

No. 17-2202

**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,

MARCUS 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; MASSACHUSETTS
ATTORNEY GENERAL,
Defendants-Appellees,

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

Appeal from the Final Judgment of the United States District Court for the District
of Massachusetts, No. 1:16-cv-10181-FDS

**BRIEF OF *AMICUS CURIAE* GIFFORDS LAW CENTER TO PREVENT
GUN VIOLENCE IN SUPPORT OF APPELLEES AND AFFIRMANCE**

SIMON J. FRANKEL
COVINGTON & BURLING LLP
One Front Street, 35th Floor
San Francisco, CA 94111
(415) 591-6000

NANDINI SINGH
ALLISON M. WHELAN
COVINGTON & BURLING LLP
850 Tenth Street, NW
Washington, DC 20001
(202) 662-6000

J. ADAM SKAGGS
GIFFORDS LAW CENTER TO
PREVENT GUN VIOLENCE
223 West 38th St. # 90
New York, NY 10018
(917) 680-3473

HANNAH SHEARER
GIFFORDS LAW CENTER TO
PREVENT GUN VIOLENCE
268 Bush St. # 555
San Francisco, CA 94104
(415) 433-2062

Attorneys for *Amicus Curiae* Giffords
Law Center to Prevent Gun Violence

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(c)(1), Giffords Law Center to Prevent Gun Violence states that it has no parent corporations. It has no stock, and therefore no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

	<u>Page</u>
INTEREST OF THE <i>AMICUS CURIAE</i>	1
INTRODUCTION AND SUMMARY OF THE ARGUMENT	2
ARGUMENT	4
I. Carrying Concealed Guns Is Not Protected by the Second Amendment.....	4
II. Even Assuming Public Concealed Carry Enjoys Second Amendment Protections, the Court Should Review the Restrictions Under Its “Substantial Relationship” Test.....	8
III. The Massachusetts Law Survives the Substantial Relationship Test.....	10
A. Protecting the Public from Firearm Violence Is an Important Governmental Objective.	10
B. There Is a Substantial Relationship Between Appellees’ Requirements for Concealed Carry Licenses and Their Goal of Protecting the Public from Firearm Violence.	11
1. Permissive Concealed Carry Laws Are Associated With Higher Levels of Violent Crime.	11
2. Firearms Are Rarely Used in Self-Defense and Do Not Increase Safety.	15
3. The Studies Offered by Appellants and <i>Amici</i> for An Association Between Lenient Carry Laws and Lower Crime Have All Been Discredited.	18
4. Appellants’ Unfounded Claim that Massachusetts Regulated with an Improper Purpose to Reduce the Number of Concealed Weapons in Public Cannot Succeed.	21
CONCLUSION.....	23
CERTIFICATE OF COMPLIANCE.....	25
CERTIFICATE OF SERVICE	26

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Berron v. Ill. Concealed Carry Licensing Review Bd.</i> , 825 F.3d 843 (7th Cir. 2016)	23
<i>Bonidy v. U.S. Postal Serv.</i> , 790 F.3d 1121 (10th Cir. 2015)	9, 23
<i>Chardin v. Police Comm’r of Boston</i> , 465 Mass. 314, 989 N.E.2d 392 (Mass. 2013)	11, 21
<i>District of Columbia v. Heller</i> , 554 U.S. 570 (2008).....	<i>passim</i>
<i>Drake v. Filko</i> , 724 F.3d 426 (3d Cir. 2013)	5, 6
<i>Gould v. O’Leary</i> , 291 F. Supp. 3d 155 (D. Mass. 2017).....	3, 11
<i>Hightower v. City of Boston</i> , 693 F.3d 61 (1st Cir. 2012).....	<i>passim</i>
<i>Hodel v. Va. Surface Mining & Reclamation Ass’n, Inc.</i> , 452 U.S. 264 (1981).....	12
<i>Kachalsky v. Cty. of Westchester</i> , 701 F.3d 81 (2d Cir. 2012)	6, 7, 9
<i>McDonald v. City of Chicago</i> , 561 U.S. 742 (2010).....	1
<i>Moore v. Madigan</i> , 702 F.3d 933 (7th Cir. 2012)	12
<i>Peruta v. Cty. of San Diego</i> , 824 F.3d 919 (9th Cir. 2016)	5, 6
<i>Peterson v. Martinez</i> , 707 F.3d 1197 (10th Cir. 2013)	5, 6

Robertson v. Baldwin,
165 U.S. 275 (1897).....6

Teixeira v. City of Alameda,
873 F.3d 670 (9th Cir. 2017)23

Turner Broad. Sys., Inc. v. FCC,
512 U.S. 622 (1994).....8

Tyler v. Hillsdale Cty. Sheriff’s Dep’t,
837 F.3d 678 (6th Cir. 2016)9

United States v. Booker,
644 F.3d 12 (1st Cir. 2011).....8, 9, 10

United States v. Castleman,
134 S. Ct. 1405 (2014).....1

United States v. Marzzarella,
614 F.3d 85 (3d Cir. 2010)9

United States v. Masciandaro,
638 F.3d 458 (4th Cir. 2011)9

United States v. Skoien,
587 F.3d 803 (7th Cir. 2009)9

United States v. Skoien,
614 F.3d 638 (7th Cir. 2010)8, 9

Voisine v. United States,
136 S. Ct. 2272 (2016).....1

Ward v. Rock Against Racism,
491 U.S. 781 (1989).....8

Woollard v. Gallagher,
712 F.3d 865 (4th Cir. 2013)6

Wrenn v. District of Columbia,
864 F.3d 650 (D.C. Cir. 2017).....6, 10

Statutes and Rules

Fed. R. App. P.....25
 MASS. GEN. LAWS ch. 269 § 10(a)2

Other Authorities

4 Calendar Of The Close Rolls, Edward I, 1296–1302 (Sept. 15, 1299, Canterbury) (H.C. Maxwell–Lyte ed. 1906)6

Ari Armstrong, *Gary Kleck and John Lott Offer Closing Thoughts in Dispute Over Gun Research*, Ari Armstrong: Reason & Rights (Dec. 23, 2015), <http://ariarmstrong.com/2015/12/gary-kleck-and-john-lott-offer-closing-thoughts-in-dispute-over-gun-research/>19

