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, *et al.*,

Respondents.

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

REPLY BRIEF FOR PETITIONERS

DAVID D. JENSEN
DAVID JENSEN PLLC
111 John Street
Suite 420
New York, NY 10038
(212) 380-6615
david@djensenpllc.com

DAVID H. THOMPSON
Counsel of Record
PETER A. PATTERSON
JOHN D. OHLENDORF
COOPER & KIRK, PLLC
1523 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 220-9600
dthompson@cooperkirk.com

Counsel for Petitioners

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CORPORATE DISCLOSURE STATEMENT

The disclosure statement in the petition for writ of certiorari remains accurate.

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ARGUMENT

Respondents effectively concede the urgent need for this Court's review of the questions presented. The circuit courts have split over the constitutionality of "good reason"-style restrictions on the right to bear arms: the D.C. Circuit categorically invalidated a law that is materially indistinguishable from restrictions upheld by several other circuits, including the panel below. *Wrenn v. District of Columbia*, 864 F.3d 650, 666, 668 (D.C. Cir. 2017). Boston and Brookline candidly acknowledge that "[i]t cannot be denied that the decision below stands in tension with *Wrenn*." Brief of Respondents Andrew Lipson & William G. Gross 15 (May 6, 2019) ("Cities' BIO"). And they also concede the importance of the stakes: the issue that has divided the lower courts, they note, is a "fundamental … question about firearms in American public life," and a "landmark" issue of constitutional law. *Id.* at 17. Though Respondents do their best to resist the conclusion, where the lower courts have explicitly and intractably disagreed over "so fundamental a question," *id.*, the necessity of this Court's review is undeniable.

The instant case, however, is the second-best of two possible vehicles for resolving the questions presented. Also pending before the Court is a petition in *Rogers v. Grewal*, No. 18-824, raising precisely the same questions. And *Rogers* enjoys several benefits this case lacks. *Rogers* concerns a "good reason"-type restriction that is embedded in a state statute and thus unlikely to be changed during the course of this Court's review; Respondents' policies, by contrast, could be changed at the stroke of a local official's pen,

before the Court has a chance to resolve the lower courts' disagreement. The restriction in *Rogers* is simple, unambiguous, and uniform statewide; Respondents' licensing regime is a city-by-city patchwork, which is encumbered by a variety of legal complexities that do not change the ultimate result—but *do* risk unnecessarily complicating this Court's review. And while Respondents point out that *Rogers* comes up on a motion to dismiss, there is no likelihood that the vaunted "comprehensive factual record" in this case, Cities' BIO 28, would materially affect the course of the Court's review. The constitutional flaw in both Respondents' and New Jersey's restrictions flows from the *nature and definition* of the "good reason" requirement, making an "evidence-based factual record" about "the implementation" of the standard utterly irrelevant. *Id.* And at the end of the day, the parties in *Rogers* will be able to cite the same judicial opinions, set forth the same pieces of historical evidence, and discuss the same social-science studies as the parties here—just as they have done at every stage of both cases so far.

While Respondents fail to show that this case is the superior vehicle, their briefs leave no doubt that their "good reason" requirement must be struck down. The root question is whether the Second Amendment right to bear arms is really a *right* in any meaningful sense. If Respondents truly acknowledged, as they claim, that there is a right to bear arms outside the home, they would see clearly that they cannot treat it instead as a *privilege*. The Second Amendment does not protect a mere benefit to be doled out for some approved purposes (hunting and recreational shooting) but not others (including the "core lawful

purpose of self-defense." *District of Columbia v. Heller*, 554 U.S. 570, 630 (2008)).

An ordinary, unarmed citizen who is assaulted on the streets of Boston and unable to defend herself will gain little comfort from the knowledge that the government has indulged *other* Bostonians, such as those in favored professions, to carry firearms for self-protection. One would have thought *Heller* made it sufficiently clear that the Second Amendment is not a "collective" right that may be satisfied by tolerating its exercise by a sufficient percentage of the population. No, that provision guarantees "the *individual* right to possess and carry weapons in case of confrontation." *Id.* at 592 (emphasis added). Respondents' "good reason" requirement is categorically inconsistent with that right.

