No. 18-1272

IN THE
Supreme Court of the United States

MICHAEL GOULD, *et al.*,
Petitioners,
v.

ANDREW LIPSON, in his official capacity as Chief of the Brookline Police Department, WILLIAM G. GROSS, in his official capacity as Commissioner of the Boston Police Department, and COMMONWEALTH OF MASSACHUSETTS OFFICE OF THE ATTORNEY GENERAL,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF RESPONDENTS ANDREW LIPSON AND WILLIAM G. GROSS

EUGENE L. O'FLAHERTY
Corporation Counsel
MATTHEW M. MCGARRY
CITY OF BOSTON
LAW DEPARTMENT
1 City Hall Square, Room 615
Boston, MA 02201
Counsel for William G. Gross

JOHN BUCHHEIT
Office of Town Counsel
BROOKLINE TOWN HALL
333 Washington Street, 6th Floor
Brookline, MA 02445
Counsel for Andrew Lipson

DEEPAK GUPTA
Counsel of Record
JONATHAN E. TAYLOR
GUPTA WESSLER PLLC
1900 L Street, NW
Suite 312
Washington, DC 20036
(202) 888-1741
deepak@guptawessler.com
Counsel for Andrew Lipson and William G. Gross

QUESTION PRESENTED

The petitioners assert that this case presents two questions:

> 1. Whether the Second Amendment protects the right to carry a firearm outside the home for self-defense.
>
> 2. Whether the government may deny categorically the exercise of the right to carry a firearm outside the home to typical law-abiding citizens by conditioning the exercise of the right on a showing of a special need to carry a firearm.

The sole question actually presented by this case is whether Boston's and Brookline's public-carry licensing regimes, which allow restricted licenses for many discrete purposes and unrestricted licenses for those with good reason to fear injury to themselves or their property, are consistent with the Second Amendment.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

American statutes

English statutes and royal proclamations

Other authorities

INTRODUCTION

When Michael Gould requested a license to carry a loaded firearm in public, he said that he needed one to defend himself while working around town, hiking, and for target shooting. He soon received a license from the Town of Brookline allowing him to do all of that and more—in addition to the right he already had to carry a gun at home. But this did not satisfy Gould. Because his license does not also allow him to carry loaded guns in public under other unspecified circumstances, he challenged Brookline's public-carry regime as unconstitutional. His suit was joined by four residents of the City of Boston, each of whom had also sought an unrestricted firearm license but had failed to demonstrate any good reason for needing one, and thus received a restricted license instead. In their view, Boston's and Brookline's regimes are akin to a total ban that nullifies their core Second Amendment rights.

There is no support for such an extreme interpretation of the Second Amendment, and the First Circuit properly rejected it here. That decision comports with rulings from the Second, Third, and Fourth Circuits, which have upheld similar laws limiting public carry for the purpose of armed self-defense to those with a good reason to fear injury to themselves or their property. Only the D.C. Circuit (in a 2–1 decision) reached a different result. But it did so in a case where the plaintiffs were *entirely* prohibited by law from carrying handguns in public, and did not address whether good-reason limitations are of such longstanding pedigree that they qualify as exceptions to the Second Amendment (or, at the very least, are presumptively constitutional as a matter of history and tradition).

This is merely the first of many flaws in the petitioners' demand for intervention by this Court. As we explain below, the two questions posed in their petition are not the

actual issue presented, which is whether the good-reason requirement is consistent with the Second Amendment. The First Circuit did not pass upon either question, and the petitioners' claims would fail even if both questions were answered in the affirmative. Further, although judges, historians, and legislators have spent only a few scant years grappling with the constitutional questions posed by good-reason requirements, the petitioners would have the Court rush to judgment on the constitutionality of *any* such regime. This would be an especially imprudent step given the centrality of good-reason requirements to gun regulations throughout the nation, and given the sheer amount of lethal firepower that a ruling for the petitioners would invite into the public square.

Throughout their brief, the petitioners imply that the First Circuit's decision was issued in bad faith and rests on little more than a "massive resistance" to *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 561 U.S. 742 (2010). Pet. 16. That is an uncharitable and unjustified characterization of the decision below, which upheld a public-carry restriction with roots stretching back to 17th-century Massachusetts and with a solid foundation in broader Anglo-American history and tradition. Whether reviewed through a purely historical lens or subjected to means-ends scrutiny (as occurred below), Boston's and Brookline's good-reason requirements cohere with the Second Amendment.

The petitioners conclude by asking the Court to hold their petition and instead grant the petition in *Rogers v. Grewal*, No. 18-824, which presents the same issue. That is a curious request. Whereas this case contains a comprehensive factual record and a well-reasoned opinion applying the Second Amendment to that detailed record, *Rogers* was decided on the bare pleadings and through

summary affirmance. If the Court decides to review the constitutionality of good-reason requirements now rather than to allow the issue to further percolate, it should either grant and consolidate both cases or instead grant here and hold the *Rogers* petition.

STATEMENT

I. Regulatory background

A. Public carry in Massachusetts

Massachusetts's regulation of public carry spans five centuries. In the 17th and 18th centuries, the state broadly prohibited public carry. In keeping with English tradition, Massachusetts authorized justices of the peace to arrest anyone who "shall ride or go armed offensively, to the fear or terror of the good citizens of this Commonwealth." 1795 Mass. Laws 436, ch. 2; *see also* 1694 Mass. Laws 12, no. 6.

In the 19th century, Massachusetts created a narrow exception to this rule for those who could show that they had "reasonable cause to fear an assault or other injury, or violence to his person, or to his family or property." 1836 Mass. Laws 748, 750, ch. 134, § 16. Absent such a showing, no person could "go armed with a dirk, dagger, sword, pistol, or other offensive and dangerous weapon." *Id.* This good-cause requirement would become a model for other states in the decades that followed.

