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.—

DANIEL C. O'LEARY, in his Official Capacity as 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. 1:16-CV-10181-FDS

BRIEF OF *AMICUS CURIAE* PROSECUTORS AGAINST GUN VIOLENCE IN SUPPORT OF APPELLEES AND AFFIRMANCE

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Corporate Disclosure Statement

Prosecutors Against Gun Violence has no parent corporations. It has no stock, and therefore no publicly held company owns 10% or more of its stock.

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Identity and Interest of Amicus Curiae

Prosecutors Against Gun Violence ("PAGV") is an independent, nonpartisan coalition that identifies and promotes prosecutorial and policy solutions to the national public health and safety crisis of gun violence. PAGV consists of 43 prosecutors, including Suffolk County District Attorney Daniel F. Conley, and serves more than 62 million residents of 34 urban areas in 22 states across the country. PAGV's mission includes sharing best practices for prosecuting gun offenders and defending common-sense gun safety policies.

Prosecutors, along with other local law enforcement agencies with which they collaborate daily, play a critical role in promoting citizen safety, the highest objective of state and local government. The key issue before this Court is whether a state may require that a citizen show a "good" or "proper" reason for *carrying* a firearm in *public*. From their position on the front lines of local efforts to curb gun violence and defend public safety in a wide cross-section of communities, prosecutors within the First Circuit, and throughout the nation, will be directly affected by the outcome of this case.

Accordingly, PAGV submits this amicus brief to emphasize the need for deference to local jurisdictions' determinations about the type of firearm licensing requirements that are best suited to their specific public safety

challenges, and to extend its support for Massachusetts's determination that a "proper purpose" requirement for public carry of firearms effectuates that state's interest in promoting public safety and reducing crime.[1]

Summary of Argument

Local concealed carry permitting standards are often crucial tools for combating unlawful gun use and the crime and violence it inflicts.

The Supreme Court has repeatedly emphasized that, pursuant to their police powers, states have broad discretion in creating legislative standards aimed at protecting citizens' lives. *See, e.g.*, *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996). The choice of whether and how to regulate firearms, short of imposing categorical bans, is well within this discretion.

It has long been established that laws restricting the public carrying of concealed weapons do not infringe on the Second Amendment right to keep and bear arms. *Robertson v. Baldwin*, 165 U.S. 275, 281-82 (1897). According to the weight of precedent, bans on public carry thus do not burden conduct protected by the Second Amendment.

[1] PAGV has obtained the consent of all parties in this case to file its amicus brief, with the exception of Commissioner William B. Evans, who does not oppose the motion for leave to file that PAGV concurrently submits. *See* Local First Circuit Rule 29(a)(4). PAGV certifies that this brief was not written in whole or in part by counsel for any party, and no person or entity other than PAGV, its members, and its counsel has made any monetary contribution to the preparation or submission of this brief. *See id*.

Even assuming that public carry falls within the scope of protected conduct, permitting laws similar to the Massachusetts statute at issue here have been upheld as substantially related to the important governmental objective of protecting the public. Federal courts, including the Second, Third, Fourth, and Ninth Circuits, have specifically upheld states' licensing schemes vesting authority in local officials to impose "justifiable need" or "good and substantial reason" requirements on the acquisition of concealed carry handgun permits. In contrast, the shall-issue licensing schemes that Appellants promote obstruct law enforcement's ability to promote public safety and protect lives in many communities.

Empirical data and expert testimony from law enforcement officials across the nation confirm the deleterious effects that can result from weak, shall-issue licensing laws. As shall-issue licensing increases the number of concealed handguns carried in public, such licensing transforms routine police encounters into potentially dangerous, high-risk scenarios threatening the safety of both law enforcement officials and the people they serve. Studies confirm that the increased number of concealed handguns, inherent in shall-issue jurisdictions, exacerbates the likelihood of handguns falling into the hands of criminals. These risks, while problematic on a nation-wide level, are amplified in the urban areas that PAGV serves.

Discretion in issuing concealed carry permits is not only a common-sense administrative tool, but also a necessary means of controlling the levels of crime and violence in vulnerable American cities. For this reason, tens of millions of Americans, through their elected officials, have exercised their choice to grant local law enforcement agencies discretion when it comes to issuing concealed carry permits. The will of these citizens, and the dangers posed by shall-issue permitting, ought not to be ignored by this Court.

Argument

I. Local Discretion in Issuing Public Carry Permits Is Essential to Exercising a State's Police Power to Protect the Public

Protecting and promoting the physical safety of their citizens is the highest purpose of all state and local governments. The challenged permitting regime is the product of deliberation on the part of Massachusetts lawmakers on how to best effectuate that objective.

