No. 18-1272

In the Supreme Court of the United States

MICHAEL GOULD, ET AL.,
Petitioners,

v.

ANDREW LIPSON, IN HIS OFFICIAL CAPACITY AS ACTING CHIEF OF THE BROOKLINE POLICE DEPARTMENT, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION FOR THE COMMONWEALTH OF MASSACHUSETTS

MAURA HEALEY
Attorney General for the Commonwealth of Massachusetts
Elizabeth N. Dewar
State Solicitor
Timothy J. Casey*
David C. Kravitz
Assistant Attorneys General
One Ashburton Place
Boston, Massachusetts 02108
timothy.casey@mass.gov
(617) 963-2043
**Counsel of Record*

QUESTION PRESENTED

Whether granting petitioners licenses to carry firearms in public for particular purposes such as hunting, target shooting, or employment, but not granting them unrestricted licenses because they did not present a specific "good reason to fear injury," violates their rights under the Second Amendment.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Page

Page

Page

Page

Statutes

Page

Constitutional Provisions

Page

Miscellaneous

Page

Page

INTRODUCTION

Petitioners here challenge Massachusetts's statute governing licenses to carry firearms in public, which has existed in the same essential form for more than a century and descends from laws dating back to 1692. Boston and Brookline, implementing the statute, require applicants to state a specific "good reason to fear injury" to person or property before issuing an unrestricted license to carry in public. Mass. Gen. Laws ch. 140, § 131(d). In the absence of such a reason, these licensing authorities will issue a license that allows for keeping and bearing a firearm in the home and for carrying in public for particular purposes, such as hunting, target shooting, or employment. Petitioners themselves did not attempt to state a good reason to fear injury and therefore were issued licenses allowing them to carry their firearms in public only for various particular purposes.

The petition does not present a question warranting this Court's review. Contrary to petitioners' contentions, the courts of appeals have settled on a uniform approach to analyzing Second Amendment claims like petitioners', and, aside from one outlier decision in tension with intra-circuit precedent, have also uniformly upheld good-cause licensing statutes like Massachusetts's. Moreover, the First Circuit's decision below upholding Massachusetts's longstanding and measured licensing scheme was correct. The petition should therefore be denied.

STATEMENT

1. Regulation of public carriage of firearms in Massachusetts pre-dates the Founding. In 1692, the colony and province of Massachusetts Bay authorized justices of the peace to arrest those who "shall ride or go armed Offensively before any of Their Majesties Justices . . . or elsewhere, by Night or by Day, in Fear or Affray of Their Majesties Liege People." 1692 Mass. Laws ch. 18, § 6. More than one hundred years later, Massachusetts reenacted the law as a state. 1795 Mass. Laws ch. 2. By 1818, it was "well known to be an offence against law to ride or go armed with . . . firelocks, or other dangerous weapons," subjecting a person to arrest. The Salem Gazette, June 2, 1818, at 4, *quoted in* Patrick J. Charles, *The Faces of the Second Amendment Outside the Home: History Versus Ahistorical Standards of Review*, 60 Clev. St. L. Rev. 1, 33 n.176 (2012).

In 1836, Massachusetts revised its law to permit public carry of weapons if a person reasonably feared injury to person or property. The statute provided:

> If any person shall go armed with a dirk, dagger, sword, pistol, or other offensive and dangerous weapon, without reasonable cause to fear an ass[au]lt or other injury, or violence to his person, or to his family or property, he may, on complaint of any person having reasonable cause to fear an injury, or breach of the peace, be required to find sureties for keeping the peace, for a term not exceeding six months, with the right of appealing as before provided.

1836 Mass. Laws ch. 134, § 16. Failure to comply with the surety requirement could lead to imprisonment for up to six months. *See id.* § 6. Thus began the "Massachusetts model" of public-carry regulation that later spread widely to other states. Saul Cornell, *The Right to Carry Firearms Outside the Home: Separating Historical Myths from Historical Realities*, 39 Fordham Urban L.J. 1695, 1719-25 (2012); *see also id.* at 1722 & n.141 (collecting state laws patterned after Massachusetts's 1836 law).

In 1906, Massachusetts again amended its public-carry law, creating the licensing scheme that exists in the same essential form today. *See* 1906 Mass. Acts ch. 172, §§ 1-2 (providing that local officials "may" issue a license to carry "a loaded pistol or revolver . . . if it appears that the applicant has good reason to fear an injury to his person or property, and that he is a suitable person to be so licensed" and imposing criminal penalties for carrying without a license). And in 1919, Massachusetts broadened the permitted bases for obtaining a license to carry in public to include not only good reason to fear injury to person or property, but also for "any other proper purpose." 1919 Mass. Acts ch. 207, § 1.

2. Under the Massachusetts licensing scheme as it continues today, individuals must obtain a license to carry a "firearm" in public. A "firearm" is "a pistol, revolver or other weapon of any description, loaded or unloaded, from which a shot or bullet can be discharged and of which the length of the barrel or barrels is less than 16 inches[.]" Mass. Gen. Laws ch. 140, § 121. The statute distinguishes a "firearm" from a "rifle" or "shotgun." *Id.* Public carry of lawful rifles or shotguns, as defined, does not require a

separate license to carry in Massachusetts; for these weapons, public carry is permitted for all holders of a required identification card, which the licensing authority "shall issue" to any applicant who is not a "prohibited person" (defined to include, for example, persons under 15 years of age and persons convicted of certain crimes). *Id.* § 129B(1); *see id.* § 129B(6); *see also id.* § 131(a).

