NO. _____

In the Supreme Court of the United States

MICHAEL GOULD, *et al.*,

Petitioners,

v.

MARK MORGAN, in his Official Capacity as Acting 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

PETITION FOR WRIT OF CERTIORARI

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April 1, 2019

QUESTIONS PRESENTED

In *District of Columbia v. Heller*, this Court held that the Second Amendment protects "the individual right to possess and carry weapons in case of confrontation," 554 U.S. 570, 592 (2008), and in *McDonald v. City of Chicago*, it determined that this right "is fully applicable to the States," 561 U.S. 742, 750 (2010). The Court of Appeals for the District of Columbia Circuit has concluded that the right to carry a firearm extends outside the home and that licensing restrictions that require citizens to show a special need for carrying a firearm effectively "destroy[ ] the ordinarily situated citizen's right to bear arms" and therefore are categorically unconstitutional. *Wrenn v. District of Columbia*, 864 F.3d 650, 666 (D.C. Cir. 2017). By contrast, the court below, along with the Second, Third, and Fourth Circuits, have upheld substantively indistinguishable licensing restrictions under a watered-down "intermediate scrutiny" analysis.

The questions presented are:

1. Whether the Second Amendment protects the right to carry a firearm outside the home for self-defense.

2. Whether the government may deny categorically the exercise of the right to carry a firearm outside the home to typical law-abiding citizens by conditioning the exercise of the right on a showing of a special need to carry a firearm.

PARTIES TO THE PROCEEDING

Petitioners Michael Gould, Christopher Hart, Commonwealth Second Amendment, Inc., Danny Weng, Sarah Zesch, and John R. Stanton were plaintiffs before the District Court and the plaintiffs-appellants in the Court of Appeals.

Respondents Mark Morgan, in his official capacity as Acting Chief of the Brookline Police Department, William G. Gross, in his official capacity as Commissioner of the Boston Police Department, and the Commonwealth of Massachusetts Office of the Attorney General were defendants-appellees in the Court of Appeals. William B. Evans, the former Commissioner of the Boston Police Department, was initially docketed by the Court of Appeals as an appellee, but the current Commissioner, William G. Gross, was substituted in his place on August 23, 2018, pursuant to FED. R. APP. P. 43(c)(2). Daniel C. O'Leary, the former Chief of the Brookline Police Department, was also initially docketed by the Court of Appeals as an appellee, but the current Acting Chief, Mark Morgan, was substituted in his place on June 14, 2018, pursuant to FED. R. APP. P. 43(c)(2).

CORPORATE DISCLOSURE STATEMENT

Commonwealth Second Amendment, Inc., has no parent corporation, and there is no publicly held corporation that owns 10% or more of its stock.

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In *District of Columbia v. Heller*, this Court held that the Second Amendment protects "the individual right to possess and carry weapons in case of confrontation" for the "the core lawful purpose of self-defense." 554 U.S. 570, 592, 630 (2008). But the lower courts have split over the constitutionality of laws that categorically bar typical, law-abiding citizens from carrying handguns outside the home for self-defense. The D.C. Circuit has seen these laws for what they are—"necessarily a total ban on most [citizens'] right to carry a gun"—and it has struck down the District of Columbia's requirement that citizens show a "good reason," *other than self-defense*, before carrying a handgun outside the home as categorically unconstitutional. *Wrenn v. District of Columbia*, 864 F.3d 650, 666, 668 (D.C. Cir. 2017). But following contrary decisions from the Second, Third, and Fourth Circuits, the court below upheld Massachusetts's substantively indistinguishable "good reason" requirement, App.6a, concluding that the restriction passes constitutional muster under a toothless version of "intermediate scrutiny" that consists of little more than blind deference to the State's "prerogative" to "make the necessary policy judgments" and "[s]elect among reasonable alternatives." App.35a; *see also Drake v. Filko*, 724 F.3d 426, 429, 440 (3d Cir. 2013); *Woollard v. Gallagher*, 712 F.3d 865, 881–82 (4th Cir. 2013); *Kachalsky v. County of Westchester*, 701 F.3d 81, 97 (2d Cir. 2012).

The decision below also directly contradicts this Court's decisions in *Heller* and *McDonald v. City of Chicago*, 561 U.S. 742 (2010). In *Heller*, this Court

held that the right to self-defense is "the *central component*" of the Second Amendment. 554 U.S. at 599. But the First Circuit upheld the Commonwealth's law based on the view that bearing arms for the purpose of self-defense lies at "the periphery of the Second Amendment right," App.26a. In *Heller*, this Court held that the Second Amendment takes "off the table" the policy choice of flatly banning core Second Amendment conduct. 554 U.S. at 636; *see also McDonald*, 561 U.S. at 767–68. But the First Circuit upheld Respondents' ban on bearing arms for self-defense by blindly deferring to the Commonwealth's "policy judgment[ ]" that *whenever* a law-abiding citizen possesses a firearm in public, he creates a risk to the public safety. App.31a–33a, 35a. And *Heller* made clear that the Second Amendment rids the government of "the power to decide on a case-by-case basis whether the right is *really worth* insisting upon," 554 U.S. at 634, yet that is the precise power the First Circuit has allowed Massachusetts to arrogate to itself.

The First Circuit, unfortunately, does not stand alone in its repudiation of this Court's precedent. This Court currently has pending before it a petition for a writ of certiorari to the Third Circuit, which has upheld New Jersey's substantively similar restrictions on the right to bear arms. *Rogers v. Grewal*, No. 18-824. And the Second and Fourth Circuits have likewise blessed substantively identical laws. Indeed, as the Fourth Circuit has stated plainly, the subtext apparently underlying all of these decisions is that these courts will not extend "*Heller* beyond its undisputed core holding" until this Court tells them they must: "If the Supreme Court . . . meant its holding

to extend beyond home possession, it will need to say so more plainly." *United States v. Masciandaro*, 638 F.3d 458, 475 (4th Cir. 2011) (quotation marks omitted).

While this Court spoke plainly enough in *Heller*, the time has come to give recalcitrant lower courts the even-more explicit direction they claim to need. The petition in *Rogers* presents an ideal vehicle for this Court to review the issue that has so divided the lower federal courts, and the Court should grant review in that case, resolve the split in authority, and reiterate that adherence to its Second Amendment precedents is not optional. It should then grant the instant petition, vacate the panel decision below siding with the Second, Third, and Fourth Circuits, and remand to the First Circuit to reconsider the issue anew.

OPINIONS BELOW

The panel opinion of the Court of Appeals is reported at 907 F.3d 659 and reproduced at App.1a. The order of the District Court granting Respondents' motion for summary judgment is reported at 291 F. Supp. 3d 155 and reproduced at App.37a.

JURISDICTION

The Court of Appeals issued its judgment on November 2, 2018. On December 26, 2018, Justice Breyer extended the time within which to file a petition for a writ of certiorari to and including April 1, 2019. No. 18A660. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The relevant portions of Amendments II and XIV to the United States Constitution, the General Laws of Massachusetts, and the Acts and Resolves of Massachusetts are reproduced in the Appendix beginning at App.77a.

STATEMENT

I. THE COMMONWEALTH'S "GOOD REASON" REQUIREMENT

"In Massachusetts, carrying a firearm in public without a license is a crime." App.4a–5a. State law makes the knowing possession of a handgun outside the home without "a license to carry firearms" punishable by "imprisonment . . . for not less than two and one-half years." MASS. GEN. LAWS ch. 269, § 10(a)(6). To obtain a license to carry firearms, Massachusetts residents must apply to the chief of police of the jurisdiction where they reside or are employed. *Id.* ch. 140, § 131(d); *see also id.* § 121 (defining "licensing authority"). Under current law, the only type of license that an individual can apply for, or that a police chief can issue, is a "Class A" license.[1]

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[1] Massachusetts law previously authorized police chiefs to issue "Class B" licenses, which authorized the carrying—openly, but not concealed—of firearms with a capacity of ten rounds or less. *See* MASS. GEN. LAWS ch. 140, § 131(b); *see also id.* § 121 (defining "large capacity"). In 2014, the General Court enacted legislation that immediately prohibited police chiefs from issuing "Class B" licenses and phased out statutory references to Class A and B licenses by 2021. 2014 Mass. Acts ch. 284, secs. 46–57, 101; *see*

Upon receiving an application, the local police official—in concert with the Massachusetts Colonel of State Police and other state officials—must investigate the applicant and determine whether he or she meets certain statutory eligibility requirements. *Id.* § 131(d), (e). Petitioners do not challenge any of these eligibility requirements.

If the local licensing official determines that an applicant meets all of these eligibility conditions, he "may issue" a license to carry, *id.*, if he further concludes that "the applicant can demonstrate a 'proper purpose' for carrying a firearm," App.6a (quoting *Ruggiero v. Police Comm'r of Boston*, 464 N.E.2d 104, 107 (Mass. App. Ct. 1984)). Massachusetts law does not enumerate all of the "proper purposes" for carrying a handgun in public, but it does specify two reasons that, if shown, can justify issuance of a license: (1) the applicant "has good reason to fear injury to the applicant or the applicant's property," or (2) the applicant wishes to "carry[ ] . . . firearms for use in sport or target practice only . . . ." MASS. GEN. LAWS ch. 140, § 131(d).

Massachusetts further authorizes the licensing authority to impose "such restrictions relative to the possession, use or carrying of firearms as the licensing authority deems proper," *id.* § 131(a), and some localities issue licenses subject to restrictions that authorize the carrying of firearms in public for limited, specified purposes. *See Ruggiero*, 464 N.E.2d at 107. For example, Respondent Morgan, Acting Chief of the

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also Morin v. Leahy, 862 F.3d 123, 126 n.8 (1st Cir. 2017). Because of this transition, the distinction between these types of licenses is irrelevant in this case. App.39a n.2.

Brookline Police Department, issues licenses with seven different types of restrictions, including "target," "hunting," and "employment"; Respondent Gross, Commissioner of the Boston Police Department, issues licenses with three varieties of restrictions: "employment," "target and hunting," and "sporting." App.7a; *see also* App.42a–45a, 46a–48a. A resident with a license subject to one of these restrictions may only carry a firearm in the course of engaging in activity specified by the restriction.[2] App.7a. Such a license thus *does not* authorize the carrying of firearms for the purpose of general self-defense.

Instead, to obtain a license that authorizes carrying a firearm outside the home for the purpose of self-defense—one that is not subject to these restrictions—an applicant must show "good reason to fear injury" to his person or property. MASS. GEN. LAWS ch. 140, § 131(d); App.6a. Implementing this provision, Respondents have "promulgated policies requiring that an applicant furnish some information to distinguish his own need for self-defense from that of the general public." App.6a–7a.

Accordingly, under Massachusetts law as applied in these jurisdictions, typical law-abiding citizens of Massachusetts—the vast majority of responsible citizens who, by definition, cannot demonstrate a special need for self-defense that "distinguish[es] [their] own need for self-defense from that of the

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[2] In some cases, Respondents' restrictions also authorize individuals to carry firearms when traveling to and from the location where an authorized activity will take place—e.g., the firing range or job site. App.43a–44a.

general public," App.7a—effectively remain subject to a flat ban on carrying handguns outside the home for the purpose of self-protection.

II. RESPONDENTS' REFUSAL TO ISSUE PETITIONERS LICENSES TO CARRY FIREARMS OUTSIDE THE HOME

Pursuant to these policies, Respondents denied requests by each of the individual Petitioners (and members of Petitioner Commonwealth Second Amendment) for a license that would allow them to carry a firearm outside the home for purposes of self-defense. For instance, Petitioner John Stanton, a professional musician, applied for a license in 2014, listing "self-defense, target shooting, hunting, and all other lawful purposes" as his reasons for wishing to carry a firearm outside the home. App.51a. Rather than granting him a license authorizing these purposes, however, Respondent Gross's licensing unit issued Stanton a license restricted to "Target & Hunting." *Id.* Mr. Stanton twice wrote to the Boston licensing officials requesting that these restrictions be removed and that he be allowed to carry a firearm for self-protection. Both times, Boston's licensing officials refused to remove the restrictions that prevented Stanton from carrying a firearm for self-defense, explaining that he "could not show that [he had a] proper purpose to possess [an unrestricted] license." App.50a–52a (alterations in original); *see also* App.45a–46a, 49a–52a.

III. PROCEEDINGS BELOW

1. On February 4, 2016, Petitioners brought suit against Respondents, in their official capacities, challenging their refusal to issue licenses allowing

Petitioners to carry firearms for self-defense under the Second Amendment, applicable to state and local officials in Massachusetts by way of the Fourteenth Amendment. The District Court had jurisdiction over the action under 28 U.S.C. §§ 1331 and 1343. On March 13, 2017, the Commonwealth of Massachusetts intervened to defend the constitutionality of its licensing laws. The parties cross-moved for summary judgment, and on December 5, 2017, the District Court entered an opinion and order denying Petitioners' motion and granting Respondents'.

The court applied a "two-step approach," asking first "whether the challenged law imposes a burden on conduct that falls within the scope of the Second Amendment's guarantee as historically understood," and second whether the law passed "the appropriate form of judicial scrutiny." App.56a–57a. At the first step, the court elected not to "engag[e] in a round of full-blown historical analysis" of the scope of the Second Amendment right, instead "assum[ing] for analytical purposes that the Second Amendment extends to protect the right of armed self-defense outside the home." App.60a, 64a. At the second step, the court concluded that "intermediate scrutiny, or a related analogue, is the appropriate standard to assess the constitutionality of the restrictions in question," and that those restrictions survived that scrutiny. App.67a, 73a–74a.

2. Petitioners appealed the judgment to the First Circuit, and on November 2, 2018, a panel of that court affirmed. Applying the same "two-step" approach as the District Court, the panel first asked "whether the challenged law burdens conduct that falls within the

scope of the Second Amendment's guarantee." App.18a. Because it read the historical record as indicating that "states and their predecessor colonies and territories have taken divergent approaches to the regulation of firearms" the panel concluded that "historical inquiry does not dictate an answer to the question of whether the Boston and Brookline policies burden conduct falling within the scope of the Second Amendment." App.20a. However, reading the "tea leaves" from this Court's decisions in *Heller* and *McDonald*, the court reasoned that those cases "impl[ied] that the right to carry a firearm for self-defense guaranteed by the Second Amendment is not limited to the home." App.21a. Accordingly, the panel elected to "proceed on the assumption that the Boston and Brookline policies burden the Second Amendment right to carry a firearm for self-defense." *Id.*

At the second step, the court determined that "the appropriate level of scrutiny must turn on how closely a particular law or policy approaches the core of the Second Amendment," with "intermediate scrutiny" the appropriate standard for "firearms regulations that burden rights on the periphery of the Second Amendment." App.22a, 27a. Because, in the panel's view, "the core Second Amendment right is limited to self-defense in the home," it assessed the policies challenged in this case under intermediate scrutiny. App.23a, 28a. And the challenged restrictions passed this test, the court concluded, since "[i]t cannot be gainsaid that Massachusetts has compelling governmental interests in both public safety and crime prevention," *id.*, and "the fit between the asserted governmental interests and the means chosen to advance them is close enough to pass intermediate

scrutiny," App.30a. While it noted that Petitioners had submitted "a profusion of countervailing studies and articles" showing that Respondents' restrictions would have no net public-safety benefit, the panel opined that "it is the legislature's prerogative—not ours—to weigh the evidence, choose among conflicting inferences, and make the necessary policy judgments." App.33a, 35a.

REASONS FOR GRANTING THE WRIT

This Court should intervene and decide the constitutionality of "good reason"-style restrictions on the right to bear arms for three independent reasons: to resolve the direct conflict in the Circuits over the constitutionality of these laws; to correct the decisions ignoring the clear holdings of *Heller* and *McDonald*; and to end the lower courts' open and massive resistance to those decisions. A petition is currently pending before this Court, in *Rogers v. Grewal*, No. 18-824, that squarely raises the same questions presented in this case, in the context of New Jersey's "justifiable need" standard. This gives the Court an ideal opportunity to consider these important questions, resolve the lower-court split in authority, and correct the federal courts' defiance of its Second Amendment case law. This Court accordingly should grant the petition in *Rogers*, hold the petition in this case while *Rogers* is argued and decided, and then grant a writ of certiorari, vacate the First Circuit's decision, and remand the matter to that court to reconsider the case in light of this Court's disposition in *Rogers*.

I. THIS COURT SHOULD RESOLVE THE CONFLICT OVER THE CONSTITUTIONALITY OF "GOOD REASON"-STYLE RESTRICTIONS ON THE SECOND AMENDMENT RIGHT.

A. THE LOWER FEDERAL COURTS ARE INTRACTABLY DIVIDED OVER THE CONSTITUTIONALITY OF THESE TYPES OF LAWS.

As discussed at further length in the *Rogers* petition, since this Court's decisions in *Heller* and *McDonald*, the lower federal courts have struggled over the extent to which the Second Amendment "individual right to possess and carry weapons in case of confrontation" applies outside the confines of the home. *Heller*, 554 U.S. at 592. The lower courts have ultimately coalesced around two distinct—and directly contrary—answers to the question.

The panel below hewed to the approach that has been adopted by the Second, Third, and Fourth Circuits, all of which have upheld "good reason"-type restrictions substantively identical to Respondents'. In *Kachalsky v. County of Westchester*, for example, the Second Circuit upheld New York's requirement that ordinary citizens demonstrate "proper cause" to carry handguns outside the home—a standard the defendants defined as demanding "a special need for self-protection distinguishable from that of the general community." 701 F.3d at 86 (quoting *Klenosky v. New York City Police Dep't*, 428 N.Y.S.2d 256, 257 (N.Y. App. Div. 1980), *aff'd*, 421 N.E.2d 503 (N.Y. 1981)). The *Kachalsky* court concluded that even assuming the Second Amendment applies in public, "[t]he state's ability to regulate firearms . . . is

qualitatively different in public than in the home." *Id.* at 94, 95. Accordingly, it analyzed New York's "proper cause" restriction under merely intermediate scrutiny. And reasoning that "[i]t is the legislature's job, not ours, to weigh conflicting evidence and make policy judgments," it upheld the law. *Id.* at 99; *see also Drake*, 724 F.3d at 426; *Woollard*, 712 F.3d at 865.

In *Wrenn v. District of Columbia*, by contrast, the D.C. Circuit struck down the District of Columbia's requirement that ordinary citizens must show a "good reason" to obtain a permit to carry handguns outside the home. While *Gould*, *Kachalsky*, *Woollard*, and *Drake* determined that "good reason"-type restrictions "fall[ ] outside the core of the Second Amendment right," App.23a, *Wrenn* drew precisely the opposite conclusion: "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." 864 F.3d at 661. Similarly, while the First Circuit, along with the Second, Third, and Fourth, upheld the substantively identical restrictions before them under intermediate scrutiny, *Wrenn* instead adopted a "categorical approach," under which "complete prohibitions of Second Amendment rights" are "always invalid." *Id.* at 665 (brackets and quotation marks omitted). And the *Wrenn* court determined that the District of Columbia's "good reason" requirement "is necessarily a total ban on most . . . residents' right to carry a gun in the face of ordinary self-defense needs." *Id.* at 666; *see also Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012).

Accordingly, the lower courts have split into two diametrically opposed camps over the question whether a State may effectively ban ordinary, law-abiding citizens from carrying handguns in public for self-defense. As a result, whether an American citizen is allowed to bear arms for "the core lawful purpose of self-defense," *Heller*, 554 U.S. at 630, largely depends on which federal circuit his State of residence falls within. That state of affairs is arbitrary and intolerable, and this Court should intervene to resolve the split of authority over this vital question.

B. THE DECISIONS UPHOLDING "GOOD REASON"-STYLE RESTRICTIONS ARE DIRECTLY CONTRARY TO THIS COURT'S INSTRUCTIONS IN *HELLER* AND *MCDONALD*.

This Court's review of the questions presented is necessary for the independent reason that those courts that have upheld "good reason"-style restrictions on the right to bear arms are in direct conflict with the clear holdings of this Court's decisions in *Heller* and *McDonald*.

By protecting both the keeping *and bearing* of arms, the text of the Second Amendment leaves no doubt that it applies outside the home. This is also clear from *Heller*, which "repeatedly invokes a broader Second Amendment right than the right to have a gun in one's home." *Moore*, 702 F.3d at 935–36. And as discussed in the petition in *Rogers*, the inquiry into the historical understanding of the Second Amendment required by this Court's precedents leads to the same destination. Petition for Writ of Certiorari at 23–28, *Rogers v. Grewal*, No. 18-824 (Dec. 20, 2018).