1. Respondents cannot deny that the circuits have squarely and irreconcilably split over the constitutionality of "good reason"-type restrictions on the carrying of firearms outside the home. *See* Cities' BIO 15. While Massachusetts argues that the decision below is "distinguishable" from *Wrenn* because D.C.'s "good reason"-type law "was far more restrictive than Massachusetts's statute as implemented by the licensing authorities here," its attempt to reconcile the decisions is a failure. Brief in Opposition for the Commonwealth of Massachusetts 15 (May 6, 2019) ("Commonwealth's BIO"). The Commonwealth concedes that Respondents refuse to grant ordinary citizens licenses for *precisely* the reason found unconstitutional in *Wrenn*: because an ordinary citizen cannot "show that his or her fear of injury is in any way distinct from that of the general population."

Id. at 5. As the D.C. Circuit explained, such a restriction "is necessarily a total ban on most … residents' right to carry a gun in the face of ordinary self-defense needs." *Wrenn*, 864 F.3d at 666.

Respondents retort that at least ordinary citizens may carry firearms for *some* purposes, such as "target practice" or "hunting." Cities' BIO 13. This argument fundamentally fails to understand the basic nature of the Second Amendment. That provision protects "the *right* of the people to keep and bear Arms," U.S. CONST. amend. II (emphasis added), not some gratuitous privilege that the Government is free to dole out for those purposes it deems sufficiently innocuous. It therefore is no answer to say that it is permissible to ban the carrying of handguns for the core lawful purpose of self-defense so long as the carrying of handguns for other purposes is allowed. *See Heller*, 554 U.S. at 629-30. If Boston banned political speech within its borders, this Court would not entertain the justification that its residents may continue to publish works of fiction, advertise their commercial products, and talk about the Patriots, Red Sox, and Celtics. And the fact that *some* favored citizens are allowed to bear arms for self-protection does *nothing* to lessen the constitutional injury to *ordinary citizens like Petitioners*, who are flatly denied this right. The Fourth Amendment would not be satisfied so long as the Boston police only engaged in unreasonable searches of those citizens who had a merely "generalized" need for privacy; nor could Brookline excuse the imposition of a "may issue" permitting regime for religious worship by pointing out that it benevolently granted these discretionary permits to some subset of the population.

Accordingly, while Boston and Brookline argue that Petitioners' first Question Presented—whether the Second Amendment protects the right to bear arms for self-defense outside the home, *see* Pet.i—"does not warrant review," Cities' BIO 13, in reality it is *the central* question in this case. For as just shown, if Respondents really took seriously the existence of a Second Amendment *right* to carry firearms outside the home, they would be forced to acknowledge that their treatment of that right as a discretionary privilege dependent upon the good graces of government bureaucrats cannot stand. *Wrenn* recognized this basic fact about the nature of the Second Amendment right. 864 F.3d at 665-66. The cases on the other side of the split do not. Pet.App.16a-17a.

2. The urgency of this Court's review is evident from Respondents' own briefing. Where "[i]t cannot be denied" that the lower courts have irreconcilably divided over "so fundamental a question," Cities' BIO 15, 17, the matter demands this Court's immediate attention. Respondents attempt to escape this conclusion, but they do not succeed.

Respondents suggest that this Court's review is unnecessary because *Wrenn* is "inconsistent with intra-circuit precedent," Commonwealth's BIO 16, but they cannot even *agree among themselves* about the nature of the supposed inconsistency. Massachusetts claims that the tension arises because the D.C. Circuit's decision in *Heller II* adopted "the same two-step approach to firearms regulations as the other courts of appeals," while *Wrenn* "eschewed this approach." *Id.* But there is no inconsistency here, because *Heller II itself* instructed that its two-step

approach does not apply to flat bans akin to the one in *Heller*. *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1266 (D.C. Cir. 2011). *Wrenn* merely invoked and applied *Heller II*'s own exception. *Wrenn*, 864 F.3d at 666-67.

Boston and Brookline, for their part, attempt to conjure up an *entirely different* "intra-circuit divide." Cities' BIO 15. *Heller II*, they say, "recognized that regulations from the early-20th century are sufficiently 'rooted in our history' and traditions to qualify as constitutional." *Id.* Yet *Wrenn*, they complain, "did not address whether good-reason limitations are of such longstanding pedigree that they qualify as exceptions to the Second Amendment." *Id.* at 1. There is no inconsistency here, either. The fact of the matter is that *Wrenn did address*—explicitly and at length—*Heller*'s teaching that "legal regulations of possession or carrying that are 'longstanding'—including bans on possession by felons or bans on carrying near sensitive sites—reflect limits to the preexisting right." 864 F.3d at 659. And it *expressly rejected* D.C.'s contention, based on essentially the same collection of historical evidence put forward by Respondents, "that this doctrine rescues the good-reason law." *Id.*

