No. 17-2202

In the United States Court of Appeals for the First Circuit

MICHAEL GOULD, CHRISTOPHER HART, COMMONWEALTH SECOND AMENDMENT, INC., DANNY WENG, SARAH ZESCH, JOHN R. STANTON,
Plaintiffs-Appellants,

MARKUS VALLASTER; IRWIN CRUZ,
Plaintiffs

v.

MARK MORGAN, in his official capacity as Acting Chief of the Brookline Police Department, WILLIAM B. EVANS, in his official capacity as Commissioner of the Boston Police Department, COMMONWEALTH OF MASSACHUSETTS OFFICE OF THE ATTORNEY GENERAL,
Defendants-Appellees,

DAVID A. PROVENCHER, in his official capacity as Chief of the New Bedford Police Department,
Defendant.

On Appeal from the United States District Court
for the District of Massachusetts (No. 16-cv-10181-FDS)

BRIEF OF DEFENDANT-APPELLEE MARK MORGAN, IN HIS OFFICIAL CAPACITY AS ACTING CHIEF OF THE BROOKLINE POLICE DEPARTMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

American statutes

American ordinances

English statutes and royal proclamations

Books, articles, and historical materials

REASONS WHY ORAL ARGUMENT SHOULD BE HEARD

This appeal involves a constitutional challenge to Massachusetts's regulatory scheme for carrying handguns in public, as implemented by Brookline and Boston. The issues presented are of considerable importance, both practically and doctrinally. This brief lays out the Anglo-American historical foundation for the regulation in detail, and demonstrates why that foundation renders it constitutional under *District of Columbia v. Heller*, 554 U.S. 570 (2008). To help provide the Court with a full understanding of that history and its constitutional significance, Brookline respectfully requests an opportunity to present oral argument in this appeal. No other party addresses the relevant history in the same level of detail.

INTRODUCTION

When Michael Gould requested a license to carry a loaded firearm in public, he said he needed one to defend himself while working around town, hiking, and for target-shooting. He soon received a license from the Town of Brookline, allowing him to do all that and more—in addition to the right he already had to carry a gun at home. But this didn't satisfy Gould. Because his license does not also allow him to carry loaded guns in public under other unspecified circumstances, he filed suit challenging Brookline's public-carry policy as unconstitutional. In his view, this policy (and Boston's parallel policy, challenged by the other plaintiffs) "is akin to a total ban" that "extinguishes [his] core Second Amendment rights."

There is no support for such a radical reading of the Second Amendment, and the district court was right to reject it here. Four federal circuits have agreed, upholding similar laws in full. And the one circuit that reached a different result (in a 2–1 decision) did so where the plaintiffs were entirely barred from carrying handguns in public—not where they could carry "in all of the circumstances in which [they] indicated [they] needed the firearm," as Gould can. JA 80.

What makes Gould's argument particularly extreme, however, is that it flouts not just precedent but history. History is critical here because this Court may uphold the law and "rest [its] conclusion on the existence of a longstanding tradition" of "state laws imposing similar restrictions." *United States v. Rene E.*, 583 F.3d 8, 12 (1st Cir.

2009). Under the Supreme Court's decision in *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008), such "longstanding" laws" are treated as tradition-based "exceptions" to the Second Amendment by virtue of their "historical justifications."

Massachusetts' public-carry regime is such a law. As implemented by Brookline and Boston, it has two important features—each with its own robust historical pedigree. The first is that public carry has long been heavily regulated in urban areas like Brookline and Boston. This regulatory tradition began in medieval England, which broadly "prohibited carrying concealed" and "concealable" arms in populous places, as the en banc Ninth Circuit observed in canvassing this history and upholding California's concealed-carry restrictions as "longstanding." *Peruta v. Cnty. of San Diego*, 824 F.3d 919, 932 (9th Cir. 2016). The tradition then took hold in America in the 17th and 18th centuries, when Massachusetts and several other colonies enacted similar laws. And it continued into the 19th century, when states, territories, and local governments prohibited public carry in cities, towns, and villages, but not rural areas.

The second feature is that Massachusetts's regime today is far more permissive of public carry than these historical prohibitions were. It allows people to carry a handgun at home or at work without a license. M.G.L. ch. 269, § 10(a). And it permits people to carry a handgun elsewhere upon a showing of "good reason to fear injury" to themselves or their property, or "for any other reason," subject to restrictions set by local police. M.G.L. ch. 140, § 131(d). Brookline police work hard to ensure that

eligible people may carry firearms for "those occasions when an applicant has stated in her or her application that they need a firearm and supported that claim with some information," JA 230—as they did in Gould's case.

The good-cause exception has been part of Massachusetts' law since 1836, after which many other states followed suit. Although a more permissive approach emerged in the South before the Civil War, these antebellum laws were motivated largely by fear of slave rebellions, and they did not represent a majority approach.

Altogether, by the early 1900s, more than half the states and many cities had adopted laws that either entirely prohibited public carry in urban areas or required a showing of "good cause." Because Massachusetts carries forward this longstanding tradition, its public-carry regime falls within the class of laws that "were left intact by the Second Amendment and by *Heller*." *Rene E.*, 583 F.3d at 12. Indeed, this Court upheld a law as "longstanding" because nine states and Chicago "enacted similar statutes" around the turn of the 20th century. *Id.* at 14. Under that precedent, this is an *a fortiori* case: the history here is both broader and deeper.

Upholding Brookline's policy does not require the Court to decide whether the Second Amendment has *any* application outside the home. To the contrary, the Court need only recognize that the policy is consistent with the "historical understanding of the scope of the right." *Heller*, 554 U.S. at 625. The right that Gould asserts, by contrast—unfettered public carry in urban areas, without any

demonstration of need or purpose—has no historical foundation. At no point in our history has there been a constitutional "right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Id.* at 626.

But even without reference to history, Brookline's policy is constitutional. It allows people "to use arms in defense of hearth and home"—the use *Heller* "elevates above all," 554 U.S. at 635—while providing ample avenues for self-defense outside the home. Even assuming this policy imposed a modest burden on Second Amendment rights, it would be justified by the "substantial relationship" between the policy and Brookline's "undeniably important" interest in preventing urban gun violence. *United States v. Booker*, 644 F.3d 12, 25 (1st Cir. 2011).

STATEMENT OF THE ISSUE

For nearly two centuries, Massachusetts has required residents to show good cause for carrying a loaded firearm in public. Dozens of other states and cities have imposed similar (or more restrictive) regulations throughout American history. In implementing this longstanding good-cause requirement, the Town of Brookline issued Michael Gould a license allowing him to carry a loaded handgun in "all of the circumstances in which he indicated he needed [it]," JA 80—to defend himself while at work, traveling to and from work, hiking, and for target-shooting—in addition to being able to defend himself at home. Did Brookline violate the Second Amendment by not also issuing him a license for other unspecified circumstances?

STATEMENT OF THE CASE

I. Regulatory background

History of public carry in Massachusetts. Massachusetts's regulation of public carry spans five centuries. In the 17th and 18th centuries—both before and after the Constitution's adoption—the state broadly prohibited public carry. In keeping with English tradition (more about that later), Massachusetts authorized justices of the peace to arrest anyone who "shall ride or go armed offensively, to the fear or terror of the good citizens of this Commonwealth." 1795 Mass. Laws 436, ch. 2; *see also* 1694 Mass. Laws 12, no. 6. There was no exception for "good cause." This blanket prohibition governed for nearly 150 years.

Massachusetts maintained its broad prohibition in the 19th century, while creating a narrow exception for those who could show that they had "reasonable cause to fear an assault or other injury, or violence to his person, or to his family or property." 1836 Mass. Laws 748, 750, ch. 134, § 16. Absent such a showing, no person could "go armed with a dirk, dagger, sword, pistol, or other offensive and dangerous weapon." *Id.* This "good cause" requirement would become a model for other states in the decades that followed. *See infra*, at 31–33.

At the dawn of the 20th century, Massachusetts sought to increase oversight of the good-cause requirement by incorporating it into a licensing regime. To obtain a license, a person would have to submit an application substantiating his or her need

"to carry a loaded pistol or revolver" in public. 1906 Mass. Sess. Laws 150, § 1. Local law-enforcement officials would then have discretion to issue a public-carry license if the applicant (1) was a "suitable person to be so licensed" and (2) met the good-cause standard. *Id.* Within a few years of adopting this licensing regime, the state extended it to cover unloaded guns, increased the fine for violations, and added a one-month minimum mandatory sentence. 1911 Mass Acts 568, ch. 548.

In 1919, Massachusetts amended the law to expand public-carry access. Under the new law, licenses could be issued not only for good cause, but also for "any other proper purpose." 1919 Mass. Acts 156, ch. 207. Local officials were eventually authorized to restrict the license to the purpose for which it was issued. For example, a license could be issued for "the carrying of a pistol or revolver for use for target practice only." 1936 Mass. Acts 289, ch. 302, § 131.