At the dawn of the 20th century, Massachusetts sought to increase oversight of the good-cause requirement by incorporating it into a licensing regime. To obtain a public-carry license, a person would have to submit an application substantiating his or her need "to carry a loaded pistol or revolver" in public. 1906 Mass. Sess. Laws 150 § 1. Local law-enforcement officials would then have discretion to issue a license if the applicant (1) was a "suitable person to be so licensed" and (2) met the good-cause standard. *Id.*

Within a few years of adopting this licensing regime, the state extended it to cover unloaded guns, increased the fine for violations, and added a one-month minimum mandatory sentence. 1911 Mass. Acts 568, ch. 548.

In 1919, Massachusetts provided that licenses could be issued not only for good cause, but also for "any other proper purpose." 1919 Mass. Acts 156, ch. 207. Officials were eventually authorized to restrict the license to the particular purpose for which it was issued. Around the same time, Massachusetts prohibited certain categories of people from obtaining a license, including felons, domestic abusers, and minors. 1936 Mass. Acts 289, ch. 302, § 131.

The current regime operates in much the same way. Applications are submitted to the local licensing authority, who "may issue" a license if the applicant (1) is not a "prohibited person" and (2) "has good reason to fear injury to the applicant or the applicant's property or for any other reason," "subject to the restrictions expressed or authorized in this section." M.G.L. ch. 140, § 131(d). When an applicant meets these two requirements, the licensing authority may "subject [the license] to such restrictions relative to the possession, use or carrying of firearms as the licensing authority deems proper." *Id.* § 131(a–b). A person who obtains a license may carry a loaded gun in public consistent with the license. Those without a license may still carry a gun "in or on [their] residence or place of business." M.G.L. ch. 269, § 10(a)(1).

B. Brookline's practices in issuing licenses

In 2016, when this lawsuit was filed, the application process in the Town of Brookline was administered by Police Chief Daniel O'Leary and Sargent Christopher Malinn, who had a combined 62 years of experience in the

force. CA1 JA226, JA232.[1] Together, these local police officers implement the state's public-carry framework through a tailored regime offering seven different types of restricted licenses: "target," "hunting," "transport," "sporting," "employment," "in home," and "collecting." CA1 JA77–78. An applicant may receive a license for some or all of these uses, depending on their reasons for needing a handgun. The police officers review each application on a "case by case basis, taking into consideration all information provided in the application," CA1 JA82, and are willing to expand on these seven uses to accommodate applicants. CA1 JA230. When a qualifying request cannot be met by some combination of the restricted uses, the Town issues an unrestricted license to the applicant so long as the applicant has demonstrated "the knowledge, skill and character to possess an unrestricted" license and a "good reason" for needing such a license. CA1 JA84.

Of the 191 licenses Brookline issued from early 2015 to mid 2017, nearly 40% were unrestricted. CA1 JA59. Many of these applicants were "employed in positions that would be deemed dangerous at any time, not just while working." CA1 JA79. Those positions include off-duty police officers, criminal-defense attorneys, and judges "hearing and deciding criminal cases," who "would likely receive an unrestricted license due to the threat posed by sentencing and presiding over cases involving potentially dangerous persons." *Id.*

Brookline processes each application with great care. Sargent Malinn interviews the applicant to "gather all of the facts" needed. JA224. He also "discusses the matter with and answers questions from the applicant." *Id.* When

[1] Chief O'Leary has since retired and been succeeded by Police Chief Mark Morgan, who in turn was recently succeeded by Police Chief Andrew Lipson.

Malinn finishes his inquiry, he "has a discussion with and makes a recommendation to the Chief[.]" JA76. The chief then personally reviews all information in the application. *Id.* If the applicant wishes to meet with the chief, the chief is "always willing to do so." CA1 JA225. And if the applicant would like to provide more information, the chief is "always willing" to accept it. *Id.*

The police chief is proud that the "Brookline Police Department devotes more time and resources to reviewing firearm license applications than most if not all other cities and towns in Massachusetts." CA1 JA225–26. Doing so allows him to meet his objective of "provid[ing] the gun-owning community the rights secured by the Second Amendment while at the same time protect[ing] the public as much as possible given the reach of these rights." CA1 JA230.

C. Boston's practices in issuing licenses

Boston's regime is very similar to Brookline's. The Commissioner of the Boston Police Department has delegated his responsibilities as a licensing authority to Lieutenant Detective John McDonough, the head of the Boston Police Department's Licensing Unit. Pet. App. 46a. McDonough carefully reviews each application for an unrestricted license and any supporting documentation, and then makes decisions on a case-by-case basis. *Id.* at 48a. The Licensing Unit will issue unrestricted licenses to qualified individuals who show good reason to fear injury that distinguishes them from the general population, and will often do so for those engaged in certain occupations (such as law enforcement or the legal profession, which can carry special personal-safety risks). *Id.* at 46a. The Licensing Unit also issues unrestricted licenses to any applicant who has already been issued an unrestricted license elsewhere in Massachusetts. *Id.* In addition, much

like Brookline, Boston's Licensing Unit issues restricted licenses for employment, target practice and hunting, and sport. *Id.* at 47a. Between early 2015 and mid 2017, the Licensing Unit issued 3,684 licenses, of which 42.8% were unrestricted. *Id.* at 48a. The rest were restricted. *Id.*

II. Factual background

A. Brookline

The sole plaintiff in this case who requested a firearm license from Brookline is Michael Gould. Gould met with Sargent Malinn in July 2014 to renew a restricted license he held from a different town, which he was seeking to renew as an unrestricted license. CA1 JA232–33. He said that he needed to carry a loaded firearm for hiking, target shooting, and for his work as a professional photographer, "to protect himself while in possession of valuable works of art and camera equipment[.]" CA1 JA137, JA234.