Heller makes clear that the right to individual self-defense is "the *central component*" of the Second Amendment. 554 U.S. at 599. Because the Second Amendment's text, history, and purposes all show that its protections extend outside the home, the right to carry firearms "for the core lawful purpose of self-defense" necessarily extends beyond those four walls as well. *Id.* at 630. Those courts that have concluded that "good reason" restrictions "fall[ ] outside the core of the Second Amendment right," App.24a, are thus in direct conflict with this Court's precedents.

The decision in the case below, and the other decisions upholding similar laws, also run contrary to this Court's precedents by declining to apply *Heller*'s categorical text-and-history approach. Under *Heller*, because "[t]he very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon," wholesale infringements upon the Amendment's "core protection" must be held unconstitutional categorically, not "subjected to a freestanding 'interest-balancing' approach." 554 U.S. at 634–35. Respondents' demand "that an applicant furnish some information to distinguish his own need for self-defense from that of the general public," App.6a–7a, *extinguishes* the core Second Amendment rights of typical citizens in just this wholesale way—for these citizens by definition cannot make such a showing. The panel below accordingly should have struck down the challenged policies as unconstitutional *per se*, not weighed their constitutionality under a watered down version of the "tiers of scrutiny" approach.

Finally, the First Circuit—along with the Second, Third, and Fourth Circuits—have compounded their error in refusing to apply *Heller*'s categorical test by instead applying a weak-tea form of scrutiny that is effectively indistinguishable from the rational-basis review that this Court *singled out as inappropriate*. *Heller*, 554 U.S. at 628 n.27. As demonstrated in the *Rogers* petition, Petition for Writ of Certiorari at 32–35, the social science literature studying the effects of "good reason"-type restrictions like Respondents' has overwhelmingly concluded that these limits cannot be shown to cause *any* increase in public safety. For instance, in 2005 the National Academy of Sciences' National Research Council ("NRC") determined, after an exhaustive review of the relevant social-scientific literature, that "with the current evidence it is not possible to determine that there is a causal link between the passage of right-to-carry laws and crime rates." NATIONAL RESEARCH COUNCIL, FIREARMS AND VIOLENCE: A CRITICAL REVIEW 150 (Charles F. Wellford, John V. Pepper, & Carol V. Petrie eds., 2005), http://goo.gl/WO1ZNZ. Any realistic appraisal of existing social-scientific data thus leads inexorably to the conclusion that the "justifiable need" requirement cannot be shown to benefit the public safety.

Moreover, because myriad alternatives exist that are more narrowly crafted to address the problem of handguns being carried by those likely to misuse them—such as background-check and training requirements—a "good reason"-style law that prevents *any* ordinary citizen from carrying a firearm in public plainly fails the narrow-tailoring requirement that applies under intermediate

scrutiny. *See McCullen v. Coakley*, 573 U.S. 464, 486 (2014); Petition for Writ of Certiorari at 34, *Rogers*, No. 18-824. The panel below thus upheld the Commonwealth's "good reason" requirement only by applying a form of scrutiny effectively equivalent to rational basis review.

C. THIS COURT'S REVIEW IS NEEDED TO CORRECT THE LOWER FEDERAL COURTS' MASSIVE RESISTANCE TO *HELLER* AND *MCDONALD*.

Since the decisions in *Heller* and *McDonald*, many lower courts have stubbornly and deliberately ignored those decisions, narrowing them to their specific facts and making a hollow mockery of the Second Amendment's promise that law-abiding citizens must be allowed "to use [firearms] for the core lawful purpose of self-defense." *Heller*, 554 U.S. at 630. Many courts, for example, have flatly ruled that "the Second Amendment does not confer a right that extends beyond the home." *Jennings v. McCraw*, 2012 WL 12898407, at *5 (N.D. Tex. Jan. 19, 2012), *aff'd sub nom. NRA v. McCraw*, 719 F.3d 338 (5th Cir. 2013); *see also, e.g.*, *Kachalsky v. Cacace*, 817 F. Supp. 2d 235, 264–65 (S.D.N.Y. 2011), *aff'd sub nom. Kachalsky*, 701 F.3d 81. These cases "reflect[ ] a distressing trend: the treatment of the Second Amendment as a disfavored right." *Peruta v. California*, 137 S. Ct. 1995, 1999 (2017) (Thomas, J., dissenting from the denial of certiorari).

While this Court's decision to grant the writ in *New York State Rifle & Pistol Ass'n v. City of New York*, No. 18-280, begins to reverse that trend, the Court hears many cases each Term resolving disputes

about the application of more favored rights; declining to review this issue because of the grant in *New York* would thus itself be a signal of the Second Amendment's continued second-class status. *See Silvester v. Becerra*, 138 S. Ct. 945, 951 (2018) (Thomas, J., dissenting from the denial of certiorari) ("[I]n this Term alone, we have granted review in at least five cases involving the First Amendment and four cases involving the Fourth Amendment—even though our jurisprudence is much more developed for those rights."). Indeed, this Court's review is all the more necessary in the context of "good-reason"-type restrictions on carrying firearms in public, since unlike the law at issue in *New York*, these types of restrictions have been imposed by multiple jurisdictions and repeatedly upheld by the lower courts—in open defiance of this Court's instructions. The many decisions thumbing the nose at this Court's Second Amendment precedents accordingly provide an independent basis for this Court's review of the issue raised in this case.

II. THIS COURT SHOULD HOLD THIS PETITION, GRANT REVIEW IN *ROGERS V. GREWAL*, AND THEN GRANT THE WRIT, VACATE THE PANEL'S DECISION, AND REMAND TO THE FIRST CIRCUIT.

For all of these reasons, this Court should grant review of this critically important issue to resolve the disagreement among the lower courts over the scope of the Second Amendment and the constitutionality of "good reason" restrictions like the ones upheld below. The petition in *Rogers* currently pending before this Court squarely presents an ideal opportunity to take up this issue.

The questions presented in *Rogers* are the same as those presented in this case. And as explained in the *Rogers* petition, that case is a uniquely good vehicle for reviewing these important issues. The Second Amendment claim is the sole claim at issue in that case, meaning that this Court's resolution of that claim will likely be dispositive not only of that case but also of other cases like this one challenging "good reason"-style restrictions. Indeed, the New Jersey law challenged in *Rogers* is a perfect representative of the types of "good reason"-style restrictions that have created the split of authority. The time for the Court to resolve the conflict over the constitutionality of these laws has come, and *Rogers* presents the perfect opportunity to do so.

The Court should accordingly grant certiorari in *Rogers*. Further, because the questions presented in this case are the same as those in *Rogers*, it should hold this petition, pending the briefing, argument, and decision in *Rogers*, and then grant certiorari in this case, vacate the panel's decision, and remand to the First Circuit to give that court an opportunity to reconsider the case in light of whatever disposition this Court reaches in *Rogers*.

CONCLUSION

For the reasons set forth above, the Court should grant certiorari in *Rogers v. Grewal*, No. 18-824, grant the instant petition for certiorari once *Rogers* has been decided, vacate the decision below, and remand the case to the First Circuit for reconsideration.

April 1, 2019

Respectfully submitted,

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APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 17-2202

[Filed November 2, 2018]

MICHAEL GOULD, et al.,

Plaintiffs, Appellants,

v.

MARK MORGAN, in his Official Capacity as Acting Chief of the Brookline Police Department; WILLIAM G. GROSS, in his Official Capacity as Commissioner of the Boston Police Department*; and COMMONWEALTH OF MASSACHUSETTS OFFICE OF THE ATTORNEY GENERAL,

Defendants, Appellees.

* Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Commissioner William G. Gross has been substituted for former Commissioner William B. Evans as respondent.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[Hon. F. Dennis Saylor, IV, U.S. District Judge]

Before

Thompson, Selya, and Kayatta, Circuit Judges.

David H. Thompson, with whom Peter A. Patterson, John D. Ohlendorf, Cooper & Kirk, PLLC, David D. Jensen, and David Jensen PLLC were on brief, for appellants.

Stephen P. Halbrook, John Parker Sweeney, James W. Porter, III, T. Sky Woodward, and Bradley Arant Boult Cummings LLP on brief for National Rifle Association of America, Inc., amicus curiae.

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November 2, 2018

SELYA, **Circuit Judge**. This case involves a constitutional challenge to the Massachusetts firearms licensing statute, as implemented in the communities of Boston and Brookline. All of the individual plaintiffs sought and received licenses from one of those two communities to carry firearms in public. The licenses, though, were restricted: they allowed the plaintiffs to carry firearms only in relation to certain specified activities but denied them the right to carry firearms more generally.

The plaintiffs say that the Massachusetts firearms licensing statute, as implemented in Boston and Brookline, violates the Second Amendment. The district court disagreed, and so do we. Mindful that "the right secured by the Second Amendment is not unlimited," District of Columbia v. Heller, 554 U.S. 570, 626 (2008), we hold that the challenged regime bears a substantial relationship to important governmental interests in promoting public safety and crime prevention without offending the plaintiffs' Second Amendment rights. Accordingly, we affirm the district court's entry of summary judgment for the defendants. In the last analysis, the plaintiffs simply do not have the right "to carry arms for any sort of confrontation" or "for whatever purpose" they may choose. Id. at 595, 626 (emphasis omitted).

I. BACKGROUND

We start by rehearsing the applicable statutory and regulatory scheme and then recount the travel of the case. In Massachusetts, carrying a firearm in public

without a license is a crime. See Mass. Gen. Laws ch. 269, § 10(a); see also Hightower v. City of Bos., 693 F.3d 61, 65 (1st Cir. 2012). The Massachusetts firearms licensing statute "is part of a large regulatory scheme to promote the public safety." Commonwealth v. Davis, 343 N.E.2d 847, 849 (Mass. 1976). Under its current incarnation, Mass. Gen. Laws ch. 140, § 131, an individual may request a license to carry a firearm in public by submitting an application to the appropriate licensing authority, which is defined as either the applicant's local "chief of police or the board or officer having control of the police in a city or town, or persons authorized by them." Id. § 121; see § 131(d). Such a license allows the holder to:

> purchase, rent, lease, borrow, possess and carry: (i) 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; and (ii) rifles and shotguns, including large capacity weapons, and feeding devices and ammunition therefor, for all lawful purposes; provided, however, that the licensing authority may impose such restrictions relative to the possession, use or carrying of large capacity rifles and shotguns as it deems proper.

Id. § 131(a). For this purpose, a firearm is defined as "a stun gun or 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 or 18 inches in

the case of a shotgun as originally manufactured." Id. § 121.

The Massachusetts statute describes the circumstances in which a license to carry may be granted, denied, revoked, or restricted to particular uses. See id. § 131. Pertinently, a local licensing authority "may issue [a license] if it appears that the applicant is not a prohibited person . . . and that the applicant has good reason to fear injury . . . or for any other reason, including the carrying of firearms for use in sport or target practice only." Id. § 131(d). An applicant is a "prohibited person" if the licensing authority determines, inter alia, that he is a convicted felon, that he is younger than twenty-one years of age, or that he is otherwise unsuitable (by reason of, say, mental illness or involvement in domestic violence) to receive a license to carry. Id.; see generally Chief of Police of Worcester v. Holden, 26 N.E.3d 715, 724 (Mass. 2015) (discussing "suitable person" standard).

Once the licensing authority satisfies itself that the applicant is not a prohibited person, it may issue a license to carry as long as "the applicant can demonstrate a 'proper purpose' for carrying a firearm." Ruggiero v. Police Comm'r of Bos., 464 N.E.2d 104, 107 (Mass. App. Ct. 1984). Refined to bare essence, the statute identifies two pillars upon which the granting of a license to carry may rest: (1) good reason to fear injury, and (2) other reasons (such as sport or target practice). See id. Municipalities differ in their requirements for an applicant to establish eligibility based on the first pillar. Boston and Brookline have both promulgated policies requiring that an applicant

furnish some information to distinguish his own need for self-defense from that of the general public. This requirement — which is the focal point of the plaintiffs' challenge — means that the applicant must identify a specific need, that is, a need above and beyond a generalized desire to be safe. Cf. id. at 108 (finding insufficient applicant's statement that he had no intention of "spend[ing] his entire life behind locked doors [and was] a potential victim of crimes against his person").

An applicant who does not demonstrate a good reason to fear injury either to himself or to his property may still receive a license to carry a firearm; subject, however, to such restrictions as the licensing authority deems meet. See Mass. Gen. Laws ch. 140, § 131(a), (d). The statutory scheme vests in the licensing authority discretion to decide, on a case-by-case basis, whether and to what extent a restricted license should be issued. See id. Under this arrangement, a licensing authority may issue a restricted license that permits the carrying of a firearm only when the applicant is engaged in the particular activities specified in his application. See Ruggiero, 464 N.E.2d at 107 & n.5.

Not all communities offer the same types of restricted licenses. Boston offers licenses restricted to employment, hunting and target practice, or sport. For its part, Brookline offers licenses subject to restrictions for employment, hunting, target practice, sport, transport, domestic (use only in and around one's home), or collecting. A license restricted to employment allows the licensee to carry a firearm for all employment-related purposes, that is, while working

and while traveling to and from work. A license restricted to hunting allows the licensee to carry a firearm for lawful hunting of game and fowl. Similarly, a license restricted to sport allows the licensee to carry a firearm while partaking in hunting, target practice, and a wide variety of outdoor recreational activities (such as hiking, camping, and cross-country skiing).

In Boston, slightly more than forty percent of all licenses are issued without restrictions of any kind. In Brookline, the number shrinks to approximately thirty-five percent.[1] Every such license (whether or not restricted) permits the licensee to keep and carry firearms for personal protection in the home.

Once issued, a license may be revoked or suspended "upon the occurrence of any event that would have disqualified the holder from being issued such license or from having such license renewed" or "if it appears that the holder is no longer a suitable person to possess such license." Mass. Gen. Laws ch. 140, § 131(f). Any person "aggrieved by a denial, revocation, suspension or restriction placed on a license" may seek judicial review. Id.; see Hightower, 693 F.3d at 67. Such redress must be sought within ninety days when challenging a denial, revocation, or suspension. See Mass. Gen. Laws ch. 140, § 131(f). In contrast, judicial

[1] Boston and Brookline are not the only communities that make prolific use of restricted licenses. In 2015, fourteen communities (including Springfield, Lowell, New Bedford, Newton, and Medford) imposed restrictions on more than half of the licenses that they issued. Eleven other communities imposed restrictions on more than one-third of the licenses that they issued.

review may be sought at "any time" when challenging a restriction. Id.

Against this backdrop, we turn to the particulars of the case at hand. The individual plaintiffs (none of whom is a prohibited person) all reside in either Boston or Brookline. In each community, the local licensing authority is the chief of police.

For present purposes, the firearms licensing policies of the two communities are not materially different. Both police departments review applications for firearms licenses individually, giving careful attention to each applicant and to his stated reasons for wanting a license. Each police chief has promulgated a policy to the effect that a generalized desire to carry a firearm for self-defense, without more, will not constitute"good reason" sufficient to warrant the issuance of an unrestricted license. Instead, Boston and Brookline require an applicant to articulate a reason to fear injury to himself or his property that distinguishes him from the general population. Applicants who are employed in certain vocations (specifically, physicians, attorneys, and police officers) are more likely to be granted unrestricted licenses in both communities.[2]

The individual plaintiffs all sought and obtained licenses to carry firearms, but those licenses were issued with a variety of restrictions:

- Plaintiff Michael Gould is a professional photographer who lives in Brookline. In 2014,

[2] Boston (but not Brookline) also will grant unrestricted licenses to applicants who already have been issued unrestricted licenses by some other community in Massachusetts.

the Brookline Police Department granted him a license to carry firearms, restricted to employment and sport. These restrictions allow him to carry firearms on his person at home and whenever he is working with his high-priced photography equipment or when engaged in a range of recreational activities.

- Plaintiffs Christopher Hart, John Stanton, Danny Weng, and Sarah Zesch live in Boston. Each of them applied for an unrestricted firearms license but received a restricted license (containing hunting and target-practice restrictions).

The complaint alleges that each of the individual plaintiffs seeks an unrestricted license to carry firearms in public for the purpose of self-defense.

The individual plaintiffs are joined by plaintiff Commonwealth Second Amendment, Inc. (Comm2A), a non-profit organization dedicated to advancing the right to keep and bear arms. All of the individual plaintiffs are members of Comm2A.

Although all of the individual plaintiffs wish to have unrestricted firearms licenses for personal protection, none of them has tried to show that his or her fear of injury is in any way distinct from that of the general population. Thus, none of them has been able to satisfy Boston's or Brookline's "good reason" standard.

Invoking 42 U.S.C. § 1983, the plaintiffs brought suit in the United States District Court for the District of Massachusetts against the chiefs of police of Boston and Brookline. They alleged that these officials, acting

under color of state law, infringed their Second Amendment rights. To remedy this infringement, the plaintiffs sought a declaration that the Massachusetts firearms licensing statute, as administered in Boston and Brookline, transgressed the Second Amendment by allowing licensing authorities to deny unrestricted licenses to otherwise qualified individuals who lack a particularized reason to fear injury. See 28 U.S.C. §§ 2201, 2202. They also sought injunctive relief directing the defendants to remove all restrictions from the licenses held by the individual plaintiffs and barring the defendants from issuing restricted licenses in the future.

On motion, the district court allowed the Office of the Attorney General of the Commonwealth of Massachusetts to join the fray as an intervenor-defendant. See Fed. R. Civ. P. 24(a)(1). After the close of discovery, the parties cross-moved for summary judgment. The district court, in a thoughtful rescript, granted summary judgment for the defendants. See Gould v. O'Leary, 291 F. Supp. 3d 155, 174 (D. Mass. 2017). In its ruling, the district court first assumed (without deciding) that the challenged statutory and regulatory scheme burdened the Second Amendment right to bear arms. See id. at 169. Next, it determined that intermediate scrutiny comprised the appropriate lens through which to view the constitutionality of the challenged law. See id. at 170. Finally, the court concluded that the challenged statutory and regulatory scheme passed intermediate scrutiny: it bore a substantial relationship to the important governmental interests of promoting public safety and preventing crime. See id. at 173. In reaching this conclusion, the

court ceded some deference to the predictive judgments of the legislature "regarding matters that are beyond the competence of" courts. Id. at 171 (quoting Kachalsky v. Cty. of Westchester, 701 F.3d 81, 97 (2d Cir. 2012)).

This timely appeal ensued. The parties have filed exemplary briefs, and those submissions have been supplemented by a myriad of helpful amicus briefs.

II. FRAMING THE ISSUE

Before plunging into the merits of the plaintiffs' claims, we pause for some additional stage-setting. To begin, we note that the plaintiffs' appeal hinges on the answers to two central questions: Does the Second Amendment protect the right to carry a firearm outside the home for self-defense? And if they prevail on that question, may the government condition the exercise of the right to bear arms on a showing that a citizen has a "good reason" (beyond a generalized desire for self-defense) for carrying a firearm outside the home? Undergirding the plaintiffs' proposed answers to these questions is their claim that the manner in which Boston and Brookline have interpreted the Massachusetts "good reason" requirement offends the Second Amendment. Importantly, though, the plaintiffs do not challenge the Massachusetts firearms licensing statute as a whole, nor do they challenge the Commonwealth's requirement that an individual must have a license to carry firearms in public.

Because the plaintiffs' appeal is based exclusively upon the Second Amendment, our analysis follows suit. Consequently, we do not consider — let alone

foreclose — any other potential challenges to the manner in which Boston and Brookline have chosen to exercise their discretion under the Massachusetts firearms licensing statute. By the same token, even though we recognize that the majority of Massachusetts communities have firearms licensing policies that are more permissive than those adopted in Boston and Brookline, we do not regard those policies as relevant to our analysis.

Next, we think it is useful to draw a distinction between two types of firearms licensing regulations. Location-based regulations limit where firearms may be carried. In contrast, applicant-based regulations identify prohibited persons (such as felons) who may be barred from carrying firearms anywhere. The policies at issue here fall into the former category. Thus, we do not pass upon the validity of "prohibited person" regulations. After all, the plaintiffs have not challenged the Commonwealth's requirement, followed fastidiously in Boston and Brookline, that a license to carry firearms may be issued only to a suitable person.

Finally, we deem it helpful to offer a glossary of sorts, defining certain terms as those terms are used in this opinion.