A. State and Local Governments' Paramount Duty to Protect the Safety of Their Citizens Is Accompanied by Broad Discretion

The Supreme Court has observed that there is "no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication

of its victims." *United States v. Morrison*, 529 U.S. 598, 618 (2000).[2] Protecting the physical safety of their citizens is not merely a power, but also the primary obligation, of state and local authorities. *See Panhandle E. Pipe Line Co. v. State Highway Comm'n of Kansas*, 294 U.S. 613, 622 (1935) (stating that the state police power "springs from the obligation of the state to protect its citizens and provide for the safety and good order of society").

Commensurate with the weight of this responsibility, states retain "great latitude under their police powers to legislate as to the protection of the lives, limb, health, comfort and quiet of all persons." *Medtronic*, 518 U.S. at 475 (quotation omitted); *accord Gonzales v. Oregon*, 546 U.S. 243, 270 (2006). State and local lawmakers discharge this duty by "carefully and thoughtfully creat[ing] their own framework of standards . . . to suit public safety needs."[3] These homegrown standards reflect "the great diversity in

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[2] *See also Kelley v. Johnso*n, 425 U.S. 238, 247 (1976) ("The promotion of safety of persons and property is unquestionably at the core of the State's police power . . ."); *United Auto., Aircraft & Agric. Implement Workers of Am. v. Wisconsin Emp't Relations Bd.*, 351 U.S. 266, 274 (1956) ("The dominant interest of the State in preventing violence and property damage cannot be questioned. It is a matter of genuine local concern."); *United States v. Comstock*, 560 U.S. 126, 153 (2010) (Kennedy, J., concurring in result) ("Residual power, sometimes referred to (perhaps imperfectly) as the police power, belongs to the States and the States alone.").

[3] Letter from David LaBahn, President & CEO, Ass'n of Prosecuting Attorneys to Congressional Leaders (Nov. 27, 2017).

geography, population, culture, and tradition" of lawmakers' constituents.[4] They are not only "decisions by state and local authorities about how to best ensure public safety,"[5] but also reflect "the will of their citizens" and symbolize "the core democratic principle that . . . elected representatives make those laws."[6]

Likewise, the challenged Massachusetts statute applies local standards to issuing concealed carry permits, reflecting the judgment of the Legislature that the statute will promote public safety.[7] As a measure designed "to protect the health, safety, and welfare of [Massachusetts] citizens," it is

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[4] Letter from 17 Attorneys General to Congressional Leaders (Oct. 22, 2017).

[5] *Id*.

[6] Andrew Warren, State Attorney for the 13th Judicial Circuit, *Concealed-Carry Reciprocity Would Be Bad for Florida*, TAMPA BAY TIMES (Dec. 5, 2017), http://www.tampabay.com/opinion/columns/Column-Concealed-carry-reciprocity-would-be-bad-for-Florida_163306216. *See also* Tom Jackman, *Police Chiefs Implore Congress Not to Pass Concealed-Carry Reciprocity Gun Law*, WASH. POST (Apr. 19, 2018), https://www.washingtonpost.com/news/true-crime/wp/2018/04/19/nations-police-chiefs-implore-congress-not-to-pass-concealed-carry-reciprocity-gun-law/?noredirect=on&utm_term=.73bc281f4c6c (quoting Boston Police Commissioner William Evans as attributing "Massachusetts[']s . . . lowest gun deaths of any state" to state permitting requirements and "watch[ing] guns and who possesses them very closely").

[7] *See Ruggiero v. Police Comm'r of Boston*, 464 N.E.2d 104, 106 (Mass. App. Ct. 1984) ("From a realization that prevention of harm is often preferable to meting out punishment after an unfortunate event, G.L. c. 140, § 131, was enacted as a first-line measure in the regulatory scheme.").

entitled to the benefit of the state's latitude in the exercise of its core police powers. *Chardin v. Police Comm'r of Boston*, 989 N.E.2d 392, 403 (Mass. 2013).[8]

B. The Second Amendment Does Not Deprive the States of the Duty, or of the Discretion, to Protect Public Safety Through Firearms Permits

The Supreme Court has repeatedly emphasized that the Second Amendment does not grant the "right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose."

[8] Appellants cite non-controlling authority for the proposition that the Massachusetts statute has the illegitimate purpose of reducing guns in public in order to achieve "secondary effects" in terms of public safety. Brief of Plaintiffs-Appellants, *Gould v. O'Leary*, No. 17-2022 (1st Cir. Mar. 5, 2018) ("App. Br.") at 40-42. This logic is unavailing and misplaced. The secondary effects doctrine is cabined to a narrow subset of First Amendment cases, namely applicable land use regulations involving the adult entertainment business. *See City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986). Although other circuits have opted for the structural framework of a First Amendment analysis in determining whether the regulation implicates the Second Amendment and the applicable tier of scrutiny, *see, e.g.*, *Jackson v. City & County of San Francisco*, 746 F.3d 953, 960 (9th Cir. 2014), "no court" has imported wholesale "substantive First Amendment principles" into Second Amendment jurisprudence, *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 91-92 (2d Cir. 2012). The reason for this is plain: "everyone is entitled to speak and write, but not everyone is entitled to carry a concealed firearm in public." *Berron v. Illinois Concealed Carry Licensing Review Bd.*, 825 F.3d 843, 847 (7th Cir. 2016), *cert. denied*, 137 S. Ct. 843, 197 L. Ed. 2d 69 (2017). However, even if this Court were to adopt First Amendment principles here, the Massachusetts regulation should be upheld under *City of Renton* and the logic underpinning the secondary effects doctrine. *See, e.g., Jackson*, 746 F.3d at 965 (upholding a regulation where the city objective was "to reduce the number of gun-related injuries and deaths from having an unlocked handgun in the home").