Shortly thereafter, Gould wrote a letter articulating the same reasons for needing to carry a loaded firearm in public. He asserted a desire to be able to defend himself while "working with valuable photography equipment as well as extremely valuable works of art." CA1 JA137. He also wrote that he is "very often alone hiking through the woods with [his] camera equipment, photographing scenic landscapes and areas to sell on the stock site," and expressed an interest in shooting sports. *Id.* Gould did not identify any other reason why he needed to carry a loaded firearm in public or provide any other specifics. *Id.*

After considering Gould's statements, the chief offered a license that "allowed Mr. Gould to carry a gun on all of the occasions when he indicated he wanted to carry a firearm (*i.e.* for target shooting and to protect himself while in possession of valuable works of art and camera equipment, which was, at times, in remote places)." CA1 JA234; *see* JA139. Although still restricted, the license

would allow Gould to carry a firearm "any time he is engaged in his business," as well as for target shooting, hunting, and a range of outdoor recreational activities. CA1 JA225, JA230, JA234.

Upon receiving the offer, Gould asked Sargent Malinn if he should send any additional information. CA1 JA140–41. Because Gould had not provided any "reasons why he needed a firearm for self-defense (other than his work)," Malinn explained that additional information was unlikely to expand the scope of the license because it already allowed Gould to carry a firearm for all the reasons he had identified a need for one. CA1 JA233. If Gould had specified an additional reason, however, Sargent Malinn "would have suggested the information he could have provided to support this." *Id.* Gould decided to accept the restricted license, signing the acknowledgement forms in 2014 without identifying any additional intended uses and without requesting reconsideration of the decision. CA1 JA234.

B. Boston

The petitioners also include four Boston residents: Christopher Hart, Danny Weng, Sarah Zesch, and John Stanton. Pet. App. 10a. Like Gould, they each applied for an unrestricted firearm license, but because they could not demonstrate any good reason for needing to carry a loaded firearm for self-defense while in public, they each received a restricted license (with hunting and target-practice restrictions). *Id.*; *see also id.* at 49a–52a.

As a result, these four petitioners are allowed by law to keep and carry a firearm for "personal protection in the home," for "collecting," for "lawful recreational shooting or competition," for "lawful pursuit of game animals and birds," and for "travel to and from" any such activities. Pet. App. 47a. Within the scope of these activities, they are

permitted to carry their firearms openly or concealed on their persons. CA1 JA252. The petitioners have conceded that the purposes of the applicable restrictions are public safety and crime prevention. CA1 JA257.

III. Procedural background

The petitioners filed this suit in 2016. Their complaint asserts that the Second Amendment mandates that they be able to carry firearms not only inside their homes, on their property, while working, while traveling to and from work, while hiking, and for target-shooting, but anytime they wish to go armed on the crowded urban streets of Brookline and Boston, for any reason, and that there is no role for the people's representatives to say otherwise.

After authorizing discovery that created a substantial record about the real-world operation of Brookline's and Boston's licensing practices, the district court granted summary judgment for the respondents. In so doing, the court "assume[d] for analytical purposes that the Second Amendment extends to protect the right of armed self-defense outside the home." Pet. App. 64a. The court then applied "intermediate scrutiny," *id.* at 67a, and held that Massachusetts's public-carry regime—and Boston's and Brookline's implementation of it—survive that standard.

Here, the district court agreed with the Second Circuit that "'requiring a showing that there is an objective threat to a person's safety—a special need for self-protection—before granting a carry license is entirely consistent with the right to bear arms.'" *Id.* at 72a (quoting *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 100 (2d Cir. 2012)). The district court further emphasized that, "instead of banning the carrying of firearms in public outright," the Massachusetts legislature has adopted a more modest, calibrated, and sensible approach that respects gun rights and grants discretion to local officials. *Id.* at 73a.

The First Circuit affirmed. It began by explaining that this Court's decision in *Heller*, which was silent on the scope of Second Amendment rights outside the home, "does not provide a categorical answer to whether the challenged policies violate the Constitution." *Id.* at 17a. To address that question, the First Circuit invoked the widely accepted two-step approach: first assessing "whether the challenged law burdens conduct that falls within the scope of the Second Amendment's guarantee," and if it does, then "determin[ing] what level of scrutiny is appropriate and [proceeding] to decide whether the challenged law survives that level of scrutiny." *Id.* at 18a–19a.

As to the first prong, the court stated that "we view *Heller* as implying that the right to carry a firearm for self-defense guaranteed by the Second Amendment is not limited to the home." *Id.* at 21a. But *Heller*, the court immediately added, "did not answer whether every citizen has such a right, or whether (as Boston and Brookline have concluded) the right is more narrowly circumscribed to those citizens who can establish an individualized reason to fear injury." *Id.* "In the absence of such guidance," the court concluded, "we decline to parse this distinction today and proceed on the assumption that the Boston and Brookline policies burden the Second Amendment right to carry a firearm for self-defense." *Id.*

Because it assumed that the regulations *do* burden protected conduct, the First Circuit had to decide what level of means-ends scrutiny to apply. The court observed that this determination "must turn on how closely a particular law or policy approaches the core of the Second Amendment right and how heavily it burdens that right." *Id.* at 22a. Reviewing *Heller*, among other opinions that prioritize the sanctity of the home, the court held that "the core Second Amendment right is limited to self-defense in

the home." *Id.* at 23a. It then held that *Heller* and other appellate cases support the application of intermediate scrutiny to the regulations at issue here. *Id.* at 26a.

Before conducting that scrutiny, the First Circuit took pains to note that "deference should not be confused with blind allegiance." *Id.* at 29a. "There must be a fit between the asserted governmental interests and the means chosen by the legislature to advance those interests." *Id.* Taking a hard look at the respondents' licensing regime, the First Circuit explained that it does not "result in a total ban on the right to public carriage of firearms," but instead allows restricted licenses for a range of purposes and unrestricted licenses upon a showing of particularized need to carry a firearm in public. *Id.* at 30a. Given the historical and empirical evidence before it, the First Circuit ultimately found that the respondents "have forged a substantial link between the restrictions imposed on the public carriage of firearms and the indisputable governmental interests in public safety and crime prevention." *Id.* at 31a. On that basis, the First Circuit affirmed.

REASONS FOR DENYING THE PETITION

The petitioners challenge the constitutionality of a good-reason requirement that enjoys first-rate historical credentials. That challenge is meritless—and so, too, are the arguments that they advance in support of certiorari.