Licenses to carry firearms are issued by the local "licensing authority," defined as the municipality's police chief or the board or officer having control of the police, or their designee. *Id.* § 121. The license permits the holder to purchase, rent, lease, borrow, possess, and carry "firearms, including large capacity firearms, and feeding devices and ammunition therefor, for all lawful purposes, subject to such restrictions relative to the possession, use or carrying of firearms as the licensing authority deems proper[.]" *Id.* § 131(a). A person holding a license can carry a loaded firearm in public in either a concealed or open manner. *See id.* Upon application, the licensing authority "may issue" a license to carry in public if it appears that the applicant has "good reason to fear injury to the applicant or the applicant's property or for any other reason, including the carrying of firearms for use in sport or target practice only, subject to the restrictions expressed or authorized under this section." *Id.* § 131(d).[1]

[1] In order to issue a license, the licensing authority must also determine that the applicant is not a "prohibited person" (defined to include, for example, felons and persons under 21 years of age). Mass. Gen. Laws ch. 140, § 131(d). The licensing authority may also deny an application if an applicant is "unsuitable" for "specific reasons" given to the applicant in writing and based on

License holders who violate any restrictions on their licenses may have their licenses suspended or revoked, and may also be subject to a fine of up to $10,000. *Id.* § 131(a). Carrying a firearm in public wholly without a license is punishable by imprisonment for at least 18 months, *id.* ch. 269, § 10(a), but persons with licenses are not subject to this criminal provision. *Id.*; *id.* ch. 140, § 131(a).

Judicial review of the denial of a license, or of the imposition of restrictions upon a license, is available in state court. *Id.* § 131(f).

3. Each of the individual petitioners applied to their respective licensing authority—the police chief of Boston or Brookline—for an unrestricted license to carry a handgun in public. Pet. App. 9a-10a. In implementing the statute's "good reason to fear injury" requirement, both police chiefs require an applicant to articulate an individualized need for self-defense in order to receive an unrestricted license to carry a firearm in public; in the absence of such individualized need, these licensing authorities will issue licenses with restrictions for particular activities, such as hunting, target shooting, and employment. *Id.*[2] None of the petitioners "tried to show that his or her fear of injury is in any way distinct from that of the general population," *id.*

"reliable and credible information" suggesting the applicant "may create a risk to public safety" if issued a license. *Id.* The "prohibited person" and "unsuitable" criteria are not at issue in this case, as petitioners acknowledge. *See* Pet. 5.

[2] As the First Circuit noted, implementation of the licensing statute by the police chiefs of Boston and Brookline is "not materially different" for purposes of this case. Pet. App. 9a.

at 10a, and thus none had shown "good reason to fear injury to the applicant or the applicant's property" entitling the applicant to an unrestricted license under Mass. Gen. Laws, ch. 140, § 131(d), as implemented in Boston and Brookline. Accordingly, each petitioner was issued a license permitting the holder to keep and carry the firearm for any lawful purpose in the home and to carry it in public for specified purposes, such as target practice, hunting, sporting, and employment. Pet. App. 7a-10a.

Petitioners filed this lawsuit against the Boston and Brookline police chiefs, claiming that their refusals to issue unrestricted licenses to carry to applicants who lack a "good reason to fear injury" violated the Second Amendment. *Id.* at 93a-112a. The Commonwealth of Massachusetts intervened in the case to defend the constitutionality of the licensing statute. *Id.* at 11a, 38a. On cross-motions for summary judgment, the District Court granted summary judgment to the defendants. *Id.* at 37a-76a.

The First Circuit affirmed. *Id.* at 1a-36a. The court began its analysis with this Court's holding in *District of Columbia v. Heller*, 554 U.S. 570 (2008), that "the Second Amendment protects the right of an individual to keep and bear arms (unconnected to service in the militia)." Pet. App. 15a-16a (citing 554 U.S. at 592). But, the court observed, "'the right secured by the Second Amendment is not unlimited' and thus does not protect 'a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose' or 'for any sort of confrontation.'" *Id.* at 17a (quoting *Heller*, 554 U.S. at 595, 626). The court noted that, since *Heller* was decided, the courts of appeals have uniformly adopted

a two-step framework for analyzing Second Amendment claims. *Id.* at 18a (collecting cases). Finding that the First Circuit's previous decisions were consistent with this framework, the court expressly adopted it as well. *Id.* at 19a & n.4.

Under this framework, the court first examined whether the municipalities' implementation of Massachusetts's licensing statute burdens conduct that falls within the scope of the Second Amendment. The court explained that this is a "backward-looking inquiry, which seeks to determine whether the regulated conduct was understood to be within the scope of the right at the time of ratification." *Id.* at 18a (internal quotation marks omitted). Canvassing the relevant history, the court found that "states often disagreed as to the scope of the right to bear arms" in public. *Id.* at 20a (citation omitted). The court noted that "[c]ourts that have found the history conclusive relied primarily on historical data derived from the antebellum South." *Id.* (citations omitted). But the court found it "unconvincing" to argue that practices in the antebellum South reflected a "national consensus" protecting public carriage of firearms, since those practices conflicted with Massachusetts's tradition (subsequently followed by numerous other states), which included a "good cause" requirement starting in 1836. *Id.* In light of evidence showing that the States have historically differed in their public-carry regulations, the court "proceed[ed] on the assumption that the Boston and Brookline policies burden the Second Amendment right to carry a firearm for self-defense." *Id.* at 21a.

