No. 17-2202

United States Court of Appeals for the First Circuit

MICHAEL GOULD, *ET AL.*,

Plaintiffs-Appellants,

v.

DANIEL C. O'LEARY, *ET AL.*,

Defendants-Appellees.

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

BRIEF OF *AMICI CURIAE* ARIZONA, ALABAMA, ARKANSAS, GEORGIA, IDAHO, INDIANA, LOUISIANA, MICHIGAN, MISSOURI, MONTANA, NEBRASKA, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, UTAH, WEST VIRGINIA, WISCONSIN, AND WYOMING IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

IDENTITY OF AMICI CURIAE

The States of Arizona, Alabama, Arkansas, Georgia, Idaho, Indiana, Louisiana, Michigan, Missouri, Montana, Nebraska, Oklahoma, South Carolina, South Dakota, Texas, Utah, West Virginia, Wisconsin, and Wyoming file this brief pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure. The *Amici* States have experience advancing their substantial interests in promoting public safety, preventing crime, and reducing the harmful effects of firearm violence without abridging the constitutional rights of their citizens. They join this brief because the challenged law and policies applying the law are foreclosed by the Second Amendment.

Amici States are concerned that upholding the challenged regulation and policies would rest on an erroneous construction of the United States Constitution and would infringe upon individual rights. While States may enact firearm regulations for the important governmental interest of protecting public safety, the State has failed to meet its burden of showing that the current regulations are appropriately tailored to accomplish that goal without unduly infringing the rights of individuals.

SUMMARY OF ARGUMENT

Massachusetts' regulatory scheme unconstitutionally restricts its law-abiding citizens from carrying a firearm to protect their person or property unless they can show—to the discretionary satisfaction of a government gatekeeper—that they have "good reason to fear injury." Mass. Gen. Laws ch. 140, § 131(d). The applicable statute provides that the licensing authority "may issue" a firearm license if the applicant: (1) "has good reason to fear injury to the applicant or the applicant's property" or (2) "for any other reason, including the carrying of firearms for use in sport or target practice only, subject to the restrictions expressed or authorized under this section." M.G.L. ch. 140, § 131(d). The present case concerns the former rule, governing the carrying of a firearm for personal safety.

The first question before this Court is whether a law-abiding individual's right to carry a firearm outside of the home for self-protection is a "core" fundamental right under the Second Amendment. *Amici* submit that it is, and that under *District of Columbia v. Heller*, 554 U.S. 570 (2008), this Court should strike down the Massachusetts licensing statute as unconstitutional on this basis alone.

Even if this Court does not conclude that the law in question prohibits individuals from exercising a core right, it should nevertheless reverse the district court for either of two reasons: (1) applying an intermediate scrutiny analysis to a law abridging an enumerated constitutional right for which strict scrutiny is

appropriate, or (2) upholding the contested provision under even an intermediate standard. Correcting the former error would require that the State accomplish a compelling purpose by the least restrictive means. The State has never credibly attempted to defend its actions under that standard. Alternatively, a faithful application of intermediate scrutiny would likewise invalidate the Massachusetts regulatory scheme because the State has failed to present evidence that its restrictions serve the government's interest in public safety or that they are narrowly tailored to accomplish the same. The broad experience of a majority of States supports the conclusion that more firearms carried by law-abiding citizens simply does not lead to increased crime or decreased public safety. This Court should invalidate the regulatory scheme under either strict or intermediate scrutiny.

ARGUMENT

I. A LAW-ABIDING INDIVIDUAL'S RIGHT TO CARRY A FIREARM FOR SELF-PROTECTION OUTSIDE THE HOME IS WITHIN THE CORE OF THE SECOND AMENDMENT.

Individuals in Massachusetts must obtain a license to carry a firearm any place other than their home or business. M.G.L. ch. 269, § 10(a). The licensing authority (in this case, Boston and Brookline Police Departments) "may issue" a firearm license if the applicant: (1) "has good reason to fear injury to the applicant or the applicant's property" or (2) "for any other reason, including the carrying of firearms for use in sport or target practice only, subject to the restrictions expressed

or authorized under this section." M.G.L. ch. 140, § 131(d). Thus, if an individual wants a firearm license for the sole purpose of self-protection, he must provide "good reason to fear injury."

A law-abiding individual's right to carry a firearm for self-protection—inside or outside the home—is a fundamental right that is protected by strict scrutiny. *See District of Columbia v. Heller*, 554 U.S. at 592 (Second Amendment guarantees an "individual right . . . to carry weapons in case of confrontation."). The *Heller* Court held that carrying a firearm "'upon the person or in the clothing or in a pocket for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person'" is a core individual right. *Id.* at 584.

