Court's decision in *Bruen* — Mancevice raised two principal arguments: first, that *G. L. c. 269, § 10 (i)*, which criminalizes the knowing failure to surrender a suspended license, is unconstitutional on its face, because it "violates the *Second Amendment's* right to possess arms in the home for self-defense." The focus of this argument was that the police had not provided Mancevice with adequate time to comply with the suspension order, because they had executed a search warrant, in his home, within days of the suspension decision.[3] Second, Mancevice argued **[*6]** that *§ 10 (i)* was unconstitutional as applied to him, because the statute's requirement of surrender "without delay" was too vague under the circumstances, and given the *Second Amendment* rights at stake.

Subsequently, in 2022, after *Bruen* was decided, the defendant filed a "renewed" motion to dismiss under the *Second Amendment*. That motion focused on *Bruen*'s holding that a firearm regulation must be "consistent with the Nation's historical tradition" of such regulation, *Bruen, 597 U.S. at 24*, and argued that the prohibition on the unlicensed possession of *ammunition* was not supported by historical analogs. That argument was rejected by the motion judge, and is not pressed on appeal. While the renewed motion also made a passing reference challenging the "process" by which the license was suspended, the renewed motion did not directly raise the argument the defendant now presses — the defendant did not argue below that the "suitability" provisions of *G. L. c. 140, §§ 131 (d)* and *(f)*, granted unconstitutional discretion to the licensing authority to suspend or to deny firearm licenses.

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[2] These included twenty-one counts of failure to surrender a license to carry firearms or failure to surrender firearms, twenty of which were later dismissed, and two counts of possession of ammunition without an FID card, one of which was later dismissed.

[3] Mancevice also argued that under *G. L. c. 140, § 129D*, as amended through St. 2014, c. 284, §§ 42-44, and *G. L. c. 140, § 131 (f)*, as amended through St. 2018, c. 123, §§ 11-12, he was entitled to a ninety-day period to surrender his firearms, and therefore he could not have violated the surrender requirement as a matter of law.

The case was tried to a jury on February 17, 2023. Prior to trial, Mancevice filed a motion in limine "to exclude purported opinion testimony, whether lay or expert, . . . that the items seized . . . **[*7]** meet the definition of 'ammunition.'" The Commonwealth did not object and this motion was allowed. At trial, Officer Recos, who conducted the search of the defendant's home, testified several times that he had found "ammunition" in the home. The last of these references drew an objection from defense counsel, although the resolution of that objection is unclear on the record.[4]

After the Commonwealth rested, Mancevice filed a motion for a required finding of not guilty on several grounds, including that the Commonwealth had failed to adduce evidence that the alleged ammunition was in fact ammunition. This motion was denied. At the conclusion of trial, the jury returned a verdict of guilty on the charge of possession of ammunition without an FID card, and not guilty on the charge of failure to surrender a license to carry. Mancevice appeals.

Discussion. The defendant raises four arguments on appeal: (1) that the defendant's license was "suspended under a discretionary 'unsuitability' statute that *Bruen* held unconstitutional," (2) that under *G. L. c. 140, § 129D*, as amended through St. 2014, c. 284, §§ 42-44, the defendant should have been allowed ninety days to surrender his firearms and ammunition, (3) that it was error to allow Officer **[*8]** Recos's testimony that he found "ammunition" during the search of the defendant's home, and (4) that there was insufficient evidence that the items seized met the legal definition of "ammunition." We address each argument in turn.

1. *Second Amendment arguments*. The defendant argues that *§§ 131 (d)* and *(f)* (as in effect in 2018) were unconstitutional under *Bruen*, because they vested discretion in the licensing authority to deny a license based upon "unsuitability," and thus impinged on his right to bear arms.[5] The defendant had previously applied for, and received, a "license to carry" firearms, as authorized by *G. L. c. 140, § 131 (d)*, as amended through St. 2018, c. 123, §§ 11-12. In 2018, *§ 131 (d)* provided that the "licensing authority"[6] "may issue" a license to carry if certain conditions were met, including that "the applicant is not a prohibited person as set forth in this section."[7],[8] *Section*

[4] During his direct examination, Recos testified without objection that he found "numerous amounts of ammunition" at Mancevice's residence. The prosecutor asked if Recos recalled "where the ammunition you found was," and Recos testified that it was strewn throughout the apartment. The prosecutor then placed a bag in front of the witness and asked: "How are you familiar with the contents of that bag?" Recos answered, "This is all ammunition that was seized the —" at which point he was cut off by defense counsel's objection. The attorneys conferred with the judge at sidebar; however, the bulk of their discussion, including the judge's ruling on the issue, was not included in the record. The physical evidence in the bag was admitted.

