No. 21-1160

In the
Supreme Court of the United States

ALFRED MORIN,

Petitioner,

v.

WILLIAM LYVER AND COMMONWEALTH OF MASSACHUSETTS,

Respondents.

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

BRIEF IN OPPOSITION OF WILLIAM LYVER AND THE COMMONWEALTH OF MASSACHUSETTS

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QUESTION PRESENTED

Whether the court of appeals correctly applied the doctrine of appellate waiver to affirm the judgment in favor of the respondents on the petitioner's Second Amendment challenge to Massachusetts statutes that prohibit people with weapons-related criminal convictions punishable by a term of imprisonment from purchasing handguns, where the petitioner failed to develop argument on the issue below.

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INTRODUCTION

The petitioner, Dr. Alfred Morin, was convicted in 2004 in the District of Columbia of possession of an unregistered firearm and attempted carrying of a pistol without a license. Under Massachusetts law, the petitioner can possess and purchase a range of guns for self-defense or other lawful purposes because he has a firearm identification card, but his criminal convictions disqualify him from obtaining a license to carry and a permit to purchase handguns. The district court held that the application of Massachusetts's firearms licensing statutes to the petitioner comports with the Second Amendment. Pet. App. 23-30. Citing case law on appellate waiver, the court of appeals concluded that it "must affirm the grant of summary judgment against [the petitioner] because the only ground that he has given for overturning it rests on a description of the [statutes'] effect on his conduct that is clearly mistaken insofar as it is developed at all." Pet. App. 12-16 (citing *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990)).

Certiorari is not warranted to review the lower court's application of settled rules of appellate waiver to this case. The court of appeals did not address the merits of the question presented, as framed in the petition, because the petitioner never presented it to that court. And the petitioner does not contend that the court of appeals misapplied the appellate waiver doctrine to his appeal or that any split in authority exists regarding the standard for appellate waiver. *See* Sup. Ct. R. 10(a)–(b). Nor, for similar reasons, should the petition be granted, the judgment vacated, and the case remanded for further consideration in light of this Court's decision in *New York State Rifle*

& Pistol Ass'n, Inc. v. Bruen, 597 U.S. ___, 142 S. Ct. 2111 (2022). That decision held that a law restricting law-abiding, responsible citizens from possessing and carrying firearms violated the Second Amendment; it did not address the constitutionality of laws restricting the ability of people with weapons-related criminal convictions, like the petitioner, to purchase firearms.

STATEMENT

1. Through its firearms licensing statutes, the Commonwealth of Massachusetts seeks "to 'limit access to deadly weapons by irresponsible persons.'" *Chief of Police of the City of Worcester v. Holden*, 470 Mass. 845, 853, 26 N.E.3d 715, 723 (2015) (quoting *Ruggiero v. Police Comm'r of Boston*, 18 Mass. App. Ct. 256, 258, 464 N.E.2d 104, 106 (1984)). To that end, the Legislature has established two forms of licensure that authorize the possession and carrying of guns in Massachusetts: the firearm identification card and the license to carry. *See* Mass. Gen. Laws ch. 140, §§ 129B, 131. To lawfully possess a gun in Massachusetts, a person generally must obtain one of these licenses. *See* Mass. Gen. Laws ch. 269, § 10(a). The licenses are issued by a licensing authority, defined as either "the chief of police or the board or officer having control of the police in a city or town," Mass. Gen. Laws ch. 140, § 121, or the Colonel of the State Police, *id.* § 131(d).

The license to carry is a more expansive form of licensure than the firearm identification card. Holders of a license to carry may possess and carry firearms (*i.e.*, handguns), rifles, or shotguns, either openly or in a concealed manner, in their homes or in public. Mass.

Gen. Laws ch. 140, § 131.[1] Holders of firearm identification cards, in contrast, may possess rifles and shotguns that are not "large capacity"—that is, that cannot accept more than ten rounds of ammunition or five rounds of shotgun shells, *see* Mass. Gen. Laws ch. 140, § 121—and may possess handguns within their homes or places of business. *See Powell v. Tompkins*, 783 F.3d 332, 337 (1st Cir. 2015), *cert. denied*, 577 U.S. 1219 (2016); *Commonwealth v. Gouse*, 461 Mass. 787, 799 n.14, 965 N.E.2d 774, 785 n.14 (2012); Mass. Gen. Laws ch. 140, §§ 129B(6), 129C.