In order to obtain a license to carry a firearm outside the home for self-protection in Boston and Brookline, a law-abiding individual must distinguish his situation from that of the general public, which is virtually impossible to do.[1] In fact, in this case, one licensing authority determined that even being the recent victim of a theft crime was not sufficient to justify an unrestricted license. Dkt. 58, at ¶¶ 77-78. In short, these regulations operate exactly as advertised: they prohibit

[1] This conclusion finds support in statistics regarding unrestricted firearm licenses. For ordinary people—*i.e.*, excluding law enforcement officers, attorneys and physicians—only 23.5% of firearm licenses in Boston were "unrestricted," meaning that the bearer could carry a gun outside the home for *any* reason. Dkt. 58 at ¶¶ 21-25.

an ordinary person from exercising a core Second Amendment right. Under *Heller*, a prohibition of this kind will always be invalid and does not necessitate any further analysis. 554 U.S. at 629. This Court should hold Massachusetts's regulatory scheme unconstitutional.

II. IF THE MASSACHUSETTS REGULATORY SCHEME IS LESS THAN A COMPLETE PROHIBITION ON AN ORDINARY PERSON'S RIGHT TO CARRY A FIREARM FOR SELF-DEFENSE, THEN THE REGULATORY SCHEME NEVERTHELESS FAILS TO SATISFY STRICT SCRUTINY.

Generally, when the government burdens a core individual right, it can only do so with a compelling interest that is narrowly tailored by the least restrictive means. *See Cohen v. California*, 403 U.S. 15, 26 (1971) (expression); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 579 (1995) (association); *Purcell v. Gonzalez*, 549 U.S. 1, 7 (2006) (voting). The Supreme Court reviews burdens on core individual rights similarly to how it reviews racial classifications. *Loving v. Virginia*, 388 U.S. 1, 12 (1967). Courts' stringent standards demonstrate their commitment to protecting Constitutional rights.

The district court below erred in applying intermediate—rather than strict—scrutiny in reviewing Massachusetts' restrictions on Second Amendment rights. Sadly, the district court is not alone. Instead of protecting the "core individual right" to possess a firearm (consistent with *Heller*) under a strict scrutiny analysis,

some circuit courts have applied intermediate scrutiny. *See Kachalsky v. County Of Westchester*, 701 F.3d 81, 97 (2d Cir. 2012). But a lower level of scrutiny is inconsistent with the Supreme Court's declaration that the Second Amendment is not "a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees." *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 780 (2010) (plurality opinion); *see also Silvester v. Becerra*, No. 17-342, --- S. Ct. ---, 2018 WL 943032 at *1 (U.S. Feb. 20, 2018) (Thomas, J., dissenting from the denial of certiorari). Because the Supreme Court has held that possessing a firearm for protection is a core individual right, this Court should align itself with the Supreme Court's position as reflected in *McDonald*, and review the Massachusetts licensing scheme under strict scrutiny.

III. EVEN UNDER INTERMEDIATE SCRUTINY, THE DISTRICT COURT IMPROPERLY DEFERRED TO THE STATE'S PREFERRED "FIT" BETWEEN THESE STATUTES AND THE INTERESTS THEY ALLEGEDLY SERVE.

Even assuming that the Second Amendment confers a second-rate freedom, the district court's application of intermediate scrutiny was inconsistent with Supreme Court precedent. Specifically, the lower court accepted Massachusetts's inference that the restrictions in Section 131(d) prevent firearms from reaching criminals and protect public safety even when the guns remain in their licensed owners' possession. Intermediate scrutiny demands more than a defendant's *ipse*

dixit, and the experience of other States shows that lesser restrictions on individuals' rights actually promotes public safety.

A. The District Court Misapplied Intermediate Scrutiny By Accepting The Inadequate Evidence Offered By The State Defendants.