The court then turned to the second stage of the analysis, determining and applying the appropriate

level of scrutiny. Following cases from its sister circuits, the court concluded that the level of scrutiny should 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 (collecting cases). The court found that "the right to self-defense . . . is at its zenith inside the home," where "families reside"; where people "keep their most valuable possessions" and are "at their most vulnerable"; and where the protections of "police officers, security guards, and the watchful eyes of concerned citizens" are "much less effective" to "mitigate threats." *Id.* at 24a-25a. Accordingly, as *Heller* recognized, "the home is where 'the need for defense of self, family, and property is most acute.'" *Id.* at 24a (quoting 554 U.S. at 628). By contrast, the Second Amendment right is "more circumscribed outside the home," where "public safety interests often outweigh individual interests in self-defense." *Id.* at 25a (citation omitted). Finding "near unanimous preference for intermediate scrutiny" among the courts of appeals in adjudicating similar claims, the court agreed that intermediate scrutiny was the appropriate standard. *Id.* at 26a-27a (citation omitted).

The court then concluded that the defendants had met their burden under this standard. *Id.* at 28a-36a. Recognizing that appropriate deference to the Legislature's predictive judgments about the efficacy of its policy choices "should not be confused with blind allegiance," the court examined whether there was a "fit between the asserted governmental interests and the means chosen by the legislature to advance those interests." *Id.* at 29a. The court began by observing that the challenged licensing scheme does not infringe

on the "Second Amendment right of a citizen to keep arms in his home for the purpose of self-defense." *Id.* at 30a. And although the scheme imposes limits on public carry of firearms, the law "strike[s] a balance," allowing petitioners to carry outside the home for specified purposes (such as hunting, target shooting, and employment), and permitting other individuals to carry without restriction in public based on a "heightened need to carry firearms for self-defense." *Id.* The court thus rejected petitioners' characterization of the licensing regime as creating "a total ban on the right to public carriage of firearms" and contrasted it with "markedly" more restrictive regimes struck down by some other courts. *Id.* at 30a-31a.

Examining this regime, the court found that the defendants had demonstrated 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. Research shows that states with more comprehensive public-carry regulations "experience significantly lower rates of gun-related homicides and other violent crimes," the court explained. *Id.* at 31a-32a (collecting citations). The court described evidence that "gun owners are more likely to be the victims of gun violence when they carry their weapons in public," and that there is a "credible concern" that citizens using firearms for self-defense in public might miss their mark, creating a "deadly risk to innocent bystanders." *Id.* at 32a & n.5. And the court recognized other appellate courts' inquiries into similar "good reason" laws and their conclusions that such laws "are substantially related to the promotion of public safety and the prevention of

crime." *Id.* at 32a-33a (collecting cases). These courts, the First Circuit noted, have cited evidence that increasing the prevalence of handguns in public would increase the availability of firearms to criminals via theft, increase the likelihood that confrontations between individuals turn deadly, and increase the possibility of otherwise-routine encounters between citizens and the police becoming violent. *Id.* at 33a.

The court ultimately concluded that the defendants had adduced evidence of "considerable force" that was "sufficient to show a substantial relationship between the challenged regime and important governmental interests," notwithstanding the countervailing submissions by petitioners and their *amici* regarding the claimed deterrent effect and self-defense benefits of increased firearm presence in public. *Id.* at 35a-36a. This "measured" licensing regime represented a "reasoned attempt to reduce the risks of gun violence on public streets," "tak[ing] account of the heightened needs of some individuals to carry firearms for self-defense" and leaving "room for public carrying by those citizens who can demonstrate good reason to do so." *Id.* (internal quotation marks omitted). Accordingly, Massachusetts's statute, as implemented by the two licensing authorities, comported with the Second Amendment. *Id.*

REASONS FOR DENYING THE PETITION

Petitioners seek to invalidate a licensing scheme that has existed in Massachusetts in the same essential form since 1906 and that descends from state laws dating back to 1692. Petitioners claim that the lower courts are divided over how to analyze such laws under this Court's decision in *Heller*. But this supposed division is overstated, with the lower courts overwhelmingly agreeing on their approach to evaluating public-carry regulations. The putative split is based on a single outlier, a divided decision from the D.C. Circuit that is in strong tension with that circuit's own precedent—tension that the D.C. Circuit can itself resolve without this Court's intervention. Moreover, the First Circuit's decision is correct: it is faithful to this Court's precedent interpreting the Second Amendment, accords with a longstanding historical tradition of closely regulating the carriage of firearms in public, and appropriately respects the States' continuing authority to pursue their compelling interests in public safety and crime prevention through measured gun licensing laws. The petition should therefore be denied.

I. Petitioners' Claim of an Entrenched Split Is Overstated.

Contrary to petitioners' contention, Pet. 11, the lower courts are not "intractably divided" over the constitutionality of "good cause" licensing laws under the Second Amendment.[3] The lower courts have

[3] Although the petition purports to present a second question—"[w]hether the Second Amendment protects the right to carry a firearm outside the home for self-defense"—the First Circuit did not rule against petitioners on this point. Indeed, the

settled on a consistent approach, based on this Court's precedent, to both public-carry licensing regimes specifically, and gun regulations generally.