McDonald v. City of Chicago, 561 U.S. 742, 786 (2010) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008)).

This Court properly interprets these precedents as speaking to the states' retained duty and discretion to regulate firearms short of imposing certain categorical bans. *See Powell v. Tompkins,* 783 F.3d 332, 346 (1st Cir. 2015) (reasoning that *Heller* and *McDonald* did not "impugn . . . public welfare regulations aimed at addressing perceived inherent dangers and risks surrounding the public possession of loaded, operable firearms"); *see also Worman v. Healey*, No. 1:17-10107(WGY), 2018 WL 1663445 at *15 (D. Mass. Apr. 5, 2018) ("In the absence of federal legislation, Massachusetts is free to ban these weapons and large capacity magazines. Other states are equally free to leave them unregulated and available to their law-abiding citizens.").

C. Appropriate, Common Sense Gun Regulations Vary with the Public Safety Needs of Specific Communities

PAGV, along with Massachusetts law enforcement, strongly believe in the importance of vesting discretion in the hands of local decision-makers to regulate firearms, including requiring applicants to show a "proper purpose," "good reason" or "justifiable need," to be allowed to carry concealed weapons in public. A 2013 study published in the Journal of

Public Health Policy found that 90% of surveyed police chiefs in Massachusetts favor the state maintaining its current licensing standard.[9]

Other law enforcement leaders have echoed this principle. Chris Magnus, the Chief of Police for Tucson, Arizona, is charged with protecting a community that witnessed the horror of a gunman shooting and killing six people and injuring others, including Congresswoman Gabby Giffords. Based on his extensive experience in policing, Magnus believes that the "best strategy for preventing and reducing crime is the ability to listen and respond accordingly to the needs of the community."[10] As Magnus correctly stated, "[p]rotecting the safety of their residents has long been the purview of individual states, a right ensured by the 10th Amendment of the U.S. Constitution."[11]

Similarly, the National Law Enforcement Partnership to Prevent Gun Violence—a coalition of law enforcement organizations—asserted that

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[9] David Hemenway and James Hicks, *"May Issue" Gun Carrying Laws and Police Discretion: Some Evidence from Massachusetts*, 36 J. Pub. Health Pol'y 324, 328 (2015).

[10] Chris Magnus, Tucson Police Chief, *Lawmakers Must Listen to Law Enforcement on Dangerous Gun Bills*, ARIZONA DAILY STAR (Sept. 21, 2017), https://tucson.com/opinion/local/chris-magnus-lawmakers-must-listen-to-law-enforcement-on-dangerous/article_50ad9a22-74ba-5c15-acf3-10b22598804a.html.

[11] *Id.*

"[s]tates and localities should maintain their rights to legislate concealed carry laws that best meet the needs of their citizens."[12] Likewise, the Major Cities Chiefs Association recently endorsed the continuation of concealed carry laws that "have been tailored to the needs of regions and local communities over a period of many years."[13] In the words of Magnus, "[w]hat works in Massachusetts may not work here in Arizona."[14]

D. Local Standards in Concealed Carry Permitting Decisions Are of Importance in Combating Unlawful Handgun Use in the Urban Areas That PAGV Serves

PAGV thus emphasizes the importance of tailoring local police powers to the needs of the particular community—especially in the urban areas that PAGV overwhelmingly represents.[15]

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[12] Letter from the National Law Enforcement Partnership to Prevent Gun Violence to Congress (July 7, 2017).

[13] Press Release, Major Cities Chiefs Association, Major Cities Chiefs Denounce Combining Concealed Carry Reciprocity with the Fix NICS Act (Dec. 4, 2017). *See also* Press Release, International Association of Chiefs of Police, Law Enforcement Express Opposition to the Concealed Carry Reciprocity Act (Apr. 19, 2018) (asserting that concealed carry reciprocity proposals are "a dangerous encroachment on individual state efforts to protect public safety, and . . . effectively nullify duly enacted state laws and hamper law enforcement efforts to prevent gun violence").

[14] Magnus, *supra* note 10.