Courts subject laws to intermediate scrutiny review in a discrete category of cases. *See Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 564 (1980) (commercial speech); *United States v. Virginia*, 518 U.S. 515, 523 (1996) (gender); *Astrue v. Capato ex rel. B.N.C.*, 566 U.S. 541, 557 (2012) (illegitimacy). Under intermediate scrutiny, the government bears the burden of showing that the law at issue is "substantially related to an important governmental objective." *Clark v. Jeter*, 486 U.S. 456, 461 (1988). Moreover, the "'fit' between the legislature's ends and the means chosen to accomplish those ends" need not be "the least restrictive means but, as we have put it in the other contexts . . . a means narrowly tailored to achieve the desired objective." *Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989). The "existence of 'numerous and obvious less-burdensome alternatives to the restriction . . . is certainly a relevant consideration in determining whether the 'fit' between ends and means is reasonable.'" *Fla. Bar v. Went For It, Inc.* 515 U.S. 618, 632 (1995) (quoting *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417, n. 13 (1993)).

As previously mentioned, the district court upheld Massachusetts' regulatory scheme after applying intermediate scrutiny. Dkt. 92 at 24. The State provided no evidence to support its justification for the law, instead largely relying on the general notion of "public safety" and quoting a Massachusetts Appeals Court case providing that the purpose of the law is to keep firearms out of the hands of "evildoers[:]"

> The goal of firearms control legislation in Massachusetts is to *limit access to deadly weapons by irresponsible persons*. . . . [Section] 131, was enacted as a first-time measure in the regulatory scheme. It has been said [that the law] was intended to "have local licensing *authorities employ every conceivable means of preventing deadly weapons in the form of firearms [from] coming into the hands of evildoers*."

Dkt. 74 at 12 (citing *Ruggiero v. Police Commissioner of Boston*, 18 Mass. App. Ct. 256, 259 (1984), and Rep. A.G., Pub. Doc. No. 12, at 233-234 (1964) (emphasis added)); *see also* Dkt. 70 at 2 ("Applying this Court's analysis in *Batty v. Albertelli*, Commissioner Evans' policy of placing 'Target & Hunting' restrictions on the firearms licenses of applicants who do not demonstrate special circumstances is 'substantially related to the important governmental objective of public safety, and therefore does not violate the Second Amendment.'").[2]

Here, the district court simply accepted the State's assertion that the licensing provisions were legitimate protections for "'the health, safety, and

[2] *Batty v. Albertelli* is an unpublished Massachusetts District Court decision. No. 15-cv-10238, 2017 WL 740989, at *11-13 (D. Mass. Feb. 24, 2017).

welfare of [Massachusetts] citizens.'" Dkt. 92 at 25. Related to this purpose, it also found that the State's "interest in promoting public safety and preventing crime" was substantial. *Id.*

The district court relied on a Second Circuit case, *Kachalsky v. County of Westchester*, to find that the law "fit" the State's interest. *Id.* Because the court believed the Second Circuit upheld *more* stringent restrictions than the ones in Massachusetts, the court concluded that the instant restrictions were sufficiently related to the State's interest. *Id*. at 25-26.

This analysis falls short of satisfying the intermediate scrutiny standard in two ways. First, the State bears the burden of showing that the law does not restrict an individual right more than "is reasonably necessary" to achieve its important interest. In relying on a different circuit's reasoning (not to mention the New York Legislature's different statistics and motivations), the district court gave Massachusetts a pass in meeting its burden.

Second, the district court afforded the State more deference than intermediate scrutiny allows. The court cited *Turner Broadcasting System, Inc. v. F.C.C.*, 520 U.S. 180, 195 (1997), to assert that when courts review a statute's constitutionality, they must "accord substantial deference to the predictive judgments of Congress." *Id.* at 24. The court also stated that it must grant

"deference to legislative findings regarding matters that are beyond the competence of the courts." *Id.* (citing *Kachalsky*, 701 F.3d at 97).

The district court misapplied *Turner* and misunderstood the intermediate scrutiny requirements. It is true that only the Legislature can make predictive judgments and that the trial courts should defer to those judgments. The State, however, must produce evidence that its regulations reflect such judgment and are substantially related to important interests. *Central Hudson*, 447 U.S. at 570. In *Turner*, the Supreme Court stated that its obligation "is 'to assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence.'" *Turner*, 520 U.S. at 195. Contrary to the district court's holding, deference to legislative judgments does not allow the State to "judge" the quality of its own evidence and inferences. This "burden of justification is demanding and it rests entirely on the state." *Virginia*, 518 U.S. at 533.

In other intermediate scrutiny cases, courts required much more from the State than the inferences provided by Massachusetts here. In *United States v. Virginia*, the Supreme Court analyzed an extensive body of evidence Virginia used to justify excluding women from the Virginia Military Institute. *Virginia*, 518 U.S. at 521-31. Using an intermediate scrutiny standard, the Court accepted that the single-sex program afforded benefits to students, and that such benefits were important interests. *Id.* at 535. Nonetheless, the Court struck down the program as

unconstitutional because it did not fit an "exceedingly persuasive" interest. *Id.* at 534.