- When we say the "Massachusetts statute," we mean (unless otherwise indicated) the "good reason" requirement of the Massachusetts firearms licensing statute.
- When we refer to the "Boston and Brookline policies," we mean the administration and

implementation of the "good reason" requirement by those two municipalities.

- When we say "firearm," we mean a conventional handgun. See Mass. Gen. Laws ch. 140, § 121 (defining "firearm" as "a stun gun or 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 or 18 inches in the case of a shotgun as originally manufactured"). We do not use this term to refer to assault weapons, which have a separate definition under Massachusetts law. See id.

- When we say in "public," we mean outside of one's home, excluding "sensitive places such as schools and government buildings," where the Supreme Court has cautioned that the regulation of firearms is "presumptively lawful." Heller, 554 U.S. at 626-27 & n.26.

- The terms "carry" and "carriage" refer to "wear[ing], bear[ing], or carry[ing]" a firearm "upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person." Id. at 584 (quoting Muscarello v. United States, 524 U.S. 125, 143 (1998) (Ginsburg, J., dissenting)). Unless otherwise specified, we use these terms to include both open and concealed carriage. We caution, however, that laws restricting concealed carriage alone may call for a somewhat different analysis. See Hightower, 693 F.3d at 73-74

(finding "[l]icensing of the carrying of concealed weapons" to be "presumptively lawful").

III. ANALYSIS

The plaintiffs mount two principal claims of error. First, they contend that the right to carry firearms in public for self-defense lies at the core of the Second Amendment and, thus, admits of no regulation. Second, they contend that the Boston and Brookline policies fail under any level of scrutiny that might arguably apply. We approach these claims of error mindful that our review of the district court's entry of summary judgment is de novo. See id. at 70; see also Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Sagardía de Jesús, 634 F.3d 3, 10 (1st Cir. 2011) (reviewing constitutional challenge to state law de novo). This standard is unchanged where, as here, an appeal follows the district court's disposition of cross-motions for summary judgment. See Blackie v. Maine, 75 F.3d 716, 720-21 (1st Cir. 1996). The task at hand is simplified by the parties' agreement that there are no genuine issues of material fact and that the critical constitutional questions are purely legal inquiries.

A. Legal Framework.

The Second Amendment provides that "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. For over two centuries, the Supreme Court said very little either about the meaning of these words or about the scope of the guaranteed right. In 2008, though, the Court made pellucid that the Second Amendment

protects the right of an individual to keep and bear arms (unconnected to service in the militia). See Heller, 554 U.S. at 592. Two years later, the Court confirmed that the Second Amendment applies with full force to the states through the Fourteenth Amendment. See McDonald v. City of Chicago, 561 U.S. 742, 784-85 (2010).

These decisions merely scratched the surface: they did not provide much clarity as to how Second Amendment claims should be analyzed in future cases. In Heller, for example, the Court considered the District of Columbia's near-complete ban on keeping operable handguns in the home. See 554 U.S. at 574-75. The Court concluded that this law infringed "the right of law-abiding, responsible citizens to use arms in defense of hearth and home" — an interest that the Court described as "elevate[d] above all other [Second Amendment] interests." Id. at 635. The Court observed that "[f]ew laws in the history of our Nation have come close to the severe restriction of the District's handgun ban." Id. at 629. Starting from this premise, the Court decided that the challenged law was so restrictive of the Second Amendment right that it would fail to pass muster "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights." Id. at 628-29.

In the plaintiffs' view, it follows directly from Heller that the Second Amendment guarantees them an unconditional right to carry firearms in public for self-defense. On this basis, they urge us to find that the Boston and Brookline policies are unconstitutional. We are not so sanguine: Heller simply does not provide a

categorical answer to whether the challenged policies violate the Constitution. Put another way, nothing in Heller "impugn[s] legislative designs that comprise . . . public welfare regulations aimed at addressing perceived inherent dangers and risks surrounding the public possession of loaded, operable firearms." Powell v. Tompkins, 783 F.3d 332, 346 (1st Cir. 2015). This conclusion is reinforced by McDonald — a case in which the Court plainly read Heller in this way, observing that Heller "does not imperil every law regulating firearms." 561 U.S. at 786.

Indeed, Heller itself made precisely this point. The majority opinion there stated that "[l]ike most rights, 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." 554 U.S. at 595, 626 (emphasis omitted). The Court went on to provide a non-exhaustive list of "presumptively lawful regulatory measures," including "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." Id. at 626-27 & n.26.

Even so, the Heller Court never presumed "to clarify the entire field" of permissible Second Amendment regulation. Id. at 635. Of particular pertinence for present purposes, Heller was silent about both "the scope of [the Second Amendment] right beyond the home and the standards for determining when and how

the right can be regulated by a government." Kachalsky, 701 F.3d at 89.

In the decade since Heller was decided, courts have adopted a two-step approach for analyzing claims that a statute, ordinance, or regulation infringes the Second Amendment right. See, e.g., Young v. Hawaii, 896 F.3d 1044, 1051 (9th Cir. 2018); Drake v. Filko, 724 F.3d 426, 429 (3d Cir. 2013); Woollard v. Gallagher, 712 F.3d 865, 874-75 (4th Cir. 2013); Nat'l Rifle Ass'n of Am., Inc. v. Bureau of ATFE (NRA), 700 F.3d 185, 194 (5th Cir. 2012); United States v. Greeno, 679 F.3d 510, 518 (6th Cir. 2012); Heller v. District of Columbia (Heller II), 670 F.3d 1244, 1252 (D.C. Cir. 2011); Ezell v. City of Chicago, 651 F.3d 684, 701-04 (7th Cir. 2011); United States v. Reese, 627 F.3d 792, 800-01 (10th Cir. 2010); see also Powell, 783 F.3d at 347 n.9. Under this approach, the court first asks whether the challenged law burdens conduct that falls within the scope of the Second Amendment's guarantee. See NRA, 700 F.3d at 194. 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." United States v. Chester, 628 F.3d 673, 680 (4th Cir. 2010). Because the challenge here is directed at a state law, the pertinent point in time would be 1868 (when the Fourteenth Amendment was ratified).[3] See Greeno, 679 F.3d at 518. If the

[3] This date contrasts with the date of ratification of the Second Amendment itself (1791). It is not at all clear to us that the scope of the Second Amendment should be different when analyzing a federal law than when analyzing a state law. Here, however, we need not probe this point: our conclusion with respect to the historical record would be the same regardless of which ratification date was used.

challenged law imposes no such burden, it is valid. If, however, it burdens conduct falling within the scope of the Second Amendment, the court then must determine what level of scrutiny is appropriate and must proceed to decide whether the challenged law survives that level of scrutiny. See Drake, 724 F.3d at 429; Woollard, 712 F.3d at 875.

Although we have not yet explicitly adopted this two-step approach,[4] we do so today. This approach results in a workable framework, consistent with Heller, for evaluating whether a challenged law infringes Second Amendment rights.

B. Scope of Second Amendment Right.

The framework requires that we start by pondering "whether the conduct at issue was understood to be within the scope of the right at the time of ratification." Woollard, 712 F.3d at 875 (quoting Chester, 628 F.3d at 680). After a diligent search for the answer to this question, we find — as have several of our sister circuits — that there is no national consensus, rooted in history, concerning the right to public carriage of firearms. See Drake, 724 F.3d at 431; Kachalsky, 701

[4] On occasion, though, we have employed an analysis that resembled some part of the framework. Thus, in United States v. Rene E., we traced the historical roots of laws prohibiting minors from possessing firearms from the founding era through the early twentieth century and concluded that the challenged law was of a type historically understood to be consistent with the Second Amendment. See 583 F.3d 8, 14-16 (1st Cir. 2009). So, too, in United States v. Booker, we employed a form of means-end scrutiny to find the law at issue substantially related to an important governmental interest. See 644 F.3d 12, 25-26 (1st Cir. 2011).

F.3d at 91. The available guideposts point in conflicting directions and leave the indelible impression "that states often disagreed as to the scope of the right to bear arms." Kachalsky, 701 F.3d at 91. Courts that have found the history conclusive relied primarily on historical data derived from the antebellum South. See, e.g., Young, 896 F.3d at 1054-57; Wrenn v. District of Columbia, 864 F.3d 650, 660-61 (D.C. Cir. 2017). But we find it unconvincing to argue that practices in one region of the country reflect the existence of a national consensus about the implications of the Second Amendment for public carriage of firearms. After all, our nation is built upon its diversity — and there is no principled way that we can assume that practices in one region are representative of all regions. We must use a wider-angled lens.

The view through this wider-angled lens tells a different tale. A comprehensive survey of the historical record — including the laws of Massachusetts, which "first adopted a good cause statute in 1836" — reveals that "states and their predecessor colonies and territories have taken divergent approaches to the regulation of firearms." Young, 896 F.3d at 1076, 1078 (Clifton, J., dissenting).

The short of it is that the national historical inquiry does not dictate an answer to the question of whether the Boston and Brookline policies burden conduct falling within the scope of the Second Amendment. Since we have previously exhibited considerable hesitancy to extend the Second Amendment right beyond the home, see Powell, 783 F.3d at 348;

Hightower, 693 F.3d at 72 n.8, this phase of our inquiry brings us into uncharted waters.

The Supreme Court's seminal decision in Heller guides our voyage. The Heller Court left no doubt that the right to bear arms "for defense of self, family, and property" was "most acute" inside the home. 554 U.S. at 628. If the right existed solely within the home, the Court's choice of phrase would have been peculiar. See Moore v. Madigan, 702 F.3d 933, 935-36 (7th Cir. 2012). So, too, the Heller Court stated that prohibitions on carrying firearms in "sensitive places" are "presumptively lawful," 554 U.S. at 626-27 & n.26 — a pronouncement that would have been completely unnecessary if the Second Amendment right did not extend beyond the home at all. Reading these tea leaves, we view Heller as implying that the right to carry a firearm for self-defense guaranteed by the Second Amendment is not limited to the home.

Withal, Heller did not supply us with a map to navigate the scope of the right of public carriage for self-defense. For example, Heller did not answer whether every citizen has such a right, or whether (as Boston and Brookline have concluded) the right is more narrowly circumscribed to those citizens who can establish an individualized reason to fear injury. In the absence of such guidance, we decline to parse this distinction today and proceed on the assumption that the Boston and Brookline policies burden the Second Amendment right to carry a firearm for self-defense.

C. Level of Scrutiny.

This conclusion brings into sharp relief the next step in our inquiry, which requires us to evaluate the challenged policies under an appropriate level of scrutiny. The plaintiffs argue that any law regulating the carriage of firearms for self-defense should be subject to strict scrutiny because the Second Amendment right is specifically articulated in the Constitution. This argument bites off more than the plaintiffs reasonably can expect to chew. Strict scrutiny does not automatically attach to every right enumerated in the Constitution. See, e.g., Kelo v. City of New London, 545 U.S. 469, 480 (2005) (refusing to apply strict scrutiny in Takings Clause context); Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (applying intermediate scrutiny to content-neutral time, place, and manner restriction challenged on First Amendment grounds). Even though the Second Amendment right is fundamental, the plaintiffs have offered us no valid reason to treat it more deferentially than other important constitutional rights. Consequently, we decline the plaintiffs' invitation to take a one-size-fits-all approach to laws that burden the Second Amendment right to any extent. See NRA, 700 F.3d at 198; see also Heller II, 670 F.3d at 1256 ("The [Supreme] Court has not said, however, and it does not logically follow, that strict scrutiny is called for whenever a fundamental right is at stake.").

In our judgment, the appropriate level of scrutiny must turn on how closely a particular law or policy approaches the core of the Second Amendment right and how heavily it burdens that right. See NRA, 700

F.3d at 195; Ezell, 651 F.3d at 703. A law or policy that burdens conduct falling within the core of the Second Amendment requires a correspondingly strict level of scrutiny, whereas a law or policy that burdens conduct falling outside the core of the Second Amendment logically requires a less demanding level of scrutiny.

This gets us to the heart of the matter: whether public carriage of firearms for self-defense is a core Second Amendment right? In an earlier case, we identified the core of the Second Amendment right as "the possession of operative firearms for use in defense of the home" by responsible, law-abiding individuals. Hightower, 693 F.3d at 72. We went on to hold "that the interest . . . in carrying concealed weapons outside the home is distinct from th[e] core interest emphasized in Heller." Id. As the court below observed, "[a]lthough Hightower did not consider the constitutionality of regulating the open carrying of weapons outside the home, the authority it cited did not distinguish between [concealed and open carry], suggesting that the operative distinction [between the core and the periphery of the Second Amendment] was whether the individual asserted his Second Amendment right outside or inside the home." Gould, 291 F. Supp. 3d at 169.

We make explicit today what was implicit in Hightower: that the core Second Amendment right is limited to self-defense in the home. This holding finds support in a number of out-of-circuit cases. See, e.g., United States v. Focia, 869 F.3d 1269, 1285 (11th Cir. 2017); Tyler v. Hillsdale Cty. Sheriff's Dep't, 837 F.3d 678, 685 (6th Cir. 2016) (en banc); Drake, 724 F.3d at

436; Wollard, 712 F.3d at 876; NRA, 700 F.3d at 206; Kachalsky, 701 F.3d at 93; Reese, 627 F.3d at 800.

To be sure, some courts have formulated broader conceptions of the core of the Second Amendment — conceptions that include carrying firearms in public for self-defense. See Young, 896 F.3d at 1070; Wrenn, 864 F.3d at 661. Each of these decisions, though, was reached by a divided panel over a cogent dissent. See Young, 896 F.3d at 1074 (Clifton, J., dissenting); Wrenn, 864 F.3d at 668 (Henderson, J., dissenting).

We think that the weight of circuit court authority has correctly identified the core of the Second Amendment, and our own precedent fits comfortably within those boundaries. We think, too, that this configuration of the Second Amendment's core interest is consistent with Heller, in which the Court declared that the home is where "the need for defense of self, family, and property is most acute," such that the Second Amendment "elevates above all other interests the . . . defense of hearth and home." 554 U.S. at 628, 635; see GeorgiaCarry.Org, Inc. v. Georgia, 687 F.3d 1244, 1259 (11th Cir. 2012) (explaining that the Heller Court "went to great lengths to emphasize the special place that the home — an individual's private property — occupies in our society").

Societal considerations also suggest that the public carriage of firearms, even for the purpose of self-defense, should be regarded as falling outside the core of the Second Amendment right. The home is where families reside, where people keep their most valuable possessions, and where they are at their most vulnerable (especially while sleeping at night). Outside

the home, society typically relies on police officers, security guards, and the watchful eyes of concerned citizens to mitigate threats. This same panoply of protections is much less effective inside the home. Police may not be able to respond to calls for help quickly, so an individual within the four walls of his own house may need to provide for the protection of himself and his family in case of emergency. Last — but surely not least — the availability of firearms inside the home implicates the safety only of those who live or visit there, not the general public.

Viewed against this backdrop, the right to self-defense — upon which the plaintiffs rely — is at its zenith inside the home. This right is plainly more circumscribed outside the home. "[O]utside the home, firearm rights have always been more limited, because public safety interests often outweigh individual interests in self-defense." United States v. Masciandaro, 638 F.3d 458, 470 (4th Cir. 2011). These truths are especially evident in densely populated urban areas like Boston and Brookline. See Joseph Blocher, Firearm Localism, 123 Yale L.J. 82, 108 (2013) (explaining that "American cities have traditionally had much more stringent gun control than rural areas").

This sort of differentiation is not unique to Second Amendment rights. Many constitutional rights are virtually unfettered inside the home but become subject to reasonable regulation outside the home. See, e.g., Lawrence v. Texas, 539 U.S. 558, 567 (2003); Stanley v. Georgia, 394 U.S. 557, 565 (1969); see also

Payton v. New York, 445 U.S. 573, 596 (1980) (declaring that "a man's house is his castle").

To sum up, we hold that the core right protected by the Second Amendment is — as Heller described it — "the right of law-abiding, responsible citizens to use arms in defense of hearth and home." 554 U.S. at 635. Public carriage of firearms for self-defense falls outside the perimeter of this core right.

This holding does not end our journey. Heller left open — and we have yet to address — what level of scrutiny applies to laws that burden the periphery of the Second Amendment right but not its core. For the reasons that follow, we decide today that intermediate scrutiny supplies the appropriate test.

To begin, our decision in Booker points us toward this conclusion. There, we applied an unnamed level of scrutiny in evaluating the constitutionality of a law prohibiting domestic violence misdemeanants from possessing firearms. See 644 F.3d at 13, 25-26. Although we abjured any label, the standard that we articulated was indistinguishable from intermediate scrutiny. Compare id. at 25 (requiring "a substantial relationship between the restriction and an important governmental objective"), with Clark v. Jeter, 486 U.S. 456, 461 (1988) (explaining that "[t]o withstand intermediate scrutiny, a statutory classification must be substantially related to an important governmental objective"). Other courts have not minced words but, rather, have affixed the label of "intermediate scrutiny" to the level of scrutiny employed in Booker. See, e.g., Schrader v. Holder, 704 F.3d 980, 990 (D.C. Cir. 2013); Kachalsky, 701 F.3d at 93 n.17. Nor have our sister

circuits shied away from a conclusion that intermediate scrutiny is the appropriate test for evaluating firearms regulations that burden conduct falling outside the core of the Second Amendment (including "good reason" laws similar to the Massachusetts statute). See Bonidy v. U.S. Postal Serv., 790 F.3d 1121, 1126 (10th Cir. 2015); Drake, 724 F.3d at 435; Woollard, 712 F.3d at 876; Kachalsky, 701 F.3d at 96; NRA, 700 F.3d at 196; Ezell, 651 F.3d at 708; see also Tyler, 837 F.3d at 692 (noting "near unanimous preference for intermediate scrutiny" in such cases).

Finally, our conclusion that intermediate scrutiny is appropriate to evaluate firearms regulations that burden rights on the periphery of the Second Amendment fits comfortably in the lacuna left by Heller. The Heller Court found that the District of Columbia's ban on handguns in the home failed under "any of the standards of scrutiny" historically applied by the Court "to enumerated constitutional rights." 554 U.S. at 628-29. This statement implies that there is a role for some level of scrutiny less rigorous than strict scrutiny. Even so, the Court made clear that rational basis review would not be sufficient. See id. at 628 n.27.

Here, all roads lead to Rome. Following this roadmap, we find that a law or policy that restricts the right to carry a firearm in public for self-defense will withstand a Second Amendment challenge so long as it survives intermediate scrutiny. To pass constitutional muster in this case, then, the defendants must show that the Massachusetts firearms licensing statute, as implemented by the Boston and Brookline policies,

substantially relates to one or more important governmental interests. It is to this question that we now turn.

D. Applying Intermediate Scrutiny.

The Massachusetts firearms licensing statute allows (but does not compel) local licensing authorities to issue licenses to applicants who "ha[ve] good reason to fear injury to [themselves] or [their] property." Mass. Gen. Laws ch. 140, § 131(d). It also allows local licensing authorities to issue licenses "for any other reason," with such restrictions as those authorities "deem[] proper." Id. § 131(a), (d). The legislative purpose behind the statute is twofold: to promote public safety and to prevent crime. See Chardin v. Police Comm'r of Bos., 989 N.E.2d 392, 403 (Mass. 2013); Commonwealth v. Seay, 383 N.E.2d 828, 833 (Mass. 1978). In fashioning this regime, Massachusetts endeavored "to prevent the temptation and the ability to use firearms to inflict harm, be it negligently or intentionally, on another or on oneself." Commonwealth v. Lee, 409 N.E.2d 1311, 1315 (Mass. App. Ct. 1980).

It cannot be gainsaid that Massachusetts has compelling governmental interests in both public safety and crime prevention. See, e.g., Schenck v. Pro-Choice Network of W.N.Y., 519 U.S. 357, 376 (1997). In point of fact, few interests are more central to a state government than protecting the safety and well-being of its citizens. See United States v. Salerno, 481 U.S. 739, 755 (1987); Watchtower Bible, 634 F.3d at 12; see also United States v. Morrison, 529 U.S. 598, 618 (2000) ("Indeed, we can think of no better example of

the police power . . . than the suppression of violent crime . . . ."). Given the obvious importance of the Commonwealth's governmental interests, the question before us reduces to whether the "good reason" requirement is substantially related to those interests.

