

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

MIDDLESEX COUNTY

2009 SITTING

S.J.C. No. 10480

COMMONWEALTH OF MASSACHUSETTS,
Appellant

v.

RICHARD RUNYAN,
Appellee.

ON APPEAL FROM AN ORDER
OF THE LOWELL DISTRICT COURT

BRIEF AMICUS CURIAE OF
SECOND AMENDMENT FOUNDATION, INC.
AND
GUN OWNERS ACTION LEAGUE IN SUPPORT OF APPELLEE

Edward F. George, Jr.
(B.B.O. #189160)
EDWARD GEORGE & ASSOCIATES
110 Florence St., 2nd Floor
P.O. Box 393
Malden, MA 02148

TABLE OF CONTENTS

Table Of Authorities.....ii

Interest of Amici..... 1

Statement Of Issues Presented..... 2

Summary Of the Argument..... 2

Argument

I. THE COURT CAN AND SHOULD AVOID NEEDLESS
CONSTITUTIONAL QUESTIONS BY FAIRLY AND PLAINLY
CONSTRUING SECTION 131L..... 6

II. THE LOWER COURT SHOULD BE AFFIRMED ON STATUTORY
GROUNDS, AS APPELLEE’S SON WAS AN “AUTHORIZED USER”
IN “CONTROL” OF THE RIFLE AT THE TIME OF THE
INCIDENT..... 8

 A. Alexander Runyan Was An “Other Authorized
 User” Under Section 131L(a)..... 8

 B. Alexander Runyan Was in “Control” Of The
 Rifle Under Section 131L.....10

III. THE SECOND AMENDMENT IS INCORPORATED AS AGAINST THE
STATES BY OPERATION OF THE FOURTEENTH AMENDMENT...15

 A. The Right to Arms in Our Legal Tradition ... 22

 B. The States’ Treatment of the Right to Arms...23

 C. The Interest Secured by the Right to Arms... 23

IV. CORRECTLY APPLIED, SECTION 131L IS CONSTITUTIONAL..29

Conclusion.....44

TABLE OF AUTHORITIES

Cases:	Page(s)
<i>Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.</i> , 515 U.S. 687, 704 n.18 (1995)	7
<i>Barron ex rel. Tiernan v. Mayor of Baltimore</i> 32 U.S. (7 Pet.) 243 (1833)	16
<i>Benton v. Maryland</i> 395 U.S. 794 (1969)	28
<i>Chicago, Quincy & Burlington R.R. v. Chicago</i> 166 U.S. 266 (1897)	18
<i>Cleveland v. United States</i> 531 U.S. 12, 25 (2000)	7
<i>Commonwealth v. Bolduc</i> Barnstable Dist. Ct. No. 0825 C.R. 2026 (Feb. 19, 2009)	32
<i>Commonwealth v. Cantelli</i> 25 Mass. L. Rep. 395 (2009)	13,14
<i>Commonwealth v. Clarke</i> 44 Mass. App. Ct. 502, 505 (1998)	10
<i>Commonwealth v. Disler</i> 451 Mass. 216, 228 (2008)	6, 7
<i>Commonwealth v. Frongillo</i> 66 Mass. App. Ct. 677, 680 (2006)	11
<i>Commonwealth v. Handy</i> 30 Mass. App. Ct. 776, 781 n.5 (1991)	11
<i>Commonwealth v. Lapen</i> 17 Mass. L. Rep. 481 (2004)	14
<i>Commonwealth v. Runyan</i> No. 0811 CR 2207 (Lowell Dist. Ct. Oct. 15. 2008) ..	29
<i>Cruzan v. Dir., Mo. Dept. of Health</i> 497 U.S. 261, 269 (1990)	25

<i>Duncan v. Louisiana</i>	
391 U.S. 145, 149 (1968)	21, 27
<i>District of Columbia v. Heller</i>	
128 S. Ct. 2783 (2008)	passim
<i>Gannett Co. v. DePasquale</i>	
443 U.S. 368, 379 (1979)	28
<i>Griswold v. Connecticut</i>	
381 U.S. 479, 484 n.* (1965)	25
<i>Jupin v. Kask</i>	
447 Mass. 141, 154 (2006)	8
<i>Lawrence v. Texas</i>	
539 U.S. 558, 562 (2003)	24
<i>Mallock v. Eastly</i>	
87 Eng. Rep. 1370, 1374,	
7 Mod. Rep. 482 (C.P. 1744)	22
<i>Maloney v. Cuomo</i>	
554 F.3d 56 (2d Cir. 2009)	26
<i>Morse v. Frederick</i>	
551 U.S. 393 (2007)	41
<i>Miller v. Texas</i>	
153 U.S. 535 (1894)	passim
<i>National Rifle Ass'n v. City of Chicago,</i>	
567 F.3d 856 (7 th Cir. 2009)	26
<i>Perkins v. Endicott Johnson Corp.</i>	
128 F.2d 208, 217-18 (2nd Cir. 1942)	
<i>aff'd</i> , 317 U.S. 501 (1943)	27
<i>Planned Parenthood v. Casey</i>	
505 U.S. 833, 851 (1992)	25, 26
<i>Poe v. Ullman</i>	
367 U.S. 497, 543 (1961)	26
<i>Presser v. Illinois</i>	
116 U.S. 252 (1886)	16

<i>Price v. Georgia</i>	
398 U.S. 323, 331-32 (1970)	28
<i>Rochin v. California</i>	
342 U.S. 165 (1952)	24
<i>Scott v. Sandford</i>	
60 U.S. (19 How.) 393 (1857)	16
<i>Saenz v. Roe</i>	
526 U.S. 489, 523 n.1	20
<i>Silveira v. Lockyer</i>	
312 F.3d 1052, 1066 n.17 (9 th Cir. 2002)	19
<i>Tinker v. Des Moines Indep. Comm. Sch. Dist.</i>	
393 U.S. 503 (1969)	41
<i>United States ex rel. Bennett v. Rundle</i>	
419 F.2d 599 (3rd Cir. 1969) (en banc)	
cert. denied, 409 U.S. 916 (1972)	28
<i>United States v. Carolene Products Co.</i>	
304 U. S. 144, 152, n. 4 (1938)	34
<i>United States v. Cruikshank</i>	
92 U.S. 542 (1876)	16
<i>United States v. Duval</i>	
496 F.3d 64, 77 (1st Cir. 2007)	11
<i>United States v. Emerson</i>	
270 F.3d 203, 261 (5 th Cir. 2001)	35
<i>United States v. Everist</i>	
368 F.3d 517, 519 (5 th Cir. 2004)	35
<i>United States v. Darrington</i>	
351 F.3d 632, 635 (5 th Cir. 2003)	35
<i>United States ex rel. Hetenyi v. Wilkins</i>	
348 F.2d 844 (2d Cir. 1965)	
cert. denied, 383 U.S. 913 (1966)	28