[5] The defendant does not claim on appeal that the statute under which he was convicted, ***G. L. c. 269, § 10 (h) (1)*** (possession of ammunition without an FID card), is unconstitutional. Mancevice instead challenges *§§ 131 (d)* and *(f)*, arguing that because the suspension of his license was unconstitutional, he could not be convicted of possessing ammunition unlawfully. On appeal the Commonwealth argues that because Mancevice never challenged the suspension of his license through the statutory appeal procedure, he cannot challenge the constitutionality of his conviction. Put differently, the Commonwealth's view is that Mancevice could be guilty of unlicensed possession even if the suspension of the license was unconstitutional. As we decide today that Mancevice's constitutional challenges to the suspension of his license fail, we need not address the Commonwealth's argument.

[6] The licensing authority was "the chief of police or the board or officer having control of the police in a city or town, or persons authorized by them." *G. L. c. 140, § 121*, as amended through St. 2018, c. 123, §§ 1-7.

[7] A "prohibited person" was one who falls into a number of categories, including persons convicted of a felony or various other offenses, persons committed for mental illness or alcohol or substance abuse, persons under twenty-one, aliens who

131 (d) went on to state, however, that the licensing authority "may" deny or suspend a license to carry,

> "if, in a reasonable exercise of discretion, the licensing authority determines that the applicant or licensee is unsuitable to be issued or to continue to hold a license to carry. A determination of unsuitability shall be based on: (i) reliable and credible information that the applicant or licensee **[*9]** has exhibited or engaged in behavior that suggests that, if issued a license, the applicant or licensee may create a risk to public safety; or (ii) existing factors that suggest that, if issued a license, the applicant or licensee may create a risk to public safety."

G. L. c. 140, § 131 (d), as amended through St. 2018, c. 123, §§ 11-12.[9]

Section 131 (d) thus granted explicit authority to suspend the license to carry of an "unsuitable" person.[10] And, § 131 (f) addressed the question as well:

> "A license issued under this section shall be revoked or suspended by the licensing authority, or his designee, upon the occurrence of any event that would have disqualified the holder from being issued such license or from having such license renewed. A license may be revoked or suspended by the licensing authority if it appears that the holder is *no longer a suitable person* to possess such license" (emphasis added).

G. L. c. 140, § 131 (f), as amended through St. 2018, c. 123, §§ 11-12.

As indicated, the defendant argues that these two sections of the Massachusetts statutes violated the Second Amendment, both on their face and as applied to his circumstances. The thrust of his argument is that Bruen declared that all such "may issue" statutory schemes are unconstitutional, because they provide too much discretion to licensing authorities **[*10]** to deny persons the ability to carry a firearm.[11] As indicated, the argument the defendant advances in this court is not the same Second Amendment argument that he pressed below

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were not permanent residents, persons subject to protection orders under G. L. c. 209A, persons who were the subject of an outstanding arrest warrant, persons dishonorably discharged from the military, fugitives from justice, and persons who renounced their U.S. citizenship. G. L. c. 140, § 131 (d), as amended through St. 2018, c. 123, §§ 11-12.

[8] The Supreme Court's decision in Bruen rendered invalid the language in § 131 (d) that required that the applicant show "good reason" for the license to issue. See Bruen, 597 U.S. at 15 n.2, 71. Section 131 (d) was subsequently amended by St. 2022, c. 175, §§ 4-17A, and St. 2024, c. 135, § 49, and now does not impose a "good reason" requirement. See G. L. c. 140, § 131 (d).

[9] This section was also materially amended in 2022 by removing the "may issue" and "reasonable exercise of discretion" language, St. 2022, c. 175, §§ 7, 9, 10, such that § 131 (d) now states (in relevant part, after further amendments in 2024) that a licensing authority "shall issue" a license to carry "only if it appears that the applicant is neither a prohibited person nor determined to be unsuitable to be issued a license as set forth in . . . section 121F."