[15] The National Rifle Association characterizes such tailoring as arguing "for a special, watered-down Second Amendment in urban areas" and "attempt[ing] to read an urban/rural distinction into American laws." Brief of National Rifle Association of America, Inc. as Amicus Curiae

Franklin Zimring, a prominent scholar in the field of criminology and criminal justice, has noted that carrying loaded weapons in "shared public environments means that the implications . . . are spread over the community of users of public space."[16] For governments responsible for maintaining the safety of public spaces in densely populated areas, this concern is amplified. The problem of unrestricted carry is particularly acute with respect to handguns, which are known for being "easy to carry and conceal," rendering them a "priority concern of law enforcement."[17]

Supporting Appellants, *Gould v. O'Leary*, No. 17-2202, 14-15 (1st Cir. Mar. 29, 2018). As an initial matter, amicus is mistaken in their assertion that such permitting decisions implicate core Second Amendment conduct, which is limited to self-defense in the home. *See Hightower v. City of Boston*, 693 F.3d 61, 72 (1st Cir. 2012); *Kachalsky,* 701 F.3d at 94; *Drake v. Filko*, 724 F.3d 426, 431 (3d Cir. 2013); *United States v. Masciandaro*, 638 F.3d 458, 470 (4th Cir. 2011). Further, such permitting decisions are not arbitrary distinctions between public carrying in urban areas as opposed to less populated areas, but are instead a reflection of the will of the people who live in urban areas. *See generally Obergefell v. Hodges*, 135 S. Ct. 2584, 2627 (2015) (Scalia, J., dissenting) ("[T]he most important liberty [the People] asserted in the Declaration of Independence and won in the Revolution . . . [was] the freedom to govern themselves.").

[16] Declaration of Franklin E. Zimring, Professor of Law, the University of California, Berkeley, Joint Appendix at 490, *Kachalsky*, 701 F.3d 81.

[17] *Id.* at 487.

Handguns pose a major hazard for law enforcement in big cities, due to their higher likelihood of being used in criminal violence.[18] In an oft-cited survey of 10 major American cities, the National Violence Commission reported that 86% of all firearms used in aggravated assaults were handguns, while 96% of firearms used in robberies were handguns.[19] Duke University professor Philip Cook conducted a regression analysis of robbery-murder rates in 43 cities showing that for every "additional 1,000 gun robberies," four robbery murders were added to the city total, while an additional 1,000 non-gun robberies added just one murder, a 300% increase in the robbery-murder rate.[20] Cook also found that "[t]he likelihood [ ] a gun will be used in crime is closely linked to the general availability of guns, and especially handguns," because "it is easier for youths and criminals to obtain guns in jurisdictions in which gun ownership is common" through "thefts . . ., loans from family members and friends, and off-the-book sales."[21]

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[18] *Id.*

[19] George D. Newton, Jr. & Franklin E. Zimring, *Firearms and Violence in American Life: A Staff Report Submitted to the National Commission on the Causes & Prevention of Violence*, fig. 8-1, at 49 (1968).

[20] Declaration of Philip J. Cook, Joint Appendix at 451, *Kachalsky*, 701 F.3d 81.

[21] Cook Decl. at 452 (citing Philip J. Cook et al., *Underground Gun Markets*, 117 The Econ. J. 524, 558-88 (2007)). Cook concedes that "[i]f a state liberalizes its concealed carry law by adopting a 'shall issue' provision,

Zimring concludes that "the problem of gun robbery in American cities is almost exclusively a problem of concealable handguns."[22] Thus, the ability of officials in urban areas to determine who should be able to carry concealed handguns is critical to public safety.

II. The Long History of Local Concealed Carry Restrictions Evidences That Carry Is Not Core Protected Conduct

The Supreme Court and prominent legal scholars have acknowledged that concealed carry restrictions are longstanding, and therefore public carry is not core conduct protected by the Second Amendment. In *Heller*, the Court emphasized that "the 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." 554 U.S. at 626-27. In support, *Heller* cited several state law decisions upholding such prohibitions on concealed carry. *Id.*; *see also Peruta v. County of San Diego*, 824 F.3d 919, 936 (9th Cir. 2016), c*ert. denied sub nom. Peruta v. California*, 137 S. Ct. 1995 (2017) ("[A]n *overwhelming majority* of the states to address the question—indeed, after 1849, *all* of the states to do so—

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there is no scientific consensus for predicting whether the result would be to increase or reduce the rates of homicide and other crime." *Id.* at 457. While this sort of experimentation may be appropriate for jurisdictions that are sparsely populated, rural, or have lower levels of violent crime generally, major cities cannot afford to take this public health risk.

[22] Zimring Decl. at 488.

understood the right to bear arms, under both the Second Amendment and their state constitutions, as not including a right to carry concealed weapons in public."). A prominent defender of the Second Amendment, David Hardy, concurs that "[b]eginning in the 1820s, State courts faced issues arising from the . . . bans on concealed carry," and that most rulings upheld the bans.[23] "[B]y the end of the 19th century the constitutionality of such bans had become . . . broadly accepted."[24] The Court in *Robertson v. Baldwin* held that not only is the Bill of Rights subject to "certain well-recognized exceptions," but "the right of the people to keep and bear arms . . . is not infringed by laws prohibiting the carrying of concealed weapons." 165 U.S. at 281-82.