In answering this question, we start with the premise that courts ought to give "substantial deference to the predictive judgments" of a state legislature engaged in the enactment of state laws. Turner Broad. Sys., Inc. v. FCC (Turner II), 520 U.S. 180, 195 (1997). This degree of deference forecloses a court from substituting its own appraisal of the facts for a reasonable appraisal made by the legislature. See Holder v. Humanitarian Law Project, 561 U.S. 1, 34 (2010).

We caution, however, that deference should not be confused with blind allegiance. There must be a fit between the asserted governmental interests and the means chosen by the legislature to advance those interests. See Woollard, 712 F.3d at 878. In assessing this fit, a perfect match is not required. See id. Put another way, a legislature's chosen means need not be narrowly tailored to achieve its ends: the fit between the asserted governmental interests and the means chosen by the legislature to advance them need only be substantial in order to withstand intermediate scrutiny. See Kachalsky, 701 F.3d at 97; cf. Booker, 644 F.3d at 26 (upholding law that "substantially promote[d] an important government interest"). Courts have described this requirement in various ways. A typical formulation — with which we agree — describes it as "a reasonable fit . . . such that the law does not

burden more conduct than is reasonably necessary." Drake, 724 F.3d at 436; see Woollard, 712 F.3d at 878.

Here, the fit between the asserted governmental interests and the means chosen to advance them is close enough to pass intermediate scrutiny. The challenged regime does not infringe at all on the core Second Amendment right of a citizen to keep arms in his home for the purpose of self-defense. Outside the home, the regime arguably does burden a citizen's non-core Second Amendment right. See supra Sections III.B, III.C. But in allocating this burden, the Massachusetts legislature was cognizant that firearms can present a threat to public safety. Striving to strike a balance, the legislature took note that some individuals might have a heightened need to carry firearms for self-defense and allowed local licensing authorities to take a case-by-case approach in deciding whether a particular "applicant has good reason to fear injury." Mass. Gen. Laws ch. 140, § 131(d). In addition, the legislature made appropriate provisions for restricted licenses, thus ensuring that individuals may carry firearms while engaging in hunting, target-shooting, and a host of other pursuits. Those same protections extend to individuals who need to carry firearms for work-related reasons.

Nor do the Boston and Brookline policies result in a total ban on the right to public carriage of firearms. In this respect, the policies coalesce with the Massachusetts statute to form a regime that is markedly less restrictive than the regimes found unconstitutional by the Seventh and Ninth Circuits. The Illinois ban on public carriage struck down by the

Seventh Circuit did not give the slightest recognition to the heightened need of some individuals to arm themselves for self-protection, see Moore, 702 F.3d at 940 (noting that "[n]ot even Massachusetts has so flat a ban as Illinois"), and the Hawaii law struck down by the Ninth Circuit created a regime under which not a single unrestricted license for public carriage had ever been issued, see Young, 896 F.3d at 1071 n.21. The Ninth Circuit took pains to distinguish the Hawaii law from laws in which the "good cause" standard "did not disguise an effective ban on the public carry of firearms." Id. at 1072.

The Massachusetts regime is more akin to those regimes upheld in the Second, Third, and Fourth Circuits. See Drake, 724 F.3d at 428-29, 439-40; Woollard, 712 F.3d at 868-70, 882; Kachalsky, 701 F.3d at 85-87, 101. Those regimes — like the regime at issue here — "provided for administrative or judicial review of any license denial, . . . a safeguard conspicuously absent from Hawaii's laws." Young, 896 F.3d at 1072.

The sockdolager, of course, is that the defendants have forged a substantial link between the restrictions imposed on the public carriage of firearms and the indisputable governmental interests in public safety and crime prevention. Massachusetts consistently has one of the lowest rates of gun-related deaths in the nation, and the Commonwealth attributes this salubrious state of affairs to its comprehensive firearms licensing regime. To buttress this point, the defendants have cited several studies indicating that states with more restrictive licensing schemes for the public carriage of firearms experience significantly

lower rates of gun-related homicides and other violent crimes. See, e.g., Cassandra K. Crifasi et al., Association Between Firearm Laws and Homicide in Urban Counties, 95 J. Urban Health 383 (2018); Michael Siegel et al., Easiness of Legal Access to Concealed Firearm Permits and Homicide Rates in the United States, 107 Am. J. Pub. Health 1923, 1923-29 (2017); John J. Donahue et al., Right-to-Carry Laws and Violent Crime: A Comprehensive Assessment Using Panel Data, the LASSO, and a State-Level Synthetic Controls Analysis, 3, 63 (Nat'l Bureau of Econ. Research, Working Paper No. 23510, 2018). They also cite statistics indicating that gun owners are more 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). Finally, the defendants have expressed a credible concern that civilians (even civilians who, like the plaintiffs, are law-abiding citizens) might miss when attempting to use a firearm for self-defense on crowded public streets and, thus, create a deadly risk to innocent bystanders.[5]

Several other courts of appeals have conducted similar inquiries and have concluded that "good reason" laws are substantially related to the promotion of public safety and the prevention of crime. See Drake,

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[5] In support of this stated concern, the defendants cite a study finding that highly trained New York City police officers had an average accuracy rate of only eighteen percent in gunfights. See Bernard D. Rostker et al., RAND Ctr. on Quality Policing, Evaluation of the New York City Police Department Firearm Training and Firearm-Discharge Review Process 14 (2008).

724 F.3d at 439-40; Woollard, 712 F.3d at 879-80; Kachalsky, 701 F.3d at 98-99; see also Peruta v. Cty. of San Diego, 824 F.3d 919, 942-45 (9th Cir. 2016) (en banc) (Graber, J., concurring). Emblematic of these decisions is the series of conclusions reached by the Fourth Circuit, which found that such laws "protect[] citizens and inhibit[] crime by . . . [d]ecreasing the availability of handguns to criminals via theft"; reduce "the likelihood that basic confrontations between individuals would turn deadly"; deter "the 'potentially tragic consequences' . . . that can result from the presence of a third person with a handgun during a confrontation between a police officer and a criminal suspect"; "[c]urtail[] the presence of handguns during routine police-citizen encounters"; decrease "the number of 'handgun sightings' that must be investigated"; and "[f]aciliat[e] the identification of those persons carrying handguns who pose a menace." Woollard, 712 F.3d at 879-80 (citations omitted). We agree.

Withal, there are two sides to the story. Fairly viewed, the defendants' judgments about whether reasonable restrictions on the public carriage of firearms advance public safety and prevent crime are plausible, but not infallible. In short, those judgments are open to legitimate debate.

To this end, the plaintiffs present a profusion of countervailing studies and articles. Drawing on these materials, they argue that the increased presence of firearms on public streets would act as a deterrent to criminals, not as a menace to public safety. They also laud the perceived benefits attendant to the defensive

use of firearms. See Gary Kleck & Marc Gertz, Armed Resistance to Crime: The Prevalence and Nature of Self-Defense With a Gun, 86 J. Crim. L. & Criminology 150, 164 (1995). Several amici add their voices to the chorus, debating the findings and credibility of a kaleidoscopic array of studies and articles. Some support the plaintiffs; others support the defendants.

Taken in the ensemble, the disparate views expressed in these studies, articles, and other submissions aptly illustrate that we are dealing with matters of judgment, not with matters of metaphysical certainty. To a large extent, choosing among these disparate views is like choosing from a menu at a popular restaurant: something can be found to suit every palate and the diner's choice is more likely to reflect her particular taste than the absolute quality of the dish. In the process of crafting sound policy, a legislature often must sift through competing strands of empirical support and make predictive judgments to reach its conclusions. See Turner Broad. Sys., Inc. v. FCC (Turner I), 512 U.S. 622, 665 (1994) (opinion of Kennedy, J.). This is plainly an inexact science, and courts must defer to a legislature's choices among reasonable alternatives. Institutionally, a legislative body is better equipped than a court to assess the compendium of data bearing upon a particular issue and to reach predictive judgments about what those data portend. See Turner II, 520 U.S. at 195. This is especially true of fraught issues, such as gun violence: "when it comes to collecting evidence and drawing factual inferences in this area, 'the lack of competence on the part of the courts is marked' and respect for the Government's conclusions is appropriate."

Humanitarian Law Project, 561 U.S. at 34 (quoting Rostker v. Goldberg, 453 U.S. 57, 65 (1981)).

We conclude that this case falls into an area in which it is the legislature's prerogative — not ours — to weigh the evidence, choose among conflicting inferences, and make the necessary policy judgments. In dealing with a complex societal problem like gun violence, there will almost always be room for reasonable minds to differ about the optimal solution. It follows, we think, that a court must grant the legislature flexibility to select among reasonable alternatives. It would be foolhardy — and wrong — to demand that the legislature support its policy choices with an impregnable wall of unanimous empirical studies. Instead, the court's duty is simply "to assure that, in formulating its judgments, [the legislature] has drawn reasonable inferences based on substantial evidence." Turner I, 512 U.S. at 666 (opinion of Kennedy, J.).

Let us be perfectly clear. The problems associated with gun violence are grave. Shootings cut short tens of thousands of American lives each year. Massachusetts has made a reasoned attempt to reduce the risks of gun violence on public streets: it has democratically adopted a firearms licensing statute that takes account of the heightened needs of some individuals to carry firearms for self-defense and balances those needs against the demands of public safety. The Boston and Brookline policies fit seamlessly with these objectives.

To cinch the matter, the defendants have adduced evidence sufficient to show a substantial relationship between the challenged regime and important

governmental interests. Though not incontrovertible, this evidence has considerable force — and the legislature was entitled to rely on it to guide its policy choices. The upshot is a "measured approach" that "neither bans public handgun carrying nor allows public carrying by all firearm owners . . . [leaving] room for public carrying by those citizens who can demonstrate" good reason to do so. Drake, 724 F.3d at 440. Consequently, we hold that the Massachusetts firearms licensing statute, as implemented by the Boston and Brookline policies, passes muster under the Second Amendment.

IV. CONCLUSION

We need go no further. For the reasons elucidated above, we affirm the district court's entry of summary judgment in favor of the defendants.

Affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 16-10181-FDS

[Filed December 5, 2017]

MICHAEL GOULD, CHRISTOPHER HART, DANNY WENG, SARAH ZESCH, JOHN STANTON and COMMONWEALTH SECOND AMENDMENT, INC.,

Plaintiffs,

v.

DANIEL O'LEARY, in his official capacity as Chief of the Brookline Police Department, and WILLIAM EVANS, in his official capacity as Commissioner of the Boston Police Department,

Defendants,

and

COMMONWEALTH OF MASSACHUSETTS,

Intervenor Defendant.

MEMORANDUM AND ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

SAYLOR, J.

This is a federal constitutional challenge to the firearm licensing policies of the Town of Brookline and the City of Boston. Plaintiffs Michael Gould, Christopher Hart, Danny Weng, Sarah Zesch, John Stanton, and Commonwealth Second Amendment, Inc. have brought suit under 42 U.S.C. § 1983, contending that policies of the Brookline and Boston Police Departments that restrict the ability of applicants to obtain licenses to carry firearms violate the Second and Fourteenth Amendments. The named defendants are Daniel O'Leary, the chief of the Brookline Police Department, and William Evans, the commissioner of the Boston Police Department. The Commonwealth of Massachusetts has intervened to defend the constitutionality of its state licensing scheme.

The parties have cross-moved for summary judgment. For the following reasons, defendants' motions will be granted, and plaintiffs' motion will be denied.

I. Background

The facts set forth below are undisputed.

A. Massachusetts Regulatory Framework

In Massachusetts, it is a crime to possess a firearm in public without a valid license to carry. Mass. Gen.

Laws ch. 269, § 10(a).[1] Licenses to carry ("LTC") firearms may be requested by application pursuant to Mass. Gen. Laws ch. 140, § 131(d). Applications are made to a "licensing authority," which is defined as either the applicant's local police chief or the board or officer having control of the police in a city or town. *Id.* §§ 121, 131(d). Massachusetts law specifies the circumstances under which a licensing authority may grant licenses, when licenses may be revoked, and what restrictions licenses may contain. *Id.* § 131.

Under the statute, a licensing authority "may issue" a license if "it appears" that the applicant satisfies both parts of a two-step inquiry, demonstrating that he or she (1) is not a "prohibited person" and (2) has a "proper purpose" for carrying a firearm. *Ruggiero v. Police Comm'r of Boston*, 18 Mass. App. Ct. 256, 259 (1984) (discussing an earlier, similarly worded version of the statute); Mass. Gen. Laws ch. 140, § 131(d).[2]

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[1] With limited exceptions, a "firearm" is defined as "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 or 18 inches in the case of a shotgun as originally manufactured." Mass. Gen. Laws ch. 140 § 121.

[2] Prior to 2014, a licensing authority could issue licenses in two forms: Class A or Class B. Mass. Gen. Laws. ch. 140, § 131(a-b). A Class A license permitted an individual to carry a concealed firearm in public and to possess a large-capacity firearm, while a Class B license permitted only open carry of firearms that were not classified as large-capacity. *Id.* In 2014, the Massachusetts legislature amended the licensing laws, eliminating Class B licenses, effective in 2021. *See* Mass. Acts ch. 284, § 101. However, effective immediately, licensing authorities were directed to refrain from issuing Class B licenses and to issue new and renewed licenses as Class A licenses. *Id.*

At the first step of the inquiry, the licensing authority examines whether the applicant is a "prohibited person." Mass. Gen. Laws ch. 140, § 131(d). An applicant may be categorically prohibited from possessing a firearm (for example, minors). *Id*. Alternatively, an applicant may be found to be a prohibited person if the licensing authority, in the reasonable exercise of his or her discretion, determines that the applicant is "unsuitable" based on evidence or factors that suggest the applicant would cause a risk to public safety. *Id.* The parties agree that plaintiffs here are not categorically prohibited from obtaining a license.

At the second step of the inquiry, the licensing authority is required to consider whether the applicant has a "proper purpose" for carrying a firearm. *Ruggiero*, 18 Mass. App. Ct. at 259. The statute does not provide an exhaustive list of purposes for which an applicant may properly request a license. Instead, it states that the licensing authority "may issue" a license if the applicant (1) "has good reason to fear injury to the applicant or the applicant's property" or (2) "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). In *Ruggiero*, the Massachusetts appellate court summarized an earlier version of the statute as follows: "Without excluding other valid reasons for being licensed, the statute identifies two purposes which will furnish adequate cause to issue a license—'good reason to fear injury to person or property' and an intent to carry a firearm for use in target practice." 18 Mass.

App. Ct. at 259. When an applicant seeks a license solely for self-protection, the licensing authority may require that the applicant distinguish his or her own specific need for protection from the needs of members of the general public. *Id.* at 261 (finding that, under an earlier, similarly worded version of the statute, an applicant's stated purposes to avoid "spend[ing] his entire life behind locked doors [and to prevent becoming] a potential victim of crimes" did not require issuance of a license for self-defense in public).

Even when an applicant otherwise meets the requirements for license approval, the licensing authority may issue the license "subject to such restrictions relative to the possession, use or carrying of firearms as the licensing authority deems proper." Mass. Gen. Laws ch. 140, § 131(a-b). Pursuant to that provision, the licensing authority may restrict a license to those uses for which the authority determines there to be an appropriate reason. *See Ruggiero*, 18 Mass. App. Ct. at 260 (upholding issuance of license with target, hunting, and sporting restriction where applicant requested license for self-defense purposes).

A licensing authority's decision to deny or restrict a license is subject to judicial review. Mass. Gen. Laws ch. 140, § 131(f). An applicant who has been denied a license must challenge the denial within ninety days. *Id.* By comparison, an applicant who has been granted a license with restrictions may challenge the restrictions in court at "any time." *Id.* Upon judicial review, the licensing authority's determination to impose restrictions may be reversed only if the authority had "no reasonable ground for . . . restricting

the license" or the determination is "arbitrary, capricious, or an abuse of discretion." *Id.*; *Chief of Police of Shelburne v. Moyer*, 16 Mass. App. Ct. 543, 546 (1983)).

Unless revoked or suspended, a license "shall be valid" for between five and six years, and shall expire on the licensee's birthday. Mass. Gen. Laws ch. 140, § 131(i). The licensing authority "shall" revoke or suspend a license "upon the occurrence of any event that would have disqualified the holder from being issued such license or from having such license renewed." *Id.* § 131(f). Additionally, a license "may be" revoked or suspended if the licensee is "no longer a suitable person." *Id.* The determination to revoke or suspend a license is also subject to judicial review. *Id.*

B. Brookline Firearm Licensing Policy

Daniel O'Leary is the Chief of the Brookline Police Department. (Def. O'Leary's SMF ¶ 1). He and Sergeant Christopher Malinn are the two officials who administer the firearms-licensing process in Brookline. (*Id.*). Sgt. Malinn is the "contact person and investigator" for firearm-license applicants. (*Id.* ¶ 2). However, as Police Chief, O'Leary is the ultimate authority responsible for issuing firearm licenses to Brookline residents pursuant to Mass. Gen. Laws ch. 140, § 131. (*Id.* ¶ 3). Chief O'Leary states that it is his practice to review personally all the information concerning applicants submitted to Sgt. Malinn. (*Id.*). He also states that he is always willing to meet with applicants to discuss their applications or licenses. (*Id.* ¶ 4).

Chief O'Leary will issue unrestricted LTCs to qualified individuals who show "good reason to fear injury to his person or property." (Def. O'Leary's Ans. to Interrog. No. 9). An otherwise-qualified applicant who fails to show "good reason to fear injury" will receive a restricted license. When deciding which restrictions to impose, Chief O'Leary states that he takes into account all information provided in the application, including field of employment and any training or experience with firearms. (*Id.* at Nos. 11-12).

Since January 1, 2015, Brookline has imposed seven types of restrictions on firearm licenses: (1) target, (2) hunting, (3) transport, (4) sporting, (5) employment, (6) in home, and (7) collecting. (Def. O'Leary's SMF ¶ 6).[3] Descriptions of those restrictions are as follows:

> **TARGET** – allows firearms to be carried while engaged in firearms target practice at a firearms club or firearms school. Included is reasonable traveling time to and from said club or firearms school, with any weapon(s). The firearm cannot be carried outside the home for another purpose.
>
> **HUNTING** – allows firearms to be carried while hunting and while going to or coming from a hunting area, when in possession of a valid hunting license. The firearm cannot be carried outside of the home for another purpose.
>
> **TRANSPORT** – allows one to transport firearms from one home to another. Note that all

[3] The in home restriction was created only because one applicant specifically requested it. (Def. O'Leary's SMF ¶ 6).

of the restrictions allow one to transport the firearm to the allowed activity. The firearm cannot be carried outside the home for another purpose.

SPORTING – allows the firearm to be carried for the purpose of target practice, recreational shooting or competition, the lawful pursuit of game animals and birds, and for outdoor recreational activities such as hiking, camping, cross country skiing, and other related activities. The firearm cannot be carried outside of the home for any other purpose.

EMPLOYMENT – allows the firearm to be carried only during the hours one is actually employed by, and/or operating at their company/employer. This includes reasonable time traveling to and from the company/ employer. The firearm cannot be carried outside the home for any other purpose.

IN HOME – allows one to keep the firearm in the home. It cannot be carried outside of the home.

COLLECTING – allows one to carry the firearm for the purpose of firearms collecting. Firearms cannot be carried outside the home for any other purpose.

(Def. O'Leary's Ans. to Interrog. No. 3).

Between January 1, 2015, and July 18, 2017, Chief O'Leary issued a total of 191 LTCs. (Stipulation at 1). Of those 191 LTCs, 68 (35.6%) were unrestricted and

123 (64.4%) contained at least one restriction. (*Id.*). However, members of certain professions were more likely to receive unrestricted licenses. (*Id.*). During that time period, 22 of 24 law enforcement officers (91.7%), 10 of 14 physicians (71.4%), and 4 of 6 attorneys (66.7%) received unrestricted licenses. (*Id.*).

C. Plaintiff Gould's Application

In 2014, Michael Gould lived in Brookline. (Pls.' SMF ¶ 81). He works as a professional photographer at a fine arts museum and also operates his own photography business. (*Id.* ¶ 79; Gould Aff. ¶ 1). He previously lived in Weymouth, Massachusetts, where he had a LTC from the Weymouth Police Department with the restriction of "Target Hunting Employment." (Pls.' SMF ¶ 80). On July 8, 2014, he applied to renew his LTC for "all lawful purposes" with the Brookline Police Department. (*Id.* ¶ 81). During an interview with Sgt. Malinn, he stated that he wanted an unrestricted LTC for self-defense. (*Id.* ¶ 82). Sgt. Malinn advised that unrestricted LTCs were difficult to obtain in Brookline and that Gould would need to obtain specific documentation to support his request. (*Id.*).