[10] Following the 2024 updates to the statutory scheme, the definition of unsuitability now states: "A determination of unsuitability shall be based on reliable, articulable and credible information that the applicant has exhibited or engaged in behavior that suggests that . . . the applicant may create a risk to public safety or a risk of danger to themselves or others." G. L. c. 140, § 121F (k).

[11] The Massachusetts firearm licensing scheme in effect in 2018 also authorized the granting of FID cards, which allowed a person to possess a firearm but granted fewer privileges than a license to carry. G. L. c. 140, § 129B, as amended through St. 2018, c. 123, §§ 9, 10; G. L. c. 140, § 129C, as amended through St. 2014, c. 284, §§ 40, 41. Mancevice did not have an FID card, as his license to carry provided all the privileges of an FID card. See G. L. c. 140, § 131 (a), as amended through St. 2018, c. 123, §§ 11-12.

— at most, the argument he now presses was referenced so vaguely that it cannot fairly be said to have been raised.[12] Although not raised below, we have in the past reviewed unpreserved claims that a charge should have been dismissed for vagueness for a substantial risk of a miscarriage of justice, see *Commonwealth v. St. Louis, 473 Mass. 350, 355, 42 N.E.3d 601 (2015)*; *Commonwealth v. Mienkowski, 91 Mass. App. Ct. 668, 674, 79 N.E.3d 1066 (2017)*, and we assume without deciding that the same review applies to claims under the *Second Amendment*. "A substantial risk of a miscarriage of justice exists when we have a serious doubt whether the result of the trial might have been different had the error not been made" (quotation omitted). *Commonwealth v. Curran, 488 Mass. 792, 794, 178 N.E.3d 399 (2021)*, quoting *Commonwealth v. Valentin, 470 Mass. 186, 189, 23 N.E.3d 61 (2014)*. We conclude that there was no error and no substantial risk of a miscarriage of justice here.

The defendant posits that the Massachusetts licensing scheme (as of 2018) was "flatly unconstitutional under *Bruen*, because the *Bruen* Court already found no historical analog for . . . 'may issue' statutes" such as *§ 131 (d)*. This argument challenges the Massachusetts statute on its face. The defendant's reading of *Bruen* is incorrect.

Bruen struck down a New York license to carry statute **[*11]** under which a firearm license applicant had to show, among other things, that there was "proper cause" to obtain the license. *Bruen, 597 U.S. at 12, 71*. The New York courts had equated the term "proper cause" with a "special need for self-protection distinguishable from that of the general community" (citation omitted). *Id. at 12*. The *Bruen* Court held that such "proper cause" restrictions on firearm licensing are unconstitutional, because such regulations had no historical precedent from the periods when the *Bill of Rights* and the *Fourteenth Amendment to the United States Constitution* were adopted. See *id. at 34-35, 38-39*. In so holding, however, the Court was focused on New York's "proper cause" requirement, and not on "may issue" language in general. See *id. at 71* ("New York's *proper-cause* requirement violates the *Fourteenth Amendment*" [emphasis added]). The *Bruen* court made it clear that firearm licensing schemes generally are constitutional, as two of the six-person majority emphasized in a separate concurrence. See *id. at 79* (Kavanaugh, J., concurring) ("the Court's decision does not prohibit States from imposing licensing requirements for carrying a handgun for self-defense"). And footnote 1 of the majority opinion itself canvassed existing State laws, and indicated that the licensing schemes in at least three States (Connecticut, **[*12]** Delaware, and Rhode Island) that contained discretionary language, including a "suitability" requirement, nevertheless *were* constitutional — because those States did not require applicants to show "proper cause," or some analogous showing, before obtaining a license to carry. See, e.g., *id. at 13 n.1*, quoting *Dwyer v. Farrell, 193 Conn. 7, 12, 475 A.2d 257 (1984)* ("Three States — Connecticut, Delaware, and Rhode Island — have discretionary criteria but appear to operate like 'shall issue' jurisdictions. . . . Although Connecticut officials have discretion to deny a concealed-carry permit to anyone who is not a 'suitable person,' . . . the 'suitable person' standard precludes permits only to those 'individuals whose conduct has shown

[12] In particular, the defendant never argued below, and did not argue to this court, that his actions did not meet the definition of "unsuitability" in *§ 131 (d)*. Nor did he or does he argue constitutional infirmity in the statute's definition of unsuitability; in particular, the defendant does not specifically argue that the statute is or was unconstitutional because the actions the statute defines as unsuitable are overbroad.

them to be lacking the essential character of temperament necessary to be entrusted with a weapon'").