Around the same time that it was expanding public-carry access by creating restricted licenses, Massachusetts also specified what it means to be a "suitable person" eligible for a license. It expressly prohibited certain categories of people from obtaining a license, including minors, domestic abusers, and felons. 1936 Mass. Acts 289, ch. 302, § 131. Those eligible would still have to show good cause or a proper purpose to obtain a license. In addition, licenses would have to be annually renewed and were "revocable at the will of" the issuing body. 1922 Mass. Acts 560.

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

Although restricted licenses are somewhat rare across the state as a whole, they are much more likely to be issued by law enforcement in populous urban areas, where the problems of gun violence are most acute. JA 154–55. That includes the defendants here, Boston and Brookline. *Id.* Boston is Massachusetts's largest city, and Brookline its largest town.[1] Both fall within the Greater Boston metropolitan region, where 70% of the state's population resides.[2]

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[1] *Information and Historical Data on Cities, Towns and Counties in the Commonwealth of Massachusetts*, Sec'y of the Commonwealth of Massachusetts, https://goo.gl/kcFVfs.

[2] *See QuickFacts: Massachusetts*, U.S. Census Bureau, https://perma.cc/ZJ2R-TU5P; *Boston-Cambridge-Newton, MA-NH Metro Area*, Census Reporter, https://perma.cc/EE9D-46JK.

Brookline's implementation of the licensing regime. At the time that Gould's application was considered, the Town of Brookline's application process was administered by Police Chief Daniel O'Leary and Sergeant Christopher Malinn, who had a combined 62 years of experience in the force. JA 226, 232.[3] Together, these officials implement the state's public-carry regime through a tailored policy offering seven types of restricted licenses: target, hunting, transport, sporting, employment, home, and collecting. JA 77–78. An applicant may receive a license for some or all these uses, depending on their reasons for needing a handgun. The officials review each application on a "case by case basis, taking into consideration all information provided in the application," JA 82, and are willing to expand on these seven uses to accommodate even a single applicant. JA 230. And when a qualifying request cannot be met by some combination of the restricted uses, the Town issues an unrestricted license if the applicant demonstrates the necessary "knowledge, skill and character" and a "good reason" for such a license. JA 84.

Of the 191 licenses Brookline issued from early 2015 to mid 2017, nearly 40% were unrestricted. JA 59. Many of these applicants were "employed in positions that would be deemed dangerous at any time, not just while working." JA 82. So an

[3] While this case was on appeal, Chief O'Leary retired. Mark Morgan is currently serving as Acting Chief of the Brookline Police Department during the search for a permanent Chief. Under Federal Rule of Appellate Procedure 43(c)(2), Mr. Morgan is to be automatically substituted in Mr. O'Leary's place.

"employment" restriction—allowing a loaded gun to be carried "[i]n the home and while working," and traveling in between the two—would not be sufficient. JA 79. Examples of such people include off-duty police officers, criminal-defense attorneys, and judges "hearing and deciding criminal cases," who "would likely receive an unrestricted license due to the threat posed by sentencing and presiding over cases involving potentially dangerous persons." *Id.*[4]

Other applicants were able to obtain a license allowing them to carry a firearm under all the circumstances for which they could demonstrate a need (*e.g.*, hunting, employment, target-shooting, etc.). For example, Chief O'Leary explained that, given the nature of the surrounding community, the "majority of people that we talk to, they really don't want to carry it all the time but they want it to go target shooting or hunting." Pait, *Looking Down the Sights: An Investigation into Firearms in Brookline*, The Sagamore, June 17, 2016, https://goo.gl/oWdTj3. So they were given licenses to carry a firearm for that purpose, but not for other unspecified purposes.

Brookline processes each application with great care. Sergeant Malinn serves as the point of contact and investigator. JA 224. He meets and interviews the applicant to "gather all of the facts." *Id.* He also "discusses the matter with and

[4] Gould attempts to cast these professions (and doctors) as "favored." Gould Br. 8. But that ignores the unique dangers posed by their work and the difficulties of extrapolating meaningful information from small data sets. *See* JA 262 (data based on applications by fourteen doctors and six attorneys).

answers questions from the applicant," *id.*, ensuring that he understands the applicant's needs and that they in turn understand the Town's licensing policy. When he finishes his inquiry, he "has a discussion with and makes a recommendation to the Chief[.]" JA 76. The Chief then personally reviews all the information in the application, taking whatever time and resources are needed to make a thoughtful decision based on that information, with further input from Sergeant Malinn. *Id.*

When the license is issued, Sergeant Malinn "explains the restriction to the license holder and answers any question that he or she may have." JA 78. The license is also explained in writing, in a document that the applicant must sign to confirm that they accept and understand the license. At any stage of the process, if the applicant wishes to discuss the matter directly with the Chief, he is "always willing to do so." JA 225. And if the applicant would like to provide more information, he is "always willing" to accept it. *Id.*

The Chief is also willing to reconsider any decision he has made. Since January 2015, he has been asked to reassess seventeen license restrictions. JA 79. Of those, he modified seven and removed the restriction entirely from three. *Id.* Although this is a small sample size, it means that the applicant prevailed more than half the time, illustrating that the Chief has no problem changing his decision when appropriate. He is proud that the "Brookline Police Department devotes more time and resources to reviewing firearm license applications than most if not all other

cities and towns in Massachusetts." JA 225–26. Doing so allows him to "provide the gun-owning community the rights secured by the Second Amendment while at the same time protect[ing] the public as much as possible given the reach of these rights." JA 230.

II. Factual background

The sole plaintiff in this case who requested a firearms license from the Town of Brookline is Michael Gould.[5] Gould met with Sergeant Malinn in July 2014 to renew a restricted license he held from the Town of Weymouth, which he was seeking to renew as an unrestricted license. JA 232–33. Sergeant Malinn walked Gould through all the necessary questions to fill out his application. JA 232. Gould said that he needed to carry a loaded firearm for hiking, target-shooting, and for his work as a professional photographer, "to protect himself while in possession of valuable works of art and camera equipment[.]" JA 137, 234. To assist Gould with this application, Sergeant Malinn gave him some suggestions about the types of information he could provide to Chief O'Leary to support his stated needs. JA 233.

A couple of months later, Gould wrote a letter articulating the same reasons for needing to carry a loaded firearm in public that he had given earlier. He asserted

[5] The organizational plaintiff, Commonwealth Second Amendment, has not identified any member of theirs who resides in Brookline, much less one who has been denied a requested license. The other individual plaintiffs sought unrestricted licenses from Boston, whose public-carry policies are similar to Brookline's.

a desire to be able to defend himself while "working with valuable photography equipment as well as extremely valuable works of art." JA 137. He also wrote that he is "very often alone hiking through the woods with [his] camera equipment, photographing scenic landscapes and areas to sell on the stock site," and expressed an interest in target-shooting. *Id.* He did not identify any other reason why he needed to carry a loaded firearm in public or provide any other specifics. *Id.*

After considering all the information provided by Gould, Chief O'Leary offered him a license that "allowed Mr. Gould to carry a gun on all of the occasions when he indicated he wanted to carry a firearm (*i.e.* for target shooting and to protect himself while in possession of valuable works of art and camera equipment, which was, at times, in remote places)." JA 234; *see* JA 139. Although still restricted, the license "would expand [Gould's] right to carry a gun" from the license he had previously held from Weymouth, allowing him to carry a firearm "any time he is engaged in his business," as well as for target-shooting, hunting, and a range of outdoor recreational activities such as hiking and camping. JA 225, 230, 234.

Upon receiving the offer, Gould asked Sergeant Malinn if he should send additional information. JA 140–41. Because Gould had not provided any "reasons why he needed a firearm for self-defense (other than his work)," Malinn explained that additional information was unlikely to expand the scope of the license because it already allowed Gould to carry a firearm under all the circumstances he had given.

JA 233. If Gould had provided an additional reason, however, Sergeant Malinn "would have suggested the information he could have provided to support this." *Id.* Gould decided to accept the restricted license, signing the acknowledgement forms without identifying any additional intended uses or seeking reconsideration. JA 234.

III. Procedural background

Rather than seek reconsideration or substantiate a need for a broader license, Gould filed this lawsuit in 2016, joined by plaintiffs who received similarly restricted licenses from Boston. They contend that the Constitution mandates that they be able to carry firearms not only in their homes, on their property, while working, while traveling to and from work, while hiking, and for target-shooting, but anytime they wish to go armed on the crowded urban streets of Brookline and Boston, for any reason, and that there is no role for the people's representatives to say otherwise.

The court rejected this argument. Following the Second, Third, Fourth, and Ninth Circuits—and heeding this Court's call for caution in interpreting the Second Amendment—the district court upheld Boston and Brookline's public-carry policies as constitutional and granted them summary judgment. Gould Add. ("Add.") 21.