Ian Ayres & John J. Donohue III, *Shooting Down The More Guns, Less Crime Hypothesis*, 55 Stanford L. Rev. 1193 (Yale 2003), http://digitalcommons.law.yale.edu/fss_papers/124119

Emily Badger, *More Guns, Less Crime? Not Exactly*, Wash. Post, July 29, 2014, <https://www.washingtonpost.com/news/wonk/wp/2014/07/29/more-guns-less-crime-not-exactly>19

Charles C. Branas et al., *Investigating the Link Between Gun Possession and Gun Assault*, 99 Am. J. Pub. Health 2034 (Nov. 2009), <https://ajph.aphapublications.org/doi/abs/10.2105/AJPH.2008.143099>16

Centers for Disease Control and Prevention, WISQARS (Web-based Injury Statistics Query and Reporting System), *Fatal Injury Data and Non-Fatal Injury Data* (last visited May 15, 2018), <https://www.cdc.gov/injury/wisqars>2, 10

John J. 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*, Nat’l Bureau Econ. Res. (June 2017, revised Jan. 2018), <http://www.nber.org/papers/w23510>12

Mark Duggan, *More Guns, More Crime*, 109 J. Pol. Econ. 1086 (2001), <https://www.kellogg.northwestern.edu/faculty/dranove/htm/dranove/coursepages/Mgmt%20469/guns.pdf>20

Brian Freskos, *Guns are Stolen in America Up to Once Every Minute. Owners Who Leave Their Weapons in Cars Make it Easy for Thieves*, *The Trace* (Sept. 21, 2016, last updated Apr. 20, 2018), <https://www.thetrace.org/2016/09/stolen-guns-cars-trucks-us-atlanta/>.....14

Rashna Ginwalla et al., *Repeal of the Concealed Weapons Law and Its Impact on Gun-Related Injuries and Deaths*, 76 *J. Trauma Acute Care Surg.* 569 (2014), http://www.academia.edu/10480999/Repeal_of_the_concealed_weapons_law_and_its_impact_on_gun-related_injuries_and_deaths.....16

David Hemenway, et al., *Is an Armed Society a Polite Society?: Guns and Road Rage*, 38 *Accident Analysis & Prev.* 687 (2006).....18

David Hemenway & Sara J. Solnick, *The Epidemiology of Self-Defense Gun Use: Evidence from the National Crime Victimization Surveys 2007–2011*, 79 *Preventive Med.* 22 (Oct. 2015).....15

Devin Hughes & Evan DeFilippis, *The GOP’s Favorite Gun ‘Academic’ is a Fraud*, *ThinkProgress* (Aug. 12, 2016), <https://thinkprogress.org/debunking-john-lott-5456e83cf326>.....20

John R. Lott, Jr., *More Guns Less Crime* (3d ed. 2010).....19

Mayors Against Illegal Guns, *Trace the Guns: The Link Between Gun Laws and Interstate Gun Trafficking* (Sept. 2010), <https://everytownresearch.org/reports/trace-the-guns/>2

National Research Council, *Firearms and Violence: A Critical Review* 42 (Charles F. Wellford et al. eds., 2005), <https://www.nap.edu/read/10881/chapter/1>18, 19

Michael Siegel, et al., *Easiness of Legal Access to Concealed Firearm Permits and Homicide Rates in the United States*, 107 *Am. J. Pub. Health* 1923 (Dec. 2017), <https://ajph.aphapublications.org/doi/pdf/10.2105/AJPH.2017.304057>2, 12, 14

Daniel W. Webster et al., *Firearms on College Campuses: Research Evidence and Policy Implications*, 8 (Oct. 15, 2016).....15, 17

Violence Policy Center, *Firearm Justifiable Homicides and Non-Fatal Self-Defense Gun Use* 7 (June 2015), <http://www.vpc.org/studies/justifiable15.pdf>16

INTEREST OF THE *AMICUS CURIAE*

Amicus curiae Giffords Law Center to Prevent Gun Violence (“Giffords Law Center”) is a non-profit, national policy organization dedicated to researching, writing, enacting, and defending laws and programs proven to reduce gun violence and save lives. Giffords Law Center provides free assistance and expertise to lawmakers, advocates, legal professionals, law enforcement, and citizens who seek to make their communities safer from gun violence, and has a strong interest in supporting laws regulating the public possession of firearms and laws that require a showing of good cause for a license to carry a firearm. As an *amicus*, Giffords Law Center has provided informed analysis in a variety of firearm-related cases, including *District of Columbia v. Heller*, 554 U.S. 570 (2008), *McDonald v. City of Chicago*, 561 U.S. 742 (2010), *United States v. Castleman*, 134 S. Ct. 1405 (2014), *Voisine v. United States*, 136 S. Ct. 2272 (2016), and *Draper v. Healey*, 827 F.3d 1 (1st Cir. 2016).¹

¹ Giffords Law Center files this brief while seeking leave of the Court pursuant to Federal Rule of Appellate Procedure 29(a)(2). No counsel for a party in this action authored the brief in whole or in part. No person, inclusive of any party or party’s counsel, contributed money that was intended to fund the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Through sensible firearm legislation, Massachusetts is a success story for state efforts to save lives from gun violence. Research has shown that its careful laws regulating firearm storage, licensing, and carry have reduced youth suicides,² prevented the trafficking of crime guns,³ and lowered firearm homicide rates.⁴ In 2016, Massachusetts had the lowest rate of gun deaths among all fifty states, a testament to the effectiveness of its gun policies.⁵