When using intermediate scrutiny in the commercial speech context, the Supreme Court has similarly required more than assertions or inferences to justify restrictions of fundamental rights. In *Central Hudson*, a New York commission prohibited electric utilities' promotional advertisements. 447 U.S. at 558. The State claimed the ban furthered its substantial interest in conserving electricity. *Id.* at 560. Despite agreeing that energy conservation is an important interest, the Court struck down the ban, finding the State failed to pass an intermediate scrutiny analysis because it put forward no evidence about why the restriction fit its interest. Specifically, New York made no showing "that a more limited restriction on the content of promotional advertising would not serve adequately the state's interests." *Id* at 570.

As *Virginia* shows, a State can fail intermediate scrutiny even when presenting substantial favorable evidence to justify its regulation. Likewise, *Central Hudson* demonstrates that when a State fails to present any evidence, it necessarily fails intermediate scrutiny. The court certainly cannot (and should not) do the State's work for it. Similar to the New York commission in *Central Hudson*, Massachusetts has not presented any evidence that its restrictions of a fundamental right are substantially related to an important government interest. In

particular, here, the State failed to present any specific evidence justifying its apparent rationale that more firearms in public causes more firearms to come into the hands of "evildoers" and "irresponsible persons" and negatively impacts public safety and welfare.

B. The Experience Of Other States Confirms That Freely Issuing Licenses To Carry Does Not Increase Violent Crime; Private Citizens Licensed To Carry Are Law-Abiding And Actually Reduce Crime By Deterring Attacks.

Even if the State had provided evidence that its restrictions of a fundamental right are substantially related to an important government interest, the broad experience of states and significant statistical evidence do not support such a conclusion and, indeed, support the opposite conclusion. First, guns in possession of licensed owners almost never change hands. A U.S. Bureau of Justice Statistics study indicates that 99% of crime victims who are licensed to carry a firearm maintain possession and control of their firearms when involved in a criminal confrontation. *See* Gary Kleck, *Targeting Guns: Firearms and Their Control* 168-69 (1997).

Second, studies show a *reduction* in crime occurs when individuals licensed to carry firearms use their firearms to deter an attack. *Targeting Guns*, *supra*, at 171 ("Robbery and assault victims who used a gun to resist were less likely to be attacked or to suffer an injury than those who used any other methods of self-protection or those who did not resist at all."). Furthermore, "victim resistance

with a gun almost never provokes the criminal into inflicting either fatal or nonfatal violence." *Id.* at 174. Similarly, "rape victims using armed resistance were less likely to have the rape attempt completed against them than victims using any other mode of resistance." *Id.* at 175. The U.S. Justice Department reports that there is 2.5 times the likelihood of serious injury for women who do not offer resistance than for women who do. *See* John R. Lott, Jr., *More Guns Less Crime: Understanding Crime and Gun Control Laws* 4 (3d ed. 2010). Criminals themselves seem to understand this fact: forty-three percent of incarcerated criminals reported that in at least one instance they did not commit a crime because they feared the intended victim possessed a firearm. *Id.* at 180.

A 1993 study found that most defensive gun uses involved only brandishing the weapon, not firing it. Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun*, 86 J. CRIM. L. & CRIMINOLOGY 150, 175 (1995-1996) (finding that 80% of defensive gun uses involve handguns and 76% do not involve shots fired); *see also* Lott, *More Guns Less Crime* at 3 ("[A]bout 95 percent of the time that people use guns defensively, they merely have to brandish a weapon to break off an attack.").

State-level data supports the conclusion that individuals holding concealed carry permits pose no threat to the general public. Forty-two States either do not require a license to carry, or require the issuance of a license to carry without a