The Massachusetts Legislature has adopted different eligibility criteria for obtaining a license to carry and a firearm identification card. Certain categories of applicants are disqualified from obtaining a license to carry, including, for example, people with felony convictions or misdemeanor convictions for crimes of domestic violence, people under 21 years old, and people who are currently the subject of an abuse prevention restraining order. *See* Mass. Gen. Laws ch. 140, §§ 131(d)(i)–(x). As relevant here, people who have been convicted, in the Commonwealth or "in any other state or federal jurisdiction," of "a violation of any law

[1] Massachusetts law generally defines a "firearm" as a "pistol, revolver or other weapon of any description, loaded or unloaded, from which a shot or bullet can be discharged" and with a barrel less than 16 inches. Mass. Gen. Laws ch. 140, § 121. Thus, weapons commonly described as "handguns" are defined as "firearms" under Massachusetts law. A "rifle" is "a weapon having a rifled bore with a barrel length equal to or greater than 16 inches." *Id.* A "shotgun" is "a weapon having a smooth bore with a barrel length equal to or greater than 18 inches with an overall length equal to or greater than 26 inches." *Id.*

regulating the use, possession, ownership, transfer, purchase, sale, lease, rental, receipt or transportation of weapons or ammunition for which a term of imprisonment may be imposed" are also ineligible for a license to carry. *Id.* §§ 131(d)(i)(D), (d)(ii)(D). This category does not cover people who have violated weapons-related laws that are not punishable by a term of imprisonment. *Id.* If an applicant is not disqualified and is not otherwise "unsuitable" for a license to carry because they pose a risk to public safety,[2] the licensing authority must issue the license. *Id.* § 131(d).[3] Applicants aggrieved by the denial of a

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[2] Suitability review "keep[s] firearms out of the hands of persons who are not categorically disqualified, e.g., convicted felons, but who nevertheless pose a palpable risk that they would not use a firearm responsibly if allowed to carry in public." *Holden*, 26 N.E.3d at 724. The Legislature has instructed that a "determination of unsuitability shall be based on: (i) reliable and credible information that the applicant or licensee has exhibited or engaged in behavior that suggests that, if issued a license, the applicant or licensee may create a risk to public safety; or (ii) existing factors that suggest that, if issued a license, the applicant or licensee may create a risk to public safety." Mass. Gen. Laws ch. 140, § 131(d). The suitability component of Section 131(d) is not at issue in this case.

[3] Massachusetts's license-to-carry statute also states that licensing authorities can issue licenses to carry "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." Mass. Gen. Laws ch. 140, § 131(d). But on July 1, 2022, following this Court's decision in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. ___, 142 S. Ct. 2111 (2022), the Massachusetts Attorney General's Office and Executive Office of Public Safety and Security issued a joint advisory explaining that this "good reason" provision is unconstitutional. Joint Advisory Regarding the Massachusetts Firearms Licensing

license to carry are entitled to judicial review in state court. *Id.* §§ 131(d), (f).

Meanwhile, firearm identification cards "shall be issued" to applicants aged 15 and over who are not permanently or temporarily disqualified under a narrower set of prohibitions. Mass. Gen. Laws ch. 140, § 129B. Some categories of applicants—including, for example, people with felony convictions or misdemeanor convictions for crimes of domestic violence—are permanently disqualified. *See id.* §§ 129B(1)(i)–(xi). Other categories of applicants—including, as relevant here, people with misdemeanor convictions for violations of laws regulating the use, possession, and transfer of weapons or ammunition that authorize a term of imprisonment—are only temporarily disqualified. *Id.* §§ 129B(1)(i)–(ii). Applicants in this latter category can receive a firearm identification card if it has been five or more years since they were "convicted or adjudicated or released from confinement, probation or parole supervision for such conviction or adjudication, whichever occurs last," and their "right or ability to possess a rifle or shotgun has been fully restored in the jurisdiction wherein the conviction or adjudication was entered." *Id.* § 129B(1)(ii). Applicants who are

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System After the Supreme Court's Decision in *New York State Rifle & Pistol Association v. Bruen*, https://mass.gov/doc/ago-eopss-ltc-guidance/download. The advisory instructed licensing authorities that they "should no longer deny, or impose restrictions on, a license to carry because the applicant lacks a sufficiently good reason to carry a firearm. An applicant who is neither a 'prohibited person' or 'unsuitable' must be issued an unrestricted license to carry." *Id.* at 1. The "good reason" provision of Section 131(d) is not at issue in this case.

denied firearm identification cards are likewise entitled to judicial review in state court. *Id.* § 129B(5).