<i>United States ex rel. Latmore v. Sielaff</i> 561 F.2d 691, 693 n.2 (7 th Cir. 1977) cert. denied, 434 U.S. 1076 (1978).....	28
<i>United States v. Patterson</i> 431 F.3d 832, 835 (5 th Cir. 2005).....	35
<i>United States v. R.L.C.</i> 503 U.S. 291, 305 (1992).....	7
<i>Youngberg v. Romeo</i> 457 U.S. 307, 315 (1982).....	24

Table of Statutes

G.L. c. 140, § 131L(a)	passim
G.L. c. 140, § 129B	8
G.L. c. 269, § 10(a)(1) & (a)(5)(1).....	9
18 U.S.C.S. § 922(g)(1)).....	12
U.S. Const. amend. XIV, sec. 1, cl. 2.....	17

INTERESTS OF AMICI

Second Amendment Foundation, Inc.

Second Amendment Foundation, Inc. ("SAF") is a non-profit membership organization incorporated under the laws of Washington with its principal place of business in Bellevue, Washington. SAF has over 650,000 members and supporters nationwide, including Massachusetts. The purposes of SAF include promoting the exercise of the right to keep and bear arms, education, research, publishing and legal action focusing on the Constitutional right to privately own and possess firearms, and the consequences of gun control.

Gun Owners' Action League

Gun Owners' Action League ("GOAL"), formed in 1974, is an association of Massachusetts residents dedicated to the promotion of the right to keep and bear arms for competition, recreation, and self-defense. The programs sponsored and developed by GOAL are supported by shooting competitors, sportsmen, recreational shooters and law enforcement throughout the state. GOAL educates gun owners, voters, and the

general public about Massachusetts gun laws, and works toward the reform and improvement of these laws legislatively and through the courts.

ISSUES PRESENTED

1. Was Appellee's adult son an "authorized user" in "control" of a firearm kept in his home as that term is used in G.L. c. 140, § 131L(a)?

2. Is the Second Amendment incorporated as against the states by the Fourteenth Amendment?

3. Is G.L. c. 140, § 131L(a), susceptible of constitutional application, even if its application to the peculiar facts of this case would violate Second Amendment rights?

SUMMARY OF ARGUMENT

This appeal threatens to fulfill the ancient adage about hard cases leading to bad law. The lower court, sensing a constitutional issue regarding the breadth of the Commonwealth's gun storage law, misapplied Supreme Court precedent to strike down a statute that doubtless has proper applications. The Commonwealth, seeking to preserve its law, would

discard a fundamental, enumerated constitutional right. Complicating matters, the Commonwealth's amici submit a host of irrelevant and misleading social science arguments seeking to undermine the policy choices reflected in the Bill of Rights.

But on closer examination, this case is susceptible of a rather straight-forward resolution. The constitutional questions, though interesting and profound, must be avoided because Appellee was simply not in violation of the law. Massachusetts' gun storage provision, G.L. c. 140, § 131L(a), does not apply to guns "carried by or under the control of the owner or other lawfully authorized user." The BB gun whose criminal misuse brought the police to the Runyan household was not the gun at the center of the disputed gun storage charge. The unloaded rifle in the upstairs bedroom prompted this dispute, and as best as can be determined under the statute, this gun was, in fact, under the dominion and control of an authorized user: Alexander Runyan.

The law does not define who is, or is not, an "authorized user," but the younger Runyan was at the time of the incident an adult not legally disqualified

from possessing guns in Massachusetts, and in any event entitled to use a firearm in home self-defense. Alexander Runyan might well be an irresponsible user, and subsequent to any criminal proceedings that might be brought against him as a result of the incident, he may yet become an unauthorized user. However, he does not appear to have been an unauthorized user at the time of the incident, and any doubts about the construction of G.L. c. 140, § 131L(a) must be resolved in Appellee's favor under the rule of lenity. This Honorable Court has a duty to avoid unnecessary constitutional questions.

Section 131(L)(a) is susceptible of an interpretation that satisfies the interest in gun safety, preserves access to a means of self-defense, and averts a needless constitutional dispute. However, should the Court nonetheless reach the constitutional issue, the threshold question would be whether the Second Amendment applies in the first instance. Although some courts have refused to examine the question, applying the established selective incorporation analysis under the Fourteenth Amendment's Due Process Clause is not an optional

exercise. The Second Amendment is a normal part of the Bill of Rights, and the Supreme Court has made it unmistakably clear that established Fourteenth Amendment doctrines must be used to gauge whether the States are bound by the Second Amendment. They are. The Supreme Court's description of the right to arms all but foretells this conclusion, which might well be rendered by the Supreme Court in its upcoming term.

Turning to whether the Second Amendment renders Section 131(L)(a) unconstitutional, the answer is less simple. The lower court clearly erred in describing this provision as indistinguishable from the District of Columbia's late ban on the possession of functional firearms. Section 131(L)(a) properly allows a broad range of self-defense, whereas the District's law allowed for none. The question in this case would be whether on this record, applying Section 131(L)(a) to Appellee would be constitutional. The Commonwealth has failed to carry this burden. Its amicus' efforts suggest that it cannot do so.

ARGUMENT

I. THE COURT CAN AND SHOULD AVOID NEEDLESS CONSTITUTIONAL QUESTIONS BY FAIRLY AND PLAINLY CONSTRUING SECTION 131L.

This Court has long recognized its "duty to construe statutes so as to avoid . . . constitutional difficulties, if reasonable principles of interpretation permit it. Doubts as to a statute's constitutionality should be avoided if reasonable principles of interpretation permit doing so." *Commonwealth v. Disler*, 451 Mass. 216, 228 (2008) (citations and internal quotation marks omitted). Before rushing to examine the Second and Fourteenth Amendment's scope and history, this Court should carefully study the statute at issue. Section 131(L)(a) does not apply to guns "carried by or under the control of the owner or other lawfully authorized user." But that exception plainly describes Alexander Runyan's relationship to the rifle at the time of the incident.