I. The criteria for certiorari are not satisfied.

A. There is no split on the petition's first question, and this case does not present that question.

1. The petition's first question is "[w]hether the Second Amendment protects the right to carry a firearm outside the home for self-defense." Pet. i. But this question was not passed upon below and is not outcome-determinative

here.[2] In evaluating Boston's and Brookline's firearm-licensing regimes, the First Circuit expressly presumed that they "burden the Second Amendment right to carry a firearm for self-defense." Pet. App. 21a; *see also id.* ("We view *Heller* as implying that the right to carry a firearm for self-defense guaranteed by the Second Amendment is not limited to the home."). The petitioners thus seek review of a decision that does not resolve the first question presented, but instead assumes that the petitioners' answer to that question is correct and concludes that their challenge fails even if they prevail on that point.

Remarkably, the petitioners say nothing about their first question presented. They cite no appellate authority holding that the Second Amendment is categorically inapplicable outside the home. They identify no split on this issue. And they never address the fact that the First Circuit presumed that the Second Amendment applies here. They refer only to a supposed circuit split on the constitutionality of "good reason" requirements for public carry. *See* Pet. 11–13. But that split—which we address in relation to the second question presented—does not turn on whether "the Second Amendment protects the right to carry a firearm outside the home for self-defense." Every decision cited by the petitioners either holds or assumes that the answer is yes. Certiorari is thus unwarranted on that question—in either this case or *Rogers*.

2. A separate difficulty for the petitioners comes from history and tradition. As Brookline explained at length in its First Circuit brief, and as summarized below in Part II.A, good-cause requirements like those at issue here possess a centuries-long pedigree. In *Heller*, this Court

---

[2] The same is true, for that matter, of *Rogers*—the petitioners' preferred vehicle.

made clear that such "longstanding" laws—including laws that boast nowhere near the pedigree of good-reason restrictions—are treated as tradition-based "exceptions" to the Second Amendment by virtue of their "historical justifications." 554 U.S. at 635; *see also id.* at 626–27. Even if the Second Amendment generally protects the right to carry a firearm outside the home for self-defense—a question on which Boston and Brookline take no position here—the good-reason requirement thus falls within an exception to the scope of that protection. This is another reason why the petitioners' first question presented is not outcome-determinative and does not warrant review.

B. The petition's second question does not merit review under this Court's established criteria.

The petition's second question is "[w]hether the government may deny categorically the exercise of the right to carry a firearm outside the home to typical law-abiding citizens by conditioning the exercise of the right on a showing of a special need to carry a firearm." Pet. i. This question rests on a mistaken description of Boston's and Brookline's firearm-licensing regimes. Further, the petitioners' arguments in favor of review overstate the alleged split and ignore the need for further percolation.

1. The premise of the petition's second question is that Boston and Brookline have "den[ied] categorically" the right to carry a firearm outside the home "by conditioning the exercise of the right on a showing of a special need" to do so. But that premise is faulty. Under Massachusetts law, typical law-abiding citizens are free to carry a firearm in their place of business without a license. M.G.L. ch. 269, § 10(a)(1). Further, they're also generally able to obtain a license to carry a firearm in public for target practice, hunting, recreational shooting or competition, collecting, transportation, and employment. Unless carrying a

firearm for these reasons does not constitute an exercise of Second Amendment rights, it cannot be said that typical law-abiding citizens suffer a categorical denial of their right to carry a firearm outside the home. The sole limitation applicable to such citizens is the requirement of a good reason to carry a firearm for the purpose of armed self-defense outside their home, place of business, or while traveling in between those two places. For that reason, the petition's claim of a supposed categorical denial of Second Amendment rights to carry a firearm outside the home is not at issue here.

2. The petitioners assert that the lower courts have "coalesced around two distinct" and "directly contrary" views on the extent to which the Second Amendment applies outside the home. Pet. 11. This claim substantially overstates the potential tension between the decision below and the cases cited by the petitioners.

As the petitioners concede (at 12), most courts to have considered good-reason schemes have upheld them. *See Kachalsky*, 701 F.3d 81; *Drake v. Filko*, 724 F.3d 426 (3d. Cir. 2013); *Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013). And although the petitioners' argument for a split includes an unexplained "see also" citation to *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012), that case is fully consistent with decisions of the First, Second, Third, and Fourth Circuits. Whereas those circuits upheld good-reason laws, *Moore* invalidated a "flat ban on carrying ready-to-use guns outside the home," and did so while emphasizing that "reasonable limitations" on the public carrying of firearms is permissible. *Id.* at 940-42.[3]

---

[3] The First Circuit itself emphasized this distinction: "Nor do the Boston and Brookline policies result in a total ban on the right to public carriage of firearms. In this respect, the policies coalesce with the Massachusetts statute to form a regime that is markedly less

The petitioners rely principally on *Wrenn v. District of Columbia*, 864 F.3d 650, 661 (D.C. Cir. 2017), to contend that there is a circuit split. It cannot be denied that the decision below stands in tension with *Wrenn*. That case is an outlier ruling that applies only to the District of Columbia—a small and unique jurisdiction in which other unquestionably constitutional restrictions make public carry difficult as a practical matter. If extended beyond the District's limited confines, the decision would threaten to flood the nation's streets with deadly weapons and to invalidate scores of century-old laws by holding that any licensing scheme requiring good cause to carry a firearm in public is categorically unconstitutional.

But that tension may yet resolve without this Court's intervention. As we explain in the next section, one reason why Boston's and Brookline's licensing regimes are constitutional is that good-cause laws have existed in many American jurisdictions for over a century, making them "longstanding" under *Heller*. In *Heller v. District of Columbia*, 670 F.3d 1244 (D.C. Cir. 2011) (*Heller II*), the D.C. Circuit recognized that regulations from the early-20th century are sufficiently "rooted in our history" and traditions to qualify as constitutional. *See id.* at 1253–54. *Wrenn* failed to address the question whether good-cause requirements qualify as such a law. There is thus a stark intra-circuit divide between *Wrenn* and *Heller II*, which the D.C. Circuit may ultimately consider en banc, obviating any need for this Court to step so quickly into the still-nascent debate over good-cause regimes.