Bruen thus simply does not hold that any licensing statute that employs the language "may issue" is unconstitutional. It is true that the Massachusetts statute, *§ 131 (d)*, had a "good reason" requirement prior to the decision in *Bruen*. But that provision has since been removed from the statute by amendment, and that (former) provision is irrelevant to the issues the defendant raises here. The defendant's license was not suspended because **[*13]** he had not shown good cause to obtain or to maintain a license; rather, the defendant's license was suspended because of his actions, by which the chief of police had deemed the defendant to be a risk to public safety.

Whereas the Supreme Court's *Bruen* decision does not aid the defendant's facial challenge, the Supreme Court's recent decision in *Rahimi* dooms it. As part of his facial challenge, the defendant suggests that *§§ 131 (d)* and *(f)* must be struck down because they were overbroad — that is, that they were unconstitutional in *some* of their applications, even if not unconstitutional as applied to the defendant. But the Supreme Court made clear in *Rahimi* that overbreadth doctrine does not apply in this context; rather, to be unconstitutional on its face "a defendant [must] 'establish that no set of circumstances exists under which the Act would be valid.'" *Rahimi, 602 U.S. at 693*, quoting *United States v. Salerno, 481 U.S. 739, 745, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987)*. This the defendant plainly cannot do. For example, *Rahimi* itself validates a firearm regulation that "bars an individual from possessing a firearm if [he is subject to a] restraining order [that] includes a finding that he poses 'a credible threat to the physical safety' of a protected person." *Rahimi, supra*, quoting *18 U.S.C. § 922(g)(8)(C)(i)*. Consistent with Rahimi, pursuant to the unsuitability **[*14]** provisions of *§§ 131 (d)* and *(f)*, a licensing authority could suspend or revoke a license to carry where a license holder has recently been determined to be a dangerous person in a restraining order proceeding under G. L. c. 209A. As another example, the statutes explicitly prohibit convicted felons from obtaining licenses; again, such provisions have been approved by the Supreme Court. See *Rahimi, supra at 699*, quoting *District of Columbia v. Heller, 554 U.S. 570, 626, 627, n.26, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008)* ("many such prohibitions, like those on the possession of firearms by 'felons and the mentally ill,' are 'presumptively lawful'"). *Sections 131 (d)* and *(f)* are not unconstitutional on their face.

The defendant also purports to raise an "as applied" challenge, but the argument he presents is no more than a reprise of his facial challenge. He states that the defendant's "unsuitability determination was made under a highly discretionary standard that does not pass constitutional muster." The defendant cites no additional case law, and no additional facts, in support of this argument, and for the reasons stated above it is incorrect. We note as well that it is incorrect to say that the statute's unsuitability standard (as of 2018) was "highly discretionary." To the contrary, the statute specifically defined unsuitability, **[*15]** requiring, for example, "reliable and credible information that the . . . licensee has exhibited or engaged in behavior that suggests that . . . the . . . licensee may create a risk to public safety." *G. L. c. 140, § 131 (d)*, as amended through St. 2018, c. 123, §§ 11-12. This definition is narrow, specific, and dovetails with the Supreme Court's approval, in *Rahimi*, of "firearm laws [that] . . . prevent[] individuals who threaten physical harm to others from

misusing firearms." *Rahimi, 602 U.S. at 690*.[13] Finally, the defendant does not argue that the facts of his case do not meet the unsuitability standard or cannot be a constitutional basis for suspension of his license. Indeed, the briefs barely mention the facts that led to the license suspension, and our record is incomplete on that issue. The defendant has not carried his burden to show a *Second Amendment* violation, let alone a substantial risk of a miscarriage of justice.