Although amici do not believe the statutory question is close, any doubts should be resolved in Appellee's favor. "It is well established that if the statutory language [could] plausibly be found to be

ambiguous, the rule of lenity requires the defendant be given the benefit of the ambiguity." *Disler*, 451 Mass. at 228 (citation and internal punctuation marks omitted). "[A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Cleveland v. United States*, 531 U.S. 12, 25 (2000) (internal quotation marks omitted). The rule rests on society's "instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should," *United States v. R.L.C.*, 503 U.S. 291, 305 (1992) (citations omitted). "The rule of lenity is premised on two ideas: First, a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed; second, legislatures and not courts should define criminal activity." *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 704 n.18 (1995) (internal quotation marks omitted). The Legislature remains free, within constitutional limits, to clarify any ambiguity inherent in Section 131L(a).

II. THE LOWER COURT SHOULD BE AFFIRMED ON STATUTORY GROUNDS, AS APPELLEE'S SON WAS AN "AUTHORIZED USER" IN "CONTROL" OF THE RIFLE AT THE TIME OF THE INCIDENT.

A. Alexander Runyan Was An "Other Authorized User" Under Section 131L(a).

The first question is whether Appellee's son, Alexander, was an "other authorized user."¹ The term is not specifically defined in the statute, but the language clearly indicates that a gun's owner is but one kind of "authorized user," and that the "other authorized user[s]" are similarly allowed to carry or control unlocked guns. Generally, "this statutory provision . . . is illustrative of the societal concern with weapons reaching the hands of unauthorized users." *Jupin v. Kask*, 447 Mass. 141, 154 (2006).

Alexander Runyan does not apparently fall into any of the categories that would render him statutorily ineligible to obtain a Firearm Owners' Identification Card. G.L. c. 140, § 129B.² More importantly, while Massachusetts generally prohibits

¹The owner appears to be Appellee.

²Alexander Runyan may have special needs, but that is not the same as "ha[ving] been confined to any hospital or institution for mental illness." Section 129B(1)(iii).

the carriage or possession of firearms by unlicensed people, the law specifically exempts from at least one ban on the possession of guns - one may say, this law authorizes - the possession and carrying of firearms by an individual "present in or on his residence or place of business," G.L. c. 269, § 10(a)(1) & (a)(5)(1). This describes Alexander Runyan at the time of his arrest.

To somehow consider that the younger Runyan was not authorized to use the firearms in his house would lead to a nonsensical result, adopting a rule barring family members from accessing each other's firearms in the home in case of need in the absence of a specific license. It would appear that if any users would be "authorized" apart from a gun's owner - and Section 131L plainly contemplates such users exist - first among these would be the gun owner's immediate, non-prohibited, cohabiting family members. It seems obvious that a non-prohibited wife could use her husband's gun, or a non-prohibited adult child could use his parents' gun, for home self-defense - and should thus be able to access a gun for that purpose

on par with the gun's owner.³ Immediate family members sharing a residence cannot reasonably be deemed "unauthorized" to control the family firearms inside their home.⁴

B. Alexander Runyan Was in "Control" Of The Rifle Under Section 131L.

As Alexander Runyan was entitled to use his father's rifle in the home, the next question is whether he had "control" over that rifle. This much appears plain, as a man in Alexander Runyan's position prohibited from possessing arms could be prosecuted for unlawful possession. Proof of constructive possession requires a showing "that the defendant was aware of the presence of the particular [item of contraband] in question . . . , and that he had the ability and intention to exercise control over it." *Commonwealth v. Clarke*, 44 Mass. App. Ct. 502, 505

³Indeed, even children properly barred from accessing guns on account of their age may, under exigent circumstances, be considered legally "authorized" to use a family gun notwithstanding their age. Of course, amici do not endorse leaving functional firearms in the hands of unsupervised children. See *discussion, infra*.

⁴This does not necessarily mean that a firearms owner is immune in tort from the negligent entrustment of her firearms to other family members. However, the question here is who may be "authorized" by Section 131L.

(1998) (citation omitted). "A defendant's 'residential status at a premises is a relevant inculpatory factor to be considered in determining whether he can be regarded as being in constructive possession of contraband found on the premises, since it indicates more than mere presence.'" *Id.* (quoting *Commonwealth v. Handy*, 30 Mass. App. Ct. 776, 781 n.5 (1991)).

The Court of Appeals correctly reversed a conviction for possession of firearms without a Firearm Owners Identification Card in the absence of any evidence that the defendant had intent to exercise dominion and control over guns located in a home closet. "To permit a finding of constructive possession there must be evidence sufficient to infer that the defendant not only had knowledge of the items, but had the ability and intention to exercise dominion and control over them." *Commonwealth v. Frongillo*, 66 Mass. App. Ct. 677, 680 (2006) (citing *Commonwealth v. Sann Than*, 442 Mass. 748, 751 (2004)). "[T]here must be some action, some word, or some conduct that links the individual to the contraband and indicates that he had some stake in it, some power over it." *United States v. Duval*, 496 F.3d 64, 77 (1st

Cir. 2007) (citations omitted) (affirming conviction for being a felon in possession of a firearm and ammunition, in violation of 18 U.S.C.S. § 922(g)(1)).

On these facts there is no question that Alexander Runyan could be convicted of possessing the rifle, were that a crime. He was, after all, the one who led police to the rifle's location, and the fact he was operating another gun (albeit an air rifle) should be conclusive proof that he had intended to exercise dominion and control over the arms of which he had obvious knowledge. If Alexander Runyan's dominion and control over the rifle would suffice to establish his possession of it beyond a reasonable doubt, surely the rifle was within his "control" under Section 131L(a).

It may well be that Appellee exercised poor judgment in leaving his adult son home alone with unlocked firearms. But Section 131L's prohibition is not co-extensive with the tort of negligent entrustment. It is perfectly normal to suppose that individuals who own guns approve of those guns being at the disposal of their cohabiting family members for the purpose of self-defense. Indeed, the assumption is

unremarkable, and Section 131L, fairly construed, permits that behavior to the extent it allows "other authorized user[s]" not merely to carry guns, but to "control" them - that is, to have them available for use. In the absence of more specific legislation, the exact parameters of such availability are regulated by tort law, and would vary according to personal circumstance.