---

restrictive than the regimes found unconstitutional by the Seventh [Circuit]. The Illinois ban on public carriage struck down by the Seventh Circuit did not give the slightest recognition to the heightened need of some individuals to arm themselves for self-protection." Pet. App. 30a–31a.

3. The petitioners pound the drum for immediate Supreme Court intervention by asserting that the lower courts are not engaged in good-faith judging and are not adhering to the Constitution, but rather are engaged in "massive resistance" to *Heller*. Pet. 16. This inflammatory claim is incorrect as a description of the thoughtful, well-reasoned decision issued by the First Circuit. And it reflects a cynical effort to prod this Court into a gunpowder thicket just a few years after judges, scholars, and lawmakers began debating the constitutionality of good-reason laws.

Unlike *Heller* and *McDonald*, this case does not involve an outlier statute. It strikes at the very heart of modern firearm regulation and implicates untold regulatory schemes nationwide—many of them dating back decades or even centuries. The basic question here is whether state and local governments will be rendered virtually powerless to impose limits on the public carry of firearms, apart from the decidedly modest (albeit important) limitations indicated by *Heller* on who can carry firearms, where they may take them, and which arms they may wield.

More than any other Second Amendment petition presented to the Court, this case—and others like it—evoke Judge Wilkinson's plea for restraint:

> This is serious business. We do not wish to be even minutely responsible for some unspeakably tragic act of mayhem because in the peace of our judicial chambers we miscalculated as to Second Amendment rights. It is not far-fetched to think the *Heller* Court wished to leave open the possibility that such a danger would rise exponentially as one moved the right from the home to the public square.

United States v. Masciandaro, 638 F.3d 458, 475–76 (4th Cir. 2011).

Before granting a case to decide whether the Second Amendment mandates an armed and armored public square, this Court would be well-served to allow a full airing of relevant legal, historical, and policy questions. That is particularly true if this Court were to base a landmark constitutional decision on the still-evolving historical scholarship exploring the origin, development, and implementation of good-cause laws. Indeed, as a review of the opinions cited by the petitioners readily confirms, parties and courts have grown markedly more sophisticated in addressing these issues since the Second Circuit first did so in *Kachalsky*. Following *Heller* and *McDonald*, a vast landscape of unanswered historical questions regarding specific forms of firearm regulation assumed new legal importance. That study—most of which *Wrenn* missed—is still ongoing. The Court should allow this deliberative and scholarly process to continue, and perhaps allow its own Second Amendment jurisprudence to mature, before deciding so fundamental a question about firearms in American public life.

II. The decision below is correct.

Since *Heller*, many courts have adopted a two-step approach for analyzing whether a law complies with the Second Amendment. Pet. App. 18a. Under this approach, courts first ask whether the law burdens conduct within the Second Amendment's scope, as defined by history and tradition. If it doesn't, the law is upheld; if it does, the law must survive an appropriate level of means-ends scrutiny. *See id.* Some judges, though, have opined that the first question is the only one that courts may ask. *See, e.g.*, *Heller II*, 670 F.3d at 1271 (Kavanaugh, J., dissenting). On

this view, a law is unconstitutional if it does not enjoy sufficient support in our history and tradition. *See id.*

Boston's and Brookline's good-reason regimes comply with the Second Amendment under either view. Looking first to history, there is a "longstanding" tradition of states and cities imposing similar restrictions. *See Heller*, 544 U.S. at 626–27, 635.[4] Good-reason requirements thus do not infringe protected Second Amendment conduct (or are at least "presumptively" constitutional). *See id.* at 626–27 & n.26. And if this Court were to conclude that means-ends scrutiny is nevertheless appropriate, Boston's and Brookline's licensing regimes would survive it anyway.

A. History and tradition

As Justice Kavanaugh has observed, "history and tradition show that a variety of gun regulations have co-existed with the Second Amendment right and are consistent with that right, as the Court said in *Heller*." *Heller II*, 670 F.3d at 344 (Kavanaugh, J., dissenting). This case involves such a regulation. The historical foundation for good-cause public-carry laws is as deep and broad as any gun-safety law this Court is likely to confront. If even these regulations were not considered longstanding under *Heller*, it is hard to imagine a regulation that would be.

1. Start with the English history. In 1328, England enacted the Statute of Northampton, providing that "no

---

[4] As *Heller* indicated and the circuits have universally recognized, a law may qualify as "longstanding" under *Heller* even if it does not "mirror limits that were on the books in 1791" or 1868. *United States v. Skoien*, 614 F.3d 638, 641 (7th Cir. 2010) (en banc) (Easterbrook, J.); *see Fyock v. Sunnyvale*, 779 F.3d 991, 997 (9th Cir. 2015); *NRA v. BATF*, 700 F.3d 185, 196 (5th Cir. 2012); *United States v. Booker*, 644 F.3d 12, 24 (1st Cir. 2011); *see also Heller II*, 670 F.3d at 342 (Kavanaugh, J., dissenting) (emphasizing the importance of "tradition (that is, post-ratification history)" to the inquiry).

Man great nor small" shall "go nor ride armed by night nor by day, in Fairs, Markets, nor in the presence of the Justices or other Ministers, nor in no part elsewhere." 2 Edw. 3, 258, ch. 3 (1328). England repeatedly reenacted this public-carry restriction over the ensuing decades. *See, e.g.*, 7 Ric. 2, 35, ch. 13 (1383). Because the restriction carried misdemeanor penalties, violators were usually required to forfeit their weapons and pay a fine. *Id.*

By the 16th century, firearms had become increasingly accessible in England. To protect the public, Queen Elizabeth I in 1579 called for strict enforcement of the Statute of Northampton's broad prohibition on carrying "Daggers, Pistols, and such like, not only in Cities and Towns, [but] in all parts of the Realm in common high[ways], whereby her Majesty's good quiet people, desirous to live in [a] peaceable manner, are in fear and danger of their lives." Charles, *The Faces of the Second Amendment Outside the Home*, 60 Clev. St. L. Rev. 1, 21 (2012) (modernized). To enforce this prohibition, British constables were eventually instructed to "Arrest all such persons as they shall find to carry Daggers or Pistols" publicly. Keble, *An Assistance to the Justices of the Peace, for the Easier Performance of Their Duty* 224 (1683).