The district court noted that this Court has not yet "explicitly adopted" the two-step approach widely used by the other circuits, but that its decisions are consistent with that approach. Add. 16. Under this 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." Add. 16. If so, they "next determine the appropriate form of judicial scrutiny to apply." *Id.*

The district court cited *United States v. Rene E.*, 583 F.3d 8 (1st Cir. 2009), involving the federal prohibition on firearm possession by juveniles, as an example of a case in which this Court upheld a law at step one. Add. 16. Because many states had adopted similar juvenile prohibitions in the late 1800s and early 1900s, this law "was one of the 'longstanding prohibitions' that *Heller* did not call into question." *Id.* The court cited *United States v. Booker*, 644 F.3d 12 (1st Cir. 2011), *Hightower v. City of Boston*, 693 F.3d 61 (1st Cir. 2012), and *United States v. Armstrong*, 706 F.3d 1 (1st Cir. 2013), as cases in which this Court upheld a law at step two. Add. 17.

Applying the two-step framework, the district court "assume[d] for analytical purposes that the Second Amendment extends to protect the right of armed self-defense outside the home," as some other courts have done. Add. 21. But the district court (like those courts) did not ask the more relevant step-one question: whether the cities' public-carry policies—which allow substantial avenues for armed self-defense outside the home—had a sufficiently old lineage to qualify as longstanding.

Having skipped past this question, the court turned to step two. It observed that this Court's precedents support the application of intermediate scrutiny (the level of scrutiny applied by the Second, Third, and Fourth Circuits in upholding similar laws). Add. 22. Under those precedents, the ultimate question is "whether the

defendant has shown a 'substantial relationship between the restriction and an important governmental objective.'" Add. 24.

The district court had no trouble finding that Massachusetts's public-carry regime—and Boston and Brookline's implementing policies—survive this standard. The regime is "substantially related to [the government's] important objective in protecting public safety and preventing crime." Add. 28. The court thus "agree[d] in substance with the Second, Third, and Fourth Circuits," and concluded that the policy requiring "applicants to show a specific reason to fear" to obtain "unrestricted firearm licenses, and its authorizing statute, are constitutional." Add. 29.

SUMMARY OF ARGUMENT

In *District of Columbia v. Heller*, the Supreme Court held that the Second Amendment protects "the right of law-abiding, responsible citizens to use arms in defense of hearth and home," and struck down as unconstitutional a law "totally ban[ning] handgun possession in the home." 554 U.S. 570, 629, 635 (2008). The Court made clear, however, that its analysis does not "suggest the invalidity of laws" that "do not remotely burden the right of self-defense as much as an absolute ban on handguns." *Id.* at 632. And it went out of its way to explain that "longstanding" regulations are treated as "exceptions" to the self-defense right based on their "historical justifications," and thus deemed constitutional. *Id.* at 626–27 n.26, 635.

Following that precedent, four circuits have upheld public-carry restrictions similar to Massachusetts's regime. One circuit did so based on a "historical analysis," finding that California's prohibition on carrying concealed firearms in public had a sufficient pedigree to qualify as longstanding under *Heller*. *See Peruta v. Cnty. of San Diego*, 824 F.3d 919, 929 (9th Cir. 2016) (en banc) ("[T]he history relevant to both the Second Amendment and its incorporation by the Fourteenth Amendment lead to the same conclusion: The right of a member of the general public to carry a concealed firearm in public is not, and never has been, protected by the Second Amendment."). Three other circuits—none of which had access to the full wealth of historical materials we provide in this brief—upheld public-carry restrictions under intermediate scrutiny. Massachusetts's regime, as implemented by Brookline and applied to Gould, is constitutional under either approach.

I. Under the historical approach, Massachusetts's regime can be upheld based "on the existence of a longstanding tradition" of similar regulations. *United States v. Rene E.*, 583 F.3d 8, 12 (1st Cir. 2009). That tradition stretches from medieval England to the modern age. By the early 1900s, nearly 30 states and numerous cities had at one time adopted laws either entirely prohibiting public carry in urban areas or doing what Massachusetts does here: requiring a good reason for such carry. As this Court has already recognized in upholding a gun regulation as longstanding, that is more than enough to satisfy *Heller*. *Id.*

II. Under the other approach, Brookline's public-carry policy is constitutional as applied to Gould because it satisfies intermediate scrutiny. It allows people to carry guns in the home and on the job, while also providing many opportunities for armed self-defense in public. Indeed, Gould himself may carry "in all of the circumstances in which he indicated he needed the firearm," JA 80—including while working, traveling to and from work, hiking, target-shooting, and at home. As Massachusetts explains in greater detail in its brief, any burden on his constitutional rights is justified by the "substantial relationship" between the law's restrictions and the government's interest in public safety. *United States v. Booker*, 644 F.3d 12, 25 (1st Cir. 2011).

ARGUMENT

The question in this case is *not* whether there exists "some limited right under the Second Amendment to keep and bear operable firearms outside the home for the purpose of self-defense"—a question this Court has not yet answered. *Powell v. Tompkins*, 783 F.3d 332, 348 n.10 (1st Cir. 2015). Instead, the question is whether Massachusetts's public-carry regime (as implemented by Brookline) is consistent with the Second Amendment (as applied to Gould).

For two reasons, it is. *First*, the regime is constitutional in its entirety because there is a "longstanding tradition" of "state laws imposing similar restrictions." *Rene E.*, 583 F.3d at 12. *Second*, the regime is constitutional as applied to Gould even without "reference to its historical provenance." *Booker*, 644 F.3d at 24 n.15. Far from

"extinguish[ing]" his "core Second Amendment right," as Gould asserts (at 35), Brookline allows him to carry a loaded gun in public in "all of the circumstances in which he indicated he needed [one]." JA 80. And it allows him "to use arms in defense of hearth and home"—the use the Amendment "elevates above all" else. *Heller*, 554 U.S. at 635. The Constitution entitles him to no more. Even if his rights were somehow burdened, that minimal burden would be amply justified because "there is a substantial relationship" between the law and Brookline's "undeniably important" interest in preventing urban gun violence. *Booker*, 644 F.3d at 25.

I. Because Brookline carries forward a centuries-old tradition of restricting public carry in populated areas, its public-carry policy is "longstanding" and thus constitutional under *Heller*.

A. "Longstanding" laws are constitutional under *Heller* because they are consistent with our historical tradition.

One way to determine whether a law violates the Second Amendment is to assess the law based on a "historical understanding of the scope of the right," *Heller*, 554 U.S. at 625, and ask whether there is a "longstanding tradition" of analogous regulations, *Rene E.*, 583 F.3d at 12. *Heller* identified several "examples" of such regulations, including "prohibitions on the possession of firearms by felons and the mentally ill" and "laws imposing conditions and qualifications on the commercial sale of arms," which are "presum[ed]" constitutional because of their historical acceptance as consistent with the Second Amendment. 554 U.S. at 626–27 & n.26.

Such "longstanding" laws, the Supreme Court explained, are treated as tradition-based "exceptions" by virtue of their "historical justifications." *Id.* at 635; *see Fyock v. Sunnyvale*, 779 F.3d 991, 997 (9th Cir. 2015) ("[L]ongstanding prohibitions" are "traditionally understood to be outside the scope of the Second Amendment."); *United States v. Marzzarella*, 614 F.3d 85, 91 (3d Cir. 2010) ("[L]ongstanding limitations are exceptions to the right to bear arms."). As this Court has put it: "These restrictions, as well as others similarly rooted in history, were left intact by the Second Amendment and by *Heller*." *Rene E.*, 583 F.3d at 12.

For a law to qualify as "longstanding," it need not "mirror limits that were on the books in 1791" (or in this case involving a state law, 1868). *Booker*, 644 F.3d at 24 (quotation marks omitted). Nor must it have been enacted in every jurisdiction. To the contrary, a law may be longstanding even if it "cannot boast a precise founding-era analogue," *NRA v. BATF*, 700 F.3d 185, 196 (5th Cir. 2012), as was the case with the "early twentieth century regulations" *Heller* deemed longstanding, *Fyock*, 779 F.3d at 997. Indeed, *Heller* indicated that the modern "felony firearm disqualification law," for example, is considered longstanding even though it is "firmly rooted in the twentieth century and likely bears little resemblance to laws in effect at the time the Second Amendment was ratified." *Booker*, 644 F.3d at 23–24. And this Court has upheld a gun law as longstanding because nine states and Chicago "enacted similar statutes" in the late 19th and early 20th century. *Rene E.*, 583 F.3d at 14.

Under these precedents, this is an easy case. As we now show, Massachusetts has regulated public carry since its colonial origins in the 1600s—beginning with a broad ban and then requiring "good cause" in the early 1800s. It was not alone in doing so. By the early 20th century, more than 25 states and countless cities had enacted laws either entirely banning public carry in urban areas or requiring a "good reason" for it. Because Brookline's good-cause regime carries forward this robust tradition, it is longstanding and thus constitutional under *Heller*.

B. Brookline's public-carry policy has a centuries-long pedigree in Anglo-American history and is therefore "longstanding" and constitutional under *Heller*.