Crucially, Judge Henderson's dissent in *Wrenn does not so much as mention* either of these supposed "inconsistencies" with D.C. Circuit precedent, *see id.* at 668-71 (Henderson, J., dissenting)—a truly shocking lapse, if the *Wrenn* decision creates "a stark intra-circuit divide," as Respondents assert, Cities' BIO 15. Nor, apparently, did *any of the other judges* on the D.C. Circuit perceive any such "inconsistencies,"

since *not one of them* requested en banc rehearing in the case. Order, *Wrenn*, Nos. 16-7025 & 16-7067 (D.C. Cir. Sept. 28, 2017). The short of it is this: *Wrenn* presents no "tension with intra-circuit precedent," and therefore the chances that the D.C. Circuit will "resolve [the issue] without this Court's intervention" are nonexistent. Cities' BIO 15; *see* Order, *Wrenn*, *supra* (unanimously denying en banc rehearing).

Respondents next argue that the Court should allow the questions presented "to further percolate," since only "a few years" have passed since "judges, scholars, and lawmakers began debating the constitutionality of good-reason laws." Cities' BIO 3, 16. But *Kachalsky* and *Moore* were both decided in 2012, and in the seven years since, the federal bench has collectively authored dozens of separate opinions analyzing the constitutionality of these laws. And while Boston and Brookline claim that the "historical scholarship" on "good reason"-type laws is "still-evolving," BIO 17, the principal secondary source they rely on is from 2012—and they cite *no* source published later than 2015. The historical scholars favored by Respondents have repeatedly filed amicus briefs supporting the constitutionality of "good reason" laws—including in the case below—and they have never claimed that they need more time for further research before opining on the issue. *See* Brief of Professors of History and Constitutional Law, *Gould v. Morgan*, No. 17-2202 (1st Cir. June 25, 2018). Respondents' suggestion that this Court must allow the direct split over the constitutionality of these laws to persist uncorrected until Professor Cornell finishes his latest law-review article cannot be taken seriously.

3. While the necessity for this Court's review of the questions presented is clear, another petition pending before the Court, in *Rogers v. Grewal*, No. 18-824, presents exactly the same questions. For several reasons, *Rogers* provides a superior vehicle for resolving them.

As an initial matter, there is a risk that if certiorari is granted, Respondents could attempt to moot this case before the Court has a chance to complete its review. New York City currently is attempting such a gambit in another Second Amendment case pending before this Court. *See* Respondents' Motion to Hold Briefing Schedule in Abeyance, *New York State Rifle & Pistol Association, Inc. v. City of New York*, No. 18-280 (U.S. Apr. 12, 2019). And because Massachusetts law grants local licensing authorities significant discretion in implementing the "good reason" requirement, the challenged special-need licensing policies exist solely at the pleasure of Respondents Lipson and Gross, the chiefs of Boston and Brookline's police departments. Pet.App.6a, 42a, 46a. Those policies thus could be altered or eliminated at the stroke of a pen by these officers or their successors (the occupants of these offices have changed three times during the appellate proceedings in this case alone). Indeed, previous challenges in Massachusetts have been repeatedly mooted by local officials changing their policies. *See* Order of Dismissal, *Davis v. Grimes*, No. 13-cv-10246 (D. Mass. June 17, 2015), Doc. 112 (Weymouth); Stipulation of Dismissal, *Batty v. Albertelli*, No.15-cv-10238 (D. Mass. Apr. 6, 2016), Doc. 45 (New Bedford); Order, *id.*, Doc. 74 (Lowell). New Jersey's "justifiable need" requirement, by contrast, is established by all

three branches of New Jersey government and could be altered only by new legislation. *See* N.J. STAT. ANN. § 2C:58-4(c); N.J. ADMIN. CODE § 13:54-2.4; *Siccardi v. State*, 284 A.2d 533, 540 (N.J. 1971).

Further, the complex nature of Respondents' licensing regime is itself a reason to prefer *Rogers* as a vehicle. In New Jersey, a single, straightforward "good reason"-type requirement applies statewide. Under Massachusetts's regime, by contrast, licensing authority is split between the state and local levels, Pet.App.6a; most jurisdictions have effectively adopted a "shall-issue" regime, *see* Affidavit of Brent Carlton ¶ 16, *Gould v. O'Leary*, No. 16-cv-10181 (D. Mass. Aug. 31, 2017), Doc. 64 (92% of licenses granted statewide are unrestricted); and even in Boston and Brookline, the special-need requirement is complicated by the fact that favored professions, such as doctors and lawyers, appear to benefit from a de facto exemption, Pet.App.9a.