On September 29, 2014, Gould mailed a letter to Chief O'Leary detailing his request for an unrestricted LTC. (*Id.* ¶ 83). In his letter, he stated that he needed an unrestricted LTC because he routinely worked with "valuable photography equipment as well as extremely valuable works of art." (Gould Aff. Ex. 4, at 1). He further emphasized his experience with firearms. (*Id.*).

Chief O'Leary denied Gould's application for an unrestricted LTC in a letter dated October 16, 2014,

but offered to issue an LTC with the "Sporting" and "Employment" restrictions. (Pls.' SMF ¶ 84). On October 23, 2014, Sgt. Malinn explained to Gould that those restrictions would allow him to carry a firearm on all occasions identified in his letter. (Def. O'Leary's SMF ¶ 13). Gould signed forms accepting a LTC with those two restrictions on November 10, 2014, and received it on November 20, 2014. (Pls.' SMF ¶¶ 86-87). He did not appeal the license restrictions pursuant to Mass. Gen. Laws. ch. 140, § 131(f). (Def. O'Leary's SMF ¶ 14).

D. Boston Firearm Licensing Policy

William Evans is the Commissioner of the Boston Police Department. (Pls.' SMF ¶ 1). He has delegated his responsibilities as a licensing authority to Lt. Det. John McDonough, the head of the Boston Police Department's Licensing Unit. (*Id.*).

The Licensing Unit will issue unrestricted LTCs to qualified individuals who "show 'good reason to fear injury' that distinguishes them from the general population," or "are engaged in certain occupations." (*Id.* ¶ 2). Occupations that typically qualify for unrestricted LTCs include law enforcement officer, medical doctor, and lawyer. (*Id.* ¶ 3). In addition, the Licensing Unit will issue an unrestricted LTC to an applicant who has already been issued an unrestricted LTC anywhere else in Massachusetts. (*Id.* ¶ 4). If an individual does not meet one of these requirements, the Licensing Unit will typically issue the LTC subject to a "Target & Hunting" restriction. (*Id.* ¶ 5).

The Licensing Unit imposes three varieties of restrictions on firearm licenses: (1) employment, (2) target and hunting, and (3) sporting. A written policy describing those restrictions states as follows:

> **EMPLOYMENT** – restricts possession to a business owner engaged in business activities, or to an employee while engaged in work related activities, and maintaining proficiency, where the employer requires carry of a firearm (i.e. armored car, security guard, etc.). Includes travel to and from the activity location.
>
> **TARGET AND HUNTING** – restricts possession to the purpose of lawful recreational shooting or competition; for use in the lawful pursuit of game animals and birds; for personal protection in the home; and for the purpose of collecting (other than machine guns). Includes travel to and from activity location.
>
> **SPORTING** – restricts possession to the purpose of lawful recreational shooting or competition; for use in the lawful pursuit of game animals and birds; for personal protection in the home; for the purpose of collecting (other than machine guns); and for outdoor recreational activities such as hiking, camping, cross country skiing, or similar activities. Includes travel to and from activity location.

(Def. Evans's SMF, Ex. 4).

The Licensing Unit does not have a formal internal written policy for determining whether an applicant has shown good "reason" or "proper purpose" for

obtaining an unrestricted LTC. (Def. Evans's SMF ¶ 5). However, the Licensing Unit does follow general guidelines. (*Id.* ¶ 6). For example, the Licensing Unit draws a distinction between victims of random crime and victims who were specifically targeted; the latter are more likely to show the "good reason to fear injury" required for an unrestricted LTC. (*Id.* ¶ 10). The Licensing Unit does not define "good reason to fear injury" with regard to high-crime areas. (*Id.* ¶ 11). In addition, applicants requesting an unrestricted LTC must submit a letter and supporting documentation to Lt. Det. McDonough. (*Id.* ¶ 13). Lt. Det. McDonough states that he reviews those documents to determine eligibility for an unrestricted LTC on an individualized, case-by-case basis. (*Id.* ¶ 14).

Between January 1, 2015, and July 18, 2017, the Licensing Unit issued a total of 3,684 LTCs. (Pls.' SMF ¶ 21). Of those 3,684 LTCs, 1,576 (42.8%) were unrestricted and 2,108 (57.2%) contained at least one restriction. (*Id.*).[4] During that time period, 842 of 884 law enforcement officers (95.25%), 29 of 40 physicians (72.5%) and 78 of 86 attorneys (90.7%) received unrestricted licenses. (*Id.* ¶¶ 22-24). Excluding members of those three professions, the Licensing Unit issued 2,674 LTCs, of which 628 (23.5%) were unrestricted. (*Id.* ¶ 25).

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[4] The most common restriction imposed was "Target & Hunting," which was placed on 1,815 LTCs. (Def. Evans's SMF ¶ 26). The Licensing Unit also issued 17 LTCs with "Sporting" restrictions and 34 LTCs with "Employment" restrictions. (*Id.*). There were 242 LTCs issued with some combination of those three categories of restrictions. (*Id.*).

E. Boston Plaintiffs' Applications

Four plaintiffs are residents of the City of Boston: Christopher Hart, Danny Weng, Sarah Zesch, and Josh Stanton.

1. Christopher Hart

Christopher Hart works as the general manager of a restaurant in Boston. (*Id.* ¶ 48). He previously lived in Connecticut, where he possessed a "State Permit to Carry Pistols and Revolvers." (*Id.* ¶ 49). He previously possessed handgun carry licenses from Florida, Maine, and New Hampshire. (*Id.*).

On June 4, 2014, he applied for an LTC with the Licensing Unit. (*Id.* ¶ 50). On his application, Hart wrote that he was seeking a license for "personal protection both in/out of my home." (*Id.*). He then had an interview with Officer Angela Coleman. (*Id.* ¶ 51). After the interview, Officer Coleman completed a Massachusetts Instant Record Check System ("MIRCS") application for Hart and wrote "Target and Hunting" under the section "Reason(s) for requesting the issuance of a card or license." (*Id.* ¶ 52). Although Hart also submitted a letter to Lt. Det. McDonough requesting an unrestricted LTC for self-defense, he never received a reply. (*Id.* ¶¶ 54-55).

On July 2, 2014, the Licensing Unit issued a LTC to Hart with the restriction of "Target & Hunting." (*Id.* ¶ 56). The following month, he visited the Licensing Unit and asked about the possibility of removing the restriction. (*Id.* ¶ 57). Because his employer declined to provide documentation to justify an additional

"Employment" exception, Hart did not appeal the license. (*Id.*).

2. Danny Weng

Danny Weng is a software engineer who was honorably discharged from the U.S. Army. (*Id.* ¶ 37). He applied for a LTC with the Licensing Unit on January 13, 2014. (*Id.* ¶ 38). On his application, he stated that he was seeking a LTC for "all lawful purposes/target shooting." (*Id.*). He then interviewed with Officer Patricia McGoldrick, who completed a MIRCS application on his behalf. (*Id.* ¶ 40). Officer McGoldrick wrote "Target and Hunting" on his MIRCS application under the section "Reason(s) for requesting the issuance of a card or license." (*Id.* ¶ 42).

On February 18, 2014, the Licensing Unit issued a LTC to Weng with the restriction of "Target & Hunting." (*Id.* ¶ 44). Nine months later, on November 14, 2014, he wrote a letter to Lt. Det. McDonough reiterating his desire for an unrestricted LTC, emphasizing his military experience and desire for additional protection. (*Id.* ¶ 45). He followed up with another letter on March 13, 2015, adding that he wanted flexibility to participate in competitive shooting. (*Id.* ¶ 46). Lt. Det. McDonough replied on April 4, 2015, denying the request for an unrestricted LTC because he "could not show that [he had a] proper purpose to possess [an unrestricted] license." (*Id.* ¶ 47).

3. Sarah Zesch

Sarah Zesch is a Boston native who recently graduated from college and works for a state agency. (*Id.* ¶ 58). On January 6, 2015, she applied for a LTC

with the Licensing Unit. (*Id.* ¶ 59). She did not answer the question on the application form, "For what purpose do you require a License to Carry Firearms?" (*Id.*). She then interviewed with Officer Coleman, and indicated she wanted an unrestricted LTC for self-protection. (*Id.* ¶¶ 60-61).

After the interview, Officer Coleman wrote "Target and Hunting" on her MIRCS application under the section "Reason(s) for requesting the issuance of a card or license." (*Id.* ¶ 63). Although she also submitted a letter to Lt. Det. McDonough requesting an unrestricted LTC for personal protection, she never received a reply. (*Id.* ¶¶ 65, 67). On March 10, 2015, the Licensing Unit issued a LTC to her with the restriction of "Target & Hunting." (*Id.* ¶ 66).

4. <u>John Stanton</u>

John Stanton is a professional musician. (*Id.* ¶ 68). On December 15, 2014, he applied for a LTC with the Licensing Unit. (*Id.* ¶ 69). He listed "self-defense, target shooting, hunting, and all other lawful purposes" as reasons for requiring a LTC. (*Id.*). He then interviewed with Officer Coleman, who wrote "Target and Hunting" on his MIRCS application under the section "Reason(s) for requesting the issuance of a card or license." (*Id.* ¶ 72). On January 15, 2015, the Licensing Unit issued a LTC to him with the restriction of "Target & Hunting." (*Id.* ¶ 74).

On March 13, 2015, Stanton wrote a letter to Lt. Det. McDonough requesting removal of that restriction. (*Id.* ¶ 75). Lt. Det. McDonough denied the request on June 9, 2015, on the ground that Stanton "could not

show that [he had a] proper purpose to possess [an unrestricted] license." (*Id.* ¶ 76).

Within the next two months, Stanton was the victim of a theft. (*Id.* ¶ 77). On July 30, 2015, he again wrote to Lt. Det. McDonough and reiterated his prior request, emphasizing that he wanted an unrestricted LTC for personal protection. (*Id.*). Lt. Det. McDonough denied the request on August 6, 2015, stating he had still failed to provide justification for an unrestricted LTC. (*Id.* ¶ 78).

F. Commonwealth Second Amendment, Inc.

Plaintiff Commonwealth Second Amendment, Inc. is a Massachusetts-based non-profit corporation organized for the purpose of education, research, and legal action regarding what it contends is the constitutional right to possess and carry firearms. (*Id.* ¶¶ 88-89). The individual plaintiffs were made honorary members of the organization without their knowledge for purposes of this suit. (Def. Evans's SMF ¶ 25). However, since the filing of this suit, the individual plaintiffs have accepted membership offers and are now "knowing" members of the organization. (Pls.' Resp. to Def. Evans's SMF ¶ 25). Because Commonwealth Second Amendment, Inc.'s standing relies on the standing of its members and because its claims appear to be essentially derivative of the claims of its members, the organization's claims can be decided on the same grounds as those of the individual plaintiffs without separate analysis. *See United States v. AVX Corp.*, 962 F.2d 108, 116 (1st Cir. 1992).

G. Procedural Background

On February 4, 2016, plaintiffs Gould, Hart, and Commonwealth Second Amendment, Inc., brought this lawsuit against defendants O'Leary and Evans.[5] Plaintiffs amended the complaint on April 14, 2016, to add individual plaintiffs Weng, Zesch, and Stanton.

On January 27, 2017, defendant Evans filed a motion for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c). The Court denied the motion on March 6, 2017, finding that the amended complaint plausibly stated a claim for relief and raised factual issues that required the development of a factual record. After discovery concluded, plaintiffs filed a motion for summary judgment, and defendants O'Leary and Evans filed cross-motions for summary judgment.

II. Analysis

A. Cross-Motions for Summary Judgment

The two-count amended complaint alleges violations of the Second and Fourteenth Amendments under 42 U.S.C. § 1983. To succeed on a claim under 42 U.S.C. § 1983, plaintiffs must prove that (1) the conduct complained of was carried out under color of state law and (2) defendant's actions deprived plaintiffs of rights, privileges, or immunities secured by the Constitution or laws of the United States. *Collins v. Nuzzo*, 244 F.3d 246, 250 (1st. Cir. 2001).

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[5] The original complaint listed Irwin Cruz as a plaintiff and Chief David Provencher of the New Bedford Police Department as a defendant. Neither individual is a current party to the case.

There is no dispute that defendants O'Leary and Evans were acting under color of state law in issuing plaintiffs' restricted licenses. The complaint alleges that Massachusetts's firearm licensing scheme and defendants' licensing policies violate the Second Amendment and the Equal Protection Clause by (1) permitting the imposition of restrictions such as "sporting," "target," "hunting," and "employment" on their licenses and (2) allowing issuance of permits to turn on "arbitrary considerations, such as whether an individual resides or previously resided on the correct side of a boundary line, is wealthy and/or has a lot of cash, has a particular occupation, or has a place of business in another locality that issues unrestricted LTC[ ]s." Am. Compl. ¶¶ 62-68. In essence, plaintiffs contend that the Second Amendment, as interpreted by the Supreme Court decisions in *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. City of Chicago*, 561 U.S. 742 (2010), protect the right of law-abiding citizens to carry handguns in public for the purpose of self-defense.

Defendants contend that neither the municipal policies in question nor the state statutory scheme implicate a Second Amendment right because that right is limited to personal protection within the home.[6]

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[6] In *Batty v. Albertelli*, 2017 WL 740989 (D. Mass. Feb. 24, 2017), this Court upheld the constitutionality of the Town of Winchester's firearm licensing scheme against a challenge virtually identical to that made by plaintiffs here. Indeed, plaintiffs concede that the Court's ruling in *Batty* "ought to be dispositive here—unless revisited." (Pls.' Opp. and Reply at 1).

1. Standard of Review

The role of summary judgment is to "pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." *Mesnick v. General Elec. Co.*, 950 F.2d 816, 822 (1st Cir. 1991) (quoting *Garside v. Osco Drug, Inc.*, 895 F.2d 46, 50 (1st Cir. 1990)). Summary judgment is appropriate when the moving party shows that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A genuine issue is "one that must be decided at trial because the evidence, viewed in the light most flattering to the nonmovant . . . would permit a rational fact finder to resolve the issue in favor of either party." *Medina-Munoz v. R.J. Reynolds Tobacco Co.*, 896 F.2d 5, 8 (1st Cir. 1990) (citation omitted). In evaluating a summary judgment motion, the court indulges all reasonable inferences in favor of the nonmoving party. *See O'Connor v. Steeves*, 994 F.2d 905, 907 (1st Cir. 1993). When "a properly supported motion for summary judgment is made, the adverse party must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986) (quotations omitted). The non-moving party may not simply "rest upon mere allegation or denials of his pleading," but instead must "present affirmative evidence." *Id.* at 256-57.

2. The Second Amendment

The Second Amendment to the United States Constitution provides as follows: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not

be infringed." U.S. Const. amend. II. In 2008, the Supreme Court struck down a District of Columbia ordinance that prohibited the possession of handguns in the home, declaring that the Amendment guarantees "the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Heller*, 554 U.S. at 635. In 2010, the Court affirmed that the "right to possess a handgun in the home for the purpose of self-defense" is incorporated into the protections against infringement by the states provided by the Fourteenth Amendment. *McDonald*, 561 U.S. at 791. In *Heller*, however, the Supreme Court qualified its holding, stating that "[l]ike most rights, the right secured by the Second Amendment is not unlimited. . . . [N]othing in our 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 such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." 554 U.S. at 626-27.

As the First Circuit has recognized, several circuits use a two-part framework to evaluate a claim of Second Amendment infringement. *Powell v. Tompkins*, 783 F.3d 332, 347 n.9 (1st Cir. 2015). Under that framework, courts

> first consider whether the challenged law imposes a burden on conduct that falls within the scope of the Second Amendment's guarantee as historically understood, and if so, . . . next determine the appropriate form of judicial

> scrutiny to apply (typically, some form of either intermediate scrutiny or strict scrutiny).

Id. (citing *Jackson v. City and Cty. of San Francisco*, 746 F.3d 953, 962-63 (9th Cir. 2014); *Drake v. Filko*, 724 F.3d 426, 429 (3d Cir. 2013); *Woollard v. Gallagher*, 712 F.3d 865, 874-75 (4th Cir. 2013); *Nat'l Rifle Assn'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 194 (5th Cir. 2012); *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012); *Heller v. District of Columbia*, 670 F.3d 1244, 1252 (D.C. Cir. 2011) ("*Heller II*"); *Ezell v. City of Chicago*, 651 F.3d 684, 701-04 (7th Cir. 2011); *United States v. Reese*, 627 F.3d 792, 800-01 (10th Cir. 2010); *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010); *cf. Kwong v. Bloomberg*, 723 F.3d 160, 167 (2d Cir. 2013); *United States v. Bena*, 664 F.3d 1180, 1182-85 (8th Cir. 2011); *United States v. Skoien*, 614 F.3d 638, 639-43 (7th Cir. 2010) (*en banc*)).

Although the First Circuit has not explicitly adopted that two-step approach, the cases in which it has directly analyzed Second Amendment issues appear to fall under either the first or second step of the framework. For example, in *United States v. Rene E.*, the court concluded that the federal statute criminalizing firearm possession by juveniles did not violate the Second Amendment because it was one of the "longstanding prohibitions" that *Heller* did not call into question. *See* 583 F.3d 8, 15-16 (1st Cir. 2009). While the court in *Rene E.* did not specifically hold that the statute only burdened conduct outside the scope of Second Amendment protection, the analysis it followed was almost identical to those of other circuits when

conducting the first step in their Second Amendment analysis. *Compare*, *e.g.*, *Rene E.*, 583 F.3d at 13-16 (surveying nineteenth-century state laws and the founders' attitudes on juvenile handgun possession) *with National Rifle Ass'n of Am.*, 700 F.3d at 200-04 (surveying founding-era attitudes and nineteenth-century opinion on juvenile firearm possession).

In *United States v. Booker*, 644 F.3d 12 (1st Cir. 2011) and *United States v. Armstrong*, (1st Cir. 2013), the First Circuit upheld a federal statute criminalizing firearm possession by persons convicted of misdemeanor crimes of domestic violence. In doing so, it found that the statute, although falling within one of the "presumptively lawful" categories of firearm regulation in *Heller*, required some form of means-ends scrutiny because it was a categorical limit on the Second Amendment right. *Booker*, 644 F.3d at 25; *Armstrong*, 706 F.3d at 7-8.

In *Hightower v. City of Boston*, the First Circuit concluded that revoking an individual's license to carry a concealed weapon based on the fact that her firearm license application contained a false statement did not violate the Second Amendment under any standard of heightened scrutiny. 693 F.3d 61, 74 (1st Cir. 2012). Thus, the analysis in *Booker*, *Armstrong*, and *Hightower* was similar to the analysis performed by other circuits at the second step of the Second Amendment analytical framework. *Compare Hightower*, 693 F.3d at 73-76 (regulation upheld under any standard of heightened means-ends scrutiny) *with Woollard*, 712 F.3d at 880-82 (regulation upheld under intermediate scrutiny).

Accordingly, the Court will first analyze the scope of the Second Amendment to determine whether the disputed restrictions impose a burden on the right to keep and bear arms protected by the Second Amendment's guarantee as historically understood. Next, the Court will analyze what form of means-ends scrutiny the restrictions must satisfy. Finally, the Court will apply the appropriate level of scrutiny to the restrictions at issue.

a. Scope of the Second Amendment

Heller specifically precluded from Second Amendment protection three categories of firearm regulation: "longstanding prohibitions on the possession of firearms by felons and the mentally ill, . . . laws forbidding the carrying of firearms in sensitive places, [and] laws imposing conditions and qualifications on the commercial sale of arms." 554 U.S. at 626-27. The court identified these laws as examples of "presumptively lawful" regulatory measures, while explicitly describing the list as non-exhaustive. *Id.* at 627 n.26. Courts have interpreted *Heller* as delimiting the scope of the Second Amendment, placing regulations that are sufficiently rooted in history and tradition as to rise to the level of "presumptively lawful" outside its protection. *See, e.g., Rene E.,* 583 F.3d at 12.

Plaintiffs contend that the restrictions imposed on their licenses do not comport with historical understandings of the Second Amendment right as interpreted by *Heller*. They contend that the Second Amendment squarely protects the right of law-abiding citizens to carry handguns in public for the purpose of

self-defense, which defendants have infringed by requiring them to show a specific "reason to fear" in order to receive unrestricted licenses. Like the Third Circuit in *Drake*, this Court is "not inclined to address this [issue] by engaging in a round of full-blown historical analysis, given other courts' extensive consideration of the history and tradition of the Second Amendment." 724 F.3d at 431.