1. English history

Beginning in 1328, England broadly restricts public carry in populated areas. The Anglo-American tradition of broadly restricting public carry in populated areas stretches back to at least 1328, when England enacted the Statute of Northampton providing that "no Man great nor small" shall "go nor ride armed by night nor by day, in Fairs, Markets, nor in the presence of the Justices or other Ministers, nor in no part elsewhere." 2 Edw. 3, 258, ch. 3 (1328). After this statute was enacted, King Edward III and his successors directed sheriffs and bailiffs to arrest "all those whom [they] shall find going armed." Charles, *The Faces of the Second Amendment Outside the Home*, 60 Clev. St. L. Rev. 1, 13–25 (2012).

This prohibition expanded on two earlier laws: one making it a crime "to be found going or wandering about the Streets of [London], after Curfew … with Sword or Buckler, or other Arms for doing Mischief," 13 Edw. 1, 102 (1285), and another prohibiting coming with "Force [or] Armour" to the "Parliament at Westminster," 7 Edw. 2, 170 (1313)—the seat of the English government.

Over the ensuing decades, England repeatedly reenacted the Statute of Northampton's public-carry restriction. *See, e.g.*, 7 Ric. 2, 35, ch. 13 (1383); 20 Ric. 2, 93, ch. 1 (1396). Because this restriction carried misdemeanor penalties, violators were usually required to forfeit their weapons and pay a fine. *Id.* A separate law went further, outlawing "rid[ing] armed covertly or secretly with Men of Arms against any other." 25 Edw. 3, 320, ch. 2, § 13 (1351). This law had heavier penalties because it regulated threatening behavior rather than simply carrying weapons in public—the conduct prohibited by the Statute of Northampton. *Id.*

By the 16th century, firearms had become increasingly accessible in England, and the possibility that they would be carried in public had become increasingly threatening to public safety. To guard against this threat, Queen Elizabeth I in 1579 called for strict enforcement of Northampton's prohibition on carrying "Daggers, Pistols, and such like, not only in Cities and Towns, [but] in all parts of the Realm in common high[ways], whereby her Majesty's good quiet people, desirous to live in [a] peaceable manner, are in fear and danger of their lives." Charles, *Faces*, 60 Clev.

St. L. Rev. at 21 (spelling modernized). The carrying of "such offensive weapons" (like "Handguns"), she elaborated, and "the frequent shooting [of] them in and near Cities, Towns corporate, [and] the Suburbs thereof where [the] great multitude of people do live, reside, and trav[el]," had caused "great danger" and "many harms [to] ensue." *Id.* at 22 (spelling modernized). Fifteen years later, she reaffirmed that publicly carrying pistols—whether "secretly" or in the "open"—was "to the terrour of all people professing to travel and live peaceably." *Id.*

To carry out the Statute of Northampton's prohibition, British constables, magistrates, and justices of the peace were instructed to "Arrest all such persons as they shall find to carry Daggers or Pistols" publicly. Keble, *An Assistance to the Justices of the Peace*, for the Easier Performance of Their Duty 224 (1683). This mandate was unmistakably broad: "[I]f any person whatsoever … shall be so bold as to go or ride Armed, by night or by day, in Fairs, Markets, or any other places … then any Constable" may "commit him to the Gaol." *Id.*

In the 17th and 18th centuries, English authorities interpret the Statute of Northampton to restrict public carry in populated areas. This understanding of the law—as broadly prohibiting carrying guns in populated public places—continued into the 17th and 18th centuries. *See generally* Charles, *The Statute of Northampton by the Late Eighteenth Century*, 41 Fordham Urb. L.J. 1695 (2012). In 1644, for example, Lord Coke—"widely recognized by the American colonists as the greatest

authority of his time on the laws of England," *Payton v. New York*, 445 U.S. 573, 593–94 (1980)—described the Statute of Northampton as making it unlawful "to goe nor ride armed by night nor by day … in any place whatsoever." Coke, *The Third Part of the Institutes of the Laws of England* 160 (1817 reprint).

One century later, Blackstone—"the preeminent authority on English law for the founding generation," *Heller*, 554 U.S. at 593–94—described the statute similarly: "The offence of riding or going armed with dangerous or unusual weapons is a crime against the public peace, by terrifying the good people of the land; and is particularly prohibited by the statute of Northampton." 4 Blackstone, *Commentaries on the Laws of England* 148–49 (1769).[6] In other words, because carrying a dangerous weapon (such as a firearm) in populated public places naturally terrified the people, it was a crime against the peace—even if unaccompanied by a threat, violence, or any additional breach of the peace. *See Chune v. Piott*, 80 Eng. Rep. 1161, 1162 (K.B. 1615) ("Without all question, the sheriffe hath power to commit … if contrary to the Statute of Northampton, he sees any one to carry weapons in the high-way, in terrorem populi Regis; he ought to take him, and arrest him, notwithstanding he doth not break the peace in his presence.").

[6] The same description appears in "the most important early American edition of Blackstone's Commentaries," by St. George Tucker. *Heller*, 554 U.S. at 594; *see* Tucker, *Blackstone's Commentaries* 149 (1803).

To carry out Northampton's prohibition, British constables, magistrates, and justices of the peace were instructed to "Arrest all such persons as they shall find to carry Daggers or Pistols" publicly. Keble, *An Assistance to the Justices of the Peace, for the Easier Performance of Their Duty* 224 (1683). This mandate was unmistakably broad: "[I]f any person whatsoever … shall be so bold as to go or ride Armed, by night or by day, in Fairs, Markets, or any other places … then any Constable … may take such Armor from him for the Kings use, and may also commit him to the Gaol." *Id.*[7]

Heeding this instruction, one court issued an arrest warrant for a man who committed "outragious misdemeanours" by going "armed" with "pistolls[] and other offensive weapons." *Rex v. Harwood*, Quarter Sessions at Malton (Oct. 4–5, 1608), *reprinted in* North Riding Record Society, *Quarter Sessions Records* 132 (1884). Another sentenced a man to prison because he "went armed under his garments," even though he had not threatened anyone and had done so only to "safeguard … his life" because another man had "menaced him." Coke, *Institutes* 161. And a jury convicted a man "for going Armed with a Cutlass Contrary to the Statute," for which he was sentenced to two years in prison plus fines. *Middlesex Sessions: Justices' Working Documents* (1751), available at https://perma.cc/ET65-DQGC.

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[7] *See also* Lambarde, *The Duties of Constables, Borsholders, Tythingmen, and Such Other Low and Lay Ministers of the Peace* 13–14 (1602) (same); 1 Hutcheson, *Treatise on the Offices of Justice of Peace* app. I at xlviii (1806) (citing Cromwell, *Instructions Concerning Constables* (1665)) ("A constable shall arrest any person, not being in his Highness service, who shall be found wearing naugbuts, or guns, or pistols, of any sort.").

The law's narrow exceptions confirm this general public-carry prohibition. In addition to its focus on populated public places, the Statute of Northampton was understood to contain limited exceptions. One important exception was that the prohibition did not apply inside the home, in keeping with principles of self-defense law, which imposed a broad duty to retreat while in public but conferred a strong right to self-defense at home. Blackstone, 4 *Commentaries* 185. As Lord Coke explained, using force at home "is by construction excepted out of this act[,] … for a man's house is his castle." *Institutes* 162. "But [a man] cannot assemble force," Coke continued—including by carrying firearms—even "though he [may] be extremely threatened, to go with him to Church, or market, or any other place, but that is prohibited by this act." *Id.*[8] William Hawkins likewise explained that "a man cannot excuse the wearing [of] such armour in public, by alleging that such a one threatened him, and he wears it for [his] safety," but he may assemble force "in his own House, against those who threaten to do him any Violence therein, because a Man's House is as his Castle." 1 Hawkins, *A Treatise of the Pleas of the Crown* 489, 516

[8] *See also* 1 Hale, *History of the Pleas of the Crown* 547 (1800) (noting that armed self-defense was permitted at home, but not during "travel, or a journey," because of "special protection" accorded "home and dwelling"); *Semayne's Case*, 77 Eng. Rep. 194, 195 (K.B. 1603) ("[E]very one may assemble his friends and neighbors to defend his house against violence: but he cannot assemble them to go with him to the market, or elsewhere for his safeguard against violence.").

(1721) (1824 reprint); 1 Russell, *A Treatise on Crimes & Misdemeanors* 589 (1826) (same in American edition).[9]

There were two other important exceptions to the public-carry prohibition: a narrow (unwritten) exception permitting high-ranking nobles to wear fashionable swords and walk in public with armed servants, and a narrow (written) exception for the King's officers. *See* 1 Hawkins, *Treatise of the Pleas of the Crown* 489, 798 (explaining that noblemen were in "no danger of offending against this statute" by wearing "weapons of fashion, as swords, &c., or privy coats of mail," or by "having their usual number of attendants with them for their ornament or defence," for that would not "terrify the people").[10]

Putting these exceptions together, "no one" could "carry arms, by day or by night, except the vadlets of the great lord of the land, carrying the swords of their masters in their presence, and the serjeants-at-arms [of the royal family]," as well as

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[9] A contrary rule—permitting armed self-defense in populated areas, even though it terrified the public—would have suggested that "the King were not able or willing to protect his subjects." *Sir John Knight's Case*, 87 Eng. Rep. 75, 76 (K.B. 1686). Hence, the castle doctrine was confined to the home. Tucker, *Blackstone's Commentaries* 225.