It is amply evident that "restrictions on concealed carry qualify as 'longstanding' . . . 'presumptively lawful regulatory measures.'" *Peterson v. Martinez*, 707 F.3d 1197, 1211 (10th Cir. 2013) (citing *Heller*, 554 U.S. at 626 & n.26). The Massachusetts regulation at issue therefore does not burden protected conduct. *See Peruta*, 824 F.3d at 942 ("[T]he Second

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[23] David T. Hardy, *The Rise & Demise of the "Collective Right" Interpretation of the Second Amendment*, 59 Clev. St. L. Rev. 315, 333 (2011).

[24] Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. Rev. 1443, 1516 (2009).

Amendment does not protect, in any degree, the carrying of concealed firearms by members of the general public."); *see also Drake v. Filko*, 724 F.3d 426, 432-33 (3d Cir. 2013) (observing that the "justifiable need" standard had "existed in New Jersey in some form for nearly 90 years" and thus qualified as a "'long standing,' 'presumptively lawful' regulation").

III. Courts Have Recognized the Constitutionality of Discretionary Licensing Regimes Vesting Authority in Local Officials

Consistent with the obligation of local legislative bodies to craft carry laws that meet the needs of the communities they serve, courts have affirmed the constitutionality of licensing regimes in which discretion is vested in local authorities. Under Massachusetts law, the firearm regulatory system authorizes a local licensing authority to impose restrictions on firearm licenses that the authority deems proper.[25]

The Second, Third, and Fourth Circuits have all upheld similar licensing standards requiring applicants for public carry permits to demonstrate a need for self-defense greater than that of an ordinary member

[25] MASS. GEN. LAWS ch. 140 § 131(a); *id.* § 131(d) (stating that a "licensing authority . . . may issue [a concealed carry permit] if it appears that the applicant is not a prohibited person . . . and has good reason to fear injury to the applicant or the applicant's property or for any other reason."). Appellants do not challenge the eligibility requirements articulated in the statute, or that a police official can deny an application on the ground that an applicant "is 'unsuitable' if 'in reasonable exercise of discretion' the official determines that the applicant 'may create a risk to public safety.'" App. Br. at 5-6.

of the public.[26] In upholding these regimes, these courts have specifically cited deference to legislative judgments as a key factor in their decision making.[27]

For example, New York law "delegates the authority to establish standards and make individual decisions to county licensing officials."[28] In upholding the state's "proper cause" requirement, the Second Circuit reasoned that "the connection between promoting public safety and regulating handgun possession in public" was a conclusion reached by New York and a "basis for other states' handgun regulations." *Kachalsky v. County of Westchester*, 701 F.3d 81, 98 (2d Cir. 2012). The court deferred to New York's determinations, holding that 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

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[26] Similarly, the Ninth Circuit upheld a California law requiring applicants to demonstrate a "good cause" to publicly carry a concealed firearm and delegating authority to county sheriffs "to establish and publish policies defining good cause." *Peruta*, 824 F.2d at 924, 939 (relying on historical analysis).

[27] *See e.g.*, *Kachalsky*, 701 F.3d at 99 (noting that it "is the legislature's job, not [the court's], to weigh conflicting evidence and make policy judgments); *Drake*, 724 F.3d at 439.

[28] Zimring Decl. at 489; *see also* N.Y. Penal Law § 400.00(2)(f) (providing that a license "shall be issued to . . . have and carry [a firearm] concealed . . . by any person when proper cause exists for the issuance thereof").

judgment that officials in the legislative and executive branches of state government regularly make." *Id.* at 99.

Similarly, the Third Circuit upheld the constitutionality of a New Jersey statute granting local authorities broad discretion to issue concealed carry permits. *See Drake*, 724 F.3d at 440. Under the challenged law, "[n]o application shall be approved . . . unless the applicant demonstrates that he is not subject to any of the [specified] disabilities . . ., that he is thoroughly familiar with the safe handling and use of handguns, *and that he has a justifiable need to carry a handgun*." *Id.* at 428 (quoting N.J.S.A. § 2C:58-4). The court expressed deference towards New Jersey's "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." *Id.* at 439. The court concluded that "[e]ven accepting . . . that there may be conflicting empirical evidence as to the relationship between public handgun carrying and public safety, this does not suggest, let alone compel, a conclusion that the 'fit' between New Jersey's individualized, tailored approach and public safety is not 'reasonable.'" *Id*.

Finally, the Fourth Circuit in *Woollard v. Gallagher* upheld the constitutionality of a Maryland statute which conditioned eligibility for public carry "on having [a] 'good and substantial reason.'" 712 F.3d 865,

868 (4th Cir. 2013) (quoting Md. Pub. Safety § 5-306 (2013)). The court stated that Maryland's interest "in protecting public safety and preventing crime" was substantial based on legislative findings showing that a "high percentage of violent crimes . . . involve[d] the use of handguns" and that "additional regulations on the . . . carrying . . . of handguns [were] necessary to preserve the peace and tranquility of the State . . . ." *Id.* at 876-77 (quoting Md. Code Ann., Crim. Law § 4-202). In finding the good-and-substantial-reason requirement as a "reasonable fit," the court deferred to the Maryland General Assembly's findings that the current law "str[uck] an appropriate 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 of Maryland." *Id.* at 881.