2. *Lawfulness of possession of ammunition*. The defendant next urges us to overturn his conviction on the grounds that it was not unlawful for him to possess ammunition at the time when the Barre police searched his residence, which was six days after he received the license suspension notice by certified mail. He raises two grounds for this claim: **[*16]** (1) that a "safe-harbor" provision in *G. L. c. 140, § 129D*, as amended through St. 2014, c. 284, §§ 42-44 (§ 129D),[14] made it lawful for him to possess ammunition during the ninety-day appeal period by *G. L. c. 140, § 131 (f)*, as amended through St. 2018, c. 123, §§ 11-12 (*§ 131 [f]*),[15] and (2) that the requirement under *§ 129D* to surrender ammunition "without delay" was unconstitutionally vague. We take each issue in turn.

a. *Applicability of safe-harbor provision*. To begin, the defendant is incorrect that he was entitled to a ninety-day grace period before turning in his licenses and firearms. It is true that as of 2018 there was a discrepancy in the statutes, between *§§ 129D* and *131 (f)*. The Supreme Judicial Court resolved that discrepancy, however, in *Commonwealth v. Adams, 482 Mass. 514, 533-534, 125 N.E.3d 39 (2019)*. There the court harmonized *§§ 131 (f)* and *129D* by ruling that the licensing scheme gives a licensing authority two options when suspending or revoking a firearms license. *Id. at 533*. Under the first option, a licensing authority can suspend a license and order immediate surrender of firearms, in which case the licensee cannot obtain a stay of the suspension and the surrender obligations even if the licensee appeals the suspension under *§ 131 (f)*. *Id. at 533-534*. Alternatively, a licensing authority could suspend a license without seeking immediate surrender of the licensee's firearms, in which case a licensee **[*17]** could stay the obligation to surrender firearms *if* the licensee appealed the suspension order. *Id. at 534*.

The defendant argues that his obligation to turn over his firearms "without delay" should have been stayed under the circumstances, because (he claims) the licensing authority sent his notice of the suspension only by certified mail, and thus did not order "immediate surrender" per *Adams*. See *Adams, 482 Mass. at 533*. This argument fails for two reasons. First, the defendant never appealed the suspension. Thus, regardless of which method of revocation the licensing authority used, the defendant had no basis for a stay under *Adams*. Second, the Barre police in fact used the first *Adams* method and required immediate surrender, as the certified

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[13] Prior to *Bruen*, the Supreme Judicial Court, in *Chief of Police of Worcester v. Holden, 470 Mass. 845, 26 N.E.3d 715 (2015)*, considered a challenge to a prior version of *§ 131 (d)*, which contained a less specific unsuitability standard. The defendant in *Holden* had his license to carry suspended on the grounds of unsuitability, based on an incident where the defendant engaged in domestic violence. *Id. at 847-848*. The *Holden* court ruled that *§ 131 (d)* did not violate the *Second Amendment*, either on its face or as applied. *Id. at 847*. In so ruling the court rejected the argument that the prior version of *§ 131 (d)* conferred excessive discretion on the licensing authority. See *id. at 859-861*.

[14] This safe-harbor provision also has been removed from the statute. See *G. L. c. 140, § 129D*.

[15] The appeal procedure is now contained within *G. L. c. 140, § 121F (v) (2)*.

letter sent to the defendant required the defendant "to turn in . . . *without delay*, your firearms license(s) and all firearms . . . and ammunition." Thus, under no circumstance was the defendant entitled to a stay of his obligation to turn over his ammunition without delay.

b. *Vagueness of § 129D*. The defendant also argues that "without delay," as used in *§ 129D*, is unconstitutionally vague. A statute is unconstitutionally vague if it does not provide "(1) a reasonable opportunity for a person of ordinary **[*18]** intelligence to ascertain what the statute prohibits; and (2) comprehensible standards that limit prosecutorial and judicial discretion and thus avoid discriminatory or arbitrary enforcement." *Commonwealth v. Brown, 481 Mass. 77, 84, 112 N.E.3d 264 (2018)*. There is no such vagueness here, where "without delay" has a common meaning that provides a person of ordinary intelligence a reasonable opportunity to understand what is prohibited. See *id.* "Without delay" means "immediately," or as near thereto as can reasonably be accomplished. The defendant admitted as much at the scene of the search, when he stated that "without delay" meant "as soon as humanly possible." The term "without delay" is not unconstitutionally vague.