In *Heller*, this Court held that a "ban on handgun possession in the home violates the Second Amendment, as does [a] prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense." 554 U.S. at 635. The Court explained that "home [is] where the need for defense of self, family, and property is most acute," and therefore, the Second Amendment "elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Id.* at 628, 635. The Court further clarified that, "[l]ike most rights, the right secured by the Second Amendment is not unlimited" and is "not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Id.* at 626. "For example, the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues." *Id.* Moreover, the Court cautioned, "nothing in [its] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places

---

court interpreted *Heller* "as implying that the right to carry a firearm for self-defense guaranteed by the Second Amendment is not limited to the home" and proceeded accordingly. Pet. App. 21a. Moreover, the petition does not allege a distinct split on that question. *See* Pet. 11-13. Just as the lower courts' broad consensus on the constitutionality of "good cause" licensing schemes does not warrant this Court's review, so too is review of the "outside the home" question unnecessary.

such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *Id.* at 626-27. And these were merely "examples" of "presumptively lawful regulatory measures"; the Court's list did "not purport to be exhaustive." *Id.* at 627 n.26. The Court "repeat[ed] those assurances" in *McDonald v. City of Chicago*, 561 U.S 742, 786 (2010), in holding that the Second Amendment applied against the States.

In the years since *Heller* and *McDonald*, the lower courts have been presented with a number of challenges to "good cause" public-carry licensing regimes similar to the one challenged here, and the courts' decisions are broadly consistent. *See Kachalsky v. County of Westchester*, 701 F.3d 81, 100-01 (2d Cir. 2012) (upholding New York's "proper cause" requirement for unrestricted license), *cert. denied*, 569 U.S. 918 (2013); *Drake v. Filko*, 724 F.3d 426, 440 (3d Cir. 2013) (upholding New Jersey's "justifiable need" requirement for firearms license), *cert. denied*, 572 U.S. 1100 (2014); *Woollard v. Gallagher*, 712 F.3d 865, 881 (4th Cir.) (upholding Maryland's "good and substantial reason" requirement for license in Maryland), *cert. denied*, 571 U.S. 972 (2013); *Peruta v. County of San Diego*, 824 F.3d 919, 924 (9th Cir. 2016) (en banc) (upholding California's "good cause" requirement to obtain license to carry concealed firearm in public), *cert. denied*, 135 S. Ct. 1995 (2017); *see also Moore v. Madigan*, 702 F.3d 933, 940 (7th Cir. 2012) (noting, in striking down ban, that "Illinois is the *only* state that maintains a flat ban on carrying ready-to-use guns outside the home," and contrasting Illinois with States like New York and Massachusetts, which

regulate but do not ban public carrying of firearms (emphasis in original)).

The consistency of these decisions reflects a more general doctrinal consensus that has emerged following this Court's guidance in *Heller*. The lower courts have adopted a two-step approach: first asking whether the law in question burdens conduct within the Second Amendment's scope, looking to history, tradition, and this Court's precedent; and second, if the law does impose such a burden, applying a level of scrutiny commensurate with the extent to which the law burdens the right. *See, e.g.*, Pet. App. 18a-28a; *Kachalsky*, 701 F.3d at 89-97; *Drake*, 724 F.3d at 429-30; *Woollard*, 712 F.3d at 874-75; *National Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, and Firearms*, 700 F.3d 185, 194-95 (5th Cir. 2012); *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012); *Ezell v. City of Chicago*, 651 F.3d 684, 701-04 (7th Cir. 2011); *United States v. Chovan*, 735 F.3d 1127, 1136-37 (9th Cir. 2013); *United States v. Reese*, 627 F.3d 792, 800-01 (10th Cir. 2010); *GeorgiaCarry.org, Inc. v. Georgia*, 687 F.3d 1244, 1260 n.34 (11th Cir. 2012); *Heller v. District of Columbia*, 670 F.3d 1244, 1252 (D.C. Cir. 2011) ("*Heller II*"). And the lower courts have also overwhelmingly applied intermediate scrutiny to laws that do not burden the core Second Amendment right of law-abiding citizens to armed self-defense in the home. *See Tyler v. Hillsdale County Sheriff's Dep't*, 837 F.3d 678, 692 (6th Cir. 2016) (en banc) (noting a "near unanimous preference for intermediate scrutiny" among the courts of appeals); *see also, e.g.*, *Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121, 1126 (10th Cir. 2015) (describing why "[i]ntermediate scrutiny makes sense" for public-carry regulations); *United States v. Masciandaro*, 638 F.3d

458, 471 (4th Cir. 2011) ("Were we to require strict scrutiny in circumstances such as those presented here, we would likely foreclose an extraordinary number of regulatory measures, thus handcuffing lawmakers' ability to prevent armed mayhem in public places, and depriving them of 'a variety of tools for combating that problem.'" (quoting *Heller*, 554 U.S. at 636; other citations and internal quotation marks omitted)).[4]

The single case upon which petitioners rest their claim of a split of authority is the D.C. Circuit's divided decision in *Wrenn v. District of Columbia*, 864 F.3d 650 (2017), which struck down a law that limited concealed-carry licenses for handguns to applicants showing a "good reason to fear injury to [their] person or property" or "any other proper reason for carrying a pistol." *Id.* at 655. That decision is distinguishable from the decision below and does not create a split warranting this Court's attention.