Massachusetts's firearm regulatory regime likewise reflects the state political branches' decision to empower local licensing authorities to "'employ e*very conceivable means* of preventing deadly weapons in the form of firearms [from] coming into the hands of evildoers.'" *Gould v. O'Leary*, 291 F. Supp. 3d 155, 172 (D. Mass. 2017) (quoting *Ruggiero*, 464 N.E.2d at 104) (emphasis added). This Court should follow its sister Circuits and defer to Massachusetts's policy judgment that vesting authority in local officials to make a determination as to proper purpose is

"substantially related to [Massachusetts's] important governmental objective of promoting public safety and preventing crime." *Id*. at 173.

IV. Shall-Issue Licensing Improperly Limits the Discretion Needed by State and Local Authorities to Fulfill Their Obligation to Protect Their Citizens

A. Shall-Issue Licensing Limits Law Enforcement's Ability to Protect the Public, Including Increasing Risk Inherent in Civilian-Police Encounters

Shall-issue licensing would increase the incidence of individuals being armed in public spaces, which would undermine the ability of law enforcement to protect the public in two key respects.

A higher incidence of individuals being armed in public would increase the likelihood of violent encounters between civilians and law enforcement officials.[29] The Fourth Circuit in *Woollard* accepted Maryland's determination that lax public carry laws can increase confusion and "potentially tragic consequences" during confrontations with suspects due to the presence of armed third parties and bystanders. 712 F.3d at 879-80. The "increased concealed carrying of handguns *renders the work of police in targeting the illegal use of handguns more difficult*[.]"[30] Andrew

[29] Declaration of Terrence B. Sheriden, Superintendent of the Maryland State Police, Joint Appendix at 119, *Woollard*, 712 F.3d 865.

[30] Brief for State Appellees at 48, *Kachalsky,* 701 F.3d 81 (emphasis added).

Warren, State Attorney for the 13th Judicial Circuit, has stated "[c]ommon sense dictates that more concealed weapons creates uncertainty and risk for law enforcement," requiring "officers to guess who is acting lawfully and who is not."[31] In a declaration submitted to the Second Circuit in *Kachalsky*, Andrew Lunetta, a Deputy Inspector for New York City Police Department, similarly noted that the increased prevalence of armed individuals would "make it more difficult for police officers to distinguish between lawful and unlawful possession," and "make it more dangerous for law enforcement officers to deal with situations where they have reason to believe that concealed handguns are present."[32]

These risks would have a direct impact on everyday encounters between police and civilians, turning "routine, friendly, and trusting [encounters] [into] high-risk stops."[33] Considering initiatives by cities across the country to improve relations between law enforcement and civilians,[34] such risks could undermine successful "community policing[,]

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[31] Warren, *supra* note 6.

[32] Declaration of Andrew Lunetta, Deputy Inspector, New York City Police Department, Joint Appendix at 547, *Kachalsky*, 701 F.3d 81.

[33] Declaration of James W. Johnson, Chief of the Baltimore County Police Department, Joint Appendix at 131, *Woollard*, 712 F.3d 865.

[34] *See, e.g.*, Anisha Nandi, *Neighborhood Policing Program Builds Relationships to Cut Crime*, CBS NEWS (Mar. 27, 2018, 11:55 AM),

[which] is most effective when police can engage citizens in a direct, but friendly, way."[35]

B. Weak Licensing Schemes Would Further Increase the Risk to the Lives of Law Enforcement Personnel

The risk of gun violence falls significantly on law enforcement personnel. As Dallas County Sheriff Lupe Valdez noted, "[i]n the past decade, over 500 police officers have been killed in the line of duty by guns," including the five Dallas police officers killed in the deadliest attack on police since 9/11.[36] In Maryland, "[o]f the 158 [ ] law enforcement officers who have died in the line of duty from non-vehicular, non-natural causes, . . . 83.5%— died as a result of intentional gunfire, usually from a handgun."[37] Similarly, in New York City, "[e]very NYPD officer murdered in the line of duty since . . . 2005 has been killed with a handgun (excluding

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https://www.cbsnews.com/news/nypd-community-policing-lower-crime/; Maxine Bernstein, *Portland Hires 2 Firms to Develop New Community Policing Group*, OREGONIAN (Apr. 18, 2018), http://www.oregonlive.com/pacific-northwest-news/index.ssf/2018/04/city_of_portland_hires_2_firms.html.

[35] Johnson Decl. at 131.