showing of good reason or good cause. The data show that where States have license-to-carry laws that do not have a "good reason" or similar discretionary requirement there are one of two effects: either violent crime statistics remained status quo or certain types of violent crime declined. *See* Carlisle E. Moody & Thomas B. Marvell, *The Debate on Shall-Issue Laws*, 5 Econ. J. Watch 269, 291 (2008) (discussing various studies and concluding that the effect of enacting "shall issue" laws was substantial reductions in crime); *National Research Council, Firearms and Violence: A Critical Review* (2005) (determining it is impossible to draw strong conclusions on any causal impact from currently available research); Task Force on Community Preventive Service, Centers for Disease Control, *First Reports Evaluating the Effectiveness of Strategies for Preventing Violence: Early Childhood Home Visitation and Firearms Laws*, 52 Morbidity and Mortality Weekly Rep. 11 (Oct. 3, 2003) (reviewing multiple studies and concluding insufficient evidence to establish a causal link between "shall issue" laws and violence). One outlier study claimed to find a statistical increase in crime between "shall issue" laws and violence. John Donohue et al., *The Impact of Right to Carry Laws and the NRC Report: The Latest Lesson for the Empirical Evaluation of Law and Policy* (2014); *but see also* Carlisle E. Moody et al., *The Impact of Right-to-Carry Laws on Crime: An Exercise in Replication*, 4 Rev. of Econ. & Finance 33, 35 (2014) (replicating and checking Donohue's study and concluding that right to

carry laws "significantly reduce murder" and have no "significant effect on other violent crimes, including assault.").

The State of Minnesota reports one handgun crime per 1,423 licensees.[3] The State of Michigan reported 161 charges involving handguns out of approximately 190,000 licensees in 2007-08. The State of Ohio reported 639 license revocations, including licensees who moved out of Ohio, out of 142,732 permanent licenses issued since 2004. The State of Louisiana reported a firearm misuse rate of slightly more than 1 in 1,000 licensees. The State of Florida reported 27 firearm crimes per 100,000 licenses. The State of Texas reported that concealed handgun licensees are 79% less likely to be convicted of crimes than non-licensees. These outcomes are unsurprising. Individuals who seek a license to carry a firearm in public are opting to follow the law instead of circumventing the law by carrying a firearm without a license. They must also open themselves to scrutiny in the application process.

The broad experience of these States shows that permitting law-abiding citizens to carry a gun in public for self-protection does not put more firearms in the hands of evildoers or jeopardize public safety, as Massachusetts contends. This alarmist fear, however, is not new. Elected officials in Ohio, Texas, and Florida

[3] For full details on the specific State statistics listed here, *see* David B. Kopel, *Pretend "Gun-Free" School Zones: A Deadly Legal Fiction*, 42 Conn. L. Rev. 515, 564-69 (2009), http://davekopel.org/2A/LawRev/Kopel-School-Zones.pdf.

made similar alarmist predictions when their states enacted "shall issue" laws, but later admitted their fears were not borne out. *See* Tom Skoch, *The Editor's Column: Facts Top Feelings, Change Views on Gun Issues*, The Morning J. (Feb. 6, 2011) (admitting that his fears that "public shoot-outs" would be common and "fill the streets with blood" when the "shall issue" legislation first passed were ill-judged); H. Sterling Burnett, *Texas Concealed Handgun Carriers: Law-abiding Public Benefactors*, Nat'l Center for Pol'y Analysis (June 2, 2000) (despite predicting that shall issue legislation "present[ed] a clear and present danger to law-abiding citizens by placing more handguns on our streets[,]" the former Harris [Texas] County District Attorney admitted "[b]oy was I wrong" and the practical effect "prove[d] [his] initial fears absolutely groundless"); Clayton E. Cramer & David B. Kopel, *"Shall Issue": The New Wave of Concealed Handgun Permit Laws*, 62 Tenn. L. Rev. 679, 693 (1995) ("I haven't seen where we have had any instance of persons with permits causing violent crimes, and I'm constantly on the lookout.").

That these alarmist fears have proven unfounded is also supported by the fact that no "shall issue" State has changed its mind and reverted back to its pre-licensed carry days. Because the Massachusetts regulatory scheme is ineffective at achieving the government's proffered objective of increased public safety while

unconstitutionally burdening a fundamental right, it cannot withstand strict scrutiny and should be held to be unconstitutional by this Court.

CONCLUSION

Amici respectfully request this Court hold that a law-abiding citizen's right to carry a firearm for self-protection is a fundamental constitutional right. The Massachusetts laws substantially burden this fundamental right and are ineffective at achieving the State's governmental interest. Therefore, the law fails intermediate scrutiny, let alone strict scrutiny, and should be invalidated.

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CERTIFICATE OF COMPLIANCE

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

1. This brief is 3,778 words, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable.

2. This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman type, which complies with Fed. R. App. P. 32 (a)(5) and (6).

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of March, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the First Circuit using the appellate CM/ECF system. Counsel for all parties are registered CM/ECF users and will be served by the appellate CM/ECF system.

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