In the late 17th century, William and Mary enshrined the right to have arms in the Declaration of Rights, later codified in the English Bill of Rights in 1689. This right ensured that subjects "may have arms for their defence suitable to their conditions, and as allowed by law." 1 W. & M. sess. 2. ch. 2. As Blackstone later wrote, this right was considered "a public allowance, under due restrictions[,] of the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression." 1 Blackstone, *Commentaries on the Laws of England* 144

(1769). One such "due restriction" was the Statute of Northampton, which remained in effect after the right was codified in 1689. *See* 4 Blackstone, *Commentaries* 148–49.

The general understanding of the Statute of Northampton as prohibiting public carry in populated places existed in England throughout the 17th and 18th centuries. In 1644, for example, Lord Coke described the statute as making it unlawful "to goe nor ride armed by night nor by day . . . in any place whatsoever." Coke, *The Third Part of the Institutes of the Laws of England* 160 (1817 reprint). One century later, Blackstone described it similarly: "riding or going armed with dangerous or unusual weapons is a crime against the public peace, by terrifying the good people of the land; and is particularly prohibited by the statute of Northampton." 4 Blackstone, *Commentaries* 148–49.

2. Around the time that the English Bill of Rights was adopted, America began its own public-carry regulation. The first step was a 1686 New Jersey law that sought to prevent the "great fear and quarrels" induced by "several persons wearing swords, daggers, pistols," and "other unusual or unlawful weapons." 1686 N.J. Laws 289, 289–90, ch. 9. To combat this "great abuse," the law provided that no person "shall presume privately to wear any pocket pistol" or "other unusual or unlawful weapons," and "no planter shall ride or go armed with sword, pistol, or dagger," except for "strangers[] travelling" through. *Id.* This was only the start of a long history of regulation "limiting gun use for public safety reasons"—especially public carry in populated areas. Meltzer, *Open Carry for All*, 123 Yale L.J. 1486, 1523 (2014). As against this history, "there are no examples from the Founding era of anyone espousing the concept of a general right to carry." *Id.*

Eight years after New Jersey's law, Massachusetts enacted its own version of the Statute of Northampton, authorizing justices of the peace to arrest anyone who "shall ride or go armed Offensively before any of Their Majesties Justices, or other [of] Their Officers or Ministers doing their Office, or elsewhere." 1694 Mass. Laws 12, no. 6. By using the word "offensively," the statute ensured that this prohibition applied only to "offensive weapons," as it had in England—not all arms. One treatise, for example, explained that "[a] person going or riding with offensive Arms may be arrested." Bond, *A Compleat Guide for Justices of the Peace* 181 (1707).

One century later, Massachusetts reenacted its law, this time as a state. 1795 Mass. Laws 436, ch. 2. Because the law had been in effect for so long, it was "well known to be an offence against law to ride or go with . . . firelocks, or other dangerous weapons," as one newspaper later reported, so it "[could not] be doubted that the vigilant police officers" would arrest violators. Charles, *Faces*, 60 Clev. St. L. Rev. at 33 n.176 (citation omitted).

Following Massachusetts's lead, numerous additional states enacted similar laws in the late-18th and early-to-mid-19th centuries. *See* 1699 N.H. Laws 1; 1786 Va. Laws 33, ch. 21; 1792 N.C. Laws 60, 61, ch. 3; 1801 Tenn. Laws 710, § 6; 1821 Me. Laws 285, ch. 76, § 1; 1852 Del. Laws 330, 333, ch. 97, § 13. And still other states incorporated the Statute of Northampton through their common law.

3. In 1836, Massachusetts amended its public-carry prohibition to provide a narrow exception for those having "reasonable cause to fear an assault or other injury, or violence to his person, or to his family or property." 1836 Mass. Laws 748, 750, ch. 134, § 16. Absent such reasonable cause, no person could "go armed with a dirk, dagger, sword, pistol, or other offensive and dangerous weapon."

Id. Those who did so could be punished by being made to pay sureties for violating the statute, *id.*; if they did not do so, they could be imprisoned. *See id.* at 749.

Although the legislature chose to trigger these penalties using a citizen-complaint mechanism, the law was understood to restrict carrying a firearm in public without good cause. This was so even when the firearm was not used in any threatening or violent manner: The legislature placed the restriction in a section entitled "Persons who go armed may be required to find sureties for the peace," and expressly cited the state's previous enactment of the Statute of Northampton. *Id.* Thus, as one judge explained in a grand jury charge in 1837, "no person may go armed with a dirk, dagger, sword, pistol, or other offensive and dangerous weapon, without reasonable cause to apprehend an assault or violence to his person, family, or property." Cornell, *The Right to Carry Firearms Outside of the Home*, 39 Fordham Urb. L.J. 1695, 1720 & n.134 (2012).

Within a few decades, many states (all but one outside the slaveholding South) had adopted nearly identical laws. Most copied the Massachusetts law verbatim—enforcing the public-carry prohibition through a citizen-complaint provision and permitting a narrow self-defense exception. *See, e.g.*, 1851 Minn. Laws 526, 527–28, §§ 2, 17, 18; 1873 Minn. Laws 1025, § 17. At least one state (Virginia) used slightly different language. 1847 Va. Laws 127, 129, § 16. But semantic differences aside, these laws were all understood to restrict public carry, while establishing a limited exception for those with a particular need for self-defense.

Taking a different approach, many southern states allowed white citizens to carry firearms in public so long as the weapons were not concealed. *See, e.g.*, 1854 Ala.