[36] Lupe Valdez, Dallas County Sheriff, *Our Police Officers Need Protection From Gun Violence Too*, THE HILL (May 17, 2017, 11:40 AM), http://thehill.com/blogs/pundits-blog/civil-rights/333819-our-police-officers-need-protection-from-gun-violence-too.

[37] Sheriden Decl. at 117.

those who died, on September 11, 2001, or thereafter, from the attacks that day)."[38]

"[L]aw enforcement's ability to protect themselves" would be actively undermined by shall-issue permitting.[39] Officers in states with high gun ownership are three times as likely to be killed compared to those in low-gun ownership states.[40] Additionally, "[s]ince 2007, concealed weapons licensees,[41] have killed at least 11 law enforcement officers . . . [and with] laws in many states protect[ing] the identities of license holders," it is impossible to conclude "how many additional officers may have been killed or injured."[42]

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[38] Lunetta Decl. at 546.

[39] Brief of the Brady Center to Prevent Gun Violence, Ceasefire NJ, International Brotherhood of Police Officers, Major Cities Chiefs et al. as Amici Curiae at 25, *Drake v. Filko*, 724 F.3d 426.

[40] David I. Swedler et al., *Firearm Prevalence and Homicides of Law Enforcement Officers in the United States*, 105 Am. J. Pub. Health 2042, 2047 (Oct. 2015).

[41] All but one of the law enforcement killings occurred in states with shall-issue or otherwise loosely unrestricted permitting regimes. *See* Violence Policy Center, *"Law Enforcement Officers Killed by Concealed Carry Killers: May 2007 to Present*, http://concealedcarrykillers.org/wp-content/uploads/2018/04/ccwlawenforcement.pdf.

[42] Brief of the Legal Community Against Violence, Major Cities Chiefs Association, Association of Prosecuting Attorneys, and San Francisco District Attorney George Gascón as Amici Curiae Supporting Appellees at 21, *Peruta v. City of San Diego*, 824 F.3d 919 (9th Cir. 2016).

Handguns in particular present dangers to law enforcement. "[D]ue to their small size, light weight, and concealability, . . . [handguns can] be placed in the glove boxes of cars and stowed under car seats in ways that retain their ready accessibility, making them more of a threat for officers conducting traffic stops."[43] "With the flick of a thumb, a shooter can drop a depleted magazine from the pistol grip . . . [and] [i]n a couple of seconds, . . . [one] can load another magazine and chamber a round."[44] Terrence B. Sheriden, Superintendent of the Maryland State Police, has stated that "[i]f the MSP were required to issue handgun wear and carry permits to individuals without a good and substantial reason to carry, State Troopers would be in greater danger because they would encounter more armed individuals," presumably with handguns.[45]

May-issue licensing laws such as Massachusetts's directly address these dangers by ensuring that only suitable individuals who show a proper purpose may carry a handgun in public, and are thus critical to protecting the lives of law enforcement officials.

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[43] Johnson Decl. at 126-27; *see also supra* Part I.D.

[44] Declaration of Thomas L. Fazio, Deputy Superintendent of the Bureau of Criminal Investigation, New York State Police, Joint Appendix at 527, *Kachalsky*, 701 F.3d 81.

[45] Sheriden Decl. at 119.

C. The Empirical Evidence Demonstrates That Weak Licensing Laws Would Result in Increased Gun Violence

Studies lend significant support to law enforcement's concerns that shall-issue licensing regimes contribute to increased violence.[46] For example, researchers concluded in a recent study that shall-issue concealed-carry permitting laws were associated with 6.5% higher total homicide rates, 8.6% higher firearm-related homicide rates, and 10.6% higher handgun-specific homicide rates compared with may-issue states.[47] Similarly, in a study released just last month, researchers found the enactment of right-to-carry (RTC) laws to be associated with increased risk of firearm homicides in large, urban counties. The study determined that "[c]ounties in states with RTC laws experienced a 4% increase in firearm homicide relative to

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[46] Michael Siegel et al., *Easiness of Legal Access to Concealed Firearm Permits and Homicide Rates in the Unites States*, 107 Am. J. Pub. Health 1923, 1927-29 (2017); John Donohue et al., *Right-to-Carry Laws and Violent Crime: A Comprehensive Assessment Using Panel Data, the LASSO, and a State-Level Synthetic Controls Analysis* 63-65 (Nat'l Bureau of Econ. Research, Working Paper No. w23510, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2988731. Amici curiae take aim at an older study by Donohue, but do not address this comprehensive, widely cited report. Brief of Arizona, Alabama, Arkansas et al. as Amici Curiae Supporting Plaintiffs-Appellants, *Gould v. O'Leary*, No. 17-2202 (1st Cir. Mar. 12, 2018), at 14-15.