The Legislature also has specified how guns may be acquired in Massachusetts. Firearms, rifles, and shotguns may be purchased from either licensed gun retailers or private individuals, subject to the requirements set forth in Mass. Gen. Laws ch. 140, §§ 122, 123, 128A, 129C, and 131E and 940 Code Mass. Regs. 16.00 *et seq*. A resident of Massachusetts with a license to carry can purchase large capacity and non-large capacity firearms (*i.e.*, handguns), rifles, and shotguns from a retailer or private individual. *See* Mass. Gen. Laws ch. 140, § 131E(a)–(b). A resident with a firearm identification card, in contrast, is authorized by that card to purchase non-large capacity rifles and shotguns from a retailer or private individual but cannot purchase firearms. *See id.* § 131E(a)–(b). In order to purchase a firearm, someone with a firearm identification card must also obtain a "permit to purchase" under Mass. Gen. Laws ch. 140, § 131A. *See id.* §§ 129C, 131E(b). And the eligibility criteria for obtaining a permit to purchase match the eligibility criteria for obtaining a license to carry under Mass. Gen. Laws ch. 140, § 131. *See id.* § 131A ("A licensing authority under [§ 131], upon the application of a person qualified to be granted a license thereunder by such authority, may grant to such a person … a permit to purchase."). Thus, anyone who is categorically prohibited from obtaining a license to carry under Section 131 will be unable to obtain a permit to purchase a firearm under Section 131A. Someone with only a firearm identification card can, however, acquire a handgun for use in their home

or place of business through inheritance of the weapon. *See* Mass. Gen. Laws ch. 140, § 129C(n).[4]

2. The petitioner was issued a license to carry in Massachusetts in 1985. Pet. App. 3. He held that license until it expired in 2008. *Id.* at 4. In applying to renew the license, the petitioner was asked, among other things, whether he had, "in any state or federal jurisdiction," been convicted of "a violation of any law regulating the use, possession, ownership, sale, transfer, rental, receipt or transportation of weapons for which a term of imprisonment may be imposed." *Id.* The petitioner falsely answered "no." *Id.* at 4-5, 19.

In accordance with Massachusetts law, the Northborough Police Department ran a fingerprint check. Pet. App. 4. That check revealed that the petitioner had, in fact, been convicted in the District of Columbia for violating two laws regulating the possession of weapons. *Id.* at 4-5. In 2004, he had traveled from Massachusetts to Washington, D.C. with a loaded pistol and, once there, had brought his pistol to a Smithsonian Museum. *Id.* at 3. Upon noticing metal detectors at the entrance, the petitioner asked a security guard to check his gun. *Id.*

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[4] Under Mass. Gen. Laws ch. 140, § 129C(n), "upon the death of an owner" of a "firearm, rifle or shotgun" who has, through a will or other means, transferred the weapon to an "heir or legatee," the heir or legatee has 180 days from the transfer to obtain a license to carry or firearm identification card. The person inheriting the weapon must report the inheritance to the Firearms Records Bureau of the Department of Criminal Justice Information Services pursuant to Mass. Gen. Laws ch. 140, §§ 128A and 128B. *See* Dept. of Criminal Justice Information Services, Massachusetts Firearms Registration and Transfer System, *Help & Frequently Asked Questions* 17-20 (2011), https://mircs.chs.state.ma.us/fa10/help/help_and_faq.pdf.

The security guard notified the police, and the petitioner was arrested and charged with carrying a pistol without a license ("CPWL"), possession of unregistered ammunition, and possession of an unregistered firearm. *Id.* at 3-4, 19.