[10] *See also* Russell, *Treatise on Crimes & Misdemeanors* 588–89 (same); Charles, *Faces*, 60 Clev. St. L. Rev. at 26 n.123 (citing historical distinction between "go[ing] or rid[ing] *armed*" and nobleman "wear[ing] common *Armour*"); *Rex v. Sir John Knight*, 90 Eng. Rep. 330 (K.B. 1686) (noting a "general connivance" for "gentlemen" to carry arms in this way, but declining to dismiss indictment for "walk[ing] about the streets armed with guns" against a defendant who was later acquitted); *Sir John Knight's Case*, 87 Eng. Rep. at 76 (acquittal).

those responsible for "saving and maintaining the peace." Carpenter & Whitington, *Liber Albus: The White Book of the City of London* 335 (1419) (1861 reprint).[11]

The Statute of Northampton's public-carry restriction remains fully in effect following the English Bill of Rights of 1689. In the late 17th century, William and Mary enshrined the right to have arms in the Declaration of Rights, later codified in the English Bill of Rights in 1689. This right—which "has long been understood to be the predecessor to our Second Amendment," *Heller*, 554 U.S. at 593—ensured that subjects "may have arms for their defence suitable to their conditions, and as allowed by law." 1 W. & M. sess. 2. ch. 2. As Blackstone later wrote, this right was considered "a public allowance, under due restrictions[,] of the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression." 1 Blackstone, *Commentaries on the Laws of England* 144 (1769). One such "due restriction" was the Statute of Northampton, which remained in effect after the right to bear arms was codified in 1689. *See* 4 Blackstone, *Commentaries* 148–49; Gardiner, *The Compleat Constable* 18 (1692); *Middlesex Sessions* (reporting 1751 conviction under law).

[11] A 1409 royal order confirms the narrow exception allowing noblemen to carry swords. It "forb[ade] any man of whatsoever estate or condition to go armed within [London] and [its] suburbs, or any except lords, knights and esquires with a sword." 3 *Calendar of the Close Rolls, Henry IV* 485 (Jan. 30, 1409).

2. Founding-era American history

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

Massachusetts and other states enact laws mirroring the Statute of Northampton both before and after the Constitution's adoption. Eight years after New Jersey's law, Massachusetts enacted its own version of the Statute of Northampton, authorizing justices of the peace to arrest anyone who "shall ride or go armed Offensively before any of Their Majesties Justices, or other [of] Their Officers or Ministers doing their Office, or elsewhere." 1694 Mass. Laws 12, no. 6.

By using the word "offensively," Massachusetts ensured that this prohibition applied only to "offensive weapons," as it had in England—not all arms. Constable oaths of the 18th century described this law with similar language. *See* Charles, *Faces*, 60 Clev. St. L. Rev. at 34 n.178. One treatise, for example, explained that "[a] person going or riding with offensive Arms may be arrested." Bond, *A Compleat Guide for Justices of the Peace* 181 (1707). Thus, under the law, a person could publicly carry a hatchet or horsewhip, but not a pistol. *See* 1 Hawkins, *Treatise of the Pleas of the Crown* 665 (1824 reprint) (explaining that hatchets and horsewhips were not "offensive weapons," while "guns" and "pistols" were); *King v. Hutchinson*, 168 Eng. Rep. 273, 274 (1784) (explaining that firearms are offensive weapons).[12]

One century later, Massachusetts reenacted its law, this time as a state. 1795 Mass. Laws 436, ch. 2. Because the law had been in effect for so long, it was "well known to be an offence against law to ride or go with … firelocks, or other dangerous weapons," as one newspaper later reported, so it "[could not] be doubted that the vigilant police officers" would arrest violators. Charles, *Faces*, 60 Clev. St. L. Rev. at 33 n.176 (quoting *The Salem Gazette*, June 2, 1818, at 4).

Following Massachusetts's lead, additional states enacted similar laws, including founding-era statutes in Virginia and North Carolina, a New Hampshire

[12] American treatises said the same. *See* Bishop, *Commentaries on the Law of Statutory Crimes* 214 (1873); Russell, *Treatise on Crimes & Misdemeanors* 124.

law passed five years after Massachusetts's first enactment, and later enactments in states ranging from Maine to Tennessee. *See* 1699 N.H. Laws 1; 1786 Va. Laws 33, ch. 21; 1792 N.C. Laws 60, 61, ch. 3; 1801 Tenn. Laws 710, § 6; 1821 Me. Laws 285, ch. 76, § 1; 1852 Del. Laws 330, 333, ch. 97, § 13. And still other states incorporated the Statute of Northampton through their common law.[13]

To ensure that these laws were enforced, constables, magistrates, and justices of the peace in these jurisdictions were required to "arrest all such persons as in your sight shall ride or go armed." Haywood, *A Manual of the Laws of North-Carolina* pt. 2 at 40 (1814) (N.C. constable oath). That was because, as they were informed, "going armed with dangerous or unusual weapons, is a crime against the public peace, by terrifying the good people of the land, and is prohibited by statute." Haywood, *The Duty and Office of Justices of the Peace, and of Sheriffs, Coronoers, Constables* 10 (1800); *see also* Haywood, *The Duty & Authority of Justices of the Peace, in the State of Tennessee* 176 (1810).

As with the English statute, prosecution under these laws did not require a "threat[] [to] any person in particular" or "any particular act of violence." Ewing, *A*

[13] *See* A Bill for the Office of Coroner and Constable (Mar. 1, 1682), reprinted in Leaming & Spicer, *Grants, Concessions & Original Constitutions* 251 (1881) (N.J. constable oath) ("I will endeavour to arrest all such persons, as in my presence, shall ride or go arm'd offensively."); Niles, *The Connecticut Civil Officer* 154 (1833) (noting crime of "go[ing] armed offensively," even without threatening conduct); Dunlap, *The New York Justice* 8 (1815); *Vermont Telegraph*, Feb. 7, 1838 ("The laws of New England" provide a self-defense right "to individuals, but *forbid their going armed* for the purpose."). Northampton also applied in Maryland. Md. Const. of 1776, art. III, § 1.

Treatise on the Office & Duty of a Justice of the Peace 546 (1805); *see also* Bishop, *Commentaries on the Law of Statutory Crimes* (noting that there was no requirement that "peace must actually be broken, to lay the foundation for a criminal proceeding"). Nor did these laws have a self-defense exception: No one could "excuse the wearing [of] such armor in public, by alleging that such a one threatened him." Wharton, *A Treatise on the Criminal Law of the United States* 527–28 (1846).

3. Early-19th-century American history

Massachusetts begins allowing public carry with "reasonable cause to fear an assault," and many states follow its lead. In 1836, Massachusetts amended its public-carry prohibition to provide a narrow exception for those having "reasonable cause to fear an assault or other injury, or violence to his person, or to his family or property." 1836 Mass. Laws 748, 750, ch. 134, § 16. Absent such "reasonable cause," no person could "go armed with a dirk, dagger, sword, pistol, or other offensive and dangerous weapon." *Id.* Those who did so could be punished by being made to pay sureties for violating the statute, *id.*; if they did not do so, they could be imprisoned. *See id.* at 749.[14]

[14] Sureties were a form of criminal punishment, like a bond. *See* Punishments, The Proceedings of the Old Bailey, London's Central Criminal Court, 1674 to 1913, https://goo.gl/LGFMf4; 34 Edw. 3, 364, ch. 1 (1360). They still exist as a form of criminal punishment in Massachusetts. *See* M.G.L. ch. 275, § 4. The criminal nature of the surety-based historical laws, moreover, is confirmed by the legislatures that enacted them. The Massachusetts legislature placed its restriction in part of the code entitled "Of Proceedings in Criminal Cases." 1836 Mass. Laws 748, 750, ch. 134,

Although the legislature chose to trigger these penalties using a citizen-complaint mechanism (allowing "any person having reasonable cause to fear an injury, or breach of the peace" to file a complaint, *id.* at 750, § 16), the law was understood to restrict carrying a firearm in public without good cause. This was so even when the firearm was not used in any threatening or violent manner: The legislature placed the restriction in a section entitled "Persons who go armed may be required to find sureties for the peace," and expressly cited the state's previous enactment of the Statute of Northampton. *Id.* And elsewhere in the same statute the legislature separately punished "any person [who] threatened to commit an offence against the person or property of another." *Id.* at 749, § 2. Thus, as one Massachusetts judge explained in a grand jury charge appearing in the contemporary press in 1837, there was little doubt at the time that "no person may go armed with a dirk, dagger, sword, pistol, or other offensive and dangerous weapon, without reasonable cause to apprehend an assault or violence to his person, family, or property." Cornell, *The Right to Carry Firearms Outside of the Home*, 39 Fordham Urb. L.J. 1695, 1720 & n.134 (2012); *see* Hammond, *A Practical Treatise; Or an Abridgement of the Law Appertaining to the Office of Justice of the Peace* 184–86 (1841).