Amici acknowledge that at least one lower court has given Section 131L a different construction. *Commonwealth v. Cantelli*, 25 Mass. L. Rep. 395 (2009). In *Cantelli*, the defendant was not charged under Section 131L on account of the loaded handgun he was carrying on his person, but the court declined to dismiss Section 131L charges stemming from "other firearms lying around his apartment in an unsecured condition." *Cantelli*, 25 Mass. L. Rep. at ___. In that court's view, the "statute addresses how a firearm should be stored, not what its condition must be when it is in the possession of its registered owner." *Id.*

This construction of the statutory text is plainly wrong. Section 131L(a) provides an exemption where a gun is "carried by or under the control of the

owner or other authorized user." (emphasis added). The legislature obviously contemplated that a gun may be under the control of an authorized user while not on his or her person, and that such circumstances do not lead to criminal liability. *Cantelli* simply declined to apply half the exemption. Similarly, without discussion, the Superior Court allowed a charge for violation of Section 131L where the gun owner was present in the house with his gun. *Commonwealth v. Lapen*, 17 Mass. L. Rep. 481 (2004). The authorized user exemption was not even discussed.

This construction of Section 131L is not merely wrong, but dangerous to law enforcement and civilians, as illustrated by *Cantelli's* facts. *Cantelli* approved of an agitated individual confronting the police at his door with a gun, but condemned him for the guns that were otherwise laying about the home. Individuals in need of police assistance at their home should be allowed to put down any gun they may have picked up prior to the police's arrival, or at least have access to functional guns while awaiting the police without actually carrying the guns.

Alexander Runyan was at all relevant times an

adult not prohibited from possessing firearms, exercising dominion and control over firearms inside his own home. His conduct might have been criminal. But his father's conduct in leaving the guns accessible to his son might have only been careless. Whatever else it was, Appellee's conduct was within the four corners of Section 131L, properly construed.

III. THE SECOND AMENDMENT IS INCORPORATED AS AGAINST THE STATES BY OPERATION OF THE FOURTEENTH AMENDMENT.

Although at the moment there is no binding, modern Supreme Court opinion determining the question of whether the Second Amendment is incorporated as against the states by the Fourteenth Amendment, the question is not a difficult one. The Supreme Court's recent landmark opinion in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) all but commands that result. The Commonwealth's reliance on ancient, superceded decisions from the pre-incorporation era, and more modern cases that improperly refuse to

consider the question, are simply inapposite.⁵

Before the Civil War, the Supreme Court held that states were not directly bound by the Bill of Rights. *Barron ex rel. Tiernan v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243 (1833). Although this remains a correct decision with respect to the Bill of Rights as envisioned in 1791, *Barron* proved intolerable during Reconstruction. With recalcitrant southern states actively oppressing those just freed from slavery, Congress saw the need to constitutionally define American citizenship and imbue that citizenship with meaningful federal protection. Thus the Fourteenth Amendment's first section was designed to overrule two Supreme Court precedents. The first clause, defining citizenship, dispensed with *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), which had held that people of African descent could not be American citizens or citizens of American states. The Privileges or Immunities Clause - "No state shall make or enforce

⁵As hinted at by the Commonwealth, the Supreme Court has before it three petitions for certiorari, including one filed by Amicus SAF, squarely raising the question of Second Amendment incorporation. *McDonald v. City of Chicago*, Supreme Ct. No. 08-1521; *NRA v. City of Chicago*, 08-1497; *Maloney v. Rice*, No. 08-1592.

any law which shall abridge the privileges or immunities of citizens of the United States," U.S. Const. amend. XIV, sec. 1, cl. 2 - was aimed squarely at overruling *Barron*.

Unfortunately, the Supreme Court's first decision interpreting the Fourteenth Amendment, *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873), rendered the Privileges or Immunities Clause almost meaningless. *Slaughter-House* limited the Fourteenth Amendment's core guarantee to those rights that flow from the existence of United States citizenship, such as the rights to diplomatic protection abroad or to access the navigable waterways of the United States. In a series of cases that followed, the Supreme Court would follow this reasoning to hold, one by one, that none of the rights enumerated in the Bill of Rights had any application to the states, since the Bill of Rights is thought to guarantee rights that pre-exist the creation of the federal government.

Three of these relics are relied upon by the Commonwealth and its amici for the claim that the Second Amendment is not incorporated. *United States v. Cruikshank*, 92 U.S. 542 (1876); *Presser v. Illinois*,

116 U.S. 252 (1886); *Miller v. Texas*, 153 U.S. 535 (1894). But these same cases likewise held that the First and Fourth Amendments do not bind the states. The logic of these cases rested on *Barron*, holding that the Bill of Rights does not directly bind the states, and *Slaughter-House*, declaring the Privilege or Immunities Clause meaningless. Both lines of precedent remain operative, although *Slaughter-House* is all but completely condemned in academic circles as extremely wrong (see *infra*).

And yet the Commonwealth would not seriously argue that *Cruikshank* correctly immunizes it from the First Amendment, or that *Miller* renders the Fourth Amendment non-binding on this Court. That is because by the end of the nineteenth century, the Supreme Court would begin to incorporate the Bill of Rights through the Fourteenth Amendment's Due Process Clause. *Chicago, Quincy & Burlington R.R. v. Chicago*, 166 U.S. 266 (1897) (using Due Process Clause to incorporate Fifth Amendment Takings Clause). Over time, almost the entire Bill of Rights has been held incorporated under the Due Process Clause.

There has not been a Second Amendment

incorporation case at the Supreme Court since the days of *Presser* and *Cruikshank* - well before the incorporation era. But even courts unreceptive to the Second Amendment right have acknowledged the inapplicability of such precedent. Judge Reinhardt, writing for the Ninth Circuit in elucidating the "collective right" theory later rejected in *Heller*, agreed that *Presser* and *Cruikshank* "rest on a principle that is now thoroughly discredited." *Silveira v. Lockyer*, 312 F.3d 1052, 1066 n.17 (9th Cir. 2002) (citation omitted).

For that matter, so does *Slaughter-House*. "Virtually no serious modern scholar - left, right, and center-thinks that [*Slaughter-House*] is a plausible reading of the Amendment." Akhil Reed Amar, *Substance and Method in the Year 2000*, 28 Pepp. L. Rev. 601, 631 n.178 (2001). "[E]veryone' agrees the Court [has] incorrectly interpreted the Privileges or Immunities Clause." Richard Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the Slaughter-House Cases*, 70 Chi.-Kent L. Rev. 627 (1994).; see also Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on*

Free-Form Method in Constitutional Interpretation, 108 Harv. L. Rev. 1121, 1297 n. 247 (1995) (“[T]he *Slaughter-House Cases* incorrectly gutted the Privileges or Immunities Clause”).