The petitioner pleaded guilty to attempted CPWL, in violation of D.C. Code §§ 22-3204(a)(1) (2004)[5] and 22-1803 (2004), and possession of an unregistered firearm, in violation of D.C. Code § 6-2376 (2004).[6] Pet. App. 4. The CPWL charge carried a maximum sentence of five years in prison, *see* D.C. Code § 22-3204(a)(1) (2004), but because the petitioner had pleaded guilty to an attempt, his maximum sentence was reduced to 180 days pursuant to D.C. Code § 22-1803. *Id.* The maximum sentence for the possession of an unregistered firearm charge was one year. *See* D.C. Code § 6-2376 (2004). Because of these convictions, which qualified as "violation[s] of … law[s] regulating the … possession … of weapons or ammunition for which a term of imprisonment may be imposed" under Section 131(d)(ii)(D), the Chief of the Northborough Police denied the petitioner's application to renew his license to carry. Pet. App. 5.

In February 2015, the petitioner submitted a new application for a license to carry firearms. Pet. App. 5. This time, when asked if he had ever been convicted of a "violation of … a law regulating the … possession … of weapons or ammunition for which a term of

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[5] This provision has been renumbered and is now codified at D.C. Code § 22-4504(a).

[6] This provision has been renumbered and is now codified at D.C. Code §§ 7-2502.01 and 7-2507.06.

imprisonment may be imposed," he truthfully answered "yes." *Id.* Because of the petitioner's prior convictions, the chief again denied his application for a license to carry. *Id.*

3. In March 2015, the petitioner filed a lawsuit contending that the denial of his license-to-carry application violated the Second Amendment. *See Morin v. Leahy*, 189 F. Supp. 3d 226 (D. Mass. 2016). In rejecting that claim, the district court noted that the petitioner had applied for only the most expansive license available in Massachusetts, one that would have "allow[ed] him to carry concealed firearms in public" as well as in his home. *Id.* at 234. He had not applied for a firearm identification card, which would have allowed him to possess a firearm in his home. *See id.* at 231. Thus, the district court explained, it was not "necessary to determine whether a complete categorical prohibition on the arms rights of individuals who have been convicted of certain weapons-related misdemeanors is constitutional, because that is not what is being challenged in this case." *Id.* at 234. And the court held Section 131(d)(ii)(D) constitutional as applied to the petitioner's request to carry firearms in public. *See id.* at 234-36.

The First Circuit affirmed. *See Morin v. Leahy*, 862 F.3d 123 (1st Cir. 2017). It noted that, with a firearm identification card and a permit to purchase, the petitioner could obtain a firearm for self-defense in his home, but he had not applied for either license. *See id.* at 127. Because the petitioner had asserted only that the Commonwealth's statutory scheme infringed a right to possess a firearm for self-defense in his home,

but he had not applied for permits that would have enabled him to exercise that right, the court concluded that the denial of his license-to-carry application did not violate the Second Amendment, as he had framed his claim. *See id.*

4. In February 2018, the petitioner applied for a firearm identification card and a permit to purchase. Pet. App. 8-9. The Chief of the Northborough Police, respondent William Lyver, granted his application for a firearm identification card. *Id.* at 9. But Chief Lyver denied the petitioner's application for a permit to purchase because, under Section 131A, his prior convictions for weapons-related offenses punishable by a term of imprisonment rendered him ineligible for that permit. *Id.*

The petitioner thereafter filed this lawsuit against Chief Lyver, claiming that the denial of his license-to-carry and permit-to-purchase applications violated his Second Amendment "right to possess and purchase a firearm for the purpose of self-defense in the home." Pet. App. 9-10 (quoting the complaint). After the district court allowed the Commonwealth's motion to intervene, the parties filed cross-motions for summary judgment. The district court granted judgment in favor of the Commonwealth and Chief Lyver. *Id.* at 17-31. It began by noting that, because the petitioner was issued a firearm identification card, Massachusetts law imposes no restriction on his ability to *possess* a firearm in his home. *Id.* at 24. Instead, the court explained, the petitioner challenged the Massachusetts statutes that prevent him from *obtaining* a firearm for use in his home. *Id.* at 25.

The court considered that claim under the then-applicable two-step test for reviewing Second Amendment claims adopted in *Gould v. Morgan*, 907 F.3d 659, 668-69 (1st Cir. 2018), *abrogated by New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. ___, 142 S. Ct. 2111 (2022). Pet. App. 24-25. Applying that test, the court assumed, without deciding, that the restrictions on obtaining a firearm imposed by Sections 131(d)(ii)(D) and 131A burden conduct falling within the scope of the Second Amendment. *Id.* at 25. It noted, however, that "individuals convicted of weapons-related offenses punishable by a term of imprisonment are not, as a class," the ordinary "'*law-abiding, responsible* citizens'" entitled "'to use arms in defense of hearth and home.'" *Id.* at 25-26, 27 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008)) (emphasis in original). The district court then upheld the restrictions on acquiring firearms imposed by Sections 131(d)(ii)(D) and 131A under intermediate constitutional scrutiny. Pet. App. 28-30.