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§ 16. Others did likewise. *See* 1851 Minn. Laws at 527–28, §§ 2, 17, 18 ("Persons carrying offensive weapons, how punished."); 1846 Mich. Laws 690, ch. 162, § 16 ("Of Proceedings in Criminal Cases"); 1847 Va. Laws 127, ch. 14, § 16 (same); 1871 Tex. Laws 1322, art. 6512 ("Criminal Code").

Within a few decades, many states (all but one outside the slaveholding South) had adopted nearly identical laws.[15] Most copied the Massachusetts law verbatim—enforcing the public-carry prohibition through a citizen-complaint provision and permitting a narrow self-defense exception. *See, e.g.*, 1851 Minn. Laws at 527–28, §§ 2, 17, 18 (section entitled "Persons carrying offensive weapons, how punished"); 1873 Minn. Laws. 1025, § 17 (same after 14th Amendment). At least one state used slightly different language. 1847 Va. Laws 127, 129, § 16 ("If any person shall go armed with any offensive or dangerous weapon, without reasonable cause to fear an assault or other injury, or violence to his person, or to his family or property, he may be required to find sureties for keeping the peace."). Semantic differences aside, these laws were understood to do the same thing: broadly restrict public carry, while establishing a limited exception for those with a particular need for self-defense.

Taking a different approach, many southern states elect to permit public carry, while regulating the manner of carry. In contrast to the Northampton model and its good-cause variant, many—but not all—states in the slaveholding South were more permissive of public carry. They generally allowed white citizens to carry firearms in public so long as the weapons were not concealed.

[15] *See, e.g.*, 1838 Wisc. Laws 381, § 16; 1841 Me. Laws 709, ch. 169, § 16; 1846 Mich. Laws 690, 692, ch. 162, § 16; 1847 Va. Laws 127, 129, ch. 14, § 16; 1851 Minn. Laws 526, 528, ch. 112, § 18; 1853 Or. Laws 218, 220, ch. 16, § 17; 1861 Pa. Laws 248, 250, § 6.

See, e.g., 1854 Ala. Laws 588, § 272; 1861 Ga. Laws 859, § 4413; *see generally* Cramer, *Concealed Weapon Laws of the Early Republic* (1999). It is this alternative (and minority) tradition on which a divided panel relied in *Wrenn v. District of Columbia*, 864 F.3d 650, 658 (D.C. Cir. 2017), the key case cited by Gould.

This tradition owes itself to the South's peculiar history and the prominent institution of slavery. *See generally* Ruben & Cornell, *Firearm Regionalism and Public Carry: Placing Southern Antebellum Case Law in Context*, 125 Yale L.J. Forum 121 (Sept. 25, 2015), https://goo.gl/3pUZHB. It reflects "a time, place, and culture where slavery, honor, violence, and the public carrying of weapons were intertwined." *Id.* at 125. Frederick Law Olmsted, for example, "attributed the need to keep slaves in submission as the reason that 'every white stripling in the South may carry a dirk-knife in his pocket, and play with a revolver before he has learned to swim.'" Cramer, *Concealed Weapon Laws* 21 (quoting Olmsted, *A Journey in the Back Country* 447 (1860)); *cf. McDonald v. City of Chicago*, 561 U.S. 742, 844 (2010) (Thomas, J., concurring) ("[I]t is difficult to overstate the extent to which fear of a slave uprising gripped slaveholders and dictated the acts of Southern legislatures."). And historians agree that "the South was substantially more violent than the North." Cramer, *Concealed Weapon Laws* 18; *see also* Redfield, *Homicide, North and South* vii, 10, 13 (1880) (2000 reprint) (study concluding that 19-century homicide rate in southern states was 18 times the rate in New England). This view was supported by Massachusetts Senator Charles Sumner,

whose "Bleeding Kansas" speech was cited at length in *Heller*, 554 U.S. at 609. In 1845, he addressed the disparate weapon cultures like so:

> In those portions of our country where it is supposed essential to personal safety to go armed with pistols and bowie-knives, mortal affrays are so frequent as to excite but little attention, and to secure, with exceedingly rare exceptions, impunity to the murderer; whereas at the North and East, where we are unprovided with such facilities for taking life, comparatively few murders of the kind are perpetrated.

Sumner, *The True Grandeur of Nations: An Oration Delivered Before the Authorities of the City of Boston, July 4, 1845*, 61–62 (1845).

Even within the South, however, courts and legislatures took varying stances toward public carry. Virginia, for instance, "home of many of the Founding Fathers," *Edwards v. Aguillard*, 482 U.S. 578, 605 (1987) (Powell, J., concurring), prohibited public carry (with an exception for good cause) before the Fourteenth Amendment's ratification, after enacting a Northampton-style prohibition at the founding. 1847 Va. Laws 127,129, § 16 (making it illegal to "go armed with any offensive or dangerous weapon, without reasonable cause to fear an assault or other injury, or violence to his person, or to his family or property"); 1786 Va. Laws 33, ch. 21. South Carolina enacted a Northampton-style law during Reconstruction. 1870 S.C. Laws 403, no. 288, § 4. Around the same time, Texas prohibited public carry with an exception for good cause—a prohibition enforced with possible jail time, and accompanied by narrow exceptions that confirmed the law's breadth. 1871 Tex. Laws 1322, art. 6512 (prohibiting public carry absent an "immediate and pressing" self-

defense need, while exempting one's "own premises" and "place of business, and travelers "carrying arms with their baggage"). And West Virginia, added to the Union during the Civil War, similarly allowed public carry only upon a showing of good cause. 1870 W. Va. Laws 702, 703, ch. 153, § 8.

Southern case law, too, reveals a lack of uniformity. Although a few pre-Civil-War decisions interpreted state constitutions in a way that can be read to support a right to carry openly, even in populated public places without good cause, several post-War cases held the opposite. The Texas Supreme Court, for instance, twice upheld that state's good-cause requirement. *English v. State*, 35 Tex. 473 (1871); *State v. Duke*, 42 Tex. 455 (1874). The court remarked that the law—which prohibited carrying "any pistol" in public without good cause, 1871 Tex. Laws 1322, art. 6512—"is nothing more than a legitimate and highly proper regulation" that "undertakes to regulate the place where, and the circumstances under which, a pistol may be carried; and in doing so, it appears to have respected the right to carry a pistol openly when needed for self-defense or in the public service, and the right to have one at the home or place of business," *Duke*, 42 Tex. at 459. The court explained that the law thus made "all necessary exceptions," and noted that it would be "little short of ridiculous" for a citizen to "claim the right to carry" a pistol in "place[s] where ladies and gentlemen are congregated together." *English*, 35 Tex. at 477–79. Further, the court observed, the good-cause requirement was "not peculiar to our own state," for nearly "every

one of the states of this Union ha[d] a similar law upon their statute books," and many had laws that were "more rigorous than the act under consideration." *Id.* at 479.

When the U.S. Supreme Court considered Texas's law in 1894, it took a similar view. After noting that the law "forbid[s] the carrying of weapons" absent good cause and "authoriz[es] the arrest, without warrant, of any person violating [it]," the Court determined that a person arrested under the law is not "denied the benefit" of the right to bear arms. *Miller v. Texas*, 153 U.S. 535, 538 (1894). Other courts upheld similar good-cause laws against constitutional attacks. *See, e.g.*, *State v. Workman*, 35 W. Va. 367, 367 (1891) (upholding West Virginia's good-cause requirement after previously interpreting it, in *State v. Barnett*, 34 W. Va. 74 (1890), to require specific, credible evidence of an actual threat of violence, not an "idle threat"). And even when a law wasn't directly challenged as unconstitutional, like in Virginia, courts "administered the law, and consequently, by implication at least, affirmed its constitutionality." *Id.* (referring to Virginia and West Virginia courts).

By contrast, Gould has identified no historical case (southern or otherwise) striking down a good-cause requirement as unconstitutional, let alone a law applying primarily to urban areas.[16] To be sure, a couple of cases, in the course of upholding

[16] Even *Andrews v. State*, 50 Tenn. 165 (1871), cited in *Wrenn*, does not go so far. There, the court invalidated what "in effect [was] an absolute prohibition" on carrying a weapon "for any and all purposes," whether "publicly or privately,

concealed-carry prohibitions, expressed the view that the right to bear arms protects the right, under some circumstances, to openly carry a weapon in public. *See Nunn v. State*, 1 Ga. 243 (1846) (striking down the open-carry portion of a statewide prohibition on openly carrying weapons based on the erroneous view that the Second Amendment applied to the states before 1868). But even within the South, open carry was rare: The Louisiana Supreme Court, for example, referred to "the extremely unusual case of the carrying of such weapon in full open view." *State v. Smith*, 11 La. Ann. 633, 634 (1856). And Massachusetts's law, of course, does not go nearly as far as the one struck down in *Nunn*, which prohibited *any* form of public carry, and banned most handguns. At any rate, isolated snippets from a few state-court decisions issued decades after the Framing cannot trump the considered judgments of countless courts and legislatures throughout our nation's history.