Laws 588, § 272; 1861 Ga. Laws 859, § 4413. But this tradition owed itself to the South's peculiar history and the prominent institution of slavery. *See generally* Ruben & Cornell, *Firearm Regionalism and Public Carry: Placing Southern Antebellum Case Law in Context*, 125 Yale L.J. Forum 121 (Sept. 25, 2015). It reflects "a time, place, and culture where slavery, honor, violence, and the public carrying of weapons were intertwined." *Id.* at 125.

Even within the South, however, courts and legislatures took varying stances toward public carry. Virginia, for instance, "home of many of the Founding Fathers," *Edwards v. Aguillard*, 482 U.S. 578, 605 (1987) (Powell, J., concurring), prohibited public carry (with an exception for good cause) before ratification of the Fourteenth Amendment, after enacting a Northampton-style prohibition at the founding. 1847 Va. Laws at 129, § 16. South Carolina enacted a Northampton-style law during Reconstruction. 1870 S.C. Laws 403, no. 288, § 4. And around the same time, Texas prohibited public carry with an exception for good cause—a prohibition enforced with possible jail time, and accompanied by narrow exceptions that confirmed the law's breadth. 1871 Tex. Laws 1322, art. 6512.

Southern case law, too, reveals a lack of uniformity. The Texas Supreme Court, for instance, twice upheld that state's good-cause requirement. *English v. State*, 35 Tex. 473 (1871); *State v. Duke*, 42 Tex. 455 (1874). The court remarked that the law—which prohibited carrying "any pistol" in public without good cause, 1871 Tex. Laws 1322, art. 6512—"is nothing more than a legitimate and highly proper regulation" that "undertakes to regulate the place where, and the circumstances under which, a pistol may be carried; and in doing so, it appears to have respected the right to carry a pistol openly when needed for self-

defense or in the public service, and the right to have one at the home or place of business," *Duke*, 42 Tex. at 459. Other state courts upheld good-cause laws against constitutional attacks. *E.g.*, *State v. Workman*, 35 W. Va. 367, 367 (1891).

By contrast, we are aware of no historical case striking down a good-cause requirement as unconstitutional. To be sure, a couple of cases, in the course of upholding concealed-carry prohibitions, expressed the view that the right to bear arms protects the right, under some circumstances, to openly carry a weapon in public. *See Nunn v. State*, 1 Ga. 243 (1846). But even within the South, open carry was rare: The Louisiana Supreme Court, for example, referred to "the extremely unusual case of the carrying of such weapon in full open view." *State v. Smith*, 11 La. Ann. 633, 634 (1856). And isolated snippets from a few state-court decisions issued decades after the Framing cannot trump the considered judgments of countless courts and legislatures throughout our nation's history.

4. As America entered the second half of the 19th century, additional jurisdictions began enacting laws broadly restricting public carry, often subject to limited self-defense exceptions. For example, West Virginia and Texas enacted laws that broadly prohibited public carry without good cause. West Virginia's law made clear that "[i]f any person go armed with a deadly or dangerous weapon, without reasonable cause to fear violence to his person, family, or property, he may be required to give a recognizance." 1870 W. Va. Laws 702, 703, ch. 153, § 8. Courts construed this self-defense exception narrowly to require specific evidence of a concrete, serious threat. *See, e.g.*, *State v. Barnett*, 34 W. Va. 74 (1890). Texas's law had a similarly circumscribed exception, barring anyone not

acting in "lawful defense of the state" from "carrying on or about his person . . . any pistol" without "reasonable grounds for fearing an unlawful attack on his person" that was "immediate and pressing." 1871 Tex. Laws 1322, art. 6512.

Then there are the early-20th-century laws, which are also deemed longstanding under *Heller*. Massachusetts led the way in 1906, enacting a modernized version of its 1836 law. This version prohibited public carry without a license, which could be obtained only upon a showing of "good reason to fear an injury to his person or property." 1906 Mass. Sess. Laws 150. In 1909, Alabama made it a crime for anyone "to carry a pistol about his person on premises not his own or under his control," but allowed a defendant to "give evidence that at the time of carrying the pistol he had good reason to apprehend an attack." 1909 Ala. Laws 258, no. 215, §§ 2, 4. In 1913, New York banned all public carry without a permit, which required a showing of "proper cause," and, that same year, Hawaii expressly barred public carry without "good cause." 1913 N.Y. Laws 1627; 1913 Haw. Laws 25, act 22, § 1.

Around the same time, many legislatures enacted laws banning public carry in cities. New Mexico made it "unlawful for any person to carry deadly weapons, either concealed or otherwise, on or about their persons within any of the settlements of this Territory," while providing a narrow self-defense exception. 1869 N.M. Laws 312, Deadly Weapons Act of 1869, § 1. Wyoming prohibited carrying firearms "concealed or openly" "within the limits of any city, town or village." 1875 Wyo. Laws 352, ch. 52, § 1. Idaho made it unlawful "to carry, exhibit or flourish any . . . pistol, gun or other-deadly weapons, within the limits or confines of any city, town or village or in any public assembly." 1889 Idaho Laws 23, § 1. Arizona

banned "any person within any settlement, town, village or city within this Territory" from "carry[ing] on or about his person, saddle, or in his saddlebags, any pistol." 1889 Ariz. Laws 16, ch. 13, § 1. And Texas and Michigan granted cities the power to "prohibit and restrain the carrying of pistols." 1909 Tex. Laws 105; *see* 1901 Mich. Laws 687, § 8.

By this time, many cities had already imposed such public-carry restrictions for decades. "A visitor arriving in Wichita, Kansas, in 1873," for example, "would have seen signs declaring, 'LEAVE YOUR REVOLVERS AT POLICE HEADQUARTERS, AND GET A CHECK.'" Winkler, *Gunfight: The Battle over the Right to Bear Arms in America* 165 (2011). Ditto for Dodge City. A sign read: "THE CARRYING OF FIREARMS STRICTLY PROHIBITED." *Id.* Even in Tombstone, Arizona, people "could not lawfully bring their firearms past city limits. In fact, the famed shootout at Tombstone's O.K. Corral was sparked in part by Wyatt Earp pistol-whipping Tom McLaury for violating Tombstone's gun control laws." Blocher, *Firearm Localism*, 123 Yale L.J. 82, 84 (2013).