The First Circuit affirmed. Pet. App. 1-16. The court began by explaining that, on appeal, the petitioner contended "only that a more intensive form of scrutiny applies and that, under it, these restrictions are unconstitutional." *Id.* at 12. But in arguing that the district court should have reviewed Sections 131(d)(ii)(D) and 131A under strict scrutiny, rather than intermediate scrutiny, the petitioner did not develop an argument regarding the restrictions actually imposed on him by Massachusetts law. *See Id.* at 12-15. "[I]nsofar as he describe[d] [his argument] with any specificity," the court explained, he contended "on appeal only" that Massachusetts law imposes "a ban on his right to *possess* a handgun" in

the home. *Id.* at 13 (emphasis in original). But this was incorrect, because Massachusetts law allows people with firearm identification cards to possess a handgun in the home. *Id.* at 14 ("It is clear though, that, in fact, Morin is not subject to a ban on handgun possession for the purposes of self-defense in the home, because his [firearm identification card] permits him to possess a handgun for just that purpose."). And because the petitioner failed to develop any argument as to how the restrictions on his ability to *obtain* a handgun violate the Second Amendment, "due to the vague way in which he describe[d] them at some points and the specific way that he mischaracterize[d] them at others," the court concluded that the petitioner had provided "no basis for overturning the District Court's grant of summary judgment to the defendants." *Id.* at 16.

The court of appeals emphasized that it did "not mean to suggest that there is no argument" that the restrictions on handgun acquisition imposed by Sections 131A and 131(d)(ii)(D) violate the "core right that *Heller* recognized." Pet. App. 15. Rather, citing precedent on appellate waiver, the court held only that it "must affirm the grant of summary judgment against [the petitioner] because the only ground that he has given for overturning it rests on a description of the restrictions' effect on his conduct that is clearly mistaken insofar as it is developed at all." *Id.* (quoting *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990) ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.")).

ARGUMENT

The petitioner improperly asks this Court to grant certiorari to decide a legal question not pressed or passed on in the court of appeals. The only basis for the First Circuit's affirmance was its determination that the petitioner had "waived" any intelligible argument that the district court erred in assessing the constitutionality of restrictions on his ability to obtain a firearm. Pet. App. 15 (quoting *Zannino*, 895 F.2d at 17). And the petitioner does not ask this Court to review the First Circuit's conclusion in that regard. Rather, he asks this Court to address an issue not decided, and indeed, expressly reserved, by the First Circuit—namely, the merits of his Second Amendment claim. This Court seldom addresses in the first instance questions not argued or decided below. Furthermore, even setting aside his waiver of the question presented, the petitioner offers no basis for certiorari because he fails to identify any appellate decision that has even *addressed* that question, much less a conflict over the question. Nor, for similar reasons, is this case one that should be granted, vacated, and remanded in light of *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. ___, 142 S. Ct. 2111 (2022), a case, unlike this one, that concerned the Second Amendment rights of law-abiding, responsible citizens.

I. The Petition Does Not Present a Question Warranting This Court's Review.

A. The Court of Appeals Affirmed the District Court's Judgment Based Solely on an Appellate Waiver Rationale.

Contrary to the petitioner's representations, *see* Pet. 1-2, 21-24, 30, the First Circuit's analysis started and ended with its conclusion that it "must affirm the grant of summary judgment against [the petitioner] because the only ground that he has given for overturning it rests on a description of the restrictions' effect on his conduct that is clearly mistaken insofar as it is developed at all." Pet. App. 15. The court of appeals quoted at length from the petitioner's brief to explain how he mischaracterized Massachusetts law and failed to offer argument on the constitutionality of the statutes that restrict his ability to obtain a handgun. *See* Pet. App. 13-16 & nn. 6-7. And, noting that "[i]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived," the court affirmed on that basis alone. Pet. App. 15 (quoting *Zannino*, 895 F.2d at 17).