This case presents a constitutional challenge to a component of Massachusetts' regulatory scheme for carrying firearms in public. *See generally* MASS. GEN. LAWS ch. 269 § 10(a). As implemented by the policies of the Boston

² From 2004 to 2014, guns were used in just 9% of youth suicides in Massachusetts, compared to 39% of youth suicides nationally, and the overall suicide death rate among youth in Massachusetts was 35% below the national average. *See* Centers for Disease Control and Prevention, CDC's Web-based Injury Statistics Query and Reporting System ("WISQARS"), *Fatal Injury Data and Non-Fatal Injury Data*, (last visited May 15, 2018), <https://www.cdc.gov/injury/wisqars>.

³ *See* Mayors Against Illegal Guns, *Trace the Guns: The Link Between Gun Laws and Interstate Gun Trafficking*, 16-17 (Sept. 2010), <https://everytownresearch.org/reports/trace-the-guns/> (states with firearm licensing laws, including Massachusetts, export crime guns at lower rates).

⁴ *See* Michael Siegel, et al., *Easiness of Legal Access to Concealed Firearm Permits and Homicide Rates in the United States*, 107 *Am. J. Pub. Health* 1923, 1924-28 (Dec. 2017), <https://ajph.aphapublications.org/doi/pdf/10.2105/AJPH.2017.304057> (states with discretionary concealed carry laws, including Massachusetts, have lower gun homicide rates).

⁵ *See* CDC's WISQARS, *supra* note 2.

and Brookline Police Departments, the law has two important parts. First, it allows individuals to carry a firearm “in or on [their] residence or place of business.” *Id.* § 10(a)(1). Second, it permits people to carry a firearm in public if they obtain an unrestricted license to carry. *See id.* Such licenses are typically issued by a licensing authority in the city or town in which the person resides. If the licensing authority determines that an applicant is not a “prohibited person,” it then considers whether the applicant has a “proper purpose” for carrying a firearm. *Gould v. O’Leary*, 291 F. Supp. 3d 155, 158 (D. Mass. 2017). Both Boston and Brookline have interpreted “proper purpose” to require applicants for an unrestricted license to show that they have “good reason to fear injury” to themselves or their property. *Id.* at 158–61. In addition, the licensing authority can place restrictions on a license, such as allowing a license-holder to only carry a firearm for specific activities, including employment, target shooting, hunting, and/or sporting purposes. *See id.*

The Massachusetts concealed carry statute and its local implementing policies appropriately address the safety threat that firearms may pose to the general public and law enforcement without impermissibly burdening Appellants’ Second Amendment rights. Courts nationwide have upheld regulations of the right to carry guns in public that are indistinguishable from the regulations at issue, and this Court should follow suit. The challenged Massachusetts regulatory scheme is

consistent with a multi-century tradition of regulations that limit public carry, which have been recognized as constitutional since this country's founding. Even if this Court were to find that the law and implementing policies impose substantial burdens on conduct protected by the Second Amendment, it should find that they survive review under this Court's substantial relationship test. Recent social science demonstrates that lax concealed carry laws increase violent crime, and conversely, that laws conferring discretion on police officers to require a proper purpose are associated with lower gun homicide rates. This research provides more than sufficient justification for Massachusetts' regulations under the substantial relationship test.

The longstanding history of state regulation of public carry and robust social science evidence demonstrating the efficacy of such regulations both provide compelling grounds for this Court to affirm the decision below.

ARGUMENT

I. Carrying Concealed Guns Is Not Protected by the Second Amendment.

As articulated in *Heller*, the Second Amendment does not create an unfettered right to carry loaded, concealed guns in public. The Supreme Court explained that "the right secured by the Second Amendment is not unlimited," and 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.” *Heller*, 554 U.S. at 626. Since *Heller*, several federal circuits have concluded that “the Second Amendment does not confer a right to carry concealed weapons.” *Peterson v. Martinez*, 707 F.3d 1197, 1211 (10th Cir. 2013); *see also Peruta v. Cty. of San Diego*, 824 F.3d 919 (9th Cir. 2016) (en banc); *Drake v. Filko*, 724 F.3d 426, 429–30 (3d Cir. 2013). In *Hightower v. City of Boston*, 693 F.3d 61 (1st Cir. 2012), this Court similarly determined that “[l]icensing of the carrying of concealed weapons is presumptively lawful,” based on *Heller*’s statement that it is lawful to prohibit concealed carry altogether. *Id.* at 73–74 (citing *United States v. Rene E.*, 583 F.3d 8, 12 (1st Cir. 2009) (internal citations and alterations omitted)).

A robust body of evidence developed over seven centuries of Anglo-American history buttresses the conclusion that the Second Amendment permits restricting public carry. Taking its cue from *Heller*, the Ninth Circuit examined this historical evidence and held, as this Court should, that concealed carry falls outside the scope of the Second Amendment. As early as the thirteenth century, English law “prohibit[ed] anyone from ‘going armed within the realm without the king’s special licence [sic].’” *Peruta*, 824 F.3d at 929 (quoting 4 Calendar Of The Close Rolls, Edward I, 1296–1302, at 318) (Sept. 15, 1299, Canterbury) (H.C. Maxwell–Lyte ed. 1906)). This edict—contained in the influential 1328 Statute of Northampton—was later adopted into the laws of several American colonies,

including Massachusetts. *See id.* at 929–30, 933; *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 95 n.20 (2d Cir. 2012) (“[t]he laws in North Carolina, Massachusetts, and Virginia track language from the 1328 Statute of Northampton”). Consistent with this established Anglo-American tradition, in the first half of the nineteenth century, numerous American states and cities prohibited concealed carry—and these prohibitions were almost all upheld in court. *See Peruta*, 824 F.3d at 939; *see also Robertson v. Baldwin*, 165 U.S. 275, 282 (1897) (acknowledging that Second Amendment protections do not extend to “the carrying of concealed weapons”).