First, *Wrenn* addressed a licensing scheme that was far more restrictive than Massachusetts's statute as implemented by the licensing authorities here. In *Wrenn*, the plaintiffs' failure to demonstrate a "special need for self-defense" meant that they were denied

---

[4] In addition to the federal courts of appeals, many state courts of last resort have similarly adopted this two-step approach or have applied intermediate scrutiny in circumstances consistent with the approach. *See, e.g.*, *State v. DeCiccio*, 105 A.3d 165, 187, 205 (Conn. 2014); *Norman v. State*, 215 So.3d 18, 35-38 (Fla. 2017); *Hertz v. Bennett*, 751 S.E.2d 90, 93-94 (Ga. 2013); *People v. Chairez*, 104 N.E.3d 1158, 1167-75 (Ill. 2018); *New Mexico v. Murillo*, 347 P.3d 284, 288 (N.M. 2015); *People v. Hughes*, 1 N.E.3d 298, 302 (N.Y. 2013); *Oregon v. Christian*, 307 P.3d 429, 444 (Or. 2013); *City of Seattle v. Evans*, 366 P.3d 906, 923 (Wash. 2015).

altogether a license to carry a handgun in public. *Id.* at 655-56. Here, in contrast, all of the petitioners were granted licenses to carry firearms in public for specified purposes; their inability to demonstrate a particularized need for self-defense meant only that they were not granted wholly unrestricted licenses to carry firearms in public. Pet. App. 9a-10a. In other words, the scheme in *Wrenn* imposed a greater burden on those plaintiffs' Second Amendment rights.

Wrenn is, moreover, inconsistent with intra-circuit precedent—the sort of "conflict" that should be addressed by the court of appeals in the first instance. *See Wisniewski v. United States*, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties."). The D.C. Circuit has repeatedly employed the same two-step approach to firearms regulations as the other courts of appeals. *See Schrader v. Holder*, 704 F.3d 980, 988-91 (2013) (upholding federal law banning certain common-law misdemeanants from possessing a firearm under intermediate scrutiny); *Heller II*, 670 F.3d at 1252-55, 1260-64 (upholding District's basic handgun-registration requirements and ban on assault weapons and large-capacity magazines under two-step framework and intermediate scrutiny). *Wrenn* eschewed this approach, broadly holding that "the individual right to carry common firearms beyond the home for self-defense—even in densely populated areas, even for those lacking special self-defense needs—falls within the core of the Second Amendment's protections," and then opting for per se invalidation of the law, without regard to its historical provenance or the fit between the government's objective and means. 864 F.3d at 661. The decision fails even to mention *Schrader*, let alone distinguish

it. *See id.* Such intra-circuit tension can and should be resolved by the D.C. Circuit itself, particularly where *Wrenn* is out of step with the widespread consensus that has developed among the lower courts in evaluating similar "good cause" licensing schemes and firearms laws more generally.

Accordingly, the petition does not present a question warranting this Court's review.

II. The First Circuit's Decision Is Correct.

The Court should deny the petition for the further reason that the First Circuit's decision is correct. Given the long history of Massachusetts's public-carry regime, it comports with the Second Amendment. Moreover, it meets the appropriate level of means-ends scrutiny. It neither burdens the core right to keep and bear arms for self-defense in the home, nor amounts to a ban on public carry; petitioners themselves were issued licenses to carry their firearms in public for various purposes. Accordingly, intermediate scrutiny should apply. And this reasonable scheme meets that standard.

A. The History of Massachusetts's Longstanding Public-Carry Law Demonstrates That It Is Consistent with the Second Amendment.

The licensing statute, and the local licensing authorities' challenged implementation of it, are part of a "longstanding" tradition of regulating public carriage in Massachusetts that makes the policies "presumptively lawful" under the Second Amendment. *Heller*, 554 U.S. at 626-27 & n.26. Indeed, this history compels the conclusion that

Massachusetts's law does not violate the Second Amendment.

Massachusetts's firearms-licensing scheme has existed in the same essential form for more than a century, since the Legislature in 1906 granted local officials discretion to issue a license to carry a firearm in public and required a showing that the applicant had "good reason to fear an injury to his person or property." 1906 Mass. Acts ch. 172, § 1. As such a longstanding statute, it is presumptively lawful on this basis alone. *See Heller*, 554 U.S. at 605-19 (looking to historical materials from after the ratification of the Second Amendment in 1791 through the end of the 19th century, since such materials shed light on the public understanding of the amendment); *id.* at 626-27 & n.26 (identifying as "longstanding" and thus "presumptively lawful" laws such as felon-in-possession bans that were first enacted in the 20th century); *Heller II*, 670 F.3d at 1272 (Kavanaugh, J., dissenting) (endorsing the examination of post-ratification tradition in understanding the scope of the Second Amendment); *United States v. Skoien*, 614 F.3d 638, 641 (7th Cir. 2010) (en banc) ("[E]xclusions [from the Second Amendment] need not mirror limits that were on the books in 1791."); *National Rifle Ass'n,* 700 F.3d at 196 ("*Heller* considered firearm possession bans on felons and the mentally ill to be longstanding, yet the current versions of these bans are of mid-20th century vintage.").

Following *Heller*, the courts of appeals have appropriately recognized as presumptively constitutional other states' similarly longstanding laws. *See, e.g.*, *Drake*, 724 F.3d at 432-34 (New

Jersey's "justifiable need" standard for obtaining license to carry in public is "longstanding" and thus "presumptively lawful" since it dates back to 1924); *Kachalsky*, 701 F.3d at 90 n.11 ("New York's proper cause requirement is similarly 'longstanding'—it has been the law in New York since 1913."); *Heller II*, 670 F.3d at 1253-54 (handgun registration laws are presumptively lawful, citing state laws from 1910s and later; regulation "is longstanding in American law, accepted for a century in diverse states and cities and now applicable to more than one fourth of the Nation by population").[5]