It is now well-established "that the possession of operative firearms for use in defense of the home constitutes the 'core' of the Second Amendment." *Hightower*, 693 F.3d at 72; *see also Powell*, 783 F.3d at 347. However, *Heller* and *McDonald* were not intended to describe the full scope of the Second Amendment right, and neither squarely addresses whether the Second Amendment right extends beyond the home. *See Heller*, 554 U.S. at 595 (finding that "the Second Amendment conferred an individual right to keep and bear arms," but also that the Second Amendment did not "protect the right of citizens to carry arms for *any sort* of confrontation"). As a result, the lower federal courts have wrestled with the questions of whether, and to what extent, the right protected by the Second Amendment extends beyond the home. *See Hightower*, 693 F.3d at 74 (describing the matter as a "vast *terra incognita*") (quoting *United States v. Masciandaro*, 638 F.3d 458, 475 (4th Cir. 2011)). Twice, the First Circuit has declined to reach the issue of "the scope of the Second Amendment as to carrying firearms outside the vicinity of the home." *Hightower,* 693 F.3d at 72 n.8; *Powell,* 783 F.3d at 348 (quoting *Hightower*, 693 F.3d at 72 n.8).

Decisions from the other courts of appeals offer mixed guidance. The Second, Third, and Fourth Circuits have "assumed for analytical purposes" that the Second Amendment has some application outside the home, without deciding the issue. *See Powell*, 783 F.3d at 348 n.10; *see also Drake*, 724 F.3d at 431; *Kachalsky v. County of Westchester*, 701 F.3d 81, 89 (2d Cir. 2012); *Woollard*, 712 F.3d at 876.

In contrast, the Seventh Circuit held that the "Supreme Court has decided that the [Second] [A]mendment confers a right to bear arms for self-defense, which is as important outside the home as inside." *Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012). The Ninth Circuit originally agreed with the Seventh Circuit's analysis. *See Peruta v. County of San Diego*, 771 F.3d 570 (9th Cir. 2014). However, it reversed that decision upon rehearing *en banc*, and determined that although the Second Amendment does not encompass a right to carry a concealed weapon in public, "[t]here may or may not be a Second Amendment right for a member of the general public to carry a firearm openly in public." *Peruta v. County of San Diego*, 824 F.3d 919, 939 (9th Cir. 2016).

More recently, the District of Columbia Circuit held that the Second Amendment protects an individual's right to carry firearms outside the home for self-defense. *See Wrenn v. District of Columbia*, 864 F.3d 650, 661 (D.C. Cir. 2017). In *Wrenn*, the court, in a 2-to-1 decision, found that the "core" of the Second Amendment protected "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." *Id.* at 661.

The court invalidated the District of Columbia's "good-reason" law as a categorical restriction on a "'core' Second Amendment right." *Id.* at 657.[7] It stated that the historical analysis of the Supreme Court in *Heller* showed that when the Second Amendment was ratified, the so-called Northampton laws that restricted carrying firearms in crowded areas only barred the carrying of "dangerous and unusual" weaponry. *Id.* at 660 (citing *Heller*, 554 U.S. at 627).[8] In addition, English "surety laws" requiring firearm carriers to post a bond to cover any potential damage "did not deny a responsible person carrying rights . . . [t]hey only burdened someone reasonably accused of posing a threat." *Id.* at 661. Because the good-reason law infringed on the "constitutional right to bear common arms for self-defense in any fashion at all," the court found it unnecessary to conduct a means-end analysis. *Id.* at 665-66 ("It's appropriate to strike down such 'total ban[s]' without bothering to apply tiers of scrutiny because no such analysis could ever sanction

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[7] The District of Columbia's "good-reason" law is an "ensemble of [D.C.] Code provisions and police regulations" limiting LTCs to those showing a "good reason to fear injury to [their] person or property" or "any other proper reason for carrying a pistol." *Wrenn*, 864 F.3d at 655-56.

[8] The Statute of Northampton was passed during the early reign of Edward III. The Statute restricted the possession of pistols and other weapons in public locations. 2 Edw. 3, c. 3 (1328). Several colonies (and later, states) adopted similar laws in the 18th and 19th centuries. *Wrenn*, 864 F.3d at 659.

obliterations of an enumerated constitutional right.") (alteration in original).[9]

No federal court of appeals has held that the Second Amendment does not extend beyond the home. *But see Williams v. State*, 10 A.3d 1167, 1169, 1177 (Md. 2011) (holding that a statute requiring a permit to carry a handgun outside the home "is outside of the scope of the Second Amendment" and stating that "[i]f the Supreme Court . . . meant its holding to extend beyond home possession, it will need to say so more plainly").

In *Hightower*, the First Circuit stated that "[i]t is plain that the interest . . . in carrying concealed weapons outside the home is distinct from [the] core interest emphasized in *Heller*." 693 F.3d at 72. Although *Hightower* did not consider the constitutionality of regulating the open carrying of weapons outside the home, the authority it cited did not distinguish between the two, suggesting that the operative distinction was whether the individual asserted his Second Amendment right outside or inside

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[9] *Wrenn* appears to conflict, at least to some degree, with First Circuit precedent. As noted, the First Circuit has stated "that the possession of operative firearms for use in defense of the home constitutes the 'core' of the Second Amendment." *Hightower*, 693 F.3d at 72. *See also Powell*, 783 F.3d at 347 ("Together, *Heller* and *McDonald* establish that states may not impose legislation that works a complete ban on the possession of operable handguns in the home by law-abiding, responsible citizens for use in immediate self-defense."). In addition, while the First Circuit has consistently declined to explicitly adopt intermediate scrutiny for reviewing Second Amendment challenges, *see Armstrong*, 706 F.3d at 8, its language has strongly suggested that an analogous level of means-end scrutiny is warranted. *See Booker*, 644 F.3d at 25.

the home. *See id.* (collecting cases for the proposition that "[c]ourts have consistently recognized that *Heller* established that the possession of operative firearms for use in defense of the home constitutes the 'core' of the Second Amendment.").

In short, precedent does not clearly dictate whether the Second Amendment extends to protect the right of law-abiding citizens to carry firearms outside the home for the purpose of self-defense. In the face of this conflicting authority, the Court will heed the caution urged by the First Circuit that the Second Amendment is an area that "courts should enter only upon necessity and only then by small degree." *Id.* at 74 (quoting *Masciandaro*, 638 F.3d at 475). Accordingly, the Court will follow the approach taken by the Second, Third, and Fourth Circuits, and assume for analytical purposes that the Second Amendment extends to protect the right of armed self-defense outside the home. The remaining question is whether the restrictions here survive the applicable level of constitutional scrutiny.

b. Level of Scrutiny

Assuming without deciding that the restrictions at issue burden the Second Amendment right, they must survive some form of means-ends scrutiny to be constitutional. *See Hightower*, 693 F.3d at 74 (regulation upheld "whatever standard of scrutiny is used, even assuming there is some Second Amendment interest in carrying the concealed weapons at issue.").

In *Hightower*, the First Circuit explicitly refrained from deciding what standard of scrutiny applied to the

concealed-carry regulation. *Id*. In *Booker*, however, the court found that "a categorical ban on gun ownership by a class of individuals must be supported by some form of 'strong showing,' necessitating a substantial relationship between the restriction and an important governmental objective." 644 F.3d at 25.

Booker's language has been interpreted as a description of intermediate scrutiny. *See, e.g., Tyler v. Hillsdale Cty. Sheriff's Dep't*, 837 F.3d 678, 692 (6th Cir. 2016) (describing *Booker* as "applying the equivalent of intermediate scrutiny"); *Kachalsky*, 701 F.3d at 93 n.17; *Williams v. Puerto Rico*, 910 F. Supp. 2d 386, 396 (D.P.R. 2012). Indeed, the normal definition of "intermediate scrutiny" is a showing that "the challenged classification is 'substantially related to an important government objective.'" *Kittery Motorcycle, Inc. v. Rowe*, 320 F.3d 42, 47 (1st Cir. 2003) (quoting *Clark v. Jeter*, 486 U.S. 456, 461 (1988)). That definition is virtually indistinguishable from the standard used in *Booker*. In *Armstrong*, however, the First Circuit stated plainly that "this court has not adopted intermediate scrutiny as the appropriate type of review for a [Second Amendment] challenge such as Armstrong's." 706 F.3d at 8.

The regulation at issue in *Booker* and *Armstrong* was substantially different from the ones in this case, perhaps necessitating a different level of scrutiny. However, the Second, Third, and Fourth Circuits have explicitly adopted the intermediate scrutiny standard when examining regulations burdening an alleged Second Amendment right to carry weapons outside the home. *Kachalsky*, 701 F.3d at 96; *Drake*, 724 F.3d at

435; *Masciandaro*, 638 F.3d at 470-71.[10] In reaching that conclusion, those circuits have carefully parsed the language of *Heller* and *McDonald*, noted the longstanding tradition of firearms regulation in this country, and made parallels to situations where different levels of scrutiny are applied in the First Amendment context.

For example, the Second Circuit in *Kachalsky* noted that "when analyzing First Amendment claims, content-based restrictions on noncommercial speech are subject to strict scrutiny while laws regulating commercial speech are subject to intermediate scrutiny." 701 F.3d at 94 (citations omitted). *Kachalsky* concluded that "applying less than strict scrutiny when the regulation does not burden the 'core' protection of self-defense in the home makes eminent sense in this context and is in line with the approach taken by our sister circuits." *Id.* at 93. The Third Circuit in *Drake* also analogized the Second Amendment to the First Amendment, concluding that intermediate scrutiny applied because strict scrutiny was only triggered when

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[10] In addition, other circuits have used the intermediate scrutiny standard when evaluating other types of firearms regulations outside the "core" right of armed self-protection within the home. *See*, *e.g.*, *Nat'l Rifle Ass'n of Am.*, 700 F.3d at 205 (federal ban on sale of handguns to juveniles); *Heller II*, 670 F.3d at 1257 (gun registration laws); *Reese*, 627 F.3d at 802 (prohibition on firearms ownership by individuals subject to a domestic protective order). No court has applied strict scrutiny to regulations burdening Second Amendment restrictions outside the home, although the Seventh Circuit invalidated an Illinois law without applying a particular level of heightened scrutiny. *Moore*, 702 F.3d at 941. As noted, the D.C. Circuit in *Wrenn* did not subject the law at issue even to strict scrutiny analysis. 864 F.3d at 664-66.

the core "right to possess usable handguns *in the home* for self-defense" was implicated. 724 F.3d at 436 (emphasis in original). Finally, the Fourth Circuit in *Masciandaro* noted that "as we move outside the home, firearm rights have always been more limited, because public safety interests often outweigh individual interests in self-defense." 638 F.3d at 470. Because of the longstanding tradition of regulating the carrying of firearms in public, *Masciandaro* concluded those regulations need only satisfy intermediate scrutiny to survive constitutional challenge. *Id.* at 471.

This Court agrees that intermediate scrutiny, or a related analogue, is the appropriate standard to assess the constitutionality of the restrictions in question. The challenged restrictions allow for use of a firearm in defense of the home, and therefore only implicate an individual's ability to carry a firearm in public. Because that interest is not at the "core" of the Second Amendment right recognized by *Heller*, analysis at a level of scrutiny lower than the strict scrutiny standard appears to be appropriate. *See Hightower*, 693 F.3d at 72 ("It is plain that the interest . . . in carrying concealed weapons outside the home is distinct from [the] core interest emphasized in *Heller*.").

However, because *Armstrong* plainly stated that the First Circuit has not yet adopted the intermediate scrutiny standard for Second Amendment challenges to firearm regulations, the Court will avoid using that specific label. Instead, the Court's analysis will focus on whether defendant has shown a "substantial relationship between the restriction and an important governmental objective." *Booker*, 644 F.3d at 25.

c. Application

"In reviewing the constitutionality of a statute, courts must accord substantial deference to the predictive judgments of [the legislature]." *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997) (quotation marks and citation omitted). "The Supreme Court has long granted deference to legislative findings regarding matters that are beyond the competence of the courts." *Kachalsky*, 701 F.3d at 97 (citing *Holder v. Humanitarian Law Project*, 561 U.S. 1, 34 (2010)).

As described, the Massachusetts firearm regulatory regime allows, but does not require, a local licensing authority to impose restrictions on firearm licenses that the authority "deems proper." Mass. Gen. Laws ch. 140, § 131(a-b). Massachusetts law further provides that a licensing authority "may issue" a license if the applicant either has a good reason to fear injury 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). Pursuant to that broad grant of authority, defendants have policies of imposing various restrictions on applicants who do not show a "good reason to fear injury" that distinguishes them from the general population.

The purpose of the licensing provisions of Mass. Gen. Laws ch. 140, § 131, is "to protect the health, safety, and welfare of [Massachusetts] citizens." *Chardin v. Police Comm'r of Boston*, 465 Mass. 314, 327 (2013). Massachusetts undoubtedly has a substantial interest in promoting public safety and preventing crime. *See McCullen v. Coakley*, 571 F.3d

167, 178 (1st Cir. 2009) (evaluating whether restriction on free speech was "reasonably related to the legislature's legitimate public safety objectives"); *Schenck v. Pro-Choice Network of W. New York*, 519 U.S. 357, 376 (1997) (noting "the governmental interest in public safety is clearly a valid interest"); *United States v. Salerno*, 481 U.S. 739, 750 (1987) (describing "the [g]overnment's general interest in preventing crime" as "compelling"). The question is whether defendants' policies of imposing restrictions on the licenses of applicants who fail to show a specific "reason to fear" have a sufficiently substantial relationship to public safety to withstand constitutional scrutiny.

The New York licensing scheme considered by the Second Circuit in *Kachalsky* is similar to the Massachusetts regulatory regime. New York law generally prohibits citizens from possessing firearms without a valid license to carry. *Kachalsky*, 701 F.3d at 85. Several types of firearm licenses are available for individuals who work in certain types of employment. *Id*. at 86. The only license that allows the carrying of a handgun without regard to employment is New York Penal Law § 400.00(2)(f), which requires an applicant to demonstrate "proper cause" in order to receive a license. *Id*. Thus, individuals "who desire to carry a handgun outside the home and who do not fit within one of the employment categories [allowing handgun possession] must demonstrate proper cause pursuant to section 400(2)(f)." *Id*.

Although "proper cause" is not defined in the statute, "New York state courts have defined the term

to include carrying a handgun for target practice, hunting, or self-defense." *Id.* Licenses that are issued for the purpose of target practice or hunting can be restricted to those purposes. *Id.* To establish proper cause to obtain an unrestricted license, an applicant must "demonstrate a special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession." *Id.* (quoting *Klenosky v. New York City Police Dep't*, 428 N.Y.S. 2d 256, 257 (N.Y. App. Div. 1980)).

Three of the plaintiffs in *Kachalsky* were granted licenses limited to the purpose of target shooting and sought to remove that restriction. *Id.* at 88 n.7. When the relevant licensing officers refused to do so, the plaintiffs filed suit, contending that the refusal to remove the restriction violated their right to armed self-defense outside the home and that New York could not force them to demonstrate proper cause to exercise that right. *Id.* at 88.

After reviewing the legislative history of the New York licensing regime, the Second Circuit found that New York's decision to regulate the number of handguns in public "was premised on the belief that it would have an appreciable impact on public safety and crime prevention." *Id.* at 98. It concluded that "[r]estricting handgun possession in public to those who have a reason to possess the weapon for a lawful purpose is substantially related to New York's interests in public safety and crime prevention." *Id.*

As noted, the licensing regime in New York is substantially similar to the one challenged in this case. In New York, an applicant can receive an unrestricted

license if he or she shows a special need for self-protection distinguishable from that of the general public. *Id*. at 86. By comparison, in Massachusetts, an applicant can receive a license if he or she shows "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). Although no authority directly on point has interpreted the phrase "good reason to fear injury," Massachusetts courts have made clear that without such a showing, restrictions can be placed on a firearm license that limit the holder's ability to carry a firearm. *See Ruggiero*, 18 Mass. App. Ct. at 261 (plaintiff's request for unrestricted license because he "is a potential victim of crimes against his person" did not make the decision to deny him an unrestricted license arbitrary, capricious, or an abuse of discretion); *Stanley v. Neilen*, 2003 WL 1790853, at *2 (D. Mass. Mar. 31, 2003) (restriction on plaintiff's license because he "did not sufficiently demonstrate that he had good reason to fear injury to his person or property—a requirement that has been part of the Massachusetts gun licensing scheme at least since 1936" upheld). In some respects, the Massachusetts law is less restrictive than the New York law, because while in New York an applicant must show a special need to obtain an unrestricted license, Massachusetts law permits, but does not require, a licensing authority to demand applicants demonstrate a special need for self-defense before being issued an unrestricted license.

Massachusetts adopted its licensing requirement "as a first-line measure in the regulatory scheme" as a result of the "realization that prevention of harm is often preferable to meting out punishment after an unfortunate event." *Ruggiero*, 18 Mass. App. Ct. at 258-59. The requirement "was intended 'to have local licensing authorities employ every conceivable means of preventing deadly weapons in the form of firearms [from] coming into the hands of evildoers.'" *Id.* at 259 (quoting Rep. A.G., Pub. Doc. No. 12, at 233-34 (1964) (alteration in original)). As in New York, the Massachusetts legislature decided "not to ban handgun possession, but to limit it to those individuals who have an actual reason . . . to carry the weapon." *Kachalsky*, 701 F.3d at 98.

To the extent that imposing "sporting," "target," "hunting," and "employment" restrictions on applicants who fail to show "good reason to fear injury" burdens conduct protected by the Second Amendment, that requirement is substantially related to the state's important objective in protecting public safety and preventing crime. As other courts have found, "requiring a showing that there is an objective threat to a person's safety—a special need for self-protection—before granting a carry license is entirely consistent with the right to bear arms." *Id.* at 100 (quotation marks omitted). *See also Woollard*, 712 F.3d at 880 ("there is a reasonable fit between the good-and-substantial-reason requirement and Maryland's objectives of protecting public safety and preventing crime"); *Drake*, 724 F.3d at 439-40 (the "justifiable need" standard is a "measured approach [that] neither bans public handgun carrying nor allows public

carrying by all firearm owners; instead, the . . . [l]egislature left room for public carrying by those citizens who can demonstrate a 'justifiable need' to do so."). In making those findings, courts have acknowledged the deference given to the legislature in matters of public policy. *See, e.g., Kachalsky,* 701 F.3d at 99 ("It is the legislature's job, not ours, to weigh conflicting evidence and make policy judgments."). Although the empirical data may be less than conclusive, the government's regulation need only be "substantially related" to its important objective of promoting public safety and preventing crime in order to pass constitutional muster. Instead of banning the carrying of firearms in public outright, the Massachusetts legislature has balanced the need to reduce the number of firearms in public with the needs of individuals who have a heightened need to carry firearms in public for self-defense.

In short, the policy that requires applicants to show a specific reason to fear in order to be issued unrestricted firearm licenses, and its authorizing statute, are constitutional. The Court agrees in substance with the Second, Third, and Fourth Circuits, which have upheld similar requirements in other firearm-licensing regimes. *See id.* at 100-01 (upholding "proper cause" requirement for unrestricted licenses in New York); *Drake*, 724 F.3d at 440 (upholding "justifiable need" requirement for licenses in New Jersey); *Woollard*, 712 F.3d at 881 (upholding "good-and-substantial reason" requirement for licenses in Maryland). Those requirements, although phrased differently, are "essentially the same—the applicant must show a special need for self-defense

distinguishable from that of the population at large, often through a specific and particularized threat of harm." *Drake*, 724 F.3d at 442 (Hardiman, J., dissenting). The courts analyzing these requirements have concluded that they are substantially related to the important governmental objective of promoting public safety and preventing crime. The Court respectfully disagrees with the majority opinion of the D.C. Circuit in *Wrenn*, principally for the reasons stated by the dissenting judge, 864 F.3d at 668-71, and finds the Seventh Circuit's opinion in *Moore* to be distinguishable.[11]

Accordingly, the placing of restrictions such as "sporting," "target," "hunting," and "employment" on the licenses of applicants who do not show good reason

[11] In *Moore*, the court considered a Second Amendment challenge to a "blanket prohibition on carrying [a] gun in public" in Illinois. 702 F.3d at 940. In holding that prohibition unconstitutional, the court noted that "[r]emarkably, Illinois is the *only* state that maintains a flat ban on carrying ready-to-use guns outside the home." *Id.* (emphasis in original). The Illinois law had no exception for individuals who showed an objective, heightened need for a firearm for self-defense. *Id.* at 934. Indeed, *Moore* specifically noted that "[n]ot even Massachusetts has so flat a ban as Illinois." *Id.* at 940. Ultimately, the Seventh Circuit struck down the law, concluding that Illinois had failed "to justify the most restrictive gun law of any of the 50 states." *Id.* at 941. Even then, the court stayed its entry of judgment for 180 days to "allow the Illinois legislature to craft a new gun law that will impose reasonable limitations, consistent with public safety and the Second Amendment as interpreted in this opinion, on the carrying of guns in public." *Id.* at 942. The logical inference is that the Seventh Circuit concluded that some limitation on the carrying of firearms is reasonable. As *Moore* did not consider a restriction that permitted individuals with a special need for self-defense to obtain unrestricted firearm licenses, it is of limited persuasive value.

to fear injury is substantially related to the important governmental objective of public safety, and therefore does not violate the Second Amendment.