The historical evidence, as *amici* supporting Appellees observe, has only increased in the years since this Court determined in *Hightower* that concealed carry licensing is “presumptively lawful.” 693 F.3d at 73–74. Nearly every federal circuit court to consider this question has upheld the authority of states to prohibit entirely or to limit substantially the carrying of concealed guns.⁶ These

⁶ *Peruta*, 824 F.3d at 939 (“the Second Amendment does not protect in any degree the right to carry concealed firearms in public”); *Peterson*, 707 F.3d at 1211 (“[T]he Second Amendment does not confer a right to carry concealed weapons”); *Drake v. Filko*, 724 F.3d 426, 429 (3d Cir. 2013) (New Jersey’s “justifiable need” restriction on carrying handguns in public “does not burden conduct within the scope of the Second Amendment’s guarantee”); *Woollard v. Gallagher*, 712 F.3d 865, 869 (4th Cir. 2013) (Maryland’s requirement of “good and substantial reason” to carry concealed weapons does not violate Second Amendment); *Kachalsky*, 701 F.3d 81 (New York’s “proper cause” restriction on concealed carry does not violate Second Amendment); *but see Wrenn v. District of Columbia*, 864 F.3d 650,

decisions acknowledge both the historical pedigree of concealed carry restrictions and the common-sense notion that governments have substantially more leeway to regulate the carrying of guns in public than in private homes. *See, e.g., Kachalsky*, 701 F.3d at 94–95 (“[F]irearm rights have always been more limited” in public where there is a “longstanding tradition of states regulating firearm possession and use”).

The challenged provisions of Massachusetts’ public carry regulations do not come close to approaching the limits of established state power to regulate the concealed carry of guns. Under Massachusetts’ regulatory scheme, Appellants have obtained permits to carry concealed firearms outside their homes for specified purposes, including hunting, sport shooting, or for their employment. *See* Appellants’ Br. at 6, 9–10. Massachusetts’ laws are therefore perfectly consistent with the longstanding tradition of Anglo-American public carry regulation—and are indeed more modest than other, more stringent restrictions that have passed constitutional muster. This Court should follow its decision in *Hightower* and the weight of authority from other circuits and affirm the decision below that the challenged regulations are constitutional under the Second Amendment.

663–67 (D.C. Cir. 2017) (recognizing a broad Second Amendment right to carry guns in public that is “on par” with the right to possess one in the home).

II. Even Assuming Public Concealed Carry Enjoys Second Amendment Protections, the Court Should Review the Restrictions Under Its “Substantial Relationship” Test.

Even if this Court were to assume or conclude that Massachusetts’ concealed carry scheme burdens Second Amendment rights, it should apply no scrutiny more rigorous than the substantial relationship test that it has adopted in an analogous context for evaluating Second Amendment challenges. Under the substantial relationship test—most familiarly employed in the First Amendment context, *see, e.g., Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 662 (1994); *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)—the government must demonstrate a reasonably strong fit between the challenged regulation and its stated objective. *See United States v. Booker*, 644 F.3d 12, 25 (1st Cir. 2011) (citing *United States v. Skoien*, 614 F.3d 638, 641 (7th Cir. 2010) (en banc)).

In *Booker*, the Court acknowledged that a law prohibiting gun possession by domestic violence misdemeanants appeared to fall within an area of permissible regulation identified in *Heller*. *See id.*, 644 F.3d at 25. However, the Court ruled that since the challenged law categorically restricted “gun ownership by a class of individuals,” it was appropriate to require a “‘strong showing,’ necessitating a substantial relationship between the restriction and an important governmental objective.” *Id.* Similarly, here, concealed carry licensing laws fall within an area of permissible regulation under *Heller*. *See Hightower*, 693 F.3d at 73–74. But if

the Court were nonetheless to find that the concealed carry licensing scheme at issue burdens the Second Amendment rights of a class of individuals like Appellants, it should apply *Booker*'s substantial relationship test.⁷

The substantial relationship test is also appropriate because restrictions on public concealed carry do not burden the “core” Second Amendment right “to use arms in defense of hearth and home,” which *Heller* stated is “elevate[d] above all other interests.” 554 U.S. at 635. Concealed carry laws instead regulate public conduct that “poses inherent risks to others.” *Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121, 1126 (10th Cir. 2015). In public, “[f]irearms may create or exacerbate accidents or deadly encounters,” which distinguishes any public carry right from “other fundamental rights that have been held to be evaluated under a strict scrutiny test.” *Id.*; accord *United States v. Masciandaro*, 638 F.3d 458, 470 (4th Cir. 2011) (“[A]s we move outside the home, firearm rights have always been more limited, because public safety interests often outweigh individual interests in self-defense.”); *Kachalsky*, 701 F.3d at 94. As these courts have acknowledged,

⁷ Many other federal circuits apply a similar test in Second Amendment challenges, framed either as a substantial relationship test or as intermediate scrutiny. See, e.g., *United States v. Masciandaro*, 638 F.3d 458, 473 (4th Cir. 2011); *United States v. Marzzarella*, 614 F.3d 85, 98 (3d Cir. 2010); *United States v. Skoien*, 587 F.3d 803, 805, 814 (7th Cir. 2009) (en banc); see also *Tyler v. Hillsdale Cty. Sheriff's Dep't*, 837 F.3d 678, 692 (6th Cir. 2016) (en banc) (a review of post-*Heller* circuit court decisions “reveals a near unanimous preference for intermediate scrutiny”).

firearms are, by their very nature, dangerous instruments that were responsible for nearly 39,000 deaths and more than 116,000 injuries in 2016, the last year for which federal data are available.⁸ The substantial relationship test gives legislatures, including those in Massachusetts, the flexibility to craft reasonable restrictions to regulate inherently dangerous weapons.⁹

III. The Massachusetts Law Survives the Substantial Relationship Test.

Under the substantial relationship test, Appellees must show that the challenged regulations are substantially related to an important governmental objective. *See Booker*, 644 F.3d at 25. As discussed in the following sections, Appellees easily make that showing here.