But Massachusetts's regulation of carrying firearms in public goes back even further than the licensing scheme enacted in 1906. Throughout the 18th and 19th centuries, a person could be fined, required to post a bond, arrested, or imprisoned for carrying a firearm in public, bringing a loaded weapon into a house or building in Boston, or engaging in unauthorized parading or assembling with others in public with arms. *See, e.g.*, *supra* at 2-3 (discussing 1692 Mass. Laws ch. 18, § 6; 1795 Mass. Laws ch. 2; and 1836 Mass. Laws ch. 134, §§ 6, 16); Act of May 28, 1746, ch. X, Acts and Laws of Mass. Bay, p. 208 (prohibiting "discharg[ing] any Gun or Pistol charged with Shot or Ball in the Town of *Boston*"); An Act in

---

[5] Eight states beyond Massachusetts—collectively representing over a quarter of the nation's population—have similar "may issue" licensing laws. Michael Siegel *et al.*, *Easiness of Legal Access to Concealed Firearm Permits & Homicide Rates in the United States*, 107 Am. J. Pub. Health 1923, 1924 tbl.1 (2017) (identifying "may issue" states), https://tinyurl.com/y38hxsru; *see also* U.S. Census Bureau, 2018 National and State Population Estimates (Dec. 19, 2018), https://tinyurl.com/y5tza5zs.

Addition to the several Acts already made for the prudent Storage of Gun-Powder within the Town of *Boston,* ch. XIII, 1783 Mass. Acts pp. 218-219 (imposing fine on "any Person" who "shall take into any Dwelling-House, Stable, Barn, Out-house, Warehouse, Store, Shop, or other Building, within the Town of *Boston*, any . . . Fire-Arm, loaded with, or having Gun-Powder").

These and similar laws in Massachusetts co-existed with a provision in the 1780 Massachusetts Constitution that "[t]he people have a right to keep and to bear arms for the common defence," Mass. Const. Pt. I, Art. XVII, which this Court in *Heller* identified as a close analogue and predecessor to the Second Amendment, 554 U.S. at 601-02. *See Commonwealth v. Murphy*, 44 N.E. 138, 138 (Mass. 1896) (defendant's conviction for unauthorized parading with firearms in public, in violation of Mass. St. 1893, ch. 367, § 124, did not violate state constitutional right to keep and bear arms); Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 Fordham L. Rev. 487, 506-12 (2004) (describing early Massachusetts laws regulating firearms).

The historical distinction between a robust right to keep and carry arms in the home and the close regulation of carrying arms in public accords with the home's privileged place in the law. At common law, individuals had a near-absolute right to self-defense in the home, and were even permitted to use lethal force if necessary, under the "castle" doctrine. *See, e.g.*, *People v. Tomlins*, 107 N.E. 496, 497 (N.Y. 1913) (Cardozo, J.) ("It is not now and never has been the law that a man assailed in his own dwelling is bound

to retreat."). In contrast, individuals had a duty to retreat—"to the wall" if possible—when confronted with aggression outside the home. *Compare Allen v. United States*, 164 U.S. 492, 497-98 (1896) (affirming jury instruction that homicide defendant had duty to retreat "as far as he can" before killing assailant outside the home), *with Beard v. United States*, 158 U.S. 550, 559-60 (1895) (defendant had no duty to retreat while on the premises of his house).[6]

Citizens in Massachusetts thus have never enjoyed the near-unfettered right to carry firearms in public that petitioners seek here—and have no such absolute right under the Second Amendment. As *Heller* itself stated, the Second Amendment "codified a *pre-existing* right," 554 U.S. at 592 (emphasis in original), which would have included the common-law understanding of, and exceptions to, the right. *Id.* at 592-95, 626-27. "Constitutional rights are enshrined with the scope they were understood to have when the people adopted them[.]" *Id.* at 634-35; *see, e.g.*, *Kachalsky*,

---

[6] The home is also a special place in other aspects of constitutional jurisprudence. *See Carey v. Brown*, 447 U.S. 455, 471 (1980) ("The State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society."); *United States v. Orito*, 413 U.S. 139, 142 (1973) (noting that "[t]he Constitution extends special safeguards to the privacy of the home" and collecting cases). Some constitutional guarantees, like the Third and Fourth Amendments, refer explicitly to the home. And the Fourth Amendment's protection against unreasonable searches and seizures, for example, provides heightened protection in the home. *See, e.g.*, *Collins v. Virginia*, 138 S. Ct. 1663, 1669-73 (2018) (declining to extend automobile exception to the warrant requirement to the curtilage of the home, because doing so would "undervalue the core Fourth Amendment protection afforded to the home").

701 F.3d at 96 (noting the "historical prevalence of the regulation of firearms in public" in concluding that New York's "proper cause" requirement is constitutional).

Accordingly, because Massachusetts has licensed public carrying of firearms in the same way since 1906, and has closely regulated public carrying since before the Founding, the licensing statute is part of a "longstanding" tradition of regulation that is consistent with the Second Amendment.

B. The Licensing Regime Also Satisfies Intermediate Scrutiny.

The court below correctly concluded that, insofar as the challenged licensing regime burdened rights protected by the Second Amendment, it was subject to intermediate scrutiny and met that standard. Pet. App. 22a-36a.

First, the court correctly concluded that intermediate scrutiny should apply, because the statute as implemented by the licensing authorities does not burden "the right of law-abiding, responsible citizens to use arms in defense of hearth and home," which the Second Amendment "elevates above all other interests," *Heller*, 554 U.S. at 635. Pet. App. 22a-28a. The law places no burden on the rights of license holders to keep and carry a firearm for self-defense in the home, where "the need for defense of self, family, and property is most acute." *Heller*, 554 U.S. at 628. Even outside the home, where the right of individual self-defense was historically more limited and public-safety interests become more salient, *see Masciandaro*, 638 F.3d at 470, the law does not ban carriage of firearms for self-defense.