3. *Alleged improper testimony*. The defendant also argues that his conviction must be reversed because Officer Recos testified that certain items seized during the search of the defendant's residence were "ammunition." The defendant alleges that this testimony was improper lay opinion, and that it asserted his guilt as to the ultimate issue in the case. We disagree.

First, the defendant is incorrect that his assented-to motion in limine that was allowed prior to trial excluded Recos's testimony. The defendant's motion in limine sought **[*19]** to exclude opinion testimony only as to the ultimate issue in the case — that is, "purported opinion testimony, whether lay or expert . . . that the items seized . . . meet the definition of 'ammunition.'" Leaving aside the question whether such a motion in limine has merit, Recos's testimony that he was familiar with the evidence before him, because it was "ammunition" seized from the defendant, did not constitute "testimony . . . that the items seized from Derek Mancevice meet the definition of ammunition," and thus did not fall within the ambit of the motion in limine.

Furthermore, although defense counsel did object on one occasion to Recos's use of the term "ammunition," prior to that objection Recos had testified at least two other times that he found "ammunition" when searching Mancevice's apartment, without objection. Thus, the additional reference to "ammunition" was merely cumulative of evidence admitted without objection and was not prejudicial. See *Commonwealth v. Barnoski, 418 Mass. 523, 539 n.12, 638 N.E.2d 9 (1994)*.

4. *Sufficiency of the evidence of ammunition*. Finally, the defendant argues that his conviction must be overturned because the evidence was insufficient to prove that the items seized from him met the legal definition of ammunition. **[*20]** In reviewing the sufficiency of the evidence, we take the evidence in the light most favorable to the Commonwealth, and determine whether a rational jury could have found the requisite elements of the crime beyond a reasonable doubt. *Commonwealth v. Latimore, 378 Mass. 671, 677-678, 393 N.E.2d 370 (1979)*.

Here, the evidence was sufficient to allow a rational jury to find that the items seized were ammunition as defined by *G. L. c. 269, § 10 (o)*, as amended through St. 2014, c. 284, § 90. The Commonwealth had to show only that the items were "cartridges or cartridge cases,

primers (igniter), bullets or propellant powder designed for use in any firearm, rifle or shotgun," *id.*, and the Commonwealth could do so by relying upon "percipient evidence and the fact finder's common sense and life experience." *Commonwealth v. Velez, 82 Mass. App. Ct. 12, 18, 969 N.E.2d 1142 (2012)*. Expert testimony was not required. See *id.* Here, the items themselves were entered into evidence, without objection. They included bags with manufactured labels stating "black rifle powder," as well as a box of one hundred metal objects that appear to be bullets. The items were placed in evidence bags, and several were identified as ammunition by attached police evidence labels, including labels describing "green box w/ 22 assort. rounds of ammo" and ".22 caliber rounds," among others. Furthermore, **[*21]** the defendant essentially admitted at the scene of the search that what was seized from his apartment was ammunition by stating, in response to Officer Recos's question why the defendant had not turned over his ammunition, that "he wasn't able to get every little piece that he owned and turn it in." Taking the evidence in the light most favorable to the Commonwealth, a rational jury could find that the items met the statutory definition of ammunition.

Judgment affirmed.

By the Court (Sacks, Englander & Grant, JJ.[16]),

Entered: January 21, 2025.

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[16] The panelists are listed in order of seniority.

CERTIFICATION

I hereby certify that, to the best of my knowledge, this brief complies with the rules of court that pertain to the filing of briefs, including those rules specified in Mass. R. App. P. 16(k) and Mass. R. App. P. 20(a)(2). The brief is in 12-point Courier New with 10 CPI and has a length of twenty-two qualifying pages (Statement of Issues through Conclusion).

/s/ Ian MacLean
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COMMONWEALTH'S CERTIFICATE OF SERVICE

I hereby certify under the pains and penalties of perjury that served a copy of the Commonwealth's answer on opposing counsel of record, Elizabeth Lazar, at elizabeth.c.lazar@gmail.com via the Odyssey electronic filing system.

Respectfully submitted
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