A. Protecting the Public from Firearm Violence Is an Important Governmental Objective.

The purpose of the licensing provisions of Massachusetts' concealed carry laws is "to protect the health, safety, and welfare of [Massachusetts] citizens."

⁸ *See* CDC's WISQARS, *supra* note 2.

⁹ The Court should reject Appellants' suggestion that it eschew heightened constitutional scrutiny altogether and apply the categorical approach applied by the D.C. Circuit in *Wrenn*, which treated public carry of firearms "on par" with home possession. *Wrenn*, 864 F.3d at 663–67. The D.C. Circuit's categorical approach would necessarily invalidate most meaningful public carry restrictions, contradicting *Heller*'s statement that concealed carry *prohibitions* are an example of lawful limitations on the Second Amendment right. *See Heller*, 554 U.S. at 626. It also contravenes *Heller*'s holding that Second Amendment rights are at their apex in the home, and are not coterminous in the very different context of carrying concealed guns in public. *Id.* at 635.

Chardin v. Police Comm’r of Boston, 465 Mass. 314, 327, 989 N.E.2d 392, 403 (Mass. 2013). The district court here correctly recognized that “Massachusetts undoubtedly has a substantial interest in promoting public safety and preventing crime.” *Gould*, 291 F. Supp. 3d at 171; *see also Hodel v. Va. Surface Mining & Reclamation Ass’n, Inc.*, 452 U.S. 264, 300 (1981) (“Protection of the health and safety of the public is a paramount governmental interest which justifies summary administrative action.”).

B. There Is a Substantial Relationship Between Appellees’ Requirements for Concealed Carry Licenses and Their Goal of Protecting the Public from Firearm Violence.

Appellees have made a strong showing that the challenged laws and regulations are substantially related and reasonably tailored to further the critical goals of protecting the public from firearm violence for several reasons.

1. Permissive Concealed Carry Laws Are Associated With Higher Levels of Violent Crime.

Empirics confirm the common sense idea that carrying firearms in public increases the risk of injury for the carrier and others. In the past year, persuasive new social science evidence has emerged that permissive “shall-issue” concealed carry laws fuel violent crime and homicide.¹⁰ With the benefit of the latest and

¹⁰ “Shall-issue” states require officials to grant handgun carry permits as long as applicants satisfy basic criteria (*e.g.*, no felony convictions), in contrast to “may issue” regimes, like those at issue here, that provide permitting officials more

most robust evidence, it is now plain that Massachusetts’ “proper purpose” and “may issue” concealed carry licensing laws are substantially related to reducing armed violence.¹¹

First, a June 2017 study (recently revised in January 2018) by Stanford professor John Donohue and colleagues, shows persistent increases in rates of violent assaults and other violent crimes in states with more lenient “shall-issue” concealed carry permitting systems (referred to in the study as “right-to-carry” or “RTC” laws).¹² The study found that RTC laws are associated with higher aggregate violent crime rates, and the size and deleterious effects associated with the passage of RTC laws increases over time. Though overall crime rates declined

discretion in issuing carry permits. Siegel et al., *supra* note 4.

¹¹ Indeed, some of this evidence could have changed the outcome in prior cases where courts were unpersuaded that restricting or prohibiting concealed carry sufficiently furthers public safety. In *Moore v. Madigan*, 702 F.3d 933, 938 (7th Cir. 2012), a Seventh Circuit panel struck down an Illinois law (much more restrictive than Massachusetts) that prohibited the carrying of guns in public, noting that “[a] few studies find that states that allow concealed carriage of guns outside the home and impose minimal restrictions on obtaining a gun permit have experienced increases in assault rates, though not in homicide rates. . . . But it has not been shown that those increases persist.” *Id.* at 938. Since *Moore* was decided, two new studies have linked permissive concealed carry laws to persistent increases in violent crime and increased homicide rates. See John J. 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*, Nat’l Bureau Econ. Res. (June 2017, revised Jan. 2018), <http://www.nber.org/papers/w23510>; Siegel et al., *supra* note 4.

¹² Donohue et al., *supra* note 11.

nationwide during the study period, the nine states that never adopted RTC laws experienced a decline in violent crime that was approximately four times greater than in the states that implemented RTC laws. RTC laws, on the contrary, led to a thirteen to fifteen percent increase in violent crime after ten years beyond what would have been expected without the laws. Within five years after the passage of an RTC law, violent crime rates were approximately seven percent higher; within ten years, violent crime rates were approximately fifteen percent higher.

The Stanford study also discussed the mechanisms by which RTC laws may increase violent crime, stating that “the statistical evidence shows us that whatever beneficial effects RTC laws have in reducing violence, they are outweighed by greater harmful effects.”¹³ These effects include, among others, that:

- RTC permit holders may commit crimes that they would not have committed without a permit to carry a gun;
- Criminals may have easier access to guns in RTC states. For example, guns may be more easily stolen from cars. In fact, an investigation of data provided by police departments in 25 large U.S. cities found that parked cars have become a top target for gun thieves, reporting roughly 4,800 guns stolen from vehicles;¹⁴ and
- Criminals may feel a greater need to carry guns as the number of armed

¹³ *Id.* at 37.