The First Circuit did not, as the petitioner argues here, "conclud[e] that because Petitioner would still be able to possess a handgun if someone else chose to leave it to him at their death, the Petitioner was not 'categorically prohibited' and nothing more than intermediate scrutiny applied." Pet. 2; *see id.* at 21-22, 30 (claiming inaccurately that the First Circuit "tacitly [found] the trial court's approach to be sufficient"). The court did not review Section 131A and 131(d)(ii)(D) on the merits at all, much less analyze

those provisions under any level of constitutional scrutiny. Pet. App. 11-16. Indeed, the First Circuit was careful to note that it was *not* ruling on the merits on the petitioner's Second Amendment claim. "[W]e do not mean to suggest," the court explained, that "there is no argument to be made" that, as "applied to someone" like the petitioner with weapons-related misdemeanor convictions punishable by a term of imprisonment, Sections 131A and 131(d)(ii)(D) "heavily burden the core right that *Heller* recognized." Pet. App. 15. The appeal as presented by the petitioner simply did not allow the court of appeals to address that issue on the merits.

This Court ordinarily does not review a petition that "raises questions that were not decided by the court below … or seriously mischaracterizes the holding of the court." Stephen M. Shapiro, et al., Supreme Court Practice 6-151 (11th ed. 2019); *see Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206, 212-13 (1998) ("'Where issues [were not] considered by the Court of Appeals, this Court will not ordinarily consider them'" (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147, n.2 (1970))). And the petition does just that. The petitioner asks this Court to decide "whether a state can impose a lifetime ban on purchasing handguns (but not possessing them) against anyone who has been convicted of a nonviolent misdemeanor that involved the possession or use of guns." Pet. i. That issue was not decided by the court of appeals. As framed, the question presented by the petitioner remains unresolved in the First Circuit, and thus should not be considered by this Court.

B. Petitioner Does Not Seek Review of the Only Basis for the Court of Appeals' Decision.

The petitioner does not seek review of the only legal basis for the First Circuit's affirmance—namely, its conclusion that, due to the petitioner's failure to develop an argument regarding the restrictions on his ability to obtain a firearm, the argument was waived and therefore no basis existed for disturbing the district court's judgment. *See* Pet. i.

It is settled in the First Circuit that "[i]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived." Pet. App. 15 (quoting *Zannino*, 895 F.2d at 17). And no conflict exists over the formulation of that standard: in every court of appeals, when a party fails to brief or inadequately briefs an argument, that issue may be deemed waived. *See, e.g.*, *Vázquez-Rivera v. Figueroa*, 759 F.3d 44, 47 n.1 (1st Cir. 2014); *Norton v. Sam's Club*, 145 F.3d 114, 117 (2d Cir. 1998); *Laborers' Int'l Union of N. Am., AFL-CIO v. Foster Wheeler Corp.*, 26 F.3d 375, 398 (3d Cir. 1994); *Wahi v. Charleston Area Medical Ctr., Inc.*, 562 F.3d 599, 607 (4th Cir. 2009); *United States v. Scroggins*, 599 F.3d 433, 446 (5th Cir. 2010); *United States v. Elder*, 90 F.3d 1110, 1118 (6th Cir. 1996); *United States v. Collins*, 796 F.3d 829, 836 (7th Cir. 2015); *Cox v. Mortg. Elec. Registration Sys., Inc.*, 685 F.3d 663, 674 (8th Cir. 2012); *Martinez-Serrano v. I.N.S.*, 94 F.3d 1256, 1259 (9th Cir. 1996); *United States v. Walker*, 918 F.3d 1134, 1152 (10th Cir. 2019); *Access Now, Inc. v. Southwest Airlines Co.*, 385 F.3d 1324, 1330 (11th Cir. 2004). This standard accords with Fed. R. App. P. 28(a)(8)(A), which requires an

appellant's brief to contain "the appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies."