[47] Siegel at 1927.

counties in states with more restrictions on the issuance of concealed carry weapons permits."[48]

Finally, a widely cited study found not only that right-to-carry laws are associated with higher violent crime rates, but also that the size of the deleterious effects associated with the passage of such laws increases over time.[49] A decade after the adoption of right-to-carry laws, violent crime is estimated to be 13 to 15 percent higher than it would have been absent such laws.[50]

D. Weak Licensing Schemes Would Result in More Stolen Guns, and Divert More Guns to Criminal Activity

While proponents of shall-issue licensing argue that such regimes will merely empower law-abiding citizens to carry firearms, in reality, licensing regimes that allow for indiscriminate public carry also provide criminals with greater unlawful access to firearms.

As shall-issue licensing naturally increases the number of both firearms and public carry permit holders, the inevitable consequence is a greater potential for gun theft by criminals. Gun owners who carried a

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[48] Cassandra K. Crifasi, et al., *Association Between Firearm Laws & Homicide in Urban Counties*, J. Urban Health (May 21, 2018) 95:383, https://doi.org/10.1007/s11524-018-0273-3.

[49] Donohue at 63-65.

[50] *Id.*

loaded handgun on their person in the past month were approximately 3 times more likely to have their guns stolen than those who did not, while gun owners who reported storing guns in cars were over 2.5 times more likely to have their guns stolen than those who did not store guns in their car.[51] Gun thefts from cars are increasing in cities across the United States, with one study finding an average of a 40% increase in gun thefts from cars between 2014 and 2015 among a sample group of 25 large cities.[52]

Law enforcement's experience on the ground reinforces these statistics. As James Johnson, Chief of the Baltimore County Police Department, has explained, "[h]andguns that are susceptible to theft simply put more guns in the hands of criminals. . . . More people carrying handguns will also likely lead to more guns in the hands of criminals because many people will leave handguns in cars when they are entering places they are not permitted to, or do not want to, carry their handguns. . . . Observant

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[51] David Hemenway et al., *Whose Guns Are Stolen? The Epidemiology of Gun Theft Victims*, Injury Epidemiology 3 (2017) 4:11, http://bit.ly/2tczYBC. In Hemenway's survey-based research, participating gun-owners were asked 'yes or no' questions (e.g., whether any guns were stored "in my car or other motor vehicle.").

[52] Brian Freskos, *Guns are Stolen in America Up to Once Every Minute. Owners Who Leave Their Weapons in Cars Make it Easy for Thieves*, TRACE (Apr. 20, 2018, 5:54 PM), https://www.thetrace.org/2016/09/stolen-guns-cars-trucks-us-atlanta/.

criminals will target such individuals, if they have identified them as handgun carriers, for vehicle theft."[53]

Similarly, Frederick H. Bealefeld, III, Commissioner of the Baltimore Police Department, stated: "We also know from experience that these criminals often target people they know have handguns *precisely because* they possess handguns, which criminals cannot lawfully obtain."[54] Bealefeld has identified obtainment of "handguns and ammunition [as] one of the main reasons why police officers' homes and vehicles have sometimes been targeted for robberies and break-ins," and stated, "The Department has frequently investigated homicides and robberies where it appears that one, if not the primary, goal of the attacker was to deprive the victim of his handgun."[55] Relying on these statements, the Fourth Circuit upheld a licensing provision similar to the one at issue in this case. *See Woollard*, 712 F.3d at 879-82 (finding the state had clearly demonstrated that the "good and substantial reason" requirement advanced the objective of protecting public safety and preventing crime by reducing the number of handguns

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[53] Johnson Decl. at 130.

[54] Declaration of Federick H. Bealefeld, III, Joint Appendix at 111, *Woollard*, 712 F.3d 865.

[55] *Id*.

carried in public, resulting in a decrease in the availability of handguns to criminals via theft).

For densely populated, urban communities like those that PAGV members serve, licensing only those suitable individuals who demonstrate a proper purpose to carry is also substantially related to protecting the public because it limits the ability of criminals to steal firearms.

Conclusion

For the foregoing reasons, PAGV respectfully asks this Court to affirm the district court's opinion and to uphold Massachusetts's constitutional and common-sense requirement of a "proper purpose" for the public carry of firearms. Licensing regimes that vest discretion in local and state authorities are fully consistent with the Second Amendment, effectuate the government's duty to promote public safety, and reflect the will of the body politic responsible for electing such officials.

Respectfully submitted,

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Certificate of Compliance With Rule 32(g)

This brief complies with the type-volume limitation of First Circuit Local Rule 32(a)(7)(B) and First Circuit Local Rule 29(a)(5) because this brief contains 6,388 words, excluding the parts of the brief exempted by First Circuit Local Rule 32(f).

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CERTIFICATE OF SERVICE

I hereby certify pursuant to Fed. R. App. P. 25(d) that on June 13, 2018, I transmitted the foregoing Brief of *Amicus Curiae* Prosecutors Against Gun Violence in Support of Appellees in the above-captioned matter to the Clerk of the United States Court of Appeals for the First Circuit through the Court's CM/ECF filing system. I further certify that on June 13, 2018, I served the counsel listed below, who are Filing Users, through the CM/ECF System:

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