¹⁴ See Brian Freskos, *Guns are Stolen in America Up to Once Every Minute. Owners Who Leave Their Weapons in Cars Make it Easy for Thieves*, The Trace (Sept. 21, 2016, last updated Apr. 20, 2018), <https://www.thetrace.org/2016/09/stolen-guns-cars-trucks-us-atlanta/>.

people in public increases.

A second study by researchers at Boston University and Duke University supports and complements the findings of the Stanford study.¹⁵ Whereas the Stanford study focused on violent crime, the Boston University-Duke study focused specifically on homicide, and is the first study to examine the specific impact of concealed carry laws on handgun versus long gun homicide rates. This differentiation is important. If permissive concealed carry laws actually deter crime, as claimed by the State *Amici* supporting Appellants, *see* State *Amici* Br. at 10–16, then gun homicides should be expected to decrease in states with shall-issue laws, and there should be no observable increase in handgun homicides.

The Boston University-Duke study, however, found that the opposite occurred. The study found that shall-issue laws were significantly associated with 6.5% higher total homicide rates, 8.5% higher firearm homicide rates, and 10.6% higher handgun homicide rates, but were not significantly associated with long-gun or non-firearm homicides. The fact that the homicide increase is attributable to handguns in particular bolsters the study's hypothesis that lax handgun concealed carry laws are responsible for homicide increases. The study's conclusion that permissive concealed carry laws substantially increase gun homicide rates means that conversely, Massachusetts' discretionary concealed carry law substantially

¹⁵ *See* Siegel et al., *supra* note 4.

further safety by protecting the public from firearm homicide.

These are only the two most recent studies. Other researchers have similarly found a strong connection between lax concealed carry licensing laws and increased gun violence.¹⁶

2. Firearms Are Rarely Used in Self-Defense and Do Not Increase Safety.

At the same time, there is no evidence that lenient gun laws have safety benefits. Despite exaggerated claims by Appellants and others that there are millions of incidents of defensive gun use every year, reliable data demonstrate that crime victims rarely use guns in self-defense and that persons carrying firearms are, in fact, no safer than other crime victims. Victims of violent crimes use firearms in less than one percent of all criminal incidents.¹⁷ And compared to other self-protective actions that do not involve a firearm, data from the National

¹⁶ See, e.g., Rashna Ginwalla et al., *Repeal of the Concealed Weapons Law and Its Impact on Gun-Related Injuries and Deaths*, 76 J. Trauma Acute Care Surg. 569, 569, 573 (2014), http://www.academia.edu/10480999/Repeal_of_the_concealed_weapons_law_and_its_impact_on_gun-related_injuries_and_deaths (lax concealed carry permitting laws are associated with increased gun fatalities); Daniel W. Webster et al., *Firearms on College Campuses: Research Evidence and Policy Implications* 8 (Oct. 15, 2016) (discussing data on 111 high-fatality mass shootings from 1966–2015, finding that in the 41 states with RTC laws or no concealed carry regulations, the average death toll in high-fatality mass shootings increased following the implementation of an RTC law).

¹⁷ See David Hemenway & Sara J. Solnick, *The Epidemiology of Self-Defense Gun Use: Evidence from the National Crime Victimization Surveys 2007–2011*, 79 Preventive Med. 22, 23 (Oct. 2015).

Crime Victimization Surveys provide little evidence that defensive gun use is beneficial in reducing the likelihood of injury or property loss.¹⁸

On the contrary, one study concluded that carrying a firearm may *increase* a victim's risk of firearm injury during the commission of a crime. In an analysis of 677 shootings over a two-and-a-half-year period in Philadelphia, researchers found, after adjusting for confounding factors, that individuals carrying a gun were 4.46 times more likely to be shot in an assault than those not carrying a gun, and they were more than 4.23 times as likely to be fatally shot.¹⁹ Even in assaults where the victim had at least some opportunity to resist, individuals carrying a gun were 5.45 times more likely to be shot.²⁰ Although guns can be, and sometimes are, successfully used for defense, these cases are the rare exception.²¹

Such findings make sense, because defending oneself with a gun in public requires skills that few possess. As researchers have observed, “[s]hooting

¹⁸ *See id.* at 23–24.

¹⁹ *See* Charles C. Branas et al., *Investigating the Link Between Gun Possession and Gun Assault*, 99 *Am. J. Pub. Health* 2034, 2037 (Nov. 2009), <https://ajph.aphapublications.org/doi/abs/10.2105/AJPH.2008.143099>.

²⁰ *See id.*

²¹ *See* Violence Policy Center, *Firearm Justifiable Homicides and Non-Fatal Self-Defense Gun Use* 7 (June 2015), <http://www.vpc.org/studies/justifiable15.pdf> (“The reality of self-defense gun use bears no resemblance to the exaggerated claims of the gun lobby and gun industry When analyzing the most reliable data available, what is more striking is that in a nation of more than 300 million guns, how *rarely* firearms are used in self-defense.”).

accurately and making appropriate judgments about when and how to shoot in chaotic, high-stress situations requires a high level of familiarity with tactics and the ability to manage stress under intense pressure.”²² Accuracy “is influenced by distance, the opponent shooter’s actions, lighting, use of cover, type of gun, and more.”²³ Most people simply do not have the tactical ability to use a gun for self-defense in urban or densely populated public areas. And regardless of their degree of tactical training, when individuals carry guns in public for the purpose of self-defense, there is an increased risk that they will wield their firearm in situations that actually place themselves and others in greater danger. Gun carriers—even those with training—have injured innocent people after mistakenly perceiving a threat.²⁴ Additionally, in numerous other situations, the presence of a gun has escalated a mundane “road rage” dispute into a dangerous armed confrontation.²⁵

²² Webster et al., *supra* note 16, at 10.