“Legal scholars agree on little beyond the conclusion that the Clause does not mean what the Court said it meant in 1873.” *Saenz v. Roe*, 526 U.S. 489, 523 n.1 (Thomas, J., dissenting) (citations omitted). Indeed, Justice Thomas, joined by Chief Justice Rehnquist, declared that he “would be open to reevaluating [the Privileges or Immunities Clause’s] meaning in an appropriate case.” *Saenz*, 526 U.S. at 528.⁶ Amici submit that this would be an appropriate such case but for the fact that Appellee did not actually violate Section 131L. But no settled law need be overturned for this Court to find the Second Amendment is incorporated, because binding Supreme Court precedent commands incorporation of the Second

⁶“Since the adoption of [the Fourteenth] Amendment, ten Justices have felt that it protects from infringement by the States the privileges, protections, and safeguards granted by the Bill of Rights Unfortunately it has never commanded a Court. Yet, happily, all constitutional questions are always open.” *Gideon v. Wainright*, 372 U.S. 335 (1963) *Gideon v. Wainright*, 372 U.S. 335, 345-46 (1963) (Douglas, J., concurring) (citation omitted).

Amendment under the Due Process Clause.

Indeed, the most recent such command was contained in *Heller*. Discussing *Cruikshank*, the Court observed: "we note that *Cruikshank* also said that the First Amendment did not apply against the States and did not engage in the sort of Fourteenth Amendment inquiry required by our later cases." *Heller*, 128 S. Ct. at 2813 n.23 (emphasis added).

It is now well-established that the Due Process Clause has a substantive dimension, and that deprivation of enumerated constitutional rights is thus largely incompatible with due process. Almost every provision of the Bill of Rights considered for incorporation in the modern era has been incorporated. The Second Amendment must be among the incorporated rights.

The modern incorporation test asks whether a right is "fundamental to the American scheme of justice," *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968), or "necessary to an Anglo-American regime of ordered liberty," *id.* at 150 n.14. *Duncan's* analysis suggests looking to the right's historical acceptance

in our nation, its recognition by the states (including any trend regarding state recognition), and the nature of the interest secured by the right. The right to bear arms clearly satisfies all aspects of the selective incorporation standard.

A. The Right to Arms in Our Legal Tradition.

"By the time of the founding, the right to have arms had become fundamental for English subjects." *Heller*, 128 S. Ct. at 2798 (citations omitted). When the Constitution was written, English law had "settled and determined" that "a man may keep a gun for the defence of his house and family." *Mallock v. Eastly*, 87 Eng. Rep. 1370, 1374, 7 Mod. Rep. 482 (C.P. 1744). The violation of that right by George III "provoked polemical reactions by Americans invoking their rights as Englishmen to keep arms." *Heller*, 128 S. Ct. at 2799.

There is no need to recite the exhaustive historical evidence considered in *Heller*. The matter is now settled precedent and beyond further dispute: the Second Amendment "codified a right inherited from our English ancestors." *Heller*, 128 S. Ct. at 2802 (citation omitted).

B. The States' Treatment of the Right to Arms.

All five state constitutional ratifying conventions that demanded a Bill of Rights demanded a right to arms. Forty-four states secure a right to arms in their constitutions. Of these, fifteen are either new or strengthened since 1970. Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 Tex. Rev. L. & Pol. 191 (2006). In *Heller*, thirty-two states advised that the individual Second Amendment right "is properly subject to incorporation." Br. of Amici States Texas, et al., Supreme Court No. 07-290, at 23 n.6. On July 6, 2009, thirty-four states reiterated this position before the Supreme Court. Br. of Amici States Texas, et al., and Br. of Amicus State of California, Supreme Court Nos. 08-1497, 08-1521.

C. The Interest Secured by the Right to Arms.

The Second Amendment's purpose confirms its incorporation. "The inherent right of self-defense has been central to the Second Amendment right." *Heller*, 128 S. Ct. at 2818. Blackstone described that right as preserving "'the natural right of resistance and self-preservation,' and 'the right of having and using arms for self-preservation and defence.'" *Heller*, 128 S.

Ct. at 2792 (citations omitted).

"[T]he right to personal security constitutes a 'historic liberty interest' protected substantively by the Due Process Clause." *Youngberg v. Romeo*, 457 U.S. 307, 315 (1982) (citation omitted). The Supreme Court binds the states to respect various rights which, like the Second Amendment, are rooted in deference to preserving personal autonomy. Observing that

no right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law,

Cruzan v. Dir., Mo. Dept. of Health, 497 U.S. 261, 269 (1990) (citation omitted), the Supreme Court recognized a right to refuse life-sustaining medical care. *Id.* at 278; see also *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) ("the right of the individual . . . to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child"); *Lawrence v. Texas*, 539 U.S. 558, 562 (2003) ("liberty of the person both in its spatial and more transcendent dimensions" supports right to consensual intimate relationships); *Rochin v. California*, 342

U.S. 165 (1952) (bodily integrity right against searches).

The Supreme Court instructs that "choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment."

Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992).

It is unfathomable that the states are constitutionally limited in their regulation of medical decisions or intimate relations, because these matters touch upon personal autonomy, but are unrestrained in their ability to trample upon the enumerated right to arms designed to enable self-preservation. If abortion is protected because "[a]t the heart of liberty is the right to define one's own concept of existence," *id.*, the right of armed self-defense against violent criminal attack is surely deserving of incorporation. Indeed, the right to purchase contraception was discovered as related to the "indefeasible right of personal security."

Griswold v. Connecticut, 381 U.S. 479, 484 n.* (1965)

(citation omitted). The right to arms plainly possesses greater nexus to the interest in personal security.

Casey invoked the second Justice Harlan's celebrated passage describing the liberty protected by the Due Process Clause as broader than "a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; *the right to keep and bear arms*; the freedom from unreasonable searches and seizures; and so on." *Casey*, 505 U.S. at 848 (quoting *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting)) (emphasis added). Liberty cannot now be defined so narrowly as to exclude one of its more obvious attributes.