Rather, as implemented by the licensing authorities, it requires applicants to show a specific "good reason to fear injury" to obtain an unrestricted license to carry a firearm in public. Pet. App. 9a-10a; *see* Mass. Gen. Laws ch. 140, § 131(d); *Kachalsky*, 701 F.3d at 98 (noting similar features of New York's "proper cause" requirement and finding them "oriented to the Second Amendment's protections" for self-defense). Applicants who cannot make such a showing, like petitioners, can and do still obtain licenses to carry firearms in public for specific purposes. Pet. App. 9a-10a. In these circumstances, intermediate scrutiny is warranted, as it "appropriately places the burden on the government to justify its restrictions, while also giving governments considerable flexibility to regulate gun safety." *Bonidy*, 790 F.3d at 1126; *accord Masciandaro*, 638 F.3d at 471; *see also Ezell*, 651 F.3d at 706-08 (borrowing from this Court's free-speech and election-law cases in adopting a tiers-of-scrutiny approach to the Second Amendment, applying intermediate or strict scrutiny depending on whether the law burdens the core of the constitutional right, and the severity of the burden).

Second, applying intermediate scrutiny, the First Circuit correctly found the requisite fit "between the restrictions imposed on the public carriage of firearms and the indisputable governmental interests in public safety and crime prevention." Pet. App. 31a. As the court observed, the purpose of the licensing statute is "to promote public safety and to prevent crime," and "to prevent the temptation and the ability to use firearms to inflict harm, be it negligently or intentionally, on another or on oneself." Pet. App. 28a (citing *Chardin v. Police Comm'r of Boston*, 989 N.E.2d 392, 403 (Mass. 2013); *Commonwealth v. Seay*,

383 N.E.2d 828, 833 (Mass. 1978); and *Commonwealth v. Lee*, 409 N.E.2d 1311, 1315 (Mass. App. Ct. 1980)). And there can be no doubt that Massachusetts has important, indeed compelling, interests in public safety and crime prevention. *See Hodel v. Virginia Surface Min. & Reclamation Ass'n*, 452 U.S. 264, 300 (1981) ("Protection of the health and safety of the public is a paramount governmental interest[.]"); *see also United States v. Salerno*, 481 U.S. 739, 750 (1987) (state's interest in preventing crime is "compelling").

In assessing the "fit" between these ends and the challenged licensing regime under intermediate scrutiny, this Court's decisions require "a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served." *Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989) (citations and internal quotation marks omitted). A court must also "accord substantial deference to the predictive judgments" of the legislature. *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997) ("*Turner II*"). States may not rely on "mere speculation or conjecture," *Edenfied v. Fane*, 507 U.S. 761, 770-71 (1993), but may justify restrictions based on empirical evidence, "studies and anecdotes pertaining to different locales," and "history, consensus, and 'simple common sense.'" *Florida Bar v. Went for It, Inc.*, 515 U.S. 618, 628 (1995) (quoting *Burson v. Freeman*, 504 U.S. 191, 211 (1992)). Courts' obligation is "'to assure that, in formulating its judgments, [the legislature] has drawn reasonable inferences based on substantial evidence.'" *Turner II*, 520 U.S. at 195 (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 666 (1994)).

Here, to achieve its compelling public-safety and crime-prevention purposes, Massachusetts's statute provides that public-carry licenses for firearms may be issued to applicants who have "good reason to fear injury to the applicant or the applicant's property or for any other reason, including the carrying of firearms for use in sport or target practice only." Mass. Gen. Laws ch. 140, § 131(d). As implemented by the challenged licensing authorities, the regime is far from a categorical ban on public carry of firearms (and, further, exempts rifles and shotguns from the requirement to obtain such a license, *see supra* at 3-4). Petitioners themselves were each issued a license to carry their firearms in public, for particular purposes, including hunting, target shooting, and employment. Pet. App. 9a-10a. More generally, in Boston, from January 2015 through July 2017, 43% of the 3,684 licenses issued were wholly unrestricted, while 57% were issued for particular activities. *Id.* at 48a. In Brookline, during the same period, 35.6% of the 191 licenses issued were wholly unrestricted. *Id.* at 44a-45a.

Empirical evidence strongly supports the efficacy of Massachusetts's public-carry licensing regime in serving its public-safety and crime-prevention interests. Massachusetts consistently has the lowest or near the lowest rate of gun-related deaths among the 50 states annually. *See* Centers for Disease Control & Prevention, National Center for Health Statistics, Firearm Mortality by State (2017).[7] And research bears out that "may issue" states like Massachusetts, which vest licensing authorities with discretion in issuing licenses, experience less violent

[7] https://tinyurl.com/y9h9zdr2.

crime as compared to "shall issue" states, where the government must issue a license provided the applicant is not a prohibited person. Siegel, *supra* note 5, at 1923-29 (examining data spanning 1991 to 2015 and finding statistically significant differences in total homicide rates, firearm homicide rates, and handgun homicide rates); *see also, e.g.*, Cassandra K. Crifasi *et al.*, *Association Between Firearm Laws & Homicide in Urban Counties*, J. Urban Health (May 21, 2018) (concluding that licensing requirement for firearms was associated with a 14% decrease in firearm homicide in large, urban counties); John Donohue *et al.*, *Right-to-Carry Laws & Violent Crime: A Comprehensive Assessment Using Panel Data & A State-Level Synthetic Controls Analysis* 3, 42 (Nat'l Bureau of Econ. Research, Working Paper No. 23510) (Oct. 9, 2018) (concluding that adoption of shall-issue laws resulted in a statistically significant 13-15% increase in violent crime in the 10 years after adoption, and that "[t]here is not even the slightest hint in the data that [shall-issue] laws reduce violent crime").[8]