²³ *Id.*

²⁴ *Police: Man Arrested for Shooting Uber Driver Thought He Was Helping*, Fox 4 News, May 16, 2017, <http://www.fox4news.com/news/man-spots-gun-inadvertently-shoots-uber-driver> (An Army veteran shot a driver, mistakenly believing he was stopping a robbery); William Saletan, *Friendly Firearms: How an Armed Hero Nearly Shot the Wrong Man*, Slate, Jan. 11, 2011, http://www.slate.com/articles/health_and_science/human_nature/2011/01/friendly_firearms.html (During the 2011 mass shooting in Tucson perpetrated by a gunman targeting U.S. Congresswoman Gabrielle Giffords, a bystander with a concealed gun assaulted and nearly shot the man who had grabbed the shooter’s weapon).

²⁵ *E.g.*, *MA State Police: Driver Fired Gun in Highway Road Rage Incident*, Associated Press, Mar. 6, 2017, <https://www.boston.com/news/local->

3. The Studies Offered by Appellants and *Amici* for An Association Between Lenient Carry Laws and Lower Crime Have All Been Discredited.

As illustrated by the studies discussed above, there is growing, methodologically sound evidence rebutting Appellants' casual assertion that "there is no persuasive evidence" that lenient concealed carry laws increase crime and that "[t]he debate over firearms regulation is so ridden with strife that statisticians, criminologists, and public health researchers often sound less like objective social scientists than zealous advocates." Appellant's Br. at 44–45. Appellants rely on outdated studies that do not reflect the newest, most reliable research on the connection between lenient public carry licensing laws and violent crime. *See, e.g., id* at 45–46 (relying on a 2004 National Research Council (NRC) report and a 2003 Centers for Disease Control and Prevention report); *id.* at 48 (relying on a 1995 research on incidence of self-defensive gun use).

The State *Amici* supporting Appellants also present evidence purporting to show that lenient concealed carry laws have a public safety benefit, but similarly

[news/2017/03/06/ma-state-police-driver-fired-gun-in-highway-road-rage-incident;](http://www.masslive.com/news/index.ssf/2017/06/massachusetts_man_accused_of_p.html) Scott Croteau, *Man Accused of Pointing Gun at Another Driver During 'Road Rage' Incident in Boston, Mass Live*, Jun. 5, 2017, http://www.masslive.com/news/index.ssf/2017/06/massachusetts_man_accused_of_p.html; *see generally* David Hemenway, Mary Vriniotis, & Matthew Miller, *Is an Armed Society a Polite Society?: Guns and Road Rage*, 38 *Accident Analysis & Prev.* 687 (2006).

rely on outdated studies, including research that has since been widely discredited.²⁶ For example, they cite a book by John Lott, which concluded that crime rates are lower in states with shall-issue laws.²⁷ But Lott's conclusion that RTC laws are associated with lower crime rates has been widely rejected.²⁸ His research is tainted by two fundamental methodological errors. First, Lott aggregated the impact of gun law passage for all the states studied. When researchers disaggregated the effects for each state, it became clear that crime

²⁶ See, e.g., National Research Council, *Firearms and Violence: A Critical Review* 150 (Charles F. Wellford et al. eds., 2005), <https://www.nap.edu/read/10881/chapter/1> (“[W]ith the current evidence it is not possible to determine that there is a causal link between the passage of right to-carry laws and crime rates.”); Ian Ayres & John J. Donohue III, *Shooting Down The More Guns, Less Crime Hypothesis*, 55 *Stanford L. Rev.* 1193, 1284 (Yale 2003), http://digitalcommons.law.yale.edu/fss_papers/1241 (“We take these results to be generally devastating to Lott’s ‘More Guns, Less Crime’ hypothesis”); Emily Badger, *More Guns, Less Crime? Not Exactly*, *Wash. Post* (July 29, 2014), https://www.washingtonpost.com/news/wonk/wp/2014/07/29/more-guns-less-crime-not-exactly/?utm_term=.7d1166d8d94e.

²⁷ See John R. Lott, Jr., *More Guns Less Crime* (3d ed. 2010).

²⁸ See *supra*, note 26. Indeed, even conservative, pro-gun researchers, have detailed issues with Lott’s work. See, e.g., Ari Armstrong, *Gary Kleck and John Lott Offer Closing Thoughts in Dispute Over Gun Research*, Ari Armstrong: Reason & Rights (Dec. 23, 2015), <http://ariarmstrong.com/2015/12/gary-kleck-and-john-lott-offer-closing-thoughts-in-dispute-over-gun-research/> (citing Gary Kleck, a conservative, pro-gun criminologist, who criticized Lott for, among other things, making comments “filled with misinformation that betrays an extraordinary ignorance of the research [leader]” and “withhold[ing]” important facts from readers”).

increased more often *after* the passage of concealed-carry laws than it decreased.²⁹ Second, Lott used county-level crime data and did not account for changing laws at the state level. When researchers adjusted his analysis to account for this oversight, the results became statistically insignificant.³⁰ Separate from these methodological errors, Lott himself was found to have committed academic fraud on multiple occasions, including by making false public statements about his research.³¹ He also admitted to fabricating an online identity for a nonexistent former student to praise his own research.³²

In light of the increasingly strong evidence that lenient concealed carry permitting regimes increase gun violence, and the lack of methodologically-sound research to refute that evidence, the conclusion that Appellees' permitting regime is substantially related to their important interest in protecting the public from gun

²⁹ When the states are aggregated, Florida and Texas are over-represented and they experienced drops in crime. *See* Ayres & Donohue, *supra* note 26, at 39–40.

³⁰ *See* Mark Duggan, *More Guns, More Crime*, 109 J. Pol. Econ. 1086, 1109–10 (2001), <https://www.kellogg.northwestern.edu/faculty/dranove/html/dranove/coursepages/Mgmt%20469/guns.pdf>.