3. Equal Protection Claim

The amended complaint alleges a violation of the Equal Protection Clause of the Fourteenth Amendment, contending that the Massachusetts regulatory regime, and in particular Mass. Gen. Laws ch. 140, § 131(a) and (d), restricts the ability of law-abiding citizens to bear arms based on arbitrary considerations. Like the Second Amendment claim, this issue is ripe for disposal on summary judgment. "[E]qual protection analysis requires strict scrutiny of a legislative classification only when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class." *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312 (1976). Here, the classification does not impermissibly interfere with the exercise of a fundamental right, and there is no suspect class at issue. Thus, "[g]iven that the Second Amendment challenge fails, the Equal Protection claim is subject to rational basis review." *Hightower,* 693 F.3d at 83. For the same reasons that the regulatory regime is substantially related to the important governmental objectives of promoting public safety and preventing crime, it also survives rational basis review.

III. Conclusion

For the foregoing reasons, plaintiffs' motion for summary judgment is DENIED. Defendants' motions for summary judgment are GRANTED.

So Ordered.

/s/ F. Dennis Saylor
F. Dennis Saylor IV
United States District Judge

Dated: December 5, 2017

APPENDIX C

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. CONST. amend. II

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

U.S. CONST. amend. XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Massachusetts General Laws ch. 140, § 121

As used in sections 122 to 131Q, inclusive, the following words shall, unless the context clearly requires otherwise, have the following meanings:

* * *

"Firearm", 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 or 18 inches in

the case of a shotgun as originally manufactured; provided, however, that the term firearm shall not include any weapon that is: (i) constructed in a shape that does not resemble a handgun, short-barreled rifle or short-barreled shotgun including, but not limited to, covert weapons that resemble key-chains, pens, cigarette-lighters or cigarette-packages; or (ii) not detectable as a weapon or potential weapon by x-ray machines commonly used at airports or walk- through metal detectors.

* * *

"Licensing authority", the chief of police or the board or officer having control of the police in a city or town, or persons authorized by them.

* * *

Massachusetts General Laws ch. 140, § 129B[1]

A firearm identification card shall be issued and possessed subject to the following conditions and restrictions:

* * *

(6) A firearm identification card shall not entitle a holder thereof to possess: (i) a large capacity firearm or large capacity feeding device therefor, except under a Class A license issued to a shooting club as provided under section 131 or under the direct supervision of a holder of a Class A license issued to an individual

[1] An amendment deleting references to Class A and B licenses will take effect on January 1, 2021. *See* 2014 Mass. Acts ch. 284, sec. 33, 112.

under section 131 at an incorporated shooting club or licensed shooting range; or (ii) a non-large capacity firearm or large capacity rifle or shotgun or large capacity feeding device therefor, except under a Class A license issued to a shooting club as provided under section 131 or under the direct supervision of a holder of a Class A or Class B license issued to an individual under section 131 at an incorporated shooting club or licensed shooting range. . . .

* * *

Massachusetts General Laws ch. 140, § 129C

No person, other than a licensed dealer or one who has been issued a license to carry a pistol or revolver or an exempt person as hereinafter described, shall own or possess any firearm, rifle, shotgun or ammunition unless he has been issued a firearm identification card by the licensing authority pursuant to the provisions of section one hundred and twenty-nine B.

* * *

Massachusetts General Laws ch. 140, § 131[1]

All licenses to carry firearms shall be designated Class A or Class B, and the issuance and possession of any such license shall be subject to the following conditions and restrictions:

(a) A Class A license shall entitle a holder thereof to purchase, rent, lease, borrow, possess and carry:

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[1] An amendment deleting references to Class A and B licenses will take effect on January 1, 2021. *See* 2014 Mass. Acts ch. 284, sec. 24, 46, 60, 68, 71, 91, 112.

(i) 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; and (ii) rifles and shotguns, including large capacity weapons, and feeding devices and ammunition therefor, for all lawful purposes; provided, however, that the licensing authority may impose such restrictions relative to the possession, use or carrying of large capacity rifles and shotguns as it deems proper. A violation of a restriction imposed by the licensing authority under the provisions of this paragraph shall be cause for suspension or revocation and shall, unless otherwise provided, be punished by a fine of not less than $1,000 nor more than $10,000; provided, however, that the provisions of section 10 of chapter 269 shall not apply to such violation.

* * *

(b) A Class B license shall entitle a holder thereof to purchase, rent, lease, borrow, possess and carry: (i) non-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 such firearm as the licensing authority deems proper; provided, however, that a Class B license shall not entitle the holder thereof to carry or possess a loaded firearm in a concealed manner in any public way or place; and provided further, that a Class B license shall not entitle the holder thereof to possess a large capacity firearm, except under a Class A club license issued under this section or under the direct supervision of a holder of a valid Class A license at an

incorporated shooting club or licensed shooting range; and (ii) rifles and shotguns, including large capacity rifles and shotguns, and feeding devices and ammunition therefor, for all lawful purposes; provided, however, that the licensing authority may impose such restrictions relative to the possession, use or carrying of large capacity rifles and shotguns as he deems proper. A violation of a restriction provided under this paragraph, or a restriction imposed by the licensing authority under the provisions of this paragraph, shall be cause for suspension or revocation and shall, unless otherwise provided, be punished by a fine of not less than $1,000 nor more than $10,000; provided, however, that the provisions of section 10 of chapter 269 shall not apply to such violation.

* * *

(d) Any person residing or having a place of business within the jurisdiction of the licensing authority or any law enforcement officer employed by the licensing authority or any person residing in an area of exclusive federal jurisdiction located within a city or town may submit to the licensing authority or the colonel of state police, an application for a Class A license to carry firearms, or renewal of the same, which the licensing authority or the colonel may issue if it appears that the applicant is not a prohibited person, as set forth in this section, to be issued a license and 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.

A prohibited person shall be a person who:

(i) has, in a court of the commonwealth, been convicted or adjudicated a youthful offender or delinquent child, both as defined in section 52 of chapter 119, for the commission of (A) a felony; (B) a misdemeanor punishable by imprisonment for more than 2 years; (C) a violent crime as defined in section 121; (D) a violation of any law 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; (E) a violation of any law regulating the use, possession or sale of a controlled substance as defined in section 1 of chapter 94C including, but not limited to, a violation of said chapter 94C; or (F) a misdemeanor crime of domestic violence as defined in 18 U.S.C. 921(a)(33);

(ii) has, in any other state or federal jurisdiction, been convicted or adjudicated a youthful offender or delinquent child for the commission of (A) a felony; (B) a misdemeanor punishable by imprisonment for more than 2 years; (C) a violent crime as defined in section 121; (D) a violation of any law 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; (E) a violation of any law regulating the use, possession or sale of a controlled substance as defined in said section 1 of said chapter 94C including, but not limited to, a violation of said chapter 94C; or (F) a misdemeanor

crime of domestic violence as defined in 18 U.S.C. 921(a)(33);

(iii) is or has been (A) committed to a hospital or institution for mental illness, alcohol or substance abuse, except a commitment pursuant to sections 35 or 36C of chapter 123, unless after 5 years from the date of the confinement, the applicant submits with the application an affidavit of a licensed physician or clinical psychologist attesting that such physician or psychologist is familiar with the applicant's mental illness, alcohol or substance abuse and that in the physician's or psychologist's opinion, the applicant is not disabled by a mental illness, alcohol or substance abuse in a manner that shall prevent the applicant from possessing a firearm, rifle or shotgun; (B) committed by a court order to a hospital or institution for mental illness, unless the applicant was granted a petition for relief of the court order pursuant to said section 36C of said chapter 123 and submits a copy of the court order with the application; (C) subject to an order of the probate court appointing a guardian or conservator for a incapacitated person on the grounds that the applicant lacks the mental capacity to contract or manage the applicant's affairs, unless the applicant was granted a petition for relief of the order of the probate court pursuant to section 56C of chapter 215 and submits a copy of the order of the probate court with the application; or (D) found to be a person with an alcohol use disorder or substance use disorder or both and committed pursuant to said section 35 of said chapter 123, unless the applicant was granted a petition for relief of the

court order pursuant to said section 35 and submits a copy of the court order with the application;

(iv) is younger than 21 years of age at the time of the application;

(v) is an alien who does not maintain lawful permanent residency;

(vi) is currently subject to: (A) an order for suspension or surrender issued pursuant to sections 3B or 3C of chapter 209A or a similar order issued by another jurisdiction; or (B) a permanent or temporary protection order issued pursuant to said chapter 209A or a similar order issued by another jurisdiction, including any order described in 18 U.S.C. 922(g)(8);

(vii) is currently the subject of an outstanding arrest warrant in any state or federal jurisdiction;

(viii) has been discharged from the armed forces of the United States under dishonorable conditions;

(ix) is a fugitive from justice; or

(x) having been a citizen of the United States, has renounced that citizenship.

The licensing authority may deny the application or renewal of a license to carry, or suspend or revoke a license issued under this section if, in a reasonable exercise of discretion, the licensing authority determines that the applicant or licensee is unsuitable to be issued or to continue to hold a license to carry. 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. Upon denial of an application or renewal of a license based on a determination of unsuitability, the licensing authority shall notify the applicant in writing setting forth the specific reasons for the determination in accordance with paragraph (e). Upon revoking or suspending a license based on a determination of unsuitability, the licensing authority shall notify the holder of a license in writing setting forth the specific reasons for the determination in accordance with paragraph (f). The determination of unsuitability shall be subject to judicial review under said paragraph (f).

(e) Within seven days of the receipt of a completed application for a license to carry or possess firearms, or renewal of same, the licensing authority shall forward one copy of the application and one copy of the applicant's fingerprints to the colonel of state police, who shall within 30 days advise the licensing authority, in writing, of any disqualifying criminal record of the applicant arising from within or without the commonwealth and whether there is reason to believe that the applicant is disqualified for any of the foregoing reasons from possessing a license to carry or possess firearms. In searching for any disqualifying history of the applicant, the colonel shall utilize, or cause to be utilized, files maintained by the department of probation and statewide and nationwide criminal justice, warrant and protection order information

systems and files including, but not limited to, the National Instant Criminal Background Check System. The colonel shall inquire of the commissioner of the department of mental health relative to whether the applicant is disqualified from being so licensed. If the information available to the colonel does not indicate that the possession of a firearm or large capacity firearm by the applicant would be in violation of state or federal law, he shall certify such fact, in writing, to the licensing authority within said 30 day period.

The licensing authority may also make inquiries concerning the applicant to: (i) the commissioner of the department of criminal justice information services relative to any disqualifying condition and records of purchases, sales, rentals, leases and transfers of weapons or ammunition concerning the applicant; (ii) the commissioner of probation relative to any record contained within the department of probation or the statewide domestic violence record keeping system concerning the applicant; and (iii) the commissioner of the department of mental health relative to whether the applicant is a suitable person to possess firearms or is not a suitable person to possess firearms. The director or commissioner to whom the licensing authority makes such inquiry shall provide prompt and full cooperation for that purpose in any investigation of the applicant.

The licensing authority shall, within 40 days from the date of application, either approve the application and issue the license or deny the application and notify the applicant of the reason for such denial in writing; provided, however, that no such license shall be issued

unless the colonel has certified, in writing, that the information available to him does not indicate that the possession of a firearm or large capacity firearm by the applicant would be in violation of state or federal law.

* * *

(f) A license issued under this section shall be revoked or suspended by the licensing authority, or his designee, upon the occurrence of any event that would have disqualified the holder from being issued such license or from having such license renewed. A license may be revoked or suspended by the licensing authority if it appears that the holder is no longer a suitable person to possess such license. Any revocation or suspension of a license shall be in writing and shall state the reasons therefor. Upon revocation or suspension, the licensing authority shall take possession of such license and the person whose license is so revoked or suspended shall take all actions required under the provisions of section 129D. No appeal or post-judgment motion shall operate to stay such revocation or suspension. Notices of revocation and suspension shall be forwarded to the commissioner of the department of criminal justice information services and the commissioner of probation and shall be included in the criminal justice information system. A revoked or suspended license may be reinstated only upon the termination of all disqualifying conditions, if any.

Any applicant or holder aggrieved by a denial, revocation, suspension or restriction placed on a license, unless a hearing has previously been held pursuant to chapter 209A, may, within either 90 days

after receiving notice of the denial, revocation or suspension or within 90 days after the expiration of the time limit during which the licensing authority shall respond to the applicant or, in the case of a restriction, any time after a restriction is placed on the license pursuant to this section, file a petition to obtain judicial review in the district court having jurisdiction in the city or town in which the applicant filed the application or in which the license was issued. If after a hearing a justice of the court finds that there was no reasonable ground for denying, suspending, revoking or restricting the license and that the petitioner is not prohibited by law from possessing a license, the justice may order a license to be issued or reinstated to the petitioner or may order the licensing authority to remove certain restrictions placed on the license.

(g) A license shall be in a standard form provided by the executive director of the criminal history systems board in a size and shape equivalent to that of a license to operate motor vehicles issued by the registry of motor vehicles pursuant to section 8 of chapter 90 and shall contain a license number which shall clearly indicate whether such number identifies a Class A or Class B license, the name, address, photograph, fingerprint, place and date of birth, height, weight, hair color, eye color and signature of the licensee. Such license shall be marked "License to Carry Firearms" and shall clearly indicate whether the license is Class A or Class B. The application for such license shall be made in a standard form provided by the executive director of the criminal history systems board, which form shall require the applicant to affirmatively state under the pains and penalties of perjury that such

applicant is not disqualified on any of the grounds enumerated above from being issued such license.

* * *

(i) A license to carry or possess firearms shall be valid, unless revoked or suspended, for a period of not more than 6 years from the date of issue and shall expire on the anniversary of the licensee's date of birth occurring not less than 5 years nor more than 6 years from the date of issue; provided, however, that, if the licensee applied for renewal before the license expired, the license shall remain valid after its expiration date for all lawful purposes until the application for renewal is approved or denied. . . .

* * *

(n) Upon issuance of a license to carry or possess firearms under this section, the licensing authority shall forward a copy of such approved application and license to the executive director of the criminal history systems board, who shall inform the licensing authority forthwith of the existence of any disqualifying condition discovered or occurring subsequent to the issuance of a license under this section.

* * *

(r) The secretary of the executive office of public safety or his designee may promulgate regulations to carry out the purposes of this section.

Massachusetts General Laws ch. 269, § 10

(a) Whoever, except as provided or exempted by statute, knowingly has in his possession; or knowingly

has under his control in a vehicle; a firearm, loaded or unloaded, as defined in section one hundred and twenty-one of chapter one hundred and forty without either:

(1) being present in or on his residence or place of business; or

(2) having in effect a license to carry firearms issued under section one hundred and thirty-one of chapter one hundred and forty . . .

shall be punished by imprisonment in the state prison for not less than two and one-half years nor more than five years, or for not less than 18 months nor more than two and one-half years in a jail or house of correction. . . .

No person having in effect a license to carry firearms for any purpose, issued under section one hundred and thirty-one or section one hundred and thirty-one F of chapter one hundred and forty shall be deemed to be in violation of this section.

* * *

The provisions of this subsection shall not affect the licensing requirements of section one hundred and twenty-nine C of chapter one hundred and forty which require every person not otherwise duly licensed or exempted to have been issued a firearms identification card in order to possess a firearm, rifle or shotgun in his residence or place of business.

* * *

(h)(1) Whoever owns, possesses or transfers a firearm, rifle, shotgun or ammunition without complying with the provisions of section 129C of chapter 140 shall be punished by imprisonment in a jail or house of correction for not more than 2 years or by a fine of not more than $500. Whoever commits a second or subsequent violation of this paragraph shall be punished by imprisonment in a house of correction for not more than 2 years or by a fine of not more than $1,000, or both. Any officer authorized to make arrests may arrest without a warrant any person whom the officer has probable cause to believe has violated this paragraph.

* * *

2014 Mass. Acts ch. 284

Whereas, The deferred operation of this act would tend to defeat its purpose, which is to regulate forthwith the sale and possession of firearms in the commonwealth, therefore, it is hereby declared to be an emergency law, necessary for the immediate preservation of the public convenience.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same as follows:

* * *

SECTION 101. Notwithstanding any general or special law to the contrary, neither a licensing authority as defined in section 121 of chapter 140 of the General Laws nor the colonel of state police shall issue, renew or accept application for a Class B license to carry

pursuant to sections 131 or 131F of said chapter 140 as of the effective date of this section; provided, however, that any Class B license issued pursuant to said sections 131 or 131F of said chapter 140 prior to the effective date of this section shall remain in effect, subject to any restrictions or conditions set forth in any general or special law until the date on which the Class B license is set to expire or July 31, 2020, whichever occurs first; and provided further, that any application for renewal of a Class B license filed after the effective date of this section shall not extend the license beyond the stated expiration date pursuant to said section 131 of said chapter 140 and the Class B license shall expire on the anniversary of the licensee's date of birth occurring not less than 5 years but not more than 6 years from the date of issue or January 1, 2021, whichever occurs first.

* * *

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 1:16-cv-10181-FDS

[Filed April 14, 2016]

DANNY WENG; CHRISTOPHER HART; MARKUS VALLASTER; SARAH ZESCH; JOHN STANTON; MICHAEL GOULD; and COMMONWEALTH SECOND AMENDMENT, INC.,	)
Plaintiffs,	)
-against-	)
WILLIAM B. EVANS, in his Official Capacity as Commissioner of the Boston Police Department; and DANIEL C. O'LEARY, in his Official Capacity as Chief of the Brookline Police Department,	)
Defendants.	)

PRELIMINARY EQUITABLE RELIEF REQUESTED

AMENDED COMPLAINT

Plaintiffs DANNY WENG; CHRISTOPHER HART; MARKUS VALLASTER; SARAH ZESCH; JOHN

STANTON; MICHAEL GOULD; and COMMONWEALTH SECOND AMENDMENT, INC., as and for their Complaint against Defendants WILLIAM B. EVANS; and DANIEL C. O'LEARY, allege as follows:

1. This suit challenges Defendants' imposition of "sporting," "target," "hunting," and/or "employment" restrictions on handgun licenses. These restrictions prevent Plaintiffs from using handguns for the purpose self-protection, which contravenes "the right of the people to keep and bear arms" that the Second Amendment secures.

JURISDICTION AND VENUE

2. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343, 2201, 2202 and 42 U.S.C. § 1983.

3. This Court has personal jurisdiction over each of the Defendants because, inter alia, they acted under the color of laws, policies, customs, and/or practices of the Commonwealth of Massachusetts and/or within the geographic confines of the Commonwealth of Massachusetts.

4. Venue is proper pursuant to 28 U.S.C. § 1391.

5. The Eastern Division is appropriate pursuant to LR 40.1(D)(1)(b) because all parties reside in the District and a majority reside in the Eastern Division.

PARTIES

6. Plaintiff Danny Weng is a citizen and resident of Massachusetts residing in the City of Boston, Suffolk County.

7. Plaintiff Christopher Hart is a citizen and resident of Massachusetts residing in the City of Boston, Suffolk County.

8. Plaintiff Markus Vallaster is a citizen and resident of Massachusetts residing in the Town of Westborough, Worcester County.

9. Plaintiff Sarah Zesch is a citizen and resident of Massachusetts residing in the City of Boston, Suffolk County.

10. Plaintiff John Stanton is a citizen and resident of Massachusetts residing in the City of Boston, Suffolk County.

11. Plaintiff Michael Gould is a citizen and resident of Massachusetts residing in the Town of Brookline, Norfolk County.