The Second Amendment also has another purpose, spelled out in the prefatory clause: preservation of the people's ability to act as militia. *Heller*, 128 S. Ct. at 2800-01. The Amendment's framers believed this purpose was "necessary to the security of a free state." U.S. Const. amend. II. By its own terms, the Second Amendment secures a fundamental right.

Unfortunately, even post-*Heller*, two courts have recently refused to consider the question of whether the Second Amendment is incorporated. *National Rifle Ass'n v. City of Chicago*, 567 F.3d 856 (7th Cir. 2009); *Maloney v. Cuomo*, 554 F.3d 56 (2d Cir. 2009). Rather,

these courts relied on the *pre-incorporation era* precedent to hold that the Second Amendment, like the rest of the Bill of Rights, does not bind the states directly. Clearly, that is not the operative law today. Far from respecting Supreme Court precedent, *NRA* and *Maloney* ignore the Supreme Court's unmistakable command that incorporation of enumerated rights be considered under its Due Process Clause doctrine. *See, e.g. Duncan*, 391 U.S. at 155 (complete non-incorporation "a position long since repudiated").

When the Supreme Court declares a particular analysis is "required," a lower court is not respecting higher authority by foregoing that analysis and resting its decision on the complete state of the law as it existed over a century ago. "[W]hen a lower court perceives a pronounced new doctrinal trend in Supreme Court decisions, it is its duty, cautiously to be sure, to follow not to resist it." *Perkins v. Endicott Johnson Corp.*, 128 F.2d 208, 217-18 (2nd Cir. 1942), *aff'd*, 317 U.S. 501 (1943) (footnotes omitted). Indeed, the history of incorporation is one of the lower courts taking the lead in addressing incorporation questions, just as all matters not

within the Supreme Court's original jurisdiction are presented to the lower courts as a matter of first impression. For example, the Supreme Court did not incorporate the Sixth Amendment right to public trial until long after the Third and Seventh circuits had done so. See *Gannett Co. v. DePasquale*, 443 U.S. 368, 379 (1979); *United States ex rel. Latmore v. Sielaff*, 561 F.2d 691, 693 n.2 (7th Cir. 1977), *cert. denied*, 434 U.S. 1076 (1978); *United States ex rel. Bennett v. Rundle*, 419 F.2d 599 (3rd Cir. 1969) (en banc), *cert. denied*, 409 U.S. 916 (1972). Likewise, the Second Circuit incorporated the Fifth Amendment's Double Jeopardy Clause prior to the Supreme Court reaching the same conclusion. See *United States ex rel. Hetenyi v. Wilkins*, 348 F.2d 844 (2d Cir. 1965), *cert. denied*, 383 U.S. 913 (1966); *Benton v. Maryland*, 395 U.S. 794 (1969); see also *Price v. Georgia*, 398 U.S. 323, 331-32 (1970) (citing *Hetenyi* with approval).

The "required" due process analysis is within the power of this Court to perform should it choose to do so, and leads only to the conclusion that the Second Amendment is incorporated.

IV. CORRECTLY APPLIED, SECTION 131L IS CONSTITUTIONAL.

This Court should be able to "distinguish the provisions of G.L. c. 140, § 131L from those struck down in *Heller*." *Commonwealth v. Runyan*, No. 0811 CR 2207 (Lowell Dist. Ct. Oct. 15. 2008). But the lower court correctly sensed that the Commonwealth's proposed application of Section 131L would be unconstitutional. The Second Amendment's mandate that the right to keep and bear arms for self-defense be respected re-enforces the straightforward, textual approach to construing Section 131L discussed *supra*. Applying Section 131L as it was written poses no constitutional problems. Expanding it in the manner proposed by the Commonwealth does.

Heller struck down a District of Columbia law that, while touted as a "safe storage" provision, was actually something much more: a complete ban on the use of functional firearms for home self-defense, including circumstances where the victim's use of force would otherwise be lawful. *Heller*, 128 S. Ct. at 2818. The District understood the lack of a home self-defense exception was problematic, and argued that an exception be read into the statute for that purpose.

The Supreme Court properly declined to re-write the District's law, pointing out that other listed exceptions for recreational shooting and *business* defense counseled against the judicial creation of an additional exception. *Id.* Moreover, the District had previously taken the opposite litigating position, successfully defending the home-business self-defense distinction against an equal protection challenge. *Id.*, at 2818-19 & n.28.

The *Heller* functional firearms ban was struck down because it effected a "prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense." *Heller*, 128 S. Ct. at 2822. Section 131L does not go quite so far. Read properly, it only requires that firearms be securely stored when they are not "carried by or under the control of the owner or other lawfully authorized user." Critically, Section 131L does not mandate that guns be stored unloaded. In this way, Section 131L accommodates the highly common practice of gun owners to store functional firearms in an electronic quick-release safe. When stored in this manner, guns are not accessible to unauthorized users, but are readily

available to authorized users who know the safe's keypad code.

The Commonwealth's proposed construction of Section 131L would, however, be plainly unconstitutional. Under this view, it would be a crime for an individual to have an operable firearm under her control "for immediate self-defense." *Heller*, 128 S. Ct. at 2822. But different people have different needs. A woman living alone in a high-crime area with no children may wish to balance her need for firearms access differently than a family with small children residing in a gated community. What might appear sensible in one situation may be less so in another. It is important to bear in mind that under discussion is the exercise of a fundamental constitutional right, the sort of activity that, when conducted in one's home, is traditionally afforded a significant degree of personal autonomy and freedom from regulation. People in their own home should be presumed to be in control of their firearms. Thus, all Section 131L requires is that guns be securely stored when there is no "authorized user" at home. Properly read, this does not interfere with the Second Amendment's guarantee of

access to firearms for immediate self-defense. And it does not sanction Appellee's prosecution, either.

Amici are not alone in their reading of Section 131L's constitutionality. Last year, the Commonwealth charged a Massachusetts State Police Officer with a violation of Section 131L because his 12 year old son had accessed his unlocked handgun while the officer was away from home. The District Court dismissed the indictment as unconstitutional under the Second Amendment. *Commonwealth v. Bolduc*, Barnstable Dist. Ct. No. 0825 C.R. 2026 (Feb. 19, 2009).

The term "under the control of the owner" is a question of fact and subject to interpretation. Any ambiguity in the statute as applied to a person lawfully keeping a firearm in the home must be resolved in favor of the holder of the right. Legislation requiring an owner to store firearms in a place inaccessible to children or unauthorized persons would satisfy the Supreme Court's holding in *Heller* and protect the safety of others.