5. In sum, a long tradition of American law makes clear that prohibitions on public carry in urban areas (with or without a good-cause exception) have been understood to be consistent with the Constitution. No historical evidence supports the contrary position that public carry was widely permitted in populous cities. And here, the regime challenged by the petitioners—requiring good cause before a person may carry a firearm on city streets—fits squarely within our historical tradition. It is therefore a longstanding, constitutional regulation under *Heller*.

B. Means-end scrutiny

Even if Boston's and Brookline's regimes were subjected to means-ends scrutiny, they would still pass

muster. The First Circuit correctly concluded that, because these regimes do not burden the core of the Second Amendment—which is "limited to self-defense in the home," Pet. App. 23a—intermediate scrutiny is appropriate. Under that standard (the prevailing standard in the circuits), Boston and Brookline must show that their policies "substantially relate[] to one or more important governmental interests." *Id.* at 27a–28a.

As the First Circuit explained, Boston and Brookline have carried that burden. "It cannot be gainsaid" that Boston and Brookline have "compelling governmental interests in both public safety and crime prevention." *Id.* at 28a. For state and local governments, "few interests are more central." *Id.* And "the fit between the asserted governmental interests and the means chosen to advance them is close enough to pass intermediate scrutiny." *Id.* at 30a. The regulations fully allow armed self-defense inside the home, while providing numerous avenues for carrying a firearm outside the home—whether through the issuance of a restricted license "ensuring that individuals may carry firearms while engaging in hunting, targetshooting, and a host of other pursuits," as well as "for work-related reasons," or through the issuance of an unrestricted license for those individuals who can demonstrate a need for one. Further, both Boston and Brookline "provide[] for administrative or judicial review of any license denial." *Id.* at 31a.

And yet this modest regime works. As the First Circuit noted: "Massachusetts consistently has one of the lowest rates of gun-related deaths in the nation, and the Commonwealth attributes this salubrious state of affairs to its comprehensive firearms licensing regime." *Id.* The record includes studies showing that "states with more restrictive licensing schemes for the public carriage of

firearms experience significantly lower rates of gun-related homicides and other violent crimes," and "statistics indicating that gun owners are more likely to be the victims of gun violence when they carry their weapons in public." *Id.* at 32a–33a. Particularly in light of the deference owed to elected officials in deciding how best to keep their communities safe, the regimes of Boston and Brookline are sufficiently tailored to satisfy constitutional scrutiny.

III. If the Court grants review in *Rogers v. Grewal*, it should also grant this petition.

The plaintiffs in another case challenging a good-cause law (represented by the same counsel as the petitioners here) recently filed a petition for certiorari in *Rogers v. Grewal*, No. 18-824. That petition purports to present the same questions as this one. And the ultimate question at issue in both cases is the same as well: Is the good-cause requirement challenged by the petitioners consistent with the Second Amendment?

But there are two main differences between this case and *Rogers*. First, *Rogers* lacks any factual record other than the allegations in the underlying complaint, which itself says almost nothing about the implementation and real-world consequences of the challenged regime. In contrast, this case was decided on summary judgment and presents a comprehensive factual record. Second, the Third Circuit's decision in *Rogers* is nothing more than a summary affirmance based on the earlier decision in *Drake*, 724 F.3d 426. Here, the First Circuit published a scholarly, thoughtful opinion responsive to the detailed and evidence-based factual record before it.

Nonetheless, the petitioners urge the Court to grant in *Rogers* and hold this petition. The only reason they give for their preferred approach is that "the Second

Amendment claim is the sole claim at issue in that case." Pet. 18. This reason makes no sense. Although the petitioners brought an equal-protection claim here, the district court dismissed that claim and the petitioners did not appeal. *See* Pet. App. 12a ("Because the plaintiffs' appeal is based exclusively upon the Second Amendment, our analysis follows suits."). Nor have the petitioners made any effort to somehow raise questions in this petition other than those arising from their Second Amendment claim. So here, as in *Rogers*, "the Second Amendment claim is the sole claim at issue." Pet. 18.[5]

Although the petitioners apparently prefer a factual record unsullied by evidence, there is no reason for this Court to indulge that preference. Constitutional decisions should rest on actual facts about the challenged regulations, not on incomplete allegations untested by evidence and unaddressed by the court of appeals. If the Court believes that the questions presented by this petition are worthy of review, the better course would be to grant both petitions and consolidate them for briefing and argument—or, even more sensibly, to grant this petition and hold *Rogers*.

---

[5] The petitioners also suggest that "the New Jersey law challenged in *Rogers* is a perfect representative of the types of 'good reason'-style restrictions that have created the split of authority." Pet. 18. But they nowhere argue or suggest that the firearm regulations at issue here are somehow unrepresentative or less representative.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

EUGENE L. O'FLAHERTY
Corporation Counsel
MATTHEW M. MCGARRY
CITY OF BOSTON LAW DEPARTMENT
1 CITY HALL SQUARE, ROOM 615
BOSTON, MA 02201
(617) 635-4042
matthew.mcgarry@boston.gov

Counsel for William G. Gross

JOHN BUCHHEIT
Office of Town Counsel
BROOKLINE TOWN HALL
333 Washington Street, 6th Floor
Brookline, MA 02445
(617) 730-2190
jbuchheit@brooklinema.gov

Counsel for Andrew Lipson

DEEPAK GUPTA
Counsel of Record
JONATHAN E. TAYLOR
GUPTA WESSLER PLLC
1900 L Street, NW
Suite 312
Washington, DC 20036
(202) 888-1741
deepak@guptawessler.com

Counsel for Andrew Lipson and William G. Gross

May 6, 2019