4. Mid-to-late-19th- and early-20th-century American history

States continue to restrict public carry both before and after the 14th Amendment's ratification. As America entered the second half of the 19th

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without regard to time or place, or circumstances." *Id.* at 187. "Under this statute," the court explained, "if a man should carry such a weapon about his own home, or on his own premises, or should take it from his home to a gunsmith to be repaired, or return with it, … he would be subjected to the severe penalties of fine and imprisonment prescribed in the statute." *Id.* In striking down that prohibition, the court did not cast doubt on the constitutionality of a law like the one at issue here. If anything, the court did the opposite: It reaffirmed that the legislature may "regulate the carrying of this weapon publicly." *Id.* at 187–88.

century, additional jurisdictions began enacting laws broadly restricting public carry, often subject to limited self-defense exceptions. Before the Civil War, New Mexico passed *An Act Prohibiting The Carrying Of Weapons, Concealed Or Otherwise*, making it unlawful for "any person [to] carry about his person, either concealed or otherwise, any deadly weapon," and requiring repeat offenders to serve a jail term "of not less than three months." 1859 N.M. Laws 94, § 2.

After the Civil War, several other states enacted similar laws notwithstanding the recent passage of the 14th Amendment. West Virginia and Texas enacted laws that broadly prohibited public carry without good cause. West Virginia's law made clear that "[i]f any person go armed with a deadly or dangerous weapon, without reasonable cause to fear violence to his person, family, or property, he may be required to give a recognizance." 1870 W. Va. Laws 702, 703, ch. 153, § 8.[17] Courts construed this self-defense exception narrowly to require specific evidence of a concrete, serious threat. *See, e.g.*, *Barnett*, 34 W. Va. 74. Texas's law had a similarly circumscribed exception, barring anyone not acting in "lawful defense of the state" ("as a militiaman" or "policeman") from "carrying on or about his person … any

[17] A later version reaffirmed the law's breadth by clarifying that it didn't "prevent any person from keeping or carrying about his dwelling house or premises, any such revolver or other pistol, or from carrying the same from the place of purchase to his dwelling house, or from his dwelling house to any place where repairing is done, to have it repaired and back again." 1891 W. Va. Laws 915, 915–16, ch. 148, § 7. Violators could be fined or jailed. *Id.*

pistol" without "reasonable grounds for fearing an unlawful attack on his person" that was "immediate and pressing." 1871 Tex. Laws 1322, art. 6512.

And then there are the early-20th-century laws, also deemed "longstanding" under *Heller* and *Rene E.* Massachusetts led the way in 1906, enacting a modernized version of its 1836 law. This version prohibited public carry without a license, which could be obtained only upon a showing of "good reason to fear an injury to his person or property." 1906 Mass. Sess. Laws 150. In 1909, Alabama made it a crime for anyone "to carry a pistol about his person on premises not his own or under his control," but allowed a defendant to "give evidence that at the time of carrying the pistol he had good reason to apprehend an attack." 1909 Ala. Laws 258, no. 215, §§ 2, 4. In 1913, New York banned all public carry without a permit, which required a showing of "proper cause," and Hawaii barred public carry without "good cause." 1913 N.Y. Laws 1627; 1913 Haw. Laws 25, act 22, § 1; *see also Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 84–85 (2d Cir. 2012) (describing the history of New York's regulation of public carry). A decade later, in 1923, the U.S. Revolver Association published a model law, which several states adopted, requiring someone to demonstrate a "good reason to fear an injury to his person or property" before obtaining a concealed-carry permit. *See, e.g.*, 1923 Cal. Laws 701, ch. 339.[18] West Virginia also enacted a public-carry law

[18] *See also* 1923 Conn. Laws 3707, ch. 252; 1923 N.D. Laws 379, ch. 266; 1923 N.H. Laws 138, ch. 118; 1925 Mich. Laws 473, no. 313; 1925 N.J. Laws 185, ch. 64; 1925 Ind. Laws 495, ch. 207; 1925 Or. Laws 468, ch. 260.

around this time, prohibiting all carry absent good cause. *See* 1925 W. Va. Laws 25. And other states went further, prohibiting all public carry with no exception for good cause.[19]

Beginning right after the 14th Amendment's ratification, many legislatures enact laws banning public carry in populated areas. Starting with New Mexico in 1869, many legislatures enacted Northampton-style prohibitions on public carry in cities and other populated areas. New Mexico made it "unlawful for any person to carry deadly weapons, either concealed or otherwise, on or about their persons within any of the settlements of this Territory," while providing a narrow self-defense exception. 1869 N.M. Laws 312, *Deadly Weapons Act of 1869*, § 1. Violators could serve up to 50 days in jail. *Id.* § 3. Wyoming prohibited carrying firearms "concealed or openly" "within the limits of any city, town or village." 1875 Wyo. Laws 352, ch. 52, § 1. Idaho made it unlawful "to carry, exhibit or flourish any … pistol, gun or other-deadly weapons, within the limits or confines of any city, town or village or in any public assembly." 1889 Idaho Laws 23, § 1. Arizona banned "any person within any settlement, town, village or city within this Territory" from "carry[ing] on or about his person, saddle, or in his saddlebags, any pistol." 1889

[19] *See* 1890 Okla. Laws 495, art. 47, §§ 2, 5 (making it a crime for anyone "to carry upon or about his person any pistol, revolver," or "other offensive" weapon, except for carrying "shot-guns or rifles for the purpose of hunting, having them repaired, or for killing animals," or to use in "military drills, or while travelling or removing from one place to another"); 1903 Okla. Laws 643, ch. 25, art. 45, § 584.

Ariz. Laws 16, ch. 13, § 1. And, at the turn of the century, Texas and Michigan granted cities the power to "prohibit and restrain the carrying of pistols." 1909 Tex. Laws 105; *see* 1901 Mich. Laws 687, § 8.

By this time, many cities had imposed such public-carry bans for decades.[20] "A visitor arriving in Wichita, Kansas, in 1873," for example, "would have seen signs declaring, 'LEAVE YOUR REVOLVERS AT POLICE HEADQUARTERS, AND GET A CHECK.'" Winkler, *Gunfight: The Battle over the Right to Bear Arms in America* 165 (2011). Ditto for Dodge City—the iconic Wild West frontier town. A sign read: "THE CARRYING OF FIREARMS STRICTLY PROHIBITED." *Id.* Even in Tombstone, Arizona, people "could not lawfully bring their firearms past city limits. In fact, the famed shootout at Tombstone's O.K. Corral was sparked in part by Wyatt Earp pistol-whipping Tom McLaury for violating Tombstone's gun control laws." Blocher, *Firearm Localism*, 123 Yale L.J. 82, 84 (2013).

* * *

[20] *See, e.g.*, Washington, D.C., Ordinance ch. 5 (1857); Nebraska City, Neb., Ordinance no. 7 (1872); Nashville, Tenn., Ordinance ch. 108 (1873); Los Angeles, Cal., Ordinance nos. 35–36 (1878); Salina, Kan., Ordinance no. 268 (1879); La Crosse, Wis., Ordinance no. 14, § 15 (1880); Syracuse, N.Y., Ordinances ch. 27 (1885); Dallas, Tex., Ordinance (1887); New Haven, Conn., Ordinances § 192 (1890); Checotah, Okla., Ordinance no. 11 (1890); Rawlins, Wyo., Ordinances art. 7 (1893); Wichita, Kan., Ordinance no. 1641 (1899); San Antonio, Tex., Ordinance ch. 10 (1899); *When and Where May a Man Go Armed*, S.F. Bulletin, Oct. 26, 1866, at 5 ("[San Francisco] ordains that no person can carry deadly weapons").

In sum, a deep tradition of American law makes clear that prohibitions on public carry in urban areas (with or without a good-cause exception) have long been understood to be consistent with the Constitution. No historical evidence supports the contrary position that public carry was widely permitted in populous cities.

As applied here, the regime challenged by Gould—requiring some articulable reason before a person may carry a firearm on crowded urban streets—fits squarely within our historical tradition, and is therefore constitutional. Were it otherwise, public-carry laws enacted by the majority of states, the District of Columbia, and cities in several other states would all have been unconstitutional. That includes:

- Alabama (1909)
- Arizona (1889)
- California (1923)
- Connecticut (1833, 1923)
- Delaware (1852)
- Hawaii (1913)
- Idaho (1889)
- Indiana (1925)
- Maine (1821, 1841)
- Maryland (1776)
- Massachusetts (1694, 1836, 1906)
- Michigan (1846, 1901, 1925)
- Minnesota (1851, 1873)
- New Hampshire (1699, 1923)
- New Jersey (1686, 1925)
- New Mexico (1859, 1869)
- New York (1815, 1913)
- North Carolina (1792)
- North Dakota (1923)
- Oklahoma (1890, 1903)

- Oregon (1853, 1925)
- Pennsylvania (1861)
- South Carolina (1870)
- Tennessee (1801)
- Texas (1871, 1909)
- Vermont (1838)
- Virginia (1786, 1847)
- West Virginia (1870, 1891, 1925)
- Wisconsin (1838)
- Wyoming (1875)

This Court should reject Gould's untenable position, and instead do as it did in *Rene E.*: "rest [its] conclusion on the existence of a longstanding tradition" and uphold Massachusetts's public-carry regime in its entirety. 583 F.3d at 12. If a historical lineage of nine state laws and a city ordinance was enough to sustain the law in *Rene E.*, then *a fortiori* the law at issue here is constitutional.

II. Even setting aside its historical pedigree, Brookline's public-carry policy is constitutional as applied to Gould.

Alternatively, this Court could uphold Brookline's public-carry policy without "reference to its historical provenance," by finding that any burden imposed on Gould's Second Amendment right is justified by the town's substantial interest in preventing crime and violence on its public streets. *Booker*, 644 F.3d at 24 n.15. The Second, Third, and Fourth Circuits adopted similar reasoning in upholding similar laws. The policy here is if anything even more well-tailored than those laws, while allowing for greater access to public carry—as Gould's own experience illustrates.

A. As explained above, Brookline allows Gould "to carry a gun on all of the occasions when he indicated he wanted a firearm (*i.e.* for target shooting and to protect himself while in possession of valuable works of art and camera equipment, which [is], at times, in remote places)." JA 234. It allows him "to use arms in defense of hearth and home." *Heller*, 554 U.S. at 635. It allows him "to carry outside of the home any time he is engaged in his business." JA 225. It allows him to carry while "traveling to and from" work. *Id.* It allows him to carry while "hunting and while engaged in outdoor recreational activities such as camping, hiking and cross country skiing." *Id.* And it allows him to expand upon these uses and obtain a broader license by identifying other reasons for needing a firearm and "support[ing] that claim with some information"—which he has not even attempted to do. JA 227–30.

Nowhere does Gould explain how his Second Amendment rights are burdened by this policy. Instead, he pretends as if he were challenging a different policy—a "wholesale prohibition" on armed self-defense, "akin to [the] total ban" on handguns struck down in *Heller*. Gould Br. 13, 33. He then attacks *that* policy as "categorically unconstitutional." Gould Br. 33. But the policy he imagines is nothing like the policy he challenges. Just as *Heller* did not recognize a "right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose,"

it also didn't "suggest the invalidity of laws" that "do not remotely burden the right of self-defense as much as an absolute ban on handguns." 554 U.S. at 626, 632.[21]

Brookline's public-carry policy is such a law. Even assuming that Gould could show that it burdens his Second Amendment rights, that modest burden would be justified by the town's "undeniably important" interest in promoting public safety, reducing crime, and saving lives. *Booker*, 644 F.3d at 25. This Court has held that a law that imposes "a new categorical limit on the Second Amendment right" should be upheld if "there is a substantial relationship between [the limitation] and the governmental interest in preventing gun violence." *Id.* Although the Court did not say so explicitly, that is the language of intermediate scrutiny. *See Kachalsky*, 701 F.3d at 93 n.17. There is no basis for a stricter standard here, where the law does not create a new categorical prohibition, but maintains a modest historical restriction.[22]

B. Under the substantial-relationship standard, the restriction is constitutional as applied to Gould (and those like him). The Massachusetts Attorney General's brief discusses at length why the Commonwealth's "proper purpose" requirement is

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[21] It is for this reason that Gould's reliance on *Moore v. Madigan* is misplaced. 702 F.3d 933 (7th Cir. 2012). That case—unlike this case—involved an actual "blanket prohibition on carrying [a] gun in public." *Id.* at 940.

[22] Indeed, "not a single court of appeals" holds that strict scrutiny is the appropriate standard by which to assess the constitutionality of firearms laws. *Kolbe v. Hogan*, 813 F.3d 160, 196 (4th Cir. 2016) (King, J., dissenting). In the Fourth and Sixth Circuits, two divided panels applied strict scrutiny; both were promptly reversed en banc. *See Kolbe v. Hogan*, 849 F.3d 114, 138 (4th Cir. 2017) (en banc); *Tyler v. Hillsdale Cty. Sheriff's Dep't*, 837 F.3d 678, 692 (6th Cir. 2016) (en banc).

substantially related to the promotion of public safety. Mass. AG Br. 29–46. The same goes for Brookline's implementation of this requirement. As other circuits have recognized, requiring articulable reasons for needing to carry a handgun in public—and issuing a license tied to those reasons—"substantially promotes an important government interest in preventing [urban] gun violence." *Booker*, 644 F.3d at 26; *see Kachalsky*, 701 F.3d at 98 ("Restricting 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."). No circuit concluded otherwise.[23]

Although the precise relationship between guns and crime may be open to debate, empirical researchers at Stanford have authoritatively concluded that "[t]he totality of the evidence based on educated judgments about the best statistical models suggests that right-to-carry laws are associated with substantially higher rates of aggravated assault, rape, robbery and murder." Parker, *Right-to-carry gun laws linked to increase in violent crime, Stanford research shows*, Stanford News, Nov. 14, 2014, https://goo.gl/e47Ki7; *see* Aneja, Donohue, and Zhang, *The Impact of Right to Carry Laws and the NRC Report: The Latest Lessons for the Empirical Evaluation of Law and Policy*

[23] In *Wrenn v. District of Columbia*, 864 F.3d 650, 658 (D.C. Cir. 2017), a divided panel found a Second Amendment violation where the plaintiff was precluded from carrying a firearm in public under *any* circumstances. That is far cry from this case, where Gould may carry "in *all* of the circumstances in which he indicated he needed the firearm." JA 80 (emphasis added).

(Nov. 2014), http://www.nber.org/papers/w18294.pdf; *see also* Nat'l Research Council, *Firearms and Violence: A Critical Review* (2004); Donohue, *Guns, Crime, and the Impact of State Right-to-Carry Laws*, 73 Fordham L. Rev. 623 (2004); Ayres & Donohue, *Shooting Down the "More Guns, Less Crime" Hypothesis*, 55 Stan. L. Rev. 1193 (2003). Policymakers are entitled to reach the same conclusion. *See Kachalsky*, 701 F.3d at 97–101 (deferring to New York's predictive judgment that there is a "connection between promoting public safety and regulating handgun possession in public"); *Wollard v. Gallagher*, 712 F.3d 865, 878–83 (4th Cir. 2013) (same for Maryland); *Drake v. Filko*, 724 F.3d 426, 437–40 (3d Cir. 2013) (same for New Jersey).

That should be especially true for Brookline, a very densely populated area where the need for armed self-defense is low.[24] The town's density—and the link between public carry and public safety—can be illustrated by a recent incident in which a gun accidentally discharged when someone got out of their car, firing a bullet into the living room of a neighboring house. Sweeney, *Stray bullet hits home in Brookline after accidental discharge of gun*, Boston Globe, Jan. 24, 2018, https://goo.gl/LWbwxN.

[24] Brookline has more than 8,760 people per square mile. The north part of the town is entirely urban and has a density of nearly 20,000 people per square mile, on par with the densest parts of nearby Cambridge, Somerville, and Chelsea (the densest cities in all of New England) and just below that of central Boston's residential districts (such as Back Bay, South End, Fenway). The overall density of Brookline, including its more suburban areas, is still higher than that of many of the largest cities in the United States.

In implementing the town's licensing regime within Brookline's urban environment, the leaders of the Brookline Police Department take pains to ensure that residents enjoy "the rights secured by the Second Amendment[,] while at the same time protect[ing] the public as much as possible given the reach of those rights." *Id.* They know their community. They know the dangers of gun violence. And in their considered and experienced judgment—a judgment that is shared by the legislatures of eight states, collectively representing the popular will of more than a quarter of the American people—imposing some limits on public carry is necessary to "improve public safety." JA 230.

This does not mean that public safety alone is enough to justify any firearms law. According to *Heller*, a state may not erect an "absolute prohibition of handguns held and used for self-defense in the home," no matter how persuasive the rationale. 554 U.S. at 636. But this case is a world away from that case. The Second Amendment may "take[] certain policy choices off the table," *id.*, but Brookline's policy isn't one of them. JA 230. That policy can be upheld as longstanding (as in *Peruta* and *Rene E.*), or it can be upheld under intermediate scrutiny (as in *Kachalsky*, *Wollard*, and *Drake*). But either way, the constitutional right to keep and bear arms has not been infringed.

CONCLUSION

The district court's judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 12,924 words, excluding the parts of the brief exempted by Rule 32(f). This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word 2010 in 14 point Baskerville font.

June 6, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on June 6, 2018, I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the First Circuit by using the CM/ECF system. All participants are registered CM/ECF users, and will be served by the appellate CM/ECF system:

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