Courts evaluating cognate laws have recognized the broad empirical support for the laws' salutary effects on public safety and crime prevention. *See, e.g.*, *Peruta*, 824 F.3d at 944 (Graber, J., concurring) ("Several studies suggest that 'the clear majority of states' that enact laws broadly allowing concealed carrying of firearms in public 'experience *increases* in violent crime, murder, and robbery when [those] laws are adopted.'" (citations omitted; emphasis in original)); *Woollard*, 712 F.3d at 879-80 (relying in part on empirical evidence that Maryland's law

[8] http://www.nber.org/papers/w23510.

decreased the availability of handguns to criminals via theft; reduced the likelihood that confrontations between individuals turn deadly; curtailed the presence of handguns during routine police-citizen encounters; reduced the number of "handgun sightings" that must be investigated by police; and facilitated the identification of those persons carrying handguns who pose a menace); *Kachalsky*, 701 F.3d at 99 (noting "studies and data demonstrating that widespread access to handguns in public increases the likelihood that felonies will result in death and fundamentally alters the safety and character of public spaces"); *Skoien*, 614 F.3d at 642 ("[G]uns are about five times more deadly than knives, given that an attack with some kind of weapon has occurred." (citing Franklin E. Zimring, *Firearms, Violence, and the Potential Impact of Firearms Control*, 32 J.L. Med. & Ethics 34 (2004) (collecting studies))).

Other evidence shows that regulating public carriage of handguns can prevent crimes by, and against, law-abiding licensed citizens. "Nationwide, since May 2007, concealed-carry permit holders" with no prior criminal record "have shot and killed at least 17 law enforcement officers and more than 800 private citizens[.]" *Peruta*, 824 F.3d at 943 (Graber, J., concurring). Moreover, handguns are often stolen and used against the carrier or to commit other crimes; "criminals often target victims '*precisely because* they possess handguns.'" *Woollard*, 712 F.3d at 879 (emphasis in original).[9] Lawful gun owners are more

[9] Every year, hundreds of thousands of guns are stolen from their lawful owners. *See, e.g.*, U.S. Dep't of Justice, Bureau of Justice Statistics, *Firearms Stolen During Household Burglaries and Other Property Crimes, 2005-2010* (Nov. 2012) (reporting that 1.4 million guns, or an annual average of 232,400, were

likely to be the *victims* of gun violence when they carry their weapons in public. *See* Charles C. Branas *et al.*, *Investigating the Link Between Gun Possession and Gun Assault*, 99 Amer. J. Pub. Health 2034 (2009) (finding Philadelphia residents were 4.46 times more likely to be shot during an assault if they were carrying a gun, and 5.45 times more likely if they had a chance to resist). And a law-abiding citizen using a firearm in lawful self-defense against an attacker may miss and hit an innocent bystander. Even New York City police officers had an average "hit rate" of only 18% during gunfights from 1998 to 2006; at close range, and when the subject did not return fire, the rates increased only to 30-37%. Bernard D. Rostker *et al.*, *Evaluation of the New York City Police Department Firearm Training and Firearm-Discharge Review Process* 14-15 (2008).[10]

Although petitioners cite studies that they claim undermine the connection between the licensing statute's means and its ends, Pet. 15, at best for petitioners, they have shown that some social scientists may "disagree about the practical effect of modest restrictions on concealed carry of firearms." *Peruta*, 824 F.3d at 944 (Graber, J., concurring). As the First Circuit correctly found, echoing its sister circuits analyzing similar laws and bodies of evidence, "[i]nstitutionally, a legislative body is better equipped

---

stolen during property crimes from 2005-10), https://www.bjs.gov/content/pub/pdf/fshbopc0510.pdf. This is probably a conservative estimate: others estimate that as many as one million guns are stolen in America every year. Ian Ayres & John J. Donohue III, *Shooting Down the "More Guns, Less Crime" Hypothesis*, 55 Stan. L. Rev. 1193, 1205 (2003).

[10] https://tinyurl.com/3olrmac.

than a court to assess the compendium of data" and "make the necessary policy judgments." Pet. App. 34a-35a. And ultimately, evidence of "considerable force" supports the efficacy of Massachusetts's law in serving its public-safety and crime-prevention objectives. *Id.* at 35a-36a; *accord Kachalsky*, 701 F.3d at 99; *Drake*, 724 F.3d at 439; *Woollard*, 712 F.3d at 876-82.

In sum, the First Circuit correctly recognized that Massachusetts's longstanding public-carry licensing regime is constitutional, including as implemented by the licensing authorities here. The law has existed in its current form for more than a century and in some form since before the Founding. It takes "a measured approach," "neither ban[ning] public handgun carrying nor allow[ing] public carrying by all firearm owners," instead "[leaving] room for public carrying by those citizens who can demonstrate good reason to do so." Pet. App. 36a (internal quotation marks omitted). And it manifestly serves the Commonwealth's compelling interests in protecting the public. *Id.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

MAURA HEALEY, Attorney General
for the Commonwealth of Massachusetts

Elizabeth N. Dewar
State Solicitor
Timothy J. Casey*
David C. Kravitz
Assistant Attorneys General
One Ashburton Place
Boston, Massachusetts 02108
timothy.casey@mass.gov
(617) 963-2043
**Counsel of Record*

May 6, 2019