Let there be no mistake: Respondents' "good reason"-style requirement is unconstitutional, as a matter of law and on its face. But the New Jersey law in *Rogers* is, too, and that law is unencumbered by complexities that could complicate, rather than facilitate, this Court's review.

Boston and Brookline suggest that *this* case would be a superior vehicle. Given that they have just labored page after page endeavoring to *avoid* this Court's review—including by (incorrectly) arguing that Respondents' regime is wholly unlike the D.C. law that gave rise to the split, Cities' BIO 1, 13-14—their suggestion should be greeted with some skepticism. Their arguments are not persuasive. They

note that "*Rogers* lacks any factual record." *Id.* at 28. But that is hardly a reason for favoring this case as a vehicle, since the constitutional difficulty with New Jersey's law—the "special-need" restriction that "necessarily" "destroys the ordinarily situated citizen's right to bear arms," *Wrenn*, 864 F.3d at 666—is plain on the face of the law.

Boston and Brookline also note that the *Rogers* decision "is nothing more than a summary affirmance based on the earlier decision in *Drake*," while the panel in this case "published a scholarly, thoughtful opinion." Cities' BIO 28. But the Court is free to benefit from the insight and analysis in the opinion below—or in any of the other lower-court opinions discussing "good reason"-type laws—*no matter which* case it grants. This Court's choice of vehicle ought not turn on whether it will be reading the decision of the panel below from the Federal Reporter rather than the Joint Appendix.

One need only compare the Briefs in Opposition filed in this case with New Jersey's brief in *Rogers* to see the baselessness of Boston and Brookline's arguments. The oppositions in both cases rely on the very same historical laws and treatises to probe the scope of the Second Amendment, and they discuss precisely the same social-science evidence to defend the supposed public-safety benefits of "good reason" laws. The briefs opposing certiorari are not discernably different in this case because of the "comprehensive factual record" compiled by the district court below, *id.* 29, and it blinks reality to suggest that the briefs on the merits would be.

4. Finally, Respondents fail to show that the decisions upholding "good reason"-style laws were correctly decided. They argue that these laws are "presumptively lawful" because two or three similar laws were enacted in the early 20th century. Commonwealth's BIO 17-18. But the fact that the lower courts have upheld "good reason" laws as "longstanding" based solely on the existence of a handful of outlier laws first enacted well over a century after the Founding shows nothing except the urgent *need for this Court's review*.

Respondents also point to the Statute of Northampton and the analogous laws enacted on this side of the Atlantic, contending that these laws "broadly prohibited public carry." Cities' BIO 3. That revisionist account is contradicted by *reams* of primary-source evidence establishing that these laws were uniformly understood as applying only to carrying "dangerous and unusual" weapons or bearing arms with evil intent. *See, e.g.*, *Rex v. Knight*, 90 Eng. Rep. 330 (K.B. 1686); 4 WILLIAM BLACKSTONE, COMMENTARIES *148-49; 1 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 136 (1716). The account is also flatly contrary to *Heller* itself, which already adopted the historically accurate interpretation of Northampton. 554 U.S. at 625, 627. And most fundamentally, this revisionist interpretation cannot be squared with *the plain text of the Second Amendment*—for Respondents provide *no explanation* of what the right to bear arms could even conceivably mean if the citizens at the Founding were subject to a flat ban that "broadly prohibited public carry." Cities' BIO 3.

Finally, Respondents argue that "good reason"-type laws are constitutional under intermediate scrutiny, making much of the fact that "Massachusetts consistently has the lowest or near the lowest rate of gun-related deaths among the 50 states annually." Commonwealth's BIO 25. But as noted above, most jurisdictions outside of Boston and Brookline *freely grant* carry permits, giving the Commonwealth as a whole an unrestricted-license rate of 92%. *See supra*, p. 9. If Massachusetts' low crime rates show anything, they further demonstrate the public-safety *benefits* of what amounts, for most of the State, to a de facto "shall issue" licensing regime.

CONCLUSION

The Court should grant certiorari in *Rogers*, hold this petition pending a decision in that case, and then grant, vacate, and remand this case to the First Circuit for reconsideration.

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Respectfully submitted,

DAVID D. JENSEN
DAVID JENSEN PLLC
111 John Street
Suite 420
New York, NY 10038
(212) 380-6615
david@djensenpllc.com

DAVID H. THOMPSON
Counsel of Record
PETER A. PATTERSON
JOHN D. OHLENDORF
COOPER & KIRK, PLLC
1523 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 220-9600
dthompson@cooperkirk.com

Counsel for Petitioners