Nor could the petitioner argue that a fact-bound challenge to the First Circuit's application of the appellate waiver rule is "fairly included" within his question presented. Sup. Ct. R. 14.1(a). The propriety of a court's application of a rule of appellate procedure is analytically distinct from the question whether Mass. Gen. Laws ch. 140, §§ 131A and 131(d)(ii)(D) are constitutional, as applied to people with weapons-related misdemeanor convictions punishable by a term of imprisonment. *Cf. Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 32 (1993) ("Whether petitioner should have been granted leave to intervene below is quite distinct, both analytically and factually, from the question whether the Court of Appeals should vacate judgments where the parties have so stipulated."). And the petitioner cannot cure these defects through his reply brief, because "[o]nly the questions *set out in the petition*, or fairly included therein, will be considered by the Court." Sup. Ct. R. 14.1(a) (emphasis added); *see Yee v. City of Escondido*, 503 U.S. 519, 535 (1992) (in accordance with Rule 14.1(a), this Court "ordinarily do[es] not consider questions outside those presented in the petition for certiorari").

C. There Is No Basis for This Court to Review, in the First Instance, the Petitioner's Question Presented.

Quite apart from the fact that the petitioner seeks review of a question that he waived in the court of

appeals, and the fact that the petitioner does not seek review of the actual legal basis for that court's decision, the question presented, as framed in the petition, does not warrant this Court's review.

As described, the petitioner asks this Court to decide "whether a state can impose a lifetime ban on purchasing handguns (but not possessing them) against anyone who has been convicted of a nonviolent misdemeanor that involved the possession or use of guns." Pet. i. The petitioner does not allege any conflict among the federal courts of appeals or between state courts of last resort over this question. *See* Sup. Ct. R. 10(a)–(b). And none exists. Indeed, the petitioner fails to identify a decision of *any* court of appeals or state court of last resort that has even *addressed* the question he asks this Court to review. And the respondents are not aware of any such decision. This Court has frequently admonished that it is "'a court of final review and not first view'"; that precept is especially applicable to a petition that seeks review of a question thus far unaddressed by any appellate court. *Babcock v. Kijakazi*, 142 S. Ct. 641, 645 n.3 (2022) (quoting *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001) (*per curiam*)); *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005); *accord CRST Van Expedited, Inc. v. E.E.O.C.*, 578 U.S. 419, 435 (2016) ("It is not the Court's usual practice to adjudicate either legal or predicate factual questions in the first instance."). And the paucity of appellate case law on the issue suggests that the question is not a recurring one that calls out for this Court's resolution.

The only split in authority alleged in the petition involves a question of law that had no bearing on how

the lower courts decided this case. The petitioner claims that the courts of appeals disagree whether the regulatory restrictions identified in *District of Columbia v. Heller*, 554 U.S. 570 (2008), as "presumptively lawful" implicate Second Amendment rights. *See* Pet. 30-34; *Heller*, 554 U.S. at 626-27 & n.26 (explaining that "longstanding prohibitions on the possession of firearms by felons and the mentally ill," "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings," and "laws imposing conditions and qualifications on the commercial sale of arms" are "presumptively lawful regulatory measures"). But the district court did not rely on that portion of *Heller* to reject the petitioner's Second Amendment claim. It did not hold that the restrictions imposed by Sections 131A and 131(d)(ii)(D) were presumptively lawful; to the contrary, it assumed, without deciding, that the restrictions "burden conduct falling within the scope of the Second Amendment right." Pet. App. 25. And, as described, the First Circuit affirmed based on the petitioner's failure to coherently brief his case on appeal. *See supra*, at 11-12; Pet. App. 12-16.[7] Thus, to the extent there is any disagreement among the courts of appeals regarding the import of *Heller*'s identification of "presumptively lawful regulatory measures," that disagreement is not implicated by this petition.[8]

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[7] Indeed, the decisions below do not even use the words "presumptively lawful." *See* Pet. App. 1-31.

[8] In acknowledging that the "First Circuit has not taken a position on the question of whether the [presumptively lawful] examples are inside or outside the scope of protection," the petitioner himself effectively concedes as much. Pet. 32.