Id. However, under the circumstances of that case, the *Bolduc* court held Section 131L unconstitutional, noting *Heller's* requirement "that the [Second Amendment] right requires that the firearms be available for 'the purposes of immediate self-

defense.'" *Id.* (quoting *Heller*, 128 S. Ct. at 2822).⁷

The Commonwealth's amici would constitutionalize their reading of Section 131L by resorting to an interest-balancing approach flatly barred by *Heller*. Moreover, even if considered, their arguments are simply not persuasive.

The statutes at issue in *Heller* did not call upon the Supreme Court to construe the full meaning of the Second Amendment. It was enough, in that case, to recognize the existence of a right to arms to dispense with a functional firearms ban and ban on the home carrying of arms. And the handgun ban at issue in *Heller* called upon the Court to devise a test for delineating protected Second Amendment "arms" from those that are not so protected. But *Heller* did not have occasion to specifically announce a standard of review by which other gun regulations, not clearly forbidden by the Second Amendment, might be tested.

Nonetheless, the courts are not without guidance in this area. The Supreme Court did conclude that

⁷Notably, *Baldus* properly distinguished between "children" and "unauthorized persons." Although both may be constitutionally barred access to firearms for reasons of safety, children are not necessarily unauthorized persons under the law.

"[b]y the time of the founding, the right to have arms had become fundamental for English subjects." *Heller*, 128 S. Ct. at 2798 (citation omitted). The Supreme Court thus specifically rejected rational basis as the standard of review for Second Amendment claims, and strongly suggested that the standard of review would be a rigorous one:

Obviously, [rational basis] could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right, be it the freedom of speech, the guarantee against double jeopardy, the right to counsel, or the right to keep and bear arms.

Heller, 128 S. Ct. at 2818 n. 27 (citing *United States v. Carolene Products Co.*, 304 U. S. 144, 152, n. 4 (1938)). By placing the Second Amendment squarely within the established *Carolene Products* paradigm for enumerated rights, the Supreme Court indicated that the right to arms would be vigorously protected, perhaps by strict scrutiny.

Requiring strict scrutiny in evaluating Second Amendment questions does not spell the end of all gun laws because the government will often have a compelling state interest in the area that may be constitutionally addressed. Safe storage laws are acknowledged to implicate an appropriate governmental

interest. *Heller*, 128 S. Ct. at 2820. Strict scrutiny is context-sensitive and is “far from the inevitably deadly test imagined by the Gunther myth.” Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 *Vanderbilt L. Rev.* 793, 795 (2006). The Fifth Circuit has long employed a version of strict scrutiny in Second Amendment cases, allowing those laws that are

limited, narrowly tailored specific exceptions or restrictions for particular cases that are reasonable and not inconsistent with the right of Americans generally to individually keep and bear their private arms as historically understood in this country.

United States v. Emerson, 270 F.3d 203, 261 (5th Cir. 2001). Under that standard, that court has upheld the more basic federal gun laws. *See, e.g. Emerson* (upholding gun prohibition for people covered by restraining orders); *United States v. Patterson*, 431 F.3d 832, 835 (5th Cir. 2005) (drug addicts); *United States v. Everist*, 368 F.3d 517, 519 (5th Cir. 2004) (felons); *United States v. Darrington*, 351 F.3d 632, 635 (5th Cir. 2003) (felons).

Safe storage laws, including Section 131L, are capable of proper construction under such a test. The

Commonwealth has a compelling interest in ensuring that guns do not fall into the hands of dangerous people. Yet individuals also have a core, historically well-understood right to have arms available at home for self-defense. Requiring that guns be locked when no authorized users are at home, as Section 131L apparently provides, would be a narrowly-tailored rule that respects the interest in self-defense. Requiring that guns be locked in the presence of authorized users goes too far, because it interferes with the right to have arms for immediate self-defense.

Without considering any limiting principles or even a standard of review, the Commonwealth's amici launch into a rational-basis type analysis decrying the alleged social ills of firearms - precisely the approach rejected in *Heller*. An examination of these claims, however, reveals them to lack any merit even if they were to be appropriately considered.

According to the Massachusetts Department of Public Health, annual unintentional firearms related fatalities in the Commonwealth have remained roughly the same as compared to years prior to Section 131L's enactment. However since 1998 annual rates of firearm

related homicides and suicides have climbed in most years reaching a decade long record in 2007, the last year of available data. See Massachusetts Department of Public Health's Injury Surveillance program, available at <http://www.mass.gov/dph>.⁸

The primary objective of the proponents of the Massachusetts trigger lock statute was to reduce unintentional firearm related deaths, but after ten years no such trend is apparent. In the four years prior to enactment of the Massachusetts trigger lock law in 1998, unintentional firearms related deaths averaged 3 deaths per year. After enactment of the trigger lock law, from 1998 through 2007, unintentional firearms related deaths averaged 2.7 per year. Unintentional firearms related deaths were actually higher in most years following enactment of Section 131L than 1998, the year of enactment. *Id.*

A secondary goal of trigger lock proponents was to reduce firearm related homicide and suicide related deaths, but such deaths are now at a decade high. In

⁸Reports obtained by entering "ISP" in search box, selecting "injury surveillance program," selecting "injury statistics," selecting "injuries to Massachusetts residents," and selecting reports by year under title "Injury Deaths."

the four years prior to enactment of the Massachusetts trigger lock law in 1998, total firearms related homicides and suicides averaged 251.25 deaths per year *but were falling each year*. From 1998 through 2007 total firearms related homicides and suicides averaged 175.7 deaths per year. However, total firearms related deaths rose in 5 of the 10 subsequent years for which data is available, reaching a decade record high of 225 deaths in 2007. *Id.*

Most puzzling is the claim that "Section 131L Helps Prevent Suicide." Br. of Amici Brady, et al., at 22. Even if gun owners scrupulously obey Section 131L, these gun owners and other "authorized users" in the household are not prohibited by law from retrieving guns secured in accordance with the trigger lock statute. Though tragic, such persons, if suicidal, may choose to use such firearms to commit suicide in lieu of other methods. It is unclear how the presence of a gun lock reduces suicidal tendencies. The Brady amici claim "that suicide by firearm is strongly associated with the presence of a gun in the home of the victim," *id.*, at 24, but even if their assumption were correct, gun ownership is something that Section 131L does not

make unlawful.