12. Plaintiff Commonwealth Second Amendment, Inc. ("Comm2A") is a non-profit corporation organized under Massachusetts law with its principal place of business in Natick, Middlesex County, Massachusetts.

13. Defendant William B. Evans ("Commissioner Evans") is sued in his official capacity as Commissioner of the Boston Police Department (Suffolk County), responsible for issuing handgun licenses pursuant to M.G.L. c. 140, § 131. As detailed herein, Defendant Commissioner Evans has enforced the challenged laws,

policies, customs, and practices against Plaintiffs and is in fact presently enforcing the challenged laws, policies, customs, and practices against Plaintiffs.

14. Defendant Daniel C. O'Leary ("Chief O'Leary") is sued in his official capacity as Chief of the Brookline Police Department (Norfolk County), responsible for issuing handgun licenses pursuant to M.G.L. c. 140, § 131. As detailed herein, Defendant Chief O'Leary has enforced the challenged laws, policies, customs, and practices against Plaintiffs and is in fact presently enforcing the challenged laws, policies, customs, and practices against Plaintiffs.

CONSTITUTIONAL PROVISIONS

15. The Second Amendment provides:

> A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

U.S. Const. amend. II.

16. The Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation." District of Columbia v. Heller, 554 U.S. 570, 592 (2008).

17. The Second Amendment guarantees individuals a fundamental right to carry operable handguns in non-sensitive public places for the purpose of self-defense.

18. The Second Amendment "is fully applicable against the States." McDonald v. Chicago, 561 U.S. 742, 750 (2010).

19. The States retain the ability to regulate the manner of carrying handguns within constitutional parameters; to prohibit the carry of handguns in specific, narrowly defined sensitive places; to prohibit carrying arms that are not within the scope of Second Amendment protection; and, to disqualify specific, particularly dangerous individuals from possessing guns. However, States may not deny law-abiding citizens the right to carry handguns for protection.

20. The Equal Protection Clause provides that a State shall not "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Under the Equal Protection Clause, "classifications affecting fundamental rights are given the most exacting scrutiny." Clark v. Jeter, 486 U.S. 456, 461 (1988).

MASSACHUSETTS HANDGUN LICENSING LAWS

21. It is unlawful to possess, use, or carry a handgun unless one holds a License to Carry Firearms ("LTC") issued pursuant to M.G.L. c. 140, § 131. See M.G.L. c. 140, §§ 129B-129C; id. c. 269, § 10(a).

22. Under M.G.L. c. 140, §§ 121, 131(d) Massachusetts residents apply for LTC's from a designated "licensing authority," which is the head law enforcement officer of the locality in which an individual resides or has a place of business.

23. A person seeking an LTC must meet specified requirements related to, *inter alia*, age, criminal background, and mental fitness. See M.G.L. c. 140, § 131(d)(i)-(x). Furthermore, licensing authorities can deny LTC's to individuals found to be "unsuitable" in

that they otherwise "create a risk to public safety." See id. Finally, a person must also complete state mandated training. See id. at § 131P. This case does not concern any of these requirements.

24. Rather, this case concerns these Defendants' applications of the independent statutory power to issue LTC's "subject to such restrictions relative to the possession, use or carrying of firearms as the licensing authority deems proper." M.G.L. c. 140, § 131(a). Carrying, using, or possessing a handgun in violation of the restrictions placed on an LTC is grounds for suspension or revocation of the LTC and a fine of $1,000 to $10,000. See id. A licensing authority's decision to impose such restrictions on an individual's LTC will be upheld so long as it is not arbitrary, capricious, or an abuse of discretion. See, e.g., Ruggiero v. Police Comm'r of Boston, 18 Mass. App. 256, 259, 464 N.E.2d 104, 107 (1984).

25. Most Massachusetts localities do not normally place restrictions on LTC's, and the majority of LTC's in force are unrestricted. However, a minority of Massachusetts localities have policies, customs, or practices of generally or presumptively issuing LTC's subject to "sporting," "target," "hunting," and/or "employment" restrictions, and some other Massachusetts localities apply more *ad hoc* policies, customs, or practices under which some applicants receive unrestricted LTC's, and others receive restrictions, but without any apparent difference in circumstances.

26. Massachusetts' LTC scheme results in otherwise-qualified, law-abiding citizens of

Massachusetts being denied the right to carry a firearm for self-defense, while other, similarly situated residents of Massachusetts are permitted to exercise their right to bear arms to protect themselves. For example, neighboring localities may adopt different policies regarding unrestricted LTC's, resulting in a citizen's right to bear arms being dependent on whether he or she lives or previously lived in one locality or the other. One citizen may be denied the right to carry a firearm for self-defense because local licensing officials refuse to issue unrestricted LTC's, while an otherwise indistinguishable neighbor may be able to obtain an unrestricted LTC if he happens to have a place of business in a locality that does issue unrestricted licenses. A person may obtain an unrestricted LTC and then, without any apparent cause, lose it or be unable to renew it. These examples are not fanciful; on information and belief, they all describe scenarios that have taken place under Massachusetts' LTC scheme.

DEFENDANTS' APPLICATION OF THE STATUTE AGAINST THE PLAINTIFFS

COMMISSIONER EVANS AND THE BOSTON POLICE DEPARTMENT – DANNY WENG

27. Plaintiff Danny Weng is a software engineer who received firearms training during college as part of the Air Force Reserve Officers' Training Corps and also as a member of the U.S. Army.

28. Mr. Weng applied for an LTC from Commissioner Evans in approximately December 2013. Mr. Weng met all applicable requirements for issuance

of an LTC. When he applied, Mr. Weng met with an officer in the Boston Police Department's Licensing Unit, who completed an application on his behalf.

29. On February 18, 2014 Commissioner Evans issued Mr. Weng an LTC carrying the restriction of "Target & Hunting."

30. Mr. Weng subsequently joined the Southborough Rod & Gun Club so that he could practice shooting on a regular basis, and he completed hunter's education training.

31. On March 13, 2015 Mr. Weng sent a letter to the Boston Police Department requesting removal of the restriction from his LTC. On April 4, 2015 Lt. John McDonough denied Mr. Weng's request "because you could not show that you have proper purpose to possess said license."

COMMISSIONER EVANS AND THE BOSTON POLICE DEPARTMENT – CHRISTOPHER HART

32. Plaintiff Christopher Hart previously lived in Connecticut, where he held a "State Permit to Carry Pistols and Revolvers" issued pursuant to § 29-28(b) of the General Statutes of Connecticut. Mr. Hart subsequently moved to Boston. Mr. Hart is the Director of Operations at a Boston restaurant, and in this capacity, he often carries substantial amounts of cash.

33. Mr. Hart was previously a police recruit of the Boston Police Department. In this capacity, he completed much of the basic training required of Boston police officers, including part of the firearms training.

34. In 2014 Mr. Hart applied for an LTC from Commissioner Evans. Mr. Hart met all applicable requirements for issuance of an LTC. Mr. Hart completed an application form prior to applying and requested that his LTC be issued for "all lawful purposes." However, personnel at the Police Department told him that Commissioner Evans would not issue him an unrestricted LTC because "no one gets it."

35. On July 2, 2014 Commissioner Evans issued Mr. Hart an LTC carrying the restriction of "Target & Hunting."

36. In August 2014 Mr. Hart visited the Boston Police Department in person and asked whether it would be possible to have the restriction removed. The officer that Mr. Hart spoke with told him that it might be possible to get an LTC subject to an "Employment" restriction if his employer were willing to submit financial records. Otherwise, the officer said that Commissioner Evans would not remove the restriction, but that there was a possibility he might do so when Mr. Hart applied to renew his LTC in 2019.

COMMISSIONER EVANS AND THE BOSTON POLICE DEPARTMENT – MARKUS VALLASTER

37. Plaintiff Markus Vallaster is a research physician who previously resided in the City of Boston. In 2012, before he became a U.S. citizen, Dr. Vallaster had applied for and obtained a "Resident Alien Permit to Possess Non-Large Capacity Rifle/Shotgun" from the Colonel of the Massachusetts State Police pursuant to M.G.L. c. 140, § 131H. The license provided that its

"Restrictions" were "None," and it was valid from February 28, 2012 through December 31, 2012.

38. Later in the year 2012, the Massachusetts Executive Office of Public Safety and Security sent Dr. Vallaster a notice advising him that permanent residents could now apply for LTC's from their local police departments.

39. After receiving this notice, Dr. Vallaster applied for an LTC from Commissioner Evans. Dr. Vallaster met all applicable requirements for issuance of an LTC. Dr. Vallaster completed an application form prior to applying and requested that his LTC be issued for all lawful purposes. However, personnel at the Police Department did not look at this form and instead prepared an application on Dr. Vallaster's behalf.

40. On December 4, 2012 Commissioner Evans issued Dr. Vallaster an LTC carrying the restriction of "Target & Hunting."

41. Dr. Vallaster moved to Westborough in September 2013 and contacted the Westborough Police Department regarding the issuance of a new LTC. The Westborough Police Chief advised Dr. Vallaster that while he would otherwise be willing to issue him an unrestricted LTC, he could not do so because the LTC that Commissioner Evans had issued was still in force. The Westborough Chief suggested that Dr. Vallaster contact the Boston Police Department.

42. On October 6, 2015 Dr. Vallaster sent a letter to the Boston Police Department requesting removal of the restriction from his LTC. On October 23, 2015 Lt. John McDonough denied Dr. Vallaster's request

"because you could not show that you have proper purpose to possess said license." In a telephone conversation around this time, Lt. McDonough advised Dr. Vallaster that while the Police Department normally issued unrestricted LTC's to physicians, it would not do so in his case because he was not licensed to practice medicine in Massachusetts.

43. On February 12, 2016 Dr. Vallaster called the Boston Police Department's Licensing Unit and asked whether they would agree to prematurely expire his LTC so that he could apply for a new LTC in Westborough. The officer he spoke with advised him that the Department would not do so.

COMMISSIONER EVANS AND THE BOSTON POLICE DEPARTMENT – SARAH ZESCH

44. Plaintiff Sarah Zesch is a student at St. Louis University in St. Louis, Missouri. Ms. Zesch's permanent and lawful residence is in Boston in the neighborhood of West Roxbury, where she receives mail, has her driver's license, and is registered to vote. Ms. Zesch returns to Boston when she is not in school and will resume living in Boston full-time when she graduates.

45. In approximately January 2015 Ms. Zesch applied for an LTC from Commissioner Evans. Ms. Zesch met all applicable requirements for issuance of an LTC. When she applied, she met with an officer in the Boston Police Department's Licensing Unit, who completed an application on her behalf. The officer said that she (the officer) needed to enter the application as one for a restricted LTC.

46. On March 10, 2015 Commissioner Evans issued Ms. Zesch an LTC with the restriction of "Target & Hunting."

47. The laws of the State of Missouri and the City of St. Louis collectively prohibit individuals from carrying handguns in any matter (concealed or unconcealed) without a license. See St. Louis, Mo. Rev. Code § 15.130.040; Mo. Rev. Stat. §§ 21.750.3(2), 571.030.1(1) & (4). While Missouri law does not allow a nonresident such as Ms. Zesch to obtain this license, see Mo. Stat. § 571.101.2(1), it does allow a nonresident to carry a firearm pursuant to "a valid permit or endorsement to carry concealed firearms issued by another state or political subdivision of another state," id. § 571.030.4. However, the Missouri Attorney General's office has advised that Massachusetts licensees remain subject to any restrictions on their LTC's because an LTC "will be recognized only as it would be by the State of Massachusetts. Any restrictions on [a] permit imposed by Massachusetts would similarly be recognized by Missouri." Thus, the restriction on Ms. Zesch's LTC prohibits her from carrying a firearm for self-defense both in her state of residence (Massachusetts) and also in the state she attends school (Missouri).

COMMISSIONER EVANS AND THE BOSTON POLICE DEPARTMENT – JOHN STANTON

48. Plaintiff John Stanton is a stage manager and professional musician. Mr. Stanton applied for an LTC from Commissioner Evans in approximately December 2014. Mr. Stanton met all applicable requirements for issuance of an LTC. When he applied, Mr. Stanton met with an officer in the Boston Police Department's

Licensing Unit, who completed an application on his behalf. The application stated that the reasons for applying were target shooting and hunting.

49. On January 15, 2014 Commissioner Evans issued Mr. Stanton a "Class A" LTC carrying the restriction of "Target & Hunting."

50. On March 13, 2015 Mr. Stanton sent a letter to the Boston Police Department requesting removal of the restriction from his LTC. About three or four months later, Lt. John McDonough called Mr. Stanton and told him that the Department would not grant his request.

51. On July 27, 2015, after being the victim of a theft, Mr. Stanton again wrote to the Police Department to request removal of the restriction. Shortly thereafter, Lt. McDonough denied Mr. Stanton's request in writing "because you could not show that you have proper purpose to possess said license."

CHIEF O'LEARY AND THE BROOKLINE POLICE DEPARTMENT – MICHAEL GOULD

52. Plaintiff Michael Gould previously lived in Weymouth, Massachusetts, where he had applied for and obtained an LTC from the Chief of the Weymouth Police Department. Mr. Gould subsequently moved to Brookline. Mr. Gould is a photographer who often carries expensive equipment with him when engaged in private photography work for clients.

53. In approximately September 2014, Mr. Gould applied to Chief O'Leary of the Brookline Police

Department to renew his LTC. Mr. Gould met all applicable requirements for issuance of an LTC. Mr. Gould completed an application form on which he requested that his LTC be issued without restriction.

54. When Mr. Gould submitted his application, an officer reviewed the form and interviewed him. Mr. Gould specifically stated that he sought an unrestricted LTC so that he could carry a firearm for the defense of himself and his family.

55. In October 2014 Defendant Chief O'Leary sent Mr. Gould a letter stating that Mr. Gould had not provided sufficient information for an LTC to be issued without a restriction. In response, on October 22, 2014, Mr. Gould contacted Sergeant Malinn of the Brookline Police Department and offered to provide any additional information that might be needed. The next day Sergeant Malinn responded that "I do not believe that additional information would lead to an LTC for All Lawful Purposes." Sergeant Malinn advised Mr. Gould that Chief O'Leary would be willing to issue the renewal LTC subject to "Sporting" and "Employment" restrictions.

56. On November 20, 2014 Chief O'Leary issued Mr. Gould an LTC with the restrictions of "Sporting" and "Employment."

INJURY TO THE PLAINTIFFS

57. The restriction of the above individual Plaintiffs' LTC's to "sporting," "target," "hunting," and/or "employment" purposes precludes these Plaintiffs from possessing, using, or carrying handguns for the purposes of protecting themselves and their families.

Moreover, these restrictions preclude these Plaintiffs from bearing arms not just in the Commonwealth of Massachusetts, but also in other states, such as Missouri, which recognize Massachusetts LTC's only to the extent of their restrictions. But for these Plaintiffs' fear that Defendants would suspend or revoke their LTC's and/or fine them, each of these Plaintiffs would possess, use, and carry a handgun for the purpose of self-protection.

58. Plaintiff Comm2A is a nonprofit organization recognized under § 501(c)(3) of the Internal Revenue Code. The purposes of Comm2A include education, research, publishing, and legal action focusing on the constitutional right of the people to possess and carry firearms. Comm2A brings this action on its own behalf and on behalf of its members.

59. Plaintiff Comm2A has members and supporters throughout (and beyond) Massachusetts, including members and supporters who hold LTC's that the Brookline and Boston Police Departments have issued with "sporting," "target," "hunting," and/or "employment" restrictions. Plaintiffs Danny Weng, Chris Hart, Markus Vallaster, Sarah Zesch, John Stanton, and Michael Gould are all members of Comm2A. These and other members and supporters of Comm2A would possess, use, and carry handguns for the purpose of self-protection, but they refrain from doing so out of the fear that their LTC's would be suspended or revoked and/or that they would be fined.

60. In addition, Comm2A expends significant resources assisting people who receive restricted LTC's under the authority of M.G.L. c. 140, § 131, including

specifically people receiving restricted licenses from the Brookline and Boston Police Departments. Both members and supporters of Comm2A and members of the general public have contacted Comm2A as a result of the restriction of their LTC's. Comm2A would not expend its organizational resources to respond to these demands if Defendants did not impose restrictions in the first instance. Comm2A would instead use its organizational resources to pursue other organizational priorities.

61. All of the Plaintiffs' injuries are irreparable because people are entitled to enjoy their constitutional rights in fact.

COUNT I

(U.S. CONST., AMENDS. II & XIV, 42 U.S.C. § 1983)

62. Massachusetts' LTC licensing scheme, and in particular M.G.L. c. 140, § 131(a) & (d), vests local licensing officials with broad and unbounded discretion to impose restrictions on LTC's as any official "deems proper."

63. Defendants have exercised this authority by issuing Plaintiffs LTC's that prohibit them from carrying and using handguns for the purpose of self-defense and have thereby deprived Plaintiffs of their right to keep and bear arms.

64. Defendants have further exercised this authority by adopting policies, customs, and/or practices of issuing LTC's with "sporting," "target," "hunting," and/or "employment" restrictions that

prohibit carrying or using handguns for the purpose of self-defense.

65. Defendants have thereby infringed Plaintiffs' rights under the Second Amendment and the Due Process Clause of the Fourteenth Amendment, and Defendants have damaged Plaintiffs in violation of 42 U.S.C. § 1983.

COUNT II

(U.S. CONST., AMENDS. II & XIV, 42 U.S.C. § 1983)

66. Massachusetts' LTC licensing scheme, and in particular M.G.L. c. 140, § 131(a) & (d), vests local licensing officials with broad and unbounded discretion to impose restrictions on LTC's as any official "deems proper."

67. As a result of this broad and unbounded discretion and Defendants' implementation of it, the ability of law-abiding citizens of Massachusetts to exercise their fundamental right to bear arms often turns on arbitrary considerations, such as whether an individual resides or previously resided on the correct side of a local boundary line, is wealthy and/or has a lot of cash, has a particular occupation, or has a place of business in another locality that issues unrestricted LTC's.

68. The aforesaid statute, and Defendants' implementation of this statute, violates Plaintiffs' Second Amendment right to keep and bear arms and their Fourteenth Amendment rights to due process and equal protection of the laws, and damages Plaintiffs in violation of 42 U.S.C. § 1983.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for the following relief:

i. declaratory judgment that M.G.L. c. 140, § 131(a) & (d) violate the Second Amendment to the extent they allow Defendants to prohibit qualified private citizens from carrying loaded and operable handguns for self-protection by restricting licenses to carry handguns to "sporting," "target," "hunting," "employment," and similar purposes;

ii. declaratory judgment that Defendants' policies, customs, and/or practices implementing M.G.L. c. 140, § 131(a) & (d) violate the Second Amendment to the extent they allow Defendants to prohibit qualified private citizens from carrying loaded and operable handguns for self-protection by restricting licenses to carry handguns to "sporting," "target," "hunting," "employment," and similar purposes;

iii. declaratory judgment that M.G.L. c. 140, § 131(a) & (d) violate the Equal Protection Clause to the extent they allow similarly situated, law-abiding citizens to be treated differently for purposes of exercising their fundamental right to carry a loaded and operable handgun for self-protection, in a manner not sufficiently tailored to a sufficiently important government interest;

iv. injunctive relief directing Defendants and their officers, agents, servants, employees, and all persons in concert or participation with them, and all who receive notice of the injunction, to issue to Plaintiffs Danny Weng; Christopher Hart; Markus Vallaster; Sarah Zesch; John Stanton; and Michael Gould LTC's that do not carry "sporting," "target," "hunting," or "employment" restrictions, nor any other similar restrictions that would preclude the carry and use of handguns for self-protection;

v. injunctive relief precluding Defendants and their officers, agents, servants, employees, and all persons in concert or participation with them, and all persons who receive notice of the injunction, from issuing LTC's with "sporting," "target," "hunting," or "employment" restrictions, or with any other similar restriction that would preclude the use of handguns for self-protection;

vi. such other and further relief, including further and/or preliminary injunctive relief, as may be necessary to effectuate the Court's judgment or otherwise grant relief, or as the Court otherwise deems just and equitable; and

vii. attorney's fees and costs pursuant to 42 U.S.C. § 1988.

Dated: April 14, 2016

Respectfully submitted,

THE PLAINTIFFS,

By their attorneys,

/s/ David D. Jensen_____
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*** Certificate of Service Omitted***