The petitioner also claims that the district court's decision is inconsistent with the Third Circuit's fractured en banc decision in *Binderup v. Attorney General United States*, 836 F.3d 336 (3d Cir. 2016) (en banc), *cert. denied sub nom.*, *Sessions v. Binderup*, 137 S. Ct. 2323 (2017). *See* Pet. 27-30. Judge Ambro's controlling opinion in *Binderup* held unconstitutional, as applied to the plaintiffs in that case, the federal statute that generally prohibits anyone "who has been convicted in any court o[f] a crime punishable by imprisonment for a term exceeding one year" from possessing "any firearm," 18 U.S.C. § 922(g)(1). *See Binderup*, 836 F.3d at 347-56. Federal law defines the term "firearm" to include handguns, rifles, and shotguns. 18 U.S.C. § 921(a)(3); *accord* Pet. 4. The restriction on the plaintiffs' ability to keep and bear arms in *Binderup* was, accordingly, more onerous than the restriction imposed by Massachusetts law here. It is lawful for the petitioner, who has a firearm identification card, to possess, purchase, and carry at home and in public a range of rifles and shotguns, and to possess a handgun within his home or place of business. *See* Mass. Gen. Laws ch. 140, §§ 129B(6), 131E(a); Pet. 1, 6 n.2. Thus, the holding invalidating the federal statute as applied in *Binderup* is not comparable to, and does not conflict with, the District Court's decision upholding the restriction on the petitioner's ability to purchase a handgun in Massachusetts.

Otherwise, the petitioner's argument for granting review amounts to a fact-bound disagreement with the district court's reasoning. *See* Pet. 24-26. That is not a basis for granting certiorari. *See* Sup. Ct. R. 10. Where the First Circuit did not address the merits of the district court's reasoning, and where the

petitioner fails to seek review of the sole basis on which the court of appeals affirmed the judgment, further review by this Court is unwarranted.

II. *Bruen* Does Not Alter the Conclusion That the Petition Should Be Denied.

For all the reasons previously discussed, this case should not be granted, vacated, and remanded in light of this Court's decision in *Bruen*. The sole basis for the First Circuit's affirmance was the petitioner's failure to offer any argument on whether the restrictions on his ability to obtain firearms comported with this Second Amendment. *See supra*, at 14-15. And the petitioner has not asked this Court to review the First Circuit's application of the appellate waiver doctrine. *See supra*, at 16-17. Nor does the petitioner contend that the First Circuit's appellate waiver analysis would be affected by the applicable methodology for analyzing Second Amendment claims. And, unlike other matters in which this Court granted the petition, vacated the judgment, and remanded in light of *Bruen*, the petitioner does not maintain here that the outcome of his appeal would have been different under the "methodology centered on constitutional text and history" clarified in *Bruen*. *See, e.g.*, Pet. at 20, *Bianchi v. Frosh*, --- S. Ct. ---, 2022 WL 2347601 (2022) (No. 21-902).

Moreover, even if the petitioner had not waived argument in the First Circuit on whether the restrictions on his ability to purchase a handgun comport with the Second Amendment, this Court's holding in *Bruen* would still not have affected the resolution of his Second Amendment claim. Unlike this matter, *Bruen* concerned the constitutionality of

a restriction on the right of "'law-abiding, responsible citizens'" to exercise their "Second Amendment right to public carry." 142 S. Ct. at 2138 n.9 (quoting *Heller*, 554 U.S. at 635). The Court explained that, as a general matter, American governments have not "required law-abiding, responsible citizens to 'demonstrate a special need for self-protection distinguishable from that of the general community' in order to carry arms in public." *Id.* at 2156 (quoting *In re Klenosky*, 428 N.Y.S. 2d 256, 257, 75 A.D.2d 793, 793 (1980)). Nothing in *Bruen* suggested that individuals with criminal convictions can qualify as "law-abiding," nor did anything in *Bruen* suggest that individuals, like the petitioner, with weapons-related criminal convictions can qualify as "responsible," as those terms were historically understood. *See id.* at 2157 (Alito, J., concurring) ("Our holding decides nothing about who may lawfully possess a firearm or the requirements that must be met to buy a gun."). Indeed, the Court repeatedly emphasized that its holding concerned only the Second Amendment rights of "law-abiding" citizens. *See, e.g.*, *id.* at 2156 ("New York's proper-cause requirement violates the Fourteenth Amendment in that it prevents law-abiding citizens with ordinary self-defense needs from exercising their right to keep and bear arms."); *id.* at 2157 (Alito, J., concurring) ("today's decision therefore holds that a State may not enforce a law … that effectively prevents its law-abiding residents from carrying a gun" in public); *id.* at 2161 (Kavanaugh, J., concurring) (noting the features of New York's law that denied "the right to carry handguns for self-defense to many 'ordinary, law-abiding citizens'"). The Court's holding in *Bruen* does not, accordingly, require vacatur of the judgment below.

CONCLUSION

The petition for a writ of certiorari should be denied.

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