In any event, the suggestion that suicide is an impulsive decision made possible only by ready access to the means of committing it is not accepted. As the World Health Organization long ago noted, "removing an easy and favored method of suicide was not likely to affect substantially the overall suicide rate because other methods would be chosen." World Health Organization, *Changing Patterns in Suicide Behavior* (1982). Shooting is not a significantly more effective mode of suicide than hanging, asphyxiation by car exhaust, or drowning. Gary Kleck, *Targeting Guns: Firearms and Their Control* 266 (1997).

Nonetheless, to support the claim that storage laws reduce youth suicide, Brady amici invoke Andrew J. McClurg, *The Public Health Case for the Safe Storage of Firearms: Adolescent Suicides Add One More "Smoking Gun,"* 51 *Hastings L. J.* 953 (2000) "chronicling various studies that correlate safe storage of firearms with a decrease in youth suicide." Brady Br., at 40. But correlation is not the same thing as causation, and indeed, under Massachusetts law, as under the laws of most states, adolescents may

own shotguns and rifles beginning at age 15. G.L. ch. 140, § 129B(v). It is difficult to see how a trigger lock law would discourage suicide among lawful gun owners of any age.

The Brady amici appear to be critical of the very fact of gun ownership rather than any particular manner of storage. However, "[n]ations with higher gun ownership rates . . . do not have higher murder or suicide rates than those with lower gun ownership." Don Kates & Gary Mauser, *Would Banning Firearms Reduce Murder and Suicide? A Review of International and Some Domestic Evidence*, 30 J. L. & Pub. Pol'y 649, 661 (Spring 2007); see also John R. Lott, Jr., *The Bias Against Guns* 83 (2003) (noting that the Centers for Disease Control found that in the United States in 1999 only 31 children younger than 10 years of age died of an accidental shooting and concluding that "[w]ith some 94 million gun owners and almost 40 million children younger than ten, it is hard to find any item in American homes that is potentially lethal that has as low an accidental death rate as guns.")

In 2003, the Centers for Disease Control and Prevention published a study investigating the effects

of a wide variety of gun laws, including laws ostensibly designed to keep guns away from children. First Reports Evaluating the Effectiveness of Strategies for Preventing Violence: Firearms Laws (CDC 2003), available at <http://cdc.gov/mmwr/preview/mmwrhtml/rr5214a2.htm>. The following year, the National Academy of Sciences published a comprehensive review of 253 journal articles, 99 books, and 43 government publications evaluating 80 gun-control schemes. Charles F. Wellford, John V. Pepper & Carol V. Petrie (eds.), *Firearms and Violence: A Critical Review* 98 (National Academies Press 2005). None were shown proven to reduce violent crime, suicide, or accidents.

There is, however, one logical correlation between "safe storage" laws and access to guns by children. When children can access guns, they can access them for self-defense. The extent to which minors may exercise or assert constitutional rights has long vexed the courts. Compare, e.g. *Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503 (1969) with *Morse v. Frederick*, 551 U.S. 393 (2007). The issue here is more complicated than the Commonwealth's

amici suggest. Some age restrictions on the right to arms are plainly appropriate, yet violent crime directed at minors is no less abhorrent to society, which properly holds that even minors are entitled to defend themselves from violent crime.

Amici emphasize that although they do not challenge the logic seeking to keep guns out of the hands of children, a minor's access to guns frequently leads to a beneficial outcome. Last month, a ten year old boy home alone with his eight year old sister fended off a home invasion.⁹ In May, a seventeen year old boy justifiably shot a convicted domestic abuser who had severely beaten the boy's mother.¹⁰ In November, a sixteen year old justifiably shot his abusive step-father, while the latter was dragging the boy's mother away at knife point at 2:30 a.m.¹¹ That same month, a fifteen year old left home alone with his fourteen year old brother shot and drove off home

⁹<http://www.wafb.com/global/story.asp?s=10741492> (July 27, 2009).

¹⁰http://www.sacbee.com/ourregion/story/1880096.html?mi_rss=Our%2520Region (May 21, 2009).

¹¹<http://www.kctv5.com/news/18036943/detail.html#-> (Nov. 21, 2008).

intruders who had threatened to kill the boys.¹² In October, a thirteen year old used a BB gun to drive off two home invaders.¹³ See generally collection at <http://www.claytoncramer.com/gundefenseblog/labels/minor%20defender.html>.

The pattern is clear. With distressing frequency, minors are forced to exercise the right to arms to defend themselves against home invaders when their parents are gone, or to defend themselves and their parents against a parent's poor choice of companion. This common, beneficial use of guns by minors should be weighed in examining any solution to the question of how to limit minors' access to guns.

¹²http://www.starbeacon.com/local/local_story_329230719.html (Nov. 24, 2008).

¹³http://www.wkowitz.com/Global/story.asp?S=9161739&nav=menu1362_2 (Oct. 10, 2008).

CONCLUSION

The debate over gun safety regulations and the Second Amendment is compelling and critical. However, given the plain text of Section 131L, this case does not provide an opportunity to delve into that discussion.

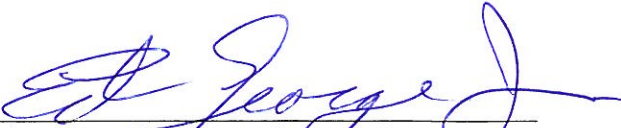
Should the Court wish to reach the constitutional questions, it is "required" to engage in a modern incorporation analysis of the Second Amendment under the Due Process Clause, an exercise that leads inexorably to the conclusion that the Second Amendment is indeed incorporated as against the Commonwealth. Construing Section 131L in accordance with constitutional limitations, the statute can be saved. Appellee's indictment cannot.

Dated: August 25, 2009

Respectfully submitted,

Second Amendment Foundation, Inc. and
Gun Owners' Action League, by their attorneys,

Alan Gura
Gura & Possessky, PLLC
101 N. Columbus St.
Suite 405
Alexandria, VA 22314
703.835.9085/Fax 703.997.7665



Edward F. George, Jr. (B.B.O. #189160)
EDWARD GEORGE & ASSOCIATES
110 Florence Street, 2nd Floor
P.O. Box 393
Malden, MA 02148
Ph: (781) 322-7575 FAX: (781) 322-1555
E-Mail: e.george@verizon.net