³¹ Devin Hughes & Evan DeFilippis, *The GOP's Favorite Gun 'Academic' is a Fraud*, ThinkProgress (Aug. 12, 2016, 4:45 PM), <https://thinkprogress.org/debunking-john-lott-5456e83cf326>

³² Richard Morin, *Scholar Invents Fan to Answer His Critics*, Washington Post, Feb. 1, 2003, <https://www.washingtonpost.com/archive/lifestyle/2003/02/01/scholar-invents-fan-to-answer-his-critics/f3ae3f46-68d6-4eee-a65e-1775d45e2133>.

violence stands on empirically firm ground.

4. Appellants’ Unfounded Claim that Massachusetts Regulated with an Improper Purpose to Reduce the Number of Concealed Weapons in Public Cannot Succeed.

Rather than meaningfully refuting the persuasive evidence that lax concealed carry laws increase violent crime and homicide, Appellants instead argue that the Second Amendment categorically bars legislatures and government officials from pursuing the goal of “limit[ing] the number of arms borne in public.” Appellants’ Br. at 42 (arguing the Second Amendment “forbids” states from acting “to reduce the number of firearms in public”). This position is unsupported by the record and contravenes *Heller*.

Appellants do not—and cannot—offer evidence that the intention of the Massachusetts statute or the local policies challenged here is to reduce the number of arms carried in public, and they do no such thing on their face. Rather, the regulatory scheme expresses no opinion about the number of guns that may be carried in public, but instead ensures that local law enforcement is empowered to verify that applicants have a “proper purpose” before they may obtain an unrestricted license to carry firearms for self-defense in light of the dangers that guns in public pose to others. *Chardin*, 465 Mass. at 327 (“The historical aim of [concealed carry] licensure generally is preservation of public health, safety, and welfare by extending the public trust only to those with proven qualifications.”)

(internal citations omitted); *supra* pages 11–21 (summarizing documented risks concealed carry poses to the public). Indeed, Appellants and applicants like them received restricted licenses to carry guns for use in activities like sport shooting, which further undermines the suggestion of legislative animus.

Leaving intent aside, and even assuming the truth of Appellants’ unsupported claim that Massachusetts’ laws have the effect of reducing the number of guns carried in public, their argument still falters. *Heller* stated that “the right secured by the Second Amendment is not unlimited” and 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. *Heller* itself thus strongly affirms that it *is* lawful for governments to adopt public-safety-promoting regulations that have the effect of limiting the number of concealed guns carried in public, because the Second Amendment allows governments to *completely* prohibit public carry of concealed weapons.

Nor is Appellants’ First Amendment argument to the contrary persuasive. *See* Appellants’ Br. at 40. Appellants’ effort to import First Amendment principles wholesale into the Second Amendment context is illogical, because unlike First Amendment-protected expressive content, firearms can physically injure and kill

people.³³ The distinction—and *Heller*'s recognition that concealed carry bans were historically considered constitutional—must make it permissible for governments to regulate the lethal effects of firearms in ways they could not do with the effects of purely expressive activity. Indeed, this Court and many others have correctly determined that while methodological analogies between the two rights can be useful, gun rights and speech rights differ sufficiently that it makes little sense to apply First Amendment doctrines in Second Amendment challenges. *E.g.*, *Hightower*, 693 F.3d at 80–81 (declining to extend First Amendment prior restraint doctrine to a Second Amendment claim); *see also Teixeira v. Cty. of Alameda*, 873 F.3d 670, 688–90 (9th Cir. 2017) (cataloging salient differences between the First and Second Amendments); *Berron v. Ill. Concealed Carry Licensing Review Bd.*, 825 F.3d 843, 847 (7th Cir. 2016) (“[E]veryone is entitled to speak and write, but not everyone is entitled to carry a concealed firearm in public.”).

CONCLUSION

Appellants have offered no basis for reversing the district court's determination that the challenged concealed carry regulations are consistent with

³³ *See Bonidy*, 790 F.3d at 1126 (“[t]he risk inherent in firearms and other weapons distinguishes the Second Amendment right from other fundamental rights ... such as the right to marry and the right to be free from viewpoint discrimination, which can be exercised without creating a direct risk to others”).

the Second Amendment. For all the reasons set forth above, this Court should affirm the district court's decision.

Respectfully submitted,

s/Simon J. Frankel

SIMON J. FRANKEL
COVINGTON & BURLING LLP
One Front Street, 35th Floor
San Francisco, CA 94111
(415) 591-6000

NANDINI SINGH
ALLISON M. WHELAN
COVINGTON & BURLING LLP
850 Tenth Street, NW
Washington, DC 20001
(202) 662-6000

Attorneys for *Amicus Curiae*

CERTIFICATE OF COMPLIANCE

The undersigned hereby certify that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(a)(5) because this brief contains 5,625 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

s/Simon J. Frankel
SIMON J. FRANKEL
COVINGTON & BURLING LLP
One Front Street, 35th Floor
San Francisco, CA 94111
(415) 591-6000

NANDINI SINGH
ALLISON M. WHELAN
COVINGTON & BURLING LLP
850 Tenth Street, NW
Washington, DC 20001
(202) 662-6000

Attorneys for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of June, 2018, I electronically filed with the Clerk of the Court for the United States Court of Appeals for the First Circuit via the CM/ECF System the foregoing Amicus Brief and mailed nine (9) paper copies of the brief to the Clerk via overnight mail. I certify that all counsel in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/Simon Frankel
Simon J. Frankel
COVINGTON & BURLING LLP
One Front Street, 35th Floor
San Francisco, CA 94111
(415) 591-6000

Nandini Singh
Allison M. Whelan
COVINGTON & BURLING LLP
850 Tenth Street, NW
Washington, DC 20001
(202) 662-6000