No. 17-2202

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

MICHAEL GOULD, *et al.*,

Plaintiffs-Appellants,

v.

DANIEL C. O'LEARY, *et al.*,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS (NO. 1:16-CV-10181-FDS)

BRIEF OF NEW JERSEY, CALIFORNIA, CONNECTICUT, DELAWARE, HAWAI'I, ILLINOIS, IOWA, MARYLAND, NEW YORK, RHODE ISLAND, VIRGINIA, AND THE DISTRICT OF COLUMBIA IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

As States, all amici are governmental entities with no reportable parent companies, subsidiaries, affiliates, or similar entities under Fed. R. of App. P. 26.1(a).

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IDENTITY OF AMICI CURIAE

Amici States, New Jersey, California, Connecticut, Delaware, Hawai'i, Illinois, Iowa, Maryland, New York, Rhode Island, Virginia, and the District of Columbia have an interest in defending their ability to protect their residents from gun violence. Many of the amici States have, like Massachusetts, acted on the evidence to tailor their public carry regimes to fit those public safety needs. In particular, because the available evidence shows that "right-to-carry" laws—which allow for widespread public carrying of firearms—substantially increase the risk that confrontations in the public sphere will turn deadly, many of the amici States have instead required applicants for public carry licenses to show an individualized safety need to carry a weapon in public. Appellants now challenge that approach and urge this Court to second-guess legislative decisions on public safety issues. Whether this Court defers to the predictive judgments of State legislatures or overrides their careful determinations thus affects each State.

States also have an interest in defending their longstanding laws. As the U.S. Supreme Court made clear, the longstanding nature of a statute is part and parcel of the Second Amendment inquiry—and laws with a particularly impressive historical pedigree are presumptively lawful. So amici States have an interest in explaining why their enduring approach to public carry withstands constitutional scrutiny.

SUMMARY OF THE ARGUMENT

Massachusetts's careful scheme to govern the public carrying of firearms, like the similar laws in other States, is constitutional. Statutes like this one reflect a centuries-old approach to advancing States' interests in public safety.

I. States have a right and an obligation to protect their residents from the scourge of gun violence. In evaluating the best way to advance their compelling interest in public safety, States have a variety of legislative tools at their disposal. One important policy option is the ability to limit the situations in which a person can carry a firearm in public. Massachusetts adopted that approach in light of all the evidence confirming that this regime advances public safety, and its decision does not offend the Second Amendment. Although the Constitution bars States from adopting certain laws, it affords States significant leeway within those broad boundaries to place limits on public carry. Indeed, legislatures are best suited to evaluate the evidence and decide how to keep their residents safe. That is why this Court's sister circuits have upheld analogous licensing laws.

II. There is another, independently sufficient basis to uphold the State's licensing law—its longstanding historical pedigree. As this Court previously (and correctly) held, longstanding restrictions on firearm possession are presumptively lawful under the Second Amendment. *See United States v. Rene E.*, 583 F.3d 8, 12 (1st Cir. 2009). State statutes limiting public carry—including outright bans—were

common and relatively uncontroversial in the nineteenth century, and this State's particular licensing regime dates back over a century. Said another way, such laws boast a lineage even more impressive than the specific statutes the Supreme Court identified as "longstanding" and "presumptively lawful" in *District of Columbia v. Heller*, 554 U.S. 570 (2008). It is thus unsurprising that other circuits have upheld analogous statutes on these grounds as well. This Court should do the same.

ARGUMENT

I. MASSACHUSETTS'S FIREARMS LICENSING LAW, LIKE OTHER LAWS THROUGHOUT THE NATION, OFFERS A REASONABLE APPROACH TO PROMOTING PUBLIC SAFETY.

Even assuming that the Second Amendment applies outside the home,[1] this Court must still uphold Massachusetts's regime. This statute seeks to, and in fact does, advance the State's compelling interest in public safety. This law fits that interest hand-in-glove: evidence shows that "right-to-carry" regimes—under which all law-abiding citizens can publicly carry a firearm—substantially *increase* violent

[1] There is no reason for this Circuit to address that threshold issue. As the District Court properly found, "[t]he Second, Third, and Fourth Circuits have 'assumed for analytical purposes' that the Second Amendment has some application outside the home, without deciding the issue." Add. 19. Because this area of law "is a 'vast *terra incognita* that courts should enter only upon necessity and only then by small degree,'" *Hightower v. City of Boston*, 693 F.3d 61, 74 (1st Cir. 2012) (citation omitted), this Court must uphold this law simply because it advances public safety and is of a longstanding nature, "without needlessly demarcating the reach of the Second Amendment," *Woollard v. Gallagher*, 712 F.3d 865, 868 (4th Cir.), *cert. denied*, 571 U.S. 952 (2013).

crime and homicide, and pose risks to law enforcement. To be sure, multiple other States nevertheless chose to adopt such right-to-carry laws, but the Constitution embraces the right of each State to make different choices based on local needs. Simply put, States have the power to decide how best to address the carrying of guns in public, and nothing in the Second Amendment is to the contrary.

One of a State's primary obligations, and thus one of its most compelling interests, is to ensure the public safety of its residents. There can be no doubt on this score—the "primary concern of every government" is that "concern for the safety and indeed the lives of its citizens." *United States v. Salerno*, 481 U.S. 739, 755 (1987); *see also Hightower*, 693 F.3d at 84 ("'[P]rotection of the health and safety of the public is a paramount governmental interest….'") (quoting *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 300 (1981)); *Drake v. Filko*, 724 F.3d 426, 437 (3d Cir. 2013) (explaining that a State has "a significant, substantial and important interest in protecting its citizens' safety"), *cert. denied*, 134 S. Ct. 2134 (2014); *Woollard*, 712 F.3d at 877 (finding that "protecting public safety and preventing crime … are substantial governmental interests"); *Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357, 376 (1997) ("[T]he governmental interest in public safety is clearly a valid interest…."). There is no dispute that "the state interest in protecting the public safety through the enforcement of licensure requirements is compelling." *Hightower*, 693 F.3d at 85.

The legislature's chosen solution to this problem must, of course, still fit the problem States are trying to solve—but Massachusetts's licensing laws clearly do. As other courts of appeals have observed, the "studies and data demonstrat[e] that widespread access to handguns in public increases the likelihood that felonies will result in death and fundamentally alters the safety and character of public spaces." *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 99 (2d Cir. 2012), *cert. denied*, 569 U.S. 918 (2013); *see also Woollard*, 712 F.3d at 879 (citing evidence that "limiting the public carrying of handguns protects citizens and inhibits crime by, *inter alia*: [d]ecreasing the availability of handguns to criminals via theft [and] [l]essening the likelihood that basic confrontations between individuals would turn deadly"); *Peruta v. Cty. of San Diego*, 824 F.3d 919, 944 (9th Cir. 2016) (en banc) (Graber, J., concurring) ("Several studies suggest that 'the clear majority of states' that enact laws broadly allowing concealed carrying of firearms in public 'experience increases in violent crime, murder, and robbery when [those] laws are adopted.'") (citation omitted), *cert. denied*, 137 S. Ct. 1995 (2017). That is (unfortunately) unsurprising: "[i]ncidents such as bar fights and road rage that now often end with people upset, but not lethally wounded, take on deadly implications when handguns are involved." *Woollard*, 712 F.3d at 879 (citation omitted).

Recent studies only confirm these courts' assessments of the evidence. *See, e.g.*, John Donohue et al., *Right-to-Carry Laws & Violent Crime: A Comprehensive*

Assessment Using Panel Data, the LASSO, & a State-Level Synthetic Controls Analysis at 63 (Nat'l Bureau of Econ. Research, Working Paper No. 23510, Jan. 2018) ("[T]he weight of the evidence … best supports the view that the adoption of [right-to-carry] laws substantially raises overall violent crime in the ten years after adoption."); Abhay Aneja et al., *The Impact of Right to Carry Laws and the NRC Report: The Latest Lessons for the Empirical Evaluation of Law and Policy* 80–81 (Nat'l Bureau of Econ. Research Working Paper No. 18294, 2014) (finding that right-to-carry laws lead to an increase in aggravated assaults, rapes, and robberies); Jens Ludwig, *Concealed-Gun-Carrying Laws & Violent Crime: Evidence from State Panel Data*, 18 Int'l Rev. L. & Econ. 239, 239 (1998) (noting that such laws "resulted, if anything, in an increase in adult homicide rates"). And "[t]here is not even the slightest hint in the data that [right-to-carry] laws reduce violent crime." Donohue, *Right-to-Carry Laws*, *supra*, at 63.

This is of special concern for law enforcement officers. From 2007 to 2016, "concealed-carry permit holders have shot and killed at least 17 law enforcement officers and more than 800 private citizens—including 52 suicides." *Peruta*, 824 F.3d at 943 (Graber, J., concurring). Right-to-carry regimes only make the problem worse: "civilians without sufficient training to use and maintain control of their weapons, particularly under tense circumstances, pose a danger to officers and other civilians." *Woollard*, 712 F.3d at 880 (citation omitted). That will, of course,

impact "routine police-citizen encounters": "[i]f the number of legal handguns on the streets increased significantly, officers would have no choice but to take extra precautions … effectively treating encounters between police and the community that now are routine, friendly, and trusting, as high-risk stops, which demand a much more rigid protocol." *Id.* (citation omitted). This evidence is why legislatures and law enforcement have instead opted to "strike a permissible balance between 'granting handgun permits to those persons known to be in need of self-protection and precluding a dangerous proliferation of handguns on the streets.'" *Peruta*, 824 F.3d at 942 (Graber, J., concurring) (citation omitted).

To be sure, not every State has balanced these interests in the same way, and not every State has chosen to adopt this licensing scheme. *See* Brief for Amicus Curiae Arizona *et al*. But that is the very point of federalism. Although *McDonald v. City of Chicago*, 561 U.S. 742 (2010), establishes that the Second Amendment "creates individual rights that can be asserted against state and local governments," *McDonald* does not "define the entire scope of the Second Amendment—to take all questions about which weapons are appropriate for self-defense out of the people's hands." *Friedman v. Highland Park*, 784 F.3d 406, 412 (7th Cir. 2015). Instead, "[t]he central role of representative democracy is no less part of the Constitution than is the Second Amendment: when there is no definitive constitutional rule, matters are left to the legislative process." *Id.* That is because,

as Judge Easterbrook so eloquently put it, "the Constitution establishes a federal republic where local differences are cherished as elements of liberty, rather than eliminated in a search for national uniformity." *Id.* Although no State can trammel on the rights that *McDonald* set forth, *McDonald* only "circumscribes the scope of permissible experimentation by state[s]" and "does not foreclose all possibility of experimentation. Within the limits [it] establishe[s] … federalism and diversity still have a claim." *Id.*; *see also, e.g.*, *Drake*, 724 F.3d at 439 ("[Although some] states have determined that it is unnecessary to conduct the careful, case-by-case scrutiny mandated by [these] gun laws before issuing a permit to publicly carry a handgun … this does not suggest, let alone compel, a conclusion that the 'fit' between [this] individualized, tailored approach and public safety is not 'reasonable.'").

That means States are free to canvass the evidence and make the tough calls on how to protect their residents from the scourge of gun violence. As Judge Wilkinson explained, it is not possible "to draw from the profound ambiguities of the Second Amendment an invitation to courts to preempt this most volatile of political subjects and arrogate to themselves decisions that have been historically assigned to other, more democratic, actors." *Kolbe v. Hogan*, 849 F.3d 114, 150 (4th Cir. 2017) (Wilkinson, J., concurring); *see also District of Columbia v. Heller*, 554 U.S. 570, 636 (2008) ("We are aware of the problem of handgun violence in this country, and … [t]he Constitution leaves … a variety of tools for combating

that problem, including some measures regulating handguns."). "Disenfranchising the American people on this life and death subject would be the gravest and most serious of steps." *Kolbe*, 849 F.3d at 150 (Wilkinson, J., concurring). That concern has never mattered more than it does today: "To say in the wake of so many mass shootings in so many localities across this country that the people themselves are now to be rendered newly powerless, that all they can do is stand by and watch as federal courts design their destiny—this would deliver a body blow to democracy as we have known it since the very founding of this nation." *Id.*

In sum, no State is *required* to protect residents from the dangers of public carry, but every State is *permitted* to do so under the Second Amendment. And that is precisely what this Court's sister circuits have found when upholding analogous licensing laws. *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."); *Drake*, 724 F.3d at 437 (upholding New Jersey's scheme given the legislature's "predictive judgment … that limiting the issuance of permits to carry a handgun in public to only those who can show a 'justifiable need' will further its substantial interest in public safety"); *Woollard*, 712 F.3d at 880 ("We are convinced by the State's evidence that there is a reasonable fit between the good-and-substantial-reason requirement and Maryland's objectives of protecting public

safety and preventing crime."); *see also Peruta*, 824 F.3d at 942 ("entirely agree[ing]" with the concurring opinion that a State's "regulation of the carrying of concealed weapons in public survives intermediate scrutiny").

In asking this Court to overrule Massachusetts's well-supported judgment, Appellants turn the governing legal framework on its head. The "Supreme Court has long granted deference to legislative findings regarding matters that are beyond the competence of courts," *Kachalsky*, 701 F.3d at 97, and it has made clear that in those areas, courts must accord "substantial deference to the predictive judgments" of legislatures, *id.* (quoting *Turner Broad. Sys. v. FCC*, 520 U.S. 180, 195 (1997)). That makes good sense: "In the context of firearm regulation, the legislature is 'far better equipped than the judiciary' to make sensitive public policy judgments (within constitutional limits) concerning the dangers in carrying firearms and the manner to combat those risks." *Id*. After all, "assessing the risks and benefits of handgun possession and shaping a licensing scheme to maximize the competing public-policy objectives … is precisely the type of discretionary judgment that officials in the legislative and executive branches of state government regularly make." *Id.* at 99. No matter whether this Court would strike precisely the same balance, the State's choice was plainly supportable.[2]

[2] To the extent Appellants have collected evidence suggesting other causes of gun violence exist, and that licensing regimes do not completely solve the problem, that is obviously and unfortunately true. But that hardly resolves the question—whether

Appellants are forced to baldly assert that these laws are *not* about safety—that States have as their "real goal … the naked desire to eliminate as much Second Amendment conduct as they can get away with." Br. 13. But that accusation falls flat in light of the legislative records, which show beyond a doubt that these States focused on public safety. The Massachusetts Supreme Judicial Court already found that the purpose of this licensing law was "to protect the health, safety, and welfare of [Massachusetts] citizens." *Chardin v. Police Comm'r of Boston*, 989 N.E.2d 392, 403 (Mass. 2013). The same is true, to take a few examples, for laws in New Jersey, *see Drake*, 724 F.3d at 439 ("New Jersey legislators, however, have made a policy judgment that the state can best protect public safety by allowing only those qualified individuals who can demonstrate a 'justifiable need' to carry a handgun to do so."), and Maryland, *see Woollard*, 712 F.3d at 876 (noting that the codified legislative findings show the legislature sought "to serve Maryland's concomitant interests in protecting public safety and preventing crime—particularly violent crime committed with handguns"). Like the other States that have enacted similar

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States can find these laws *help* to promote public safety. And insofar as Appellants claim public carry applicants are less likely to commit crimes, they are begging the question. *See Peruta*, 824 F.3d at 943–44 (Graber, J., concurring) ("[T]o the extent that concealed carry license holders are, in fact, less likely to commit crimes, their relative peacefulness may result from (and not exist in spite of) the restrictions that are disputed in this case…. In other words, it may be the heightened restrictions on concealed-carry permits in many jurisdictions—the very provisions challenged in this case—that cause statistically reduced violence by permit holders.").

laws, Massachusetts is not trying to undermine any right; it is merely seeking to maintain the individual gun owners' rights *and* the public right to safety, as is its prerogative and obligation as a sovereign.

Facing this avalanche of evidence as to the importance of licensing laws for combatting gun violence, and proof that the States were motivated by these safety concerns, Appellants offer one last argument. This Court, they write, should cover its eyes to the interests supporting the licensing laws and refuse to even weigh the public interests in the analysis. Br. 34. In their view, individual rights always trump public safety, and the right to gun ownership is no exception. But both the premise and the conclusion are wrong. Under the First Amendment, for example, this Court is often called upon to weigh a State's compelling interest in safety. *See Schenck*, 519 U.S. at 375 ("[I]n assessing a First Amendment challenge, a court looks not only at the private claims … but also inquires into the governmental interests that are protected … which may include an interest in public safety and order."). So too when asking whether a search is reasonable under the Fourth Amendment. *See, e.g.*, *Maryland v. King*, 569 U.S. 435, 448 (2013) ("[The Amendment] requires a court to weigh 'the promotion of legitimate governmental interests' against 'the degree to which [the search] intrudes upon an individual's privacy.'"). Courts thus regularly make their decisions with a view towards public safety needs, and so the assertion that courts will refuse to do so in other contexts rings hollow. The Second

Amendment is no exception to that venerable rule. *See, e.g.*, *Kolbe*, 849 F.3d at 150 (Wilkinson, J., concurring) (criticizing the approach that "envisions the Second Amendment almost as an embodiment of unconditional liberty, thereby vaulting it to an unqualified status that the even more emphatic expressions in the First Amendment have not traditionally enjoyed").[3]

Massachusetts, like the other States with similar laws, acted permissibly in aiming to protect its residents from the dangers that unlimited public carry poses. This Court should respect and uphold that judgment.

II. MASSACHUSETTS'S FIREARMS LICENSING LAW, LIKE OTHER LAWS THROUGHOUT THE NATION, PASSES CONSTITUTIONAL MUSTER IN LIGHT OF ITS HISTORICAL PEDIGREE.

Heller establishes a second, independently sufficient basis for upholding this law. That decision provides that a law's historical pedigree is of special importance in the Second Amendment inquiry. That fact leads inexorably to one result here—Massachusetts's law, like the similar laws in other States, is constitutional.

There is little doubt that the historical pedigree of the law matters. Indeed, as *Heller* established, the longstanding nature of a law can be a sufficient (though not

[3] Appellants assert that when *Heller* rejected Justice Breyer's "interest-balancing" approach, the Court necessarily also rejected *any* means-ends scrutiny of firearm restrictions. They are mistaken. In his dissent in that case, Justice Breyer departed from conventional means-ends scrutiny by calling for an explicit assessment of the costs and benefits of government regulations. *See* 554 U.S. at 689–90 (Breyer, J., dissenting). While the majority rejected that approach, it did not address the more traditional forms of means-ends scrutiny, including intermediate scrutiny.

necessary) reason to decide that it withstands Second Amendment scrutiny. *Heller* held "that the rights guaranteed by the Second Amendment were 'not unlimited'"; instead, the Court "identified limits deriving from various historical restrictions on possessing and carrying weapons." *United States v. Rene E.*, 583 F.3d 8, 12 (1st Cir. 2009) (quoting *Heller*, 554 U.S. at 626). It follows, this Court has explained, that "'longstanding' restrictions" are "'presumptively lawful.'" *Id.* (quoting *Heller*, 554 U.S. at 626, 627 n.26). While *Heller* listed a few examples of longstanding laws, *see* 554 U.S. at 626 (noting "nothing in [that] 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"), the Court was "identify[ing] these presumptively lawful regulatory measures only as examples," and its list did "not purport to be exhaustive," *id.* at 627 n.26.

As a result, these specific "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; *see also Fyock v. Sunnyvale*, 779 F.3d 991, 996 (9th Cir. 2015) (noting "longstanding prohibitions" are "traditionally understood to be outside the scope of the Second Amendment"); *Drake*, 724 F.3d at 432 (agreeing longstanding laws are presumptively lawful, because the "exceptions identified in *Heller* all derived from historical regulations"). Nor does that historical analysis stop at ratification of the Second Amendment—*Heller* looked to "nineteenth-century state laws as evidence

of 'longstanding' firearms restrictions." *Rene E.*, 583 F.3d at 12; *see also United States v. Booker*, 644 F.3d 12, 24 (1st Cir. 2011) (noting that "exclusions need not mirror limits that were on the books in 1791"). So the question becomes whether public carry statutes like this one are "presumptively lawful, longstanding licensing provision[s]." *Drake*, 724 F.3d at 432.

To understand why that inquiry calls for affirming Massachusetts's statutory scheme, start with the long history of these state laws. As other circuits have found, "[f]irearms have always been more heavily regulated in the public sphere." *Id.* at 430 n.5; *see also Peterson v. Martinez*, 707 F.3d 1197, 1201 (10th Cir. 2013) (describing "our nation's extensive practice of restricting citizens' freedom to carry firearms in a concealed manner"); *Kachalsky*, 701 F.3d at 96 (concluding that "our tradition so clearly indicates a substantial role for state regulation of the carrying of firearms in public"); *United States v. Masciandaro*, 638 F.3d 458, 470 (4th Cir. 2011) (finding that, "outside the home, firearms rights have always been more limited because public safety interests often outweigh individual interests").

Those circuits were unquestionably correct. Indeed, the history of regulating the public carrying of dangerous weapons predates the Founding—as long ago as fourteenth-century England and seventeenth-century colonial America. *See, e.g.*, *Peruta*, 824 F.3d at 929–33. Such restrictions included the Statute of Northampton in 1328, the English Bill of Rights in 1689, and colonial laws in America in the

seventeenth and eighteenth centuries. *See id.*; *see also* Br. of Deft.-Appellee Mass. at 24–25. Such laws were hardly outliers: Massachusetts, Delaware, Maine, New Mexico, North Carolina, South Carolina, Tennessee, and Virginia had complete public carrying bans, each derived from the Statute of Northampton. *See* Eric M. Ruben & Saul Cornell, *Firearm Regionalism & Public Carry: Placing Southern Antebellum Case Law in Context*, 125 Yale L.J. Forum 121, 129 n.43 (2015) (noting "constables, magistrates, or justices of the peace had the authority to arrest anyone who traveled armed"). The same was in effect through common law in Connecticut, Maryland, New Jersey, and New York. *See A Bill for the Office of Coroner and Constable* (Mar. 1, 1882) (N.J. Constable Oath); John A. Dunlapp, *The New York Justice* (New York 1815); John M. Niles, *The Connecticut Civil Officer: In Three Parts…: with Suitable and approved forms for each: together with numerous legal forms of common use and general convenience*, 2nd ed., ch. 14 (Hartford, Conn. 1833); Md. Const. of 1776, art. III, § 1 (adopting English common law). Most notably, that approach continued uninterrupted after passage of the Second and Fourteenth Amendments—especially during the nineteenth century. At that time, "most states enacted laws banning the carrying of concealed weapons," while some "went even further … bann[ing] concealable weapons … altogether whether carried openly or concealed." *Kachalsky*, 701 F.3d at 95–96; *see also Drake*, 724 F.3d at 433 (same). In other words, state laws that "directly

regulat[ed] concealable weapons for public safety became commonplace and far more expansive in scope" over two hundred years ago. *Kachalsky*, 701 F.3d at 95. Longstanding indeed.

Not only have these statutes existed for over a century, but courts to consider their validity at inception had upheld them. The "historical materials bearing on the adoption of the Second and Fourteenth Amendments are remarkably consistent"—a series of rulings allowing States to regulate concealed carry. *Peruta*, 824 F.3d at 939; *see also Heller*, 554 U.S. at 626 ("[T]he majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues."). And that "pre-Civil War consensus about the meaning of the right to keep and bear arms continued after the war and the adoption of the Fourteenth Amendment," *Peruta*, 824 F.3d at 936—courts "upheld prohibitions against carrying concealable (not just concealed) weapons in the years following the adoption of the Fourteenth Amendment," *id.* at 937. So if this Court decides to "[f]ollow the lead of the Supreme Court in both *Heller* and *McDonald* [by] look[ing] to decisions of state courts to determine the scope of the right to keep and bear arms," *id.* at 933, that will only confirm the longstanding validity of public carry restrictions.

The same is true for the precise licensing standards on which Massachusetts and other States now rely. These laws "do[] not go as far as some of the historical

bans on public carrying; rather, [they] limit[] the opportunity for public carrying to those who can demonstrate" a need to do so. *Drake*, 723 F.3d at 433; *see also Kachalsky*, 701 F.3d at 98–99 ("[I]nstead of forbidding anyone from carrying a handgun in public, New York took a more moderate approach to fulfilling its important objective and reasonably concluded that only individuals having a bona fide reason to possess handguns should be allowed to introduce them into the public sphere."). Yet these statutes boast an impressive pedigree themselves. Take Massachusetts—in 1836, the State barred the public carrying of firearms except by anyone with a "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.[4] And in 1906, the State adopted a licensing regime that permitted an applicant to receive a public carry permit only if he could show a "good reason to fear an injury to his person or property," 1906 Mass. Laws 150—in substance the same as

[4] Massachusetts was hardly the only State in the mid-1800s to limit public carrying to those with a "reasonable cause" to fear assault—Wisconsin, Maine, Michigan, Virginia, Minnesota, Oregon, Pennsylvania, Texas, and West Virginia all followed suit. *See* 1838 Wisc. Laws 381, § 16; 1841 Me. Laws 709, ch. 169, § 16; 1846 Mich. Laws 690, ch. 162, § 16; 1847 Va. Laws 127, ch. 14, § 16; 1851 Minn. Laws 526, ch. 112, § 18; 1853 Or. Laws 218, ch. 16, § 17; 1861 Pa. Laws 248, 250, § 6; 1871 Tex. Laws 1322, art. 6512; 1870 W. Va. Laws 702, ch. 153, § 8. As prominent Massachusetts judge Peter Thacher explained in 1837, these laws meant that "no person may go armed … without reasonable cause to apprehend an assault or violence to his person, family, or property." Saul Cornell, *The Right to Carry Firearms Outside of the Home: Separating Historical Myths from Historical Realities*, 39 Fordham Urb. L.J. 1695, 1720 n.134 (2012).

the standard today. The same is true of analogous state licensing laws. New York's "legislative judgment concerning handgun possession in public was made one-hundred years ago," in 1913, when it "limit[ed] handgun possession in public to those showing proper cause." *Kachalsky*, 701 F.3d at 97. So too Hawai'i, which has barred public carry without "good cause" since that same year, *see* 1913 Haw. Laws 25, act 22, § 1, and New Jersey, which has maintained a similar test for resolving all public carry applications since 1924, *see Drake*, 724 F.3d at 432. It is clear that these licensing regimes are of particularly longstanding provenance.

Strikingly, these statutes go back at least as far as those that *Heller* already described as "longstanding" and therefore "presumptively lawful"—something this Court has found dispositive in similar contexts. *Rene E.* is squarely on point. In that case, this Court faced a challenge to the "longstanding tradition of prohibiting juveniles from both receiving and possessing handguns." 583 F.3d at 12. In order to decide the validity of that prohibition, this Court "look[ed] to nineteenth-century state laws imposing similar restrictions," since *Heller* itself had "cit[ed] nineteenth-century state laws as evidence of 'longstanding' firearms restrictions" that would survive the Second Amendment. *Id.* Canvassing state laws banning juvenile gun possession and judicial decisions upholding them from the nineteenth and early twentieth centuries—including a law from 1910 and a decision from 1926—this Court held that laws restricting juvenile possession were constitutional. *Id.* at 14–

16. That resolves this case, because these statutes go back even farther than those juvenile bans. Again, state law restrictions on public concealed firearm possession date back to well before the nineteenth century, continued in force throughout the early twentieth century, and survive to this day. Just as *Heller* and *Rene E.* upheld longstanding laws on those grounds, so too should this Court here.

No wonder, then, that other circuits have relied on similar history to uphold nearly identical state laws under the Second Amendment. The Second Circuit was explicit: "There is a longstanding tradition of states regulating firearm possession and use in public because of the dangers posed to public safety." *Kachalsky*, 701 F.3d at 94–95. So, in light of "the history and tradition of firearm regulation," that court "decline[d] Plaintiffs' invitation to strike down New York's one-hundred-year-old law and call into question the state's traditional authority to extensively regulate handgun possession in public." *Id.* at 101. And the Third Circuit was, if anything, even more direct, holding "the requirement that applicants demonstrate a 'justifiable need' to publicly carry a handgun for self-defense is a presumptively lawful, longstanding licensing provision [because it] has existed in New Jersey in some form for nearly 90 years." *Drake*, 724 F.3d at 432. Since Massachusetts's law is indisputably longstanding under *Heller*, this Court should do the same.

CONCLUSION

Because Massachusetts's scheme directly advances its compelling interest in public safety and reflects a centuries-old approach to governing the public carrying of firearms, this Court should affirm the judgment below.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(a)(4)(G) and Fed. R. App. P. 32(g)(1), the undersigned hereby certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B)(i) and Fed. R. App. P. 29(a)(5):

1. This brief is 5,159 words, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable.
2. This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman type, which complies with Fed. R. App. P. 32 (a)(5) and (6).

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CERTIFICATE OF SERVICE

I hereby certify that on June 13, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the First Circuit using the appellate CM/ECF system. Counsel for all parties are registered CM/ECF users and will be served by the appellate